

Young People in the Justice System: A Review of the *Young Offenders Act 1994*

December 2016



Government of **Western Australia**
Department of **Corrective Services**

Protect, Rehabilitate & Serve

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Commissioner's foreword

The social and economic importance of ensuring that children do not become entrenched in the criminal justice system cannot be overstated. Issues facing children who come into contact with the criminal justice system are often complex and multifaceted, and the way that the youth justice system interacts with them must recognise this. With every passing year, the need to focus efforts on early intervention, diversion and rehabilitation becomes increasingly evident.



I am pleased to present the green paper 'Young People in the Justice System: A Review of the *Young Offenders Act 1994*'. The Department has undertaken this review to ensure that the Act is achieving its objectives in the context of contemporary research and evidence about what we now know to work. The *Young Offenders Act 1994* provides for the administration of youth justice in Western Australia. It informs the way in which corrective services, police and courts work with young people in the justice system. Key principles include ensuring young people are not treated more severely than adults, diverting young people from the formal criminal justice system where possible, and using detention as a last resort.

The review has been a focus of the Youth Justice Board, which was established by the Minister for Corrective Services in 2014 to provide advice on new and innovative approaches. The public release of the green paper is a reflection of Corrective Services putting young people at the centre of everything we do.

Recent events in youth detention centres across Australia, including in the Northern Territory, Victoria and here in Western Australia have made our focus on young people all the more important. So too have the National Children's Commissioner's recommendations in the 2016 Rights of the Child Report, which deal with the age of criminal responsibility and the obligation to separate children from adults in prison. We cannot fail to address the fact that Aboriginal young people remain unacceptably over-represented in youth detention. I recognise that no group or individual has all the answers. The purpose of releasing this paper is to seek feedback from all interested and affected parties, whose contribution to this discussion may help to improve outcomes for young people in the justice system.

James McMahon DSC DSM
Commissioner
Department of Corrective Services

How to submit

The Department is interested in receiving your feedback on this paper.

Please see the website of the Department of Corrective Services,
www.correctiveservices.wa.gov.au, for information on how to submit your feedback.

Overview

Glossary of terms

Child

A person aged less than 14 years (also see “young person”).

Custodial sentence

A judicial sentence for a young offender to a period of time in detention.

Detainee

A person who is detained in a detention centre.

Detention Centre

A secure residential facility for young offenders serving a custodial sentence or awaiting court hearings.

Diversion

The act of steering young people away from the formal criminal justice system.

General principle

A stated principle to be observed when performing the functions of the *Young Offenders Act 1994*.

Juvenile Justice Team

A multi-agency team which may involve the young person, their parents, the victim, a juvenile justice staff member, a police officer, a cultural representative and an education officer.

Objectives

Results that the *Young Offenders Act 1994* has set out to achieve.

Remand

The process of keeping a person who has been arrested in custody, normally while they await sentencing.

Restorative justice

A system of criminal justice which focuses on rehabilitation of offenders through reconciliation with victims and repatriation to the community.

Schedule 1 or 2 offence

More serious offences committed against an enactment referred to in Schedule 1 or Schedule 2 of the *Young Offenders Act 1994*.

Non-scheduled offence

Less serious offences which are not outlined in Schedule 1 or Schedule 2 of the *Young Offenders Act 1994*.

Youth Justice Officer

An officer employed by the Department of Corrective Services to supervise young people in the community.

Young person

A person aged between 10 and 17 years inclusive.

Young offender

A young person who has been found guilty of a criminal offence.

Introduction

This Green Paper outlines the parameters of an across-the-board discussion on the *Young Offenders Act 1994* (WA) (YOA) in the context of youth justice in Western Australia (WA). The paper is designed to facilitate feedback by identifying a range of issues in the legislation and proposing options to address these issues. **You are welcome to comment on the questions in this document and/or provide comment on the detailed legislative changes proposed in Appendices 1 and 2.**

The review of the YOA

The purpose of conducting a review of the YOA is to determine whether the YOA is efficiently achieving its objectives within the context of critical issues and contemporary trends in youth justice. Government agencies must be active in reviewing the legislation that they administer in order to remain current and avoid legislative inefficiencies. The YOA has been subject to a number of minor and consequential amendments since its assent, as well as a suite of minor and significant amendments in 2004. However, the YOA has not been reviewed since its initial statutory review in 1998.

The timing of this review coincides with a renewed whole-of-government commitment to reduce Aboriginal over-representation in the justice system. It also follows the establishment of a new Youth Justice Services division within the Department of Corrective Services (DCS) and the release of a Youth Justice Framework, which recognises the importance of engaging with Aboriginal families and communities and supporting Aboriginal-led innovation.

In embarking on a review of the YOA, DCS is partnering with the community and stakeholders across all sectors to consider what works and what doesn't work in youth justice, both for the people we rehabilitate and the people we protect. DCS recognises that government does not have all the solutions to the issues that exist in the youth justice system. Youth justice impacts deeply and directly on the lives of many people, and it is for this reason that we seek your feedback. It is hoped that by facilitating wide-ranging comment, new perspectives, expertise and ideas can be injected into this review process.

Over the course of the past two decades, demographics and community values in WA have shifted in a substantial way. Some of the problems and issues facing those who administer youth justice in WA are relatively new. Many of the issues faced remain similar to those that the YOA originally set out to address. For example:

- Aboriginal over-representation in the WA youth criminal justice system remains high
- The rate of return to detention within a two year period has not changed materially in the past five years¹
- A high proportion of young people in detention remain un-sentenced.

¹ Department of Corrective Services (DCS) Annual Reports

The YOA reflects the standards by which the Parliament of WA has determined that our young people will be judged and treated. It outlines the WA Government's overriding philosophical approach to youth justice. In this context, law reform is essential if we wish to ensure the YOA remains relevant in our changing society. Law reform must address changing community concerns, while recognising where these may be based in misconceptions. If a piece of legislation has not achieved that which it originally set out to, reformers must examine why the original issues remain and consider how better to meet expectations going forward. DCS endeavours to achieve this in its review of the YOA.

In certain circumstances, the YOA should be read in conjunction with the following statutes which form part of the legislative framework in which youth justice operates:

- *Bail Act 1982*
- *Children and Community Services Act 2004*
- *Children's Court Act 1988*
- *Criminal Code 1913*
- *Sentencing Act 1995*
- *Sentence Administration Act 2003*

The context of youth offending

As a precursor to the broader discussion on youth justice that follows this introduction, two notions emerge as being of overriding importance. The first is that detention is a detrimental and ineffective response to youth crime, and must always be a last resort. The second is that young offenders must be treated differently to adult offenders, and in particular must, under no circumstances, be treated more harshly than adults who have committed similar offences.

Most children and young people do not come into contact with the criminal justice system. Those who do tend to commit low level property crimes, such as graffiti and vandalism. A small minority of young people who offend repeatedly commit serious, violent crimes. These young people have often been victims of crime and their backgrounds are frequently characterised by disadvantage, trauma, violence and neglect. While it is recognised that these young people must be treated differently to adult offenders, the fact that the offender is a young person does not diminish the harm caused to the victim.

For more information on the characteristics of youth offending please refer to **Appendix 1**.

Diversion

Most young people who offend will not go on to become serious offenders. Exposing young people to the criminal justice system at an early age can increase their chances of reoffending, and young people who have spent time in detention are more likely to be imprisoned later in life². The YOA recognises this and provides some diversionary options for responding to young people who have offended. The two major diversionary mechanisms available in Western Australia are cautions and Juvenile Justice Team referrals.

In recent years there has been a decline in the diversion of young offenders. Rates of referral to Juvenile Justice Teams and cautions issued have decreased³. There has also been an increase in the number of young people being arrested, charged and/or remanded in detention. These declines may suggest that current diversionary initiatives under the YOA are ineffective.

General principles of youth justice

There are a number of general principles which should be observed in performing the functions of the YOA. One of these principles is that diversion should be considered in certain circumstances when dealing with young offenders. Some revision may ensure a greater emphasis on diversion, with other options for dealing with young offenders being a last resort.

Reporting processes

Under the YOA, police have the discretion to choose how to deal with a young person who is alleged to have committed a non-scheduled offence. Options to increase the use of diversionary mechanisms may include:

- a) Requiring police to take extra procedural steps in order to take a course of action other than diversion
- b) Removing the element of discretion by providing that young offenders who are alleged to have committed a non-scheduled offence must be diverted.

Conditional cautioning

Formal written cautions are issued to young people by the police. A conditional caution is a formal agreement between the police and the young person that no charges will be made if certain conditions are complied with. Conditional cautions may be an appropriate option when the public interest requires that some action is taken to prevent further offending.

² Australian Law Reform Commission (ALRC), 1997. *Children's Involvement in Criminal Justice Processes – Diversion*. Canberra, ACT: ALRC.

³ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

Court conferencing

Young people who have committed Schedule 1 or Schedule 2 offences cannot be referred to a Juvenile Justice Team under the YOA. Court conferencing is a diversion mechanism for first-time scheduled offenders who appear to have offended on a one-off basis. Court conferencing has operated in WA since 2001.

Juvenile Justice Teams may offer a court conferencing service for young people who have committed more serious offences. Referrals to this service are made by the Children's Court. Court conferencing provides an opportunity for this higher risk group of young offenders to benefit from the principles of restorative justice. In recent years, court conferences comprised only 7% of the total number of referrals to Juvenile Justice Team conferences. To formally adopt court conferencing under the YOA would help to entrench it as a genuine diversionary option for young people who have committed scheduled offences.

Bail and remand in detention

A high proportion of the young people detained at Banksia Hill Detention Centre (BHDC) are un-sentenced⁴. These young people are either apprehended by police and not released on bail or remanded in detention to await trial. Pre-trial detention is problematic because any amount of time spent in detention as a young person can be detrimental. Remand in detention is especially concerning for children (young people aged less than 14 years). Very few children are sentenced to detention but a notable number spend time in detention pre-trial. Exposing children and young people to detention in such circumstances may be unnecessarily harmful and destabilising, particularly if the young person is at a low risk of reoffending⁵. Pre-trial detention must be viewed purely as a mechanism for pre-trial security as opposed to an opportunity to deter young people from criminal behaviour.

For more detailed proposals relating to diversion under the YOA please refer to **Appendix 1**.

DISCUSSION POINTS

- 1. Are Juvenile Justice Teams an effective diversionary method? What could be done to improve Juvenile Justice Teams?**
- 2. Should the general principle of the YOA relating to diversion be strengthened? If so, how?**
- 3. How can the YOA encourage the diversion of a young person who has committed a non-scheduled offence?**
- 4. Do you believe that new mechanisms of diversion such as conditional cautioning would be effective in stopping re-offending?**

⁴ DCS, 2014. *Statistics and Publications*. Perth, WA: DCS.

⁵ Lowenkamp, Christopher T., VanNostrand, Marie, and Holsinger, Alexander. 2013. "The Hidden Costs of Pretrial Detention". *Laura and John Arnold Foundation*.

- 5. Should court conferencing arrangements be formalised under the YOA?**
- 6. What need is there to insert a provision in the YOA which requires that a young person held in custody be brought before the court as soon as practicable?**
- 7. Are there alternatives to remanding children under the age of 14 in detention?**
- 8. Are there any other options that might make diversion a more effective and available option for young offenders?**

Aboriginality

Aboriginal children and young people in WA are heavily over-represented in the criminal justice system. The rate of over-representation in WA has consistently been higher than the national average⁶. Aboriginal young offenders are significantly less likely than their non-Aboriginal counterparts to be diverted from court⁷ and more likely to be in detention⁸ or under community supervision⁹.

While Aboriginal young people generally make up around 75% of the detention population within the youth justice system in WA¹⁰, this group comprises between only 6.2 – 6.8% of the general population of 10-17 year olds¹¹.

Youth community based orders

Community based orders (CBOs) refer to a range of sentencing options available under the YOA. These orders allow young people to be managed in the community rather than having to serve a custodial sentence. At any given time, a large proportion of young offenders are on a CBO. Approximately 61% of young offenders serving a CBO are Aboriginal¹².

An option to ensure the effectiveness of CBOs in this cohort is to invest efforts in Aboriginal-owned justice. This refers to justice solutions that are developed, managed and run by Aboriginal people without the traditional levels of government intervention. A solution such as this would represent a new way of thinking about

⁶ Richards, K., 2011. *Trends in Juvenile Detention in Australia*. Canberra, ACT: AIC (Australian Institute of Criminology)

⁷ House Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011. *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*. Canberra, ACT: Parliament of Australia

⁸ Commissioner for Children and Young People (CCYP), 2014. *The State of Western Australia's Children and Young People*. Perth, WA: CCYP. p.294

⁹ Ibid, p. 301

¹⁰ DCS offender data 2016

¹¹ Commissioner for Children and Young People (CCYP), 2014. *The State of Western Australia's Children and Young People*. Perth, WA: CCYP, p. 38

¹² DCS offender data 2016

justice approaches, and may have the effect of reducing the number of Aboriginal young people in the criminal justice system.

The CBO framework could be modified to allow the young person to be managed within their community, by their community, and may provide more appropriate and individualised options for young people who are not likely to respond to a traditional CBO. The question is whether the YOA is flexible enough to allow external, community involvement in justice responses.

Principles of restorative justice

Some of the general principles of the YOA reflect a restorative approach to youth justice. Restorative justice emphasises repairing the harm caused by criminal behaviour and requiring offenders to take responsibility for their actions. While restorative justice is valuable in promoting a sense of personal responsibility, restorative interventions alone do not rehabilitate young people.

Whether or not restorative justice in its current form is an appropriate approach for Aboriginal people has been questioned in recent years. Restorative justice has been criticised for undermining self-determination and presenting barriers to referral, acceptance and completion for Aboriginal young people and their families¹³. While efforts have been made to increase the cultural competence and relevance of restorative justice initiatives (such as Juvenile Justice Teams), it remains that the underpinning principles of the YOA reflect an approach that may not be culturally competent.

For more detailed proposals to address Aboriginal over-representation under the YOA please refer to **Appendix 1**.

DISCUSSION POINTS

- 1. What considerations could a new type of CBO provide for to reflect the needs of young Aboriginal people?**
- 2. How could the YOA be made flexible enough to allow for 'community owned justice' responses?**
- 3. Can a restorative justice approach be appropriate and useful for Aboriginal young people?**
- 4. Are there any other options for using the YOA to address high levels of Aboriginal over-representation in the youth criminal justice system?**

¹³ Joudo J., 2008. *Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs*. Canberra, ACT: AIC.

Pre-release

Under the YOA, a custodial sentence is a sentence of last resort. The Children's Court cannot impose such a sentence unless it is satisfied that there is no other appropriate option. However, some young offenders will receive a sentence of detention due to the severity of their offending.

The YOA attempts to minimise the amount of time young people spend in detention. The YOA also tries to ensure that young people are successfully transitioned back into community life after leaving detention.

Pre-release (day release) scheme

The YOA allows for day release, where approved detainees can leave the detention facility for up to 72 hours for an authorised purpose. Authorised purposes could include attending job interviews, school or training enrolments, visiting family or attending special events such as funerals. The 72 hour time limit may put young people from rural/remote areas at a disadvantage, as their hometown may not be easily accessible by airplane. Given that WA's only detention centre is located in the metropolitan area, many rural/regional young people may not get the opportunity to see their families, attend ceremonies or benefit from community reintegration due to the 72 hour time limit.

Supervised Release Orders

A Supervised Release Order (SRO) is an order made by the Supervised Release Review Board (SRRB) to release a young detainee under supervision before the expiry of their sentence, subject to specified conditions. Young detainees are typically eligible to apply for an SRO halfway through their sentence. Currently, SROs expire at the end of the term of detention¹⁴. At this time, the relationship between the young offender and Youth Justice Officer comes to an end.

Approximately 54% of young offenders who leave detention will return within two years¹⁵. A reason for this may be a lack of supervision. This problem may be addressed if the SRRB had the ability to make SROs longer in duration. In proportion with sentences of detention, SROs are generally quite short. The option of an SRO that extends longer than the term of detention would give the SRRB more time to make an informed and accurate decision regarding the suitability of a young offender for an SRO. There may be a number of options for facilitating the extension of SROs.

Graduated release

Currently, Graduated Release Orders (GROs) do not exist under the YOA. GROs could be considered as a potential new option under the YOA, because graduated

¹⁴ *Young Offenders Act 1994* (WA) (YOYA) s 134

¹⁵ DCS Annual Report 2015-16

release may help young offenders to reintegrate into the community, build supportive relationships and develop useful skills prior to their release date¹⁶.

A GRO would be stricter than an SRO but flexible and individualised. For example, a GRO may involve returning to the detention centre every evening or weekend, or electronic monitoring, depending on the individual needs of the young detainee. A GRO could be offered to higher risk young detainees in the months leading up to their eligibility for an SRO, allowing them to demonstrate their suitability for an SRO. SROs are not always granted to higher risk offenders, but this group would benefit significantly from supervised, gradual integration back into the community.

Family responsibility conditions

Young offenders sometimes do not have the opportunity to overcome criminal behaviour because of dysfunctional home environments. A basic level of family support and cooperation is required to put a young person back on a non-offending path. Because family support is particularly important in completing an SRO, there may be a role for the SRRB in placing conditions on family members. A breach of a condition by a family member may lead to the SRRB reconsidering the terms of the SRO.

Duration of a Conditional Release Order

A Conditional Release Order (CRO) is a type of Intensive Youth Supervision Order which involves a custodial sentence. A CRO is a strict, condition-based order which may be suitable for more serious offenders. The process for CRO expiry under the YOA may not currently reflect this seriousness. A CRO expires at the end of the term of detention, even if the young person has not complied with the conditions of the CRO (i.e. completed set number of community service hours). The framework relating to CROs could be amended to clarify that that the CRO can be extended if the young person has failed to meet the associated conditions.

Duty of care post-release

Young people cannot always leave the detention facility on the day they are due for release. This may be because they have nowhere to go, are waiting on flights, or a responsible family member may not yet have been located. The Department for Child Protection and Family Support will accept responsibility for young people leaving detention who are eligible for state care, but there is concern about young people who fall outside of this scope. The YOA does not currently account for young people who may need to stay in detention for a day or two after they are eligible for release.

For more detailed proposals regarding pre-release under the YOA please refer to **Appendix 1**.

¹⁶ *Young Offenders Act 1994 (WA) (YOA)* s 134

DISCUSSION POINTS

1. What is an appropriate amount of time for young detainees to be released on day release? Should some flexibility be provided in the time limits?
2. Would Graduated Release Orders be a useful mechanism for pre-release? Are there any other mechanisms of pre-release that should be considered?
3. Should Supervised Release Orders be able to last longer than a sentenced period of detention? How would this help to prevent re-offending?
4. How would the use of 'family responsibility conditions' in a Supervised Release Order be helpful to young offenders?
5. In what way, if any, do the expiry processes around Conditional Release Orders need to be tightened?
6. What need is there to account for young people who are unable to leave detention on their first day of eligibility?
7. Are there any other options for assisting young detainees leading up to and post-release?

Detention facilities

A youth detention centre should be an environment in which quality supervision and rehabilitation occurs. However, youth detention centres can also be high risk and tense environments. There is the possibility of crisis situations, violent outbursts and bad behaviour. A youth detention centre must be a suitable and appropriate environment for all detainees and staff.

Statutory board governing Banksia Hill Detention Centre

BHDC has vulnerable young people in its care. It may be useful to establish a statutory Board to support the detention centre. The Board would provide independent strategic and operational decision making support to management. The extent to which the Board would be involved in decision-making is up for discussion.

Transfer to an adult facility

Young detainees who are sentenced to a term of detention before they turn 18 often remain in BHDC after reaching the age of 18. This situation may be detrimental to the detainee, younger detainees and facility staff. Currently, detainees who have reached 18 can be transferred to an adult prison when the Children's Court approves an application from the Commissioner of Corrective Services.

At the time of sentencing, Children's Court magistrates will generally be able to tell if the young person in question is likely to be a disruptive influence in BHDC upon reaching 18 years of age. For this reason, it may be appropriate to allow the Children's Court to make accommodation decisions regarding older detainees at the time of sentencing.

Contracts for custodial services

There is currently no provision under the YOA to allow for the contracting of management functions for custodial services in relation to young people. While there may not be an immediate plan to contract any aspect of the operations of BHDC, the fact that there is no scope under the YOA to do so could limit opportunities for the effective management of BHDC.

Enabling the use of contracts for the delivery of custodial services under the YOA would provide a more flexible and responsive range of options for the delivery of government services.

Detention offences

Detainees who commit certain detention offences such as attempting escape, assaulting a person or damaging property may be dealt with under the YOA by the Superintendent or a Visiting Justice.

Currently, the Superintendent and Visiting Justices have the power to extend the earliest release date of a young detainee by up to 14 days (3 days in the case of the Superintendent). However, the YOA currently does not differentiate between minor and aggravated detention offences and no standard of proof is required to establish a detention offence.

The provisions surrounding dealing with detention offences should be reviewed to ensure fairness and consistency with the intentions of the YOA.

For more detailed proposals regarding detention facilities under the YOA please refer to **Appendix 1**.

DISCUSSION POINTS

- 1. What value do you see in the use of an independent statutory board to assist facility management at a detention centre? What powers should the Board have? Should facility management be accountable to the Board in any way?**
- 2. How can the YOA be amended to better facilitate transfer to adult prison for young people who have turned 18?**
- 3. Should the option of entering into contracts for custodial services be available in relation to youth detention?**
- 4. How can the YOA better provide for dealing with detention offences?**
- 5. Are there any other options for improving detention facilities under the YOA?**

Interaction with other legislative provisions

Mandatory minimum sentences refer to sentences that the judiciary is required to impose for particular offences irrespective of the circumstances of the offence. The WA Government has introduced and enacted legislation to impose mandatory sentences for a number of offences which are considered very serious by the community.

Minimum mandatory sentencing laws have historically been subject to a great deal of debate. Proponents of mandatory sentencing argue that mandatory minimum sentences ensure consistency and deliver on community expectations in sentencing. However, it is also argued that minimum mandatory sentences shift discretion from the judiciary to the executive government, making it difficult for the judiciary to take into account the particular circumstances of the case.

During the 2008 state election the WA Government committed to introducing legislation to prescribe minimum mandatory sentences for certain categories of offences. Amendments to create minimum mandatory penalties have been enacted for the assault of public officers and dangerous driving to evade police. In 2015, legislative changes were made to create minimum mandatory penalties for aggravated burglaries.

In 1996, changes were made to the *Criminal Code 1913* (the Code) to provide that when a young person is convicted for a third time or more for a home burglary the young person must be sentenced to a minimum of 12 months detention or imprisonment (also known as ‘three strikes’).

Section 46(5a) of the YOA states that where a written law provides that a mandatory penalty or minimum penalty shall be imposed in relation to an offence, the court is not obliged to impose such a penalty. This provision may create limitations to the intent of other enactments relating to mandatory or minimum sentencing.

At present, minimum penalties for the assault of a public officer apply to young people aged 16 and 17. The changes made in 2015 relating to mandatory sentences for aggravated burglaries also apply to young people aged 16 and 17. It is timely for this review to consider the application of mandatory sentences in the context of youth justice.

For more detailed proposals relating to the YOA’s interaction with other legislative provisions please refer to **Appendix 1**.

DISCUSSION POINTS

- 1. Is it possible or appropriate to amend the YOA to reflect the intent of mandatory sentencing through providing alternative options for dealing with younger offenders who have committed offences which are subject to mandatory penalties for adults?**

Appendix 1

Youth justice context, background and statutory framework

The youth justice context in WA

Most children and young people do not come into contact with the criminal justice system¹⁷.

Young people are more likely to commit property crimes such as graffiti, vandalism, shoplifting and fare evasion as opposed to violent crimes or crimes against the person¹⁸. Young people who engage in this type of offending have a decent chance of growing out of their offending behaviour by their early 20's¹⁹. Most categories of crime committed or alleged to have been committed by young people in WA have been in decline over the course of the last decade. Table 1 refers to percentage changes in a number of categories of principal offence between 2008/2009 and 2014/2015.

Table 1: alleged youth offenders, principal offence by states and territories²⁰

Principal offence	Number		Percentage change
	2008/09	2014/15	
Homicide	6	7	17% increase
Acts intended to cause injury	2,567	864	66% decrease
Sexual assault	202	101	50% decrease
Abduction/harassment	587	199	66% decrease
Robbery/extortion	311	222	27% decrease
Unlawful entry with intent	1,491	797	47% decrease
Theft	3,189	653	71% decrease
Illicit drug offences	1,408	659	53% decrease
Property damage	1,493	313	79% decrease

¹⁷ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

¹⁸ Richards, K., 2011. *Trends in Juvenile Detention in Australia*. Canberra, ACT: AIC.

¹⁹ Ibid.

²⁰ ABS (Australian Bureau of Statistics). 2016. *Recorded Crime – Offenders, 2014-15*. Canberra, ACT: ABS.

The total number of alleged youth offenders in WA fell by 66% during the period of time between 2008/09 and 2014/15²¹. It is likely that a variety of factors have contributed to this decline, although a general decline in offending across the Western world in this time period remains largely unexplained. Despite this decline, public perception still reflects the notion that crime rates among young people are rising. This can be problematic as public perception of crime is a strong influence on justice policy²².

Characteristics of youth offending

It is widely accepted that the characteristics of young offenders and the offences they commit differ largely from adults²³. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice emphasise the importance of 'a set of laws, rules and provisions specifically applicable to juvenile offenders ... designed to meet the varying needs of juvenile offenders, while protecting their basic rights'²⁴.

It is imperative that from a broad policy and legislative perspective, young offenders are treated differently by the criminal justice system than their adult counterparts. This sometimes means that although aggregate youth offending is typically less costly than adult offending, the specific interventions used for young offenders may be more expensive²⁵.

Young people commit offences for a range of reasons. Because the adolescent years are a period of rapid physiological and psychological change²⁶, young people are less likely to possess decision making competency or understand the full extent of risks²⁷. Due to the unsophisticated manner in which they tend to offend (in groups and in public places) young offenders are much more likely to come to the attention of police than adult offenders²⁸.

Children and young people are more likely than other groups to be victims of crime. Children (aged 14 and under) are particularly susceptible to private crimes committed by family members, such as witnessing/experiencing domestic violence,

²¹ Ibid.

²² Davis, Brent and Dossetor, Kym. 2010. *(Mis)perceptions of Crime in Australia*. Canberra, ACT: AIC.

²³ Richards, Kelly. 2011. *What Makes Juvenile Offenders Different from Adult Offenders?* Canberra, ACT: AIC.

²⁴ United Nations. 1985. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*. Adopted by General Assembly resolution 40/33 of 29 November 1985.

²⁵ Cunneen C., White, R. 2007. *Juvenile Justice: Youth and Crime in Australia*, 3rd ed. South Melbourne: Oxford University Press

²⁶ Haigh, Y. 2009. "Desistance from Crime: Reflections on the Transitional Experiences of Young People with a History of Offending". *Journal of Youth Studies* 12(3): 307–322

²⁷ Reyna, V. and Rivers, S. 2008. "Current Theories of Risk and Rational Decision Making". *Developmental Review* 28: 1–11

²⁸ Cunneen, C. and White, R. 2007. *Juvenile Justice: Youth and Crime in Australia*, 3rd ed. South Melbourne: Oxford University Press.

abuse and neglect. Aboriginal children and young people are significantly more likely to experience or witness domestic violence than other children and young people²⁹.

A demonstrable link exists between young people as victims and young people as offenders. Children and young people who have been victims of crime (either victims of sexual assault, witnesses to domestic violence or otherwise) are more likely to become engaged with the criminal justice system³⁰. This tends to be the case for both adolescent offenders and adult offenders.

New approaches to youth justice should be based firmly in evidence with a strong focus on reducing re-offending. Today's version of what works looks significantly different to what appeared to work in 1994. It may be necessary to consider moving away from the focus on the 'one size fits all' approach to restorative justice currently reflected in the YOA.

We now recognise that a more appropriate way of responding to young people who come to the attention of the criminal justice system is to address the root causes of criminal behaviour. Not-for-profits, the community sector and the private sector can play an important role in assisting children, young people and their families to overcome factors of disadvantage such as poverty, drug and alcohol abuse and illiteracy. No single government agency should purport to have a monopoly over the solutions to the wide range of issues facing the children and young people who enter the criminal justice system.

Recognition of the impact on victims

While most young people who offend commit low-level crimes, a small minority repeatedly commit serious, violent crimes. These young people have often been victims of crime in childhood, and their backgrounds are frequently characterised by disadvantage, trauma, violence and neglect. While it is accepted that these young people must be treated differently to adult offenders, the fact of the offender being a young person does not diminish the harm caused to the victim.

In this context, the needs and sensitivities of victims must be balanced with the need to treat young people appropriately. This may mean additional services or support. It may mean continuing opportunities to be involved in the young person's restorative justice process, or to be informed about the life trajectory of the young person. Alternatively, it may simply mean recognition of the impact crime has had on the lives of these people.

Recent initiatives in youth justice

Law and order continues to be a priority for the WA Government and wider community. Particular priorities for the Government include a commitment to prevention, early intervention and diversion from the formal youth criminal justice system. The Youth Justice Board (the Board) was established by the Minister for

²⁹ ABS. 2005. *Personal Safety Survey*. Canberra, ACT: ABS.

³⁰ Glasser, M., Kolvin, D., et al. 2001. "Cycle of Child Sexual Abuse: Links Between Being a Victim and Becoming a Perpetrator". *The British Journal of Psychiatry*. 179(6), pp 482-494.

Corrective Services in April 2014 to facilitate direct connections between the community, the non-government sector and the public sector, amongst other functions. The priorities of the Board include developing innovative and alternative strategies for crime prevention, drug and alcohol abuse and detention in custody.

In August 2014, the Minister for Corrective Services announced in Parliament the establishment of a Youth Justice Innovation Fund. The Board is responsible for allocating \$4 million to fund innovative, community based programs that address some of the multiple and complex factors associated with high youth re-offending rates, with a particular focus on programs specifically designed for Aboriginal youth.

Recently, a number of Children and Family Centres have been established close to public schools in high-need communities. These Centres offer a range of early learning, parenting, child and maternal health and well-being programs and services including child care, predominantly to Aboriginal families with young children. The services are managed, coordinated and delivered by not-for-profit organisations (Centre Operators) who are selected through a competitive tender process. The Department of Education works with and through local Aboriginal communities, local agencies and educational institutions to provide these services.

Such initiatives within WA reflect an emerging approach to youth justice which includes the communities from which our children and young people are to return. Furthermore, initiatives such as these open the door to finding more effective and efficient ways of providing services in a challenging space. These initiatives represent a distinct move away from the siloed approach often employed in dealing with young offenders.

Diversion

Diversion is a key element of many youth criminal justice systems worldwide. Diversionary mechanisms are intended to avoid exposing young people to the criminal justice system at an early age, which may lead to a pattern of offending behaviour³¹. The majority of young people who offend will not become serial offenders, and are less likely than their adult counterparts to commit violent crimes. The YOA recognises this, stating that the treatment of a young offender who does not appear to be a regular offender should avoid exposure to associations or situations likely to influence the person to further offend³².

In both the short and long term, diversion represents a cost-effective means of dealing with young people who have offended. People who spend time in detention during their youth are significantly more likely to be imprisoned later in life³³, resulting in higher public costs over a lifespan.

³¹ ALRC, 1997. *Children's Involvement in Criminal Justice Processes – Diversion*. Canberra, ACT: ALRC.

³² YOA s 24.

³³ Cain, Michael. 1996. *Recidivism of Juvenile Offenders in New South Wales*. Sydney, NSW: Department of Juvenile Justice.

This section of the paper considers current diversion mechanisms under the YOA, the effectiveness of these mechanisms, how they may be improved and alternative diversionary mechanisms.

Diversion under the YOA

The primary statutory mechanisms of diversion available in Western Australia to divert young people from court proceedings are cautions and Juvenile Justice Teams. Both mechanisms were adopted in the early 1990s.

Under the YOA, five options are currently available to the police when dealing with a young person who is reasonably believed to have committed a crime:

1. Take no action
2. Administer a caution
3. Refer the matter to a Juvenile Justice Team
4. Charge the person without taking the person into custody
5. Apprehend and release to bail or remand in detention.

There is no requirement that diversionary options must first be exhausted.

Cautions

Oral or written cautions may be given to an alleged young offender by a member of the police when the act or omission is a non-scheduled offence. When a caution has been given, any admission made by the young person at the time of cautioning is inadmissible as evidence in proceedings involving any matter to which the caution refers³⁴.

Juvenile Justice Teams

Juvenile Justice Teams are aimed at ensuring that young offenders directly face the consequences of their actions and are given the opportunity for restitution or reparation³⁵ - principles based largely in the theory of restorative justice. Juvenile Justice Team referrals may only occur when the young person has committed a non-scheduled offence and when the alleged young offender accepts responsibility for the act or omission.

Effectiveness of current diversionary mechanisms

In recent years there has been a decline in the use of diversionary methods when dealing with young offenders and an increase in the number of young people being arrested, charged and/or remanded in detention. The decline in the use of diversionary mechanisms should be considered in the context of a decline in the overall rate of youth offending³⁶. Referrals to Juvenile Justice Teams from both the police and the court have declined between in recent years. From the period

³⁴ YOA s 22.

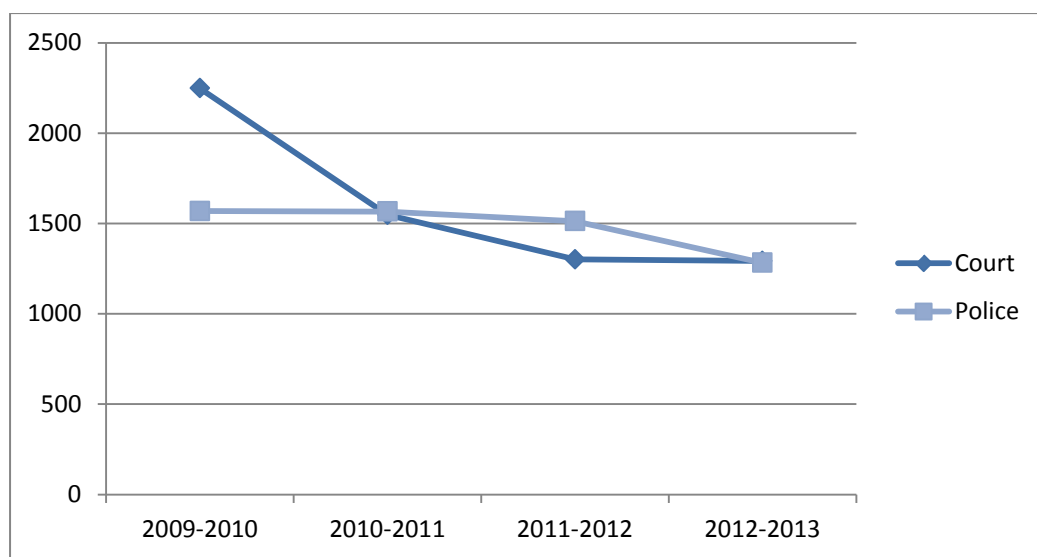
³⁵ Ibid.

³⁶ ABS. 2014. *Recorded Crime – Offender, 2012-13*. Canberra, ACT: ABS.

2009/2010 to 2012/2013, there was a 43% decrease in the number of referrals to Juvenile Justice Teams issued by the court. In this same time period there was an 18% decrease in the number of referrals to Juvenile Justice Teams issued by police³⁷. Between 2009 and 2016 the total number of Juvenile Justice Team referrals decreased by approximately 65%³⁸

This decline may suggest that the general principle stated in the YOA at section 7(g) that consideration be given to taking measures other than judicial proceedings is not being applied to the extent originally intended. The decline in diversion also suggests that current mechanisms of diversion may be ineffective.

Figure 1: Juvenile Justice Team referral trends



Between 2003 and 2008, the decline in redirection from formal criminal justice processes has resulted in a \$6.6 million cost to taxpayers. The Auditor General found the decline in police referred Juvenile Justice Teams has created juvenile justice system costs of an estimated \$1.5 million per year. The Auditor General stated that if the declining trend continues until 2015, all potential savings gained from the operation of the Act since its enactment will be eroded³⁹.

Issues identified with the effectiveness of Juvenile Justice Teams include:

- Juvenile Justice Teams have not been targeted to those young people they were intended for (primarily Aboriginal young people)
- The delay between the referral and the Juvenile Justice Team meeting was too long to be effective
- Juvenile Justice Team action plans were not adequately monitored to ensure the nature and causes of offending have been addressed⁴⁰

³⁷ DCS. 2013. *Statistics and Publications*. Perth, WA: DCS.

³⁸ DCS 2016. *Statistics and Publications*. Perth, WA: DCS. Note: based on 1 July census date.

³⁹ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

⁴⁰ Ibid.

- The format of the meeting, which involves a degree of behaviour shaming and apologising, may not be an effective and appropriate process for Aboriginal children and young people
- Aboriginal community workers may not typically be present at meetings as was originally intended
- The use of a one-off meeting rather than a longer, multi-stage process may diminish the usefulness of Juvenile Justice Teams amongst Aboriginal children and young people, particularly those who do not have a great deal of family support.

These reasons, amongst others, have led to an apparent decline in the effectiveness and/or use of Juvenile Justice Teams.

The YOA does not require cultural representatives or lay advocates for the young person to be involved in the Juvenile Justice Team. The YOA could continue to allow for flexibility in determining who is involved in a Juvenile Justice Team, allowing the response to be more individualised, whilst tightening provisions around the length of time between referral and meeting and the monitoring of action plans.

The majority of these concerns will not be remedied by legislative change, but by changing practice. The YOA leaves open the interpretation of what constitutes a Juvenile Justice Team, not specifying what elements may be necessary. This has enabled Juvenile Justice Teams to evolve over the years to respond to changes in the Department and particular issues as they arise. For example, Juvenile Justice Teams in some regional areas evolved in recent years with the establishment of Regional Youth Justice Services to include a dedicated, expanded on site Juvenile Justice Team. However, at this time it may be necessary to consider whether the statutory framework creating Juvenile Justice Teams is the best way forward.

The under-utilisation of cautions is another factor in the increasing numbers of young people, particularly young Aboriginal people, being remanded in custody⁴¹. A 2008 inquiry of the Auditor General found that a decline in the issuance of cautions by police had occurred. A reason for this may be the lack of consequences attached to cautions. Police may be reluctant to caution a child or young person who has already been cautioned in the past, as they expect this measure will have no effect on deterring re-offending. This may also indicate either a lack of an ingrained culture of diversion with the police force or a lack of confidence in the Juvenile Justice Teams.

Proposed mechanisms to increase the use of diversion include:

- i) A stronger general principle of youth justice
- ii) Reporting processes
- iii) Conditional cautioning
- iv) Court conferencing

⁴¹ Aboriginal Legal Service of Western Australia (ALSWA). 2009. *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System*. Perth, WA: ALSWA.

v) Bail and remand

General principles of youth justice

In order to promote a culture of diversion and increase rates of diversion from the criminal justice system, it is apparent that a strong general principle expressing commitment to this objective is a necessary statutory requirement. The entrenchment of such a principle will be an important first step, but government follow through with commitment in practice will be key.

The current stated general principle of juvenile justice relating to diversion proposes that consideration should be given to the possibility of taking measures other than judicial proceedings for an offence if the circumstances case and background of the alleged offender make it appropriate and it would not jeopardise the protection of the community to do so⁴².

Statutes in Queensland, New South Wales and the Northern Territory include a principle of youth justice which states that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter⁴³.

Reporting processes

There may be merit in considering whether a procedural mechanism is required to ensure that all reasonable steps and measures have been exhausted before a young person is arrested⁴⁴.

In a submission to the Parliament of Australia regarding the high levels of involvement of Aboriginal young people in the criminal justice system, the Aboriginal Legal Service of WA recommended that upon the commencement of criminal proceedings against a young person, the police be required to lodge a written document with the court outlining why all diversionary processes were inappropriate in the circumstances⁴⁵.

The Auditor General of Western Australia recommended in a performance examination of the Act that it be ensured that police consider redirection options under the YOA⁴⁶.

As per section 22B of the YOA, police have the discretion to choose how to deal with an alleged young offender, depending on whether the alleged offence is a scheduled

⁴² YOA s 7(g).

⁴³ *Youth Justice Act 1992* (QLD) Schedule 1, *Youth Justice Act 2005* (NT) s 4, *Young Offenders Act 1997* (NSW) s 7.

⁴⁴ Aboriginal Legal Service of Western Australia (ALSWA). 2009. *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System*. Perth, WA: ALSWA.

⁴⁵ *Ibid*.

⁴⁶ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

offence or not. Police are encouraged to consider alternatives to court proceedings when the alleged offence is not a scheduled offence. It may be necessary to remove an element of discretion by prescribing that police must issue a caution or a referral to a Juvenile Justice Team for certain categories of offences. To do so may increase the rate of diversion, consistent with the objectives of the YOA. Removing an element of police discretion may also help to avoid instances where young people are apprehended in custody for welfare or health reasons⁴⁷.

Conditional cautioning

The current model of police cautioning used in WA, similar to that used in many other Australian jurisdictions, is based on the issuing of cautions at the discretion of the police at time of contact⁴⁸. As a mechanism, cautioning may be strengthened through the introduction of conditional cautioning. A conditional caution is a formal agreement where police agree not to charge a young person if the young person agrees to comply with certain condition(s). Conditional cautioning is an additional statutory mechanism which creates a greater role for police prosecutors and has the effect of diverting young people from prosecution, assuming set conditions are complied with.

Both conditional cautioning and youth cautioning (similar to the type of cautions issued in WA) are used for young offenders in the United Kingdom. Conditional cautions are intended as a more robust response to offending than a youth caution in situations where the public interest requires some action be taken to prevent further offending⁴⁹. A conditional caution is a statutory development of the youth caution, otherwise known as a simple caution. The existence of these two distinct options represents a graduated suite of diversionary options available to police when dealing with young offenders.

Police discretion is removed as a conditional caution may only be issued where the prosecutor considers that it is appropriate to do so. A Code of Practice, which governs processes and decision making associated with the issuance of conditional cautions, outlines when a conditional caution may be appropriate. In addition, a number of requirements are set out in the *Criminal Justice Act 2003*. Processes such as these protect against the risk of ‘net-widening’, referring to the chance that police will issue conditional cautions where simple cautions would suffice.

The basic parameters of conditional cautioning may include:

- the relevant police prosecutor must have evidence that the young person committed a chargeable offence;
- the young offender must admit responsibility for the alleged offence;

⁴⁷ See “Freddo Frog case”, which saw a 12 year old Western Australian Aboriginal boy apprehended and charged for stealing a 70 cent Freddo Frog.

⁴⁸ New South Wales Law Reform Commission (NSWLRC). 2012. *Sentencing Question Paper 9 - Alternative Approaches to Criminal Offending*. Sydney, NSW: NSWLRC.

⁴⁹ Government of the United Kingdom Ministry of Justice (MoJ). 2013. *Code of Practice for Youth Conditional Cautions*. London, England: MoJ.

- conditions should be appropriate, achievable, proportionate and aimed at rehabilitating the young person – for example, attendance at a drug awareness program;
- conditions should be appropriately time limited;
- the young offender must agree to comply with the condition(s);
- the relevant police prosecutor must agree not to charge the young offender if the conditions are met;
- a Youth Justice Officer (DCS) must be assigned to monitor compliance with conditions; and
- if the young offender fails to comply with the condition(s), the WA Police (WAPOL) may make the decision to charge and prosecute the young offender for the original charge.

Unlike move on orders, the breach of a condition does not constitute an offence⁵⁰. Non-compliance simply exposes the young offender to a charge for the original offence.

Court conferencing

Schedule 1 and 2 offences under the YOA are more serious offences for which a caution or Juvenile Justice Team referral cannot be given and for which a conviction will normally be recorded. Under the current statutory framework, young people who are alleged to have committed a Schedule 1 or 2 offence cannot participate in a conferencing process.

Young people who have committed more serious offences may derive significant value from the benefits of conferencing, as these young people are most at risk of developing entrenched offending patterns⁵¹.

Court conferencing is a diversionary scheme designed for first-time scheduled offenders who appear to have offended on a one-off basis. Court conferencing currently operates as a non-statutory mechanism in WA. At present, the principles of restorative justice in the YOA apply in practice only to less serious offenders. To create court conferencing as a statutory mechanism may reinforce a commitment to diversion and restorative justice under the YOA and give the mechanism equal status with Juvenile Justice Teams.

Court conferencing provides an opportunity for more serious young offenders to participate in a restorative justice process. Court conferencing was established in response to recommendations made in a 1998 evaluation of the YOA⁵² and

⁵⁰ Legal Aid Western Australia: Police Powers to Arrest and Detain.
<<http://www.legalaid.wa.gov.au/INFORMATIONABOUTTHELAW/CRIME/SECURITYOFFICERS/Pages/Policepowerstoarrestanddetain.aspx>>

⁵¹ Loeber, R and Farrington, DP. 1998. *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions*. Thousand Oaks, CA. Sage Publications Inc.

⁵² Cant, R. and Downey, R. 1998. "Evaluation of the Young Offenders Act 1994". *Social Systems and Evaluation*.

commenced as a pilot project in 2001 which was gradually established across the state. Referrals to court conferencing are made by the Children's Court under sections 67 and 68 of the YOA, which pertain to undertakings and informal punishment and adjournment.

The current referral process for court conferencing involves the court determining suitability and then remanding matters under section 68 for 12 weeks. During the remand period all relevant parties are contacted and invited to participate in the conference. Generally, a known victim needs to be available and willing to participate. An action plan is put in place at the end of the conference and is signed by all parties present. The action plan is completed by the young person prior to their matter being returned to court for sentencing. The sentencing court then decides on the outcome, which is often no further punishment under section 67 of the YOA. The court conferencing process enables the young person to commence their action plan prior to sentencing, allowing them to demonstrate willingness and ability to change their behaviour.

There has been some concern in the past regarding the use of court conferencing for scheduled offenders. There is a perception that all charges for scheduled offences that are referred to court conferencing end in dismissal. This need not be the case. The court conferencing process and outcomes may simply be taken into consideration by the court when sentencing. If a young person has complied with the prescribed action plan, expressed understanding and co-operated with the court conferencing process, the court may take these factors into account when sentencing, resulting in a less harsh sentence. For example, the young person may be sentenced to a Conditional Release Order as opposed to a term of detention.

In recent times, court conferences comprised only 7% of the total number of referrals to conferences or Juvenile Justice Teams⁵³. This indicates that the mechanism may require further promotion and commitment to become an entrenched element of youth justice in WA. Court conferencing under the YOA would operate as a means of avoiding detention – that is, the young person has the option to do as much or as little as they wish in regards to completing the programme. This gives young people who may typically be sentenced to detention the option to negate their sentence or secure an alternative sentence.

Bail and remand in detention

Approximately 46% of the total population of young people detained at Banksia Hill Detention Centre (BHDC) are un-sentenced⁵⁴. These young people are either apprehended by police and not released on bail or remanded in detention to await trial. This proportion is generally consistent with the national average⁵⁵. The high

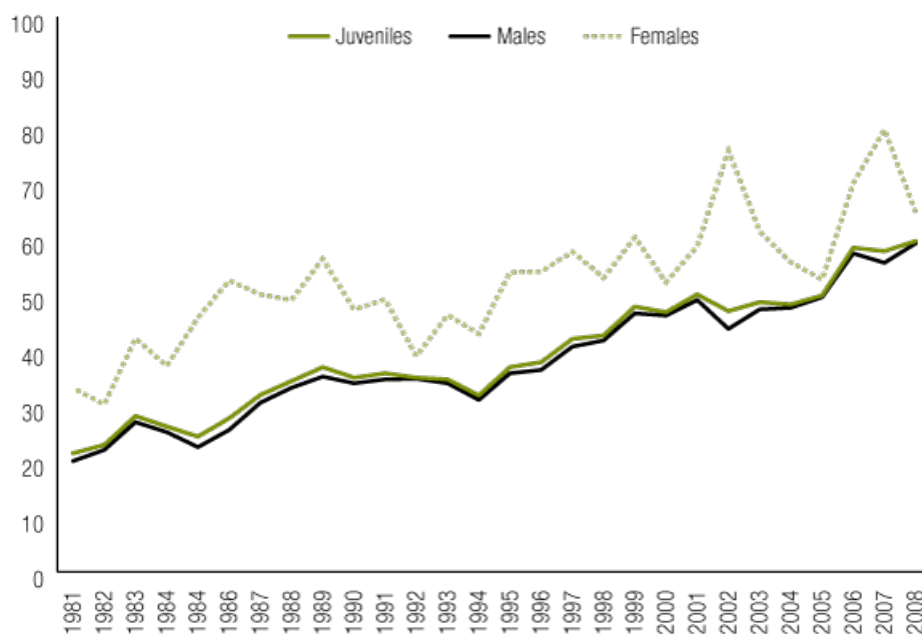
⁵³ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

⁵⁴ DCS. 2016. *Statistics and Publications*. Perth, WA: DCS.

⁵⁵ Richards, K., Renshaw, L. 2013. *Bail and Remand for Young People in Australia: A National Research Project – Custodial Remand of Young People in Australia*. Canberra, ACT: AIC

proportion of un-sentenced young people in custody may suggest that the rate at which bail is granted is low or declining. In a 2008 Performance Examination⁵⁶ the Auditor General found that the rate of bail being granted declined by 6% between 2004 and 2008.

Proportion of all Australian juveniles in detention that is on remand (un-sentenced), 1981-2008⁵⁷



This high proportion of young people detained pre-trial is problematic, as it has consistently been shown that any length of time spent in detention is damaging to young people⁵⁸. Evidence demonstrates that any time spent in detention as a young person greatly increases chances not just of future recidivism⁵⁹, but of becoming a future serious offender⁶⁰. Low-risk young people detained pre-trial in particular may become destabilised and at an increased risk of failing to appear or engaging in new criminal activity⁶¹. Detention centres may enable young people to learn more and better offending strategies and build criminal networks, particularly because young people are susceptible to peer pressure⁶². A further issue is that young people remanded in detention often do not undertake any remedial programs or receive adequate treatment or education.

⁵⁶ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

⁵⁷ AIC. 2011. *Trends in Juvenile Detention in Australia*. Canberra, ACT: AIC.

⁵⁸ White, R. and Haines, F. 2004. *Crime and Criminology*. Melbourne: Oxford University Press.

⁵⁹ Homan, B. and Ziedenberg, J. 2006. "The Dangers of Detention: the Impact of Incarcerating Youth in Detention and Other Secure Facilities". Washington, D.C.: Justice Policy Institute

⁶⁰ Makkai, T. and Payne, J. 2003. Key Findings from the Drug Use Careers of Offenders (DUCO) Study. Canberra, ACT: AIC.

⁶¹ Lowenkamp, Christopher T., VanNostrand, Marie, and Holsinger, Alexander. 2013. "The Hidden Costs of Pretrial Detention". *Laura and John Arnold Foundation*.

⁶² AIC. 2011. *Trends in Juvenile Detention in Australia*. Canberra, ACT: AIC.

Given that most young people detained pre-trial will not receive a custodial sentence, such detention should be utilised purely for the purpose of pre-trial security. Remand should not be thought of as a way to deter young people from criminal behaviour by exposing them to the realities of detention.

The YOA unequivocally states that a notice to attend court will usually be preferable to a summons. A notice to attend is preferred over the alternative options of charging the young person and causing the person to be issued with a summons to attend court or detaining the person in custody pending the person's appearance in court to be dealt with for the offence⁶³.

- **Review of the *Bail Act 1982 (WA)***

An ongoing review of the *Bail Act 1982 (WA)* has recommended a consequential amendment to the *Young Offenders Act 1994 (WA)*. This amendment will give the Children's Court further options to deal with a child who fails to attend court. The proposed amendment to section 43(7) of the YOA will include issuing the young person with a fresh summons or notice to attend, providing the Court with greater flexibility to avoid issuing a warrant to apprehend.

- **Requirement to expedite proceedings**

In New South Wales, the *Children (Criminal Proceedings) Act 1987* provides that if criminal proceedings are to be commenced against a child otherwise than by way of a court attendance notice, and the child is not released from custody, the child shall be brought before the Children's Court as soon as practicable. There is no provision in the WA YOA that requires proceedings will be expedited where the young person is in custody.

- **Separate provision for 10-13 year olds**

Empirical data shows children in WA (those aged between 10 and 13) are almost never sentenced to detention. In 2013, the median stay of 12-year old Aboriginal boys in BHDC was 3 days⁶⁴. Out of the 18 receptions of 12-year old Aboriginal boys in 2013, only one received a custodial sentence. The remaining 17 receptions pertained to un-sentenced children, all of whom stayed for a very short period of time. Exposing these children to detention before sentencing may be detrimental, considering that it is unlikely that these children will receive a custodial sentence.

A general principle of the YOA is that detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be done as a last resort. It may be the case that child remandees could be more appropriately and cost-effectively dealt with in their community rather than being remanded in detention for short periods of time.

⁶³ YOA s 42

⁶⁴ DCS Total Offender Management Solution database, 1/1/2013 – 31/12/2013.

PROPOSALS

1. It is proposed that the general principle stated at section 7(g) of the YOA relating to diversion be strengthened. The general principle should be amended to more closely reflect the principle used in New Zealand, Queensland and the Northern Territory.
2. It is proposed that a provision be inserted at Part 5, Division 1 and 2 requiring police to lodge a document outlining why diversion was not pursued wherever court proceedings are commenced against a young person in respect of relevant offences - or;

Part 5, Division 1 of the YOA be amended to provide that Police must issue a caution or Juvenile Justice Team referral for any non-scheduled offence.
3. It is proposed that consideration be given to introducing an additional measure of cautioning under Part 5, Division 1, allowing for the issuance of a conditional caution by a police prosecutor.
4. In relation to court conferencing, it is proposed that:
 - a) a provision is inserted to create court conferencing at Part 7, Division 3;
 - b) such a provision express that the Court is not obliged to dismiss a case where the offender is referred to court conferencing; and
 - c) a principle be inserted reinforcing the preference for court conferencing over upfront sentencing for first time scheduled offenders.
5. It is proposed that consideration be given to inserting a provision which states that where criminal proceedings are commenced against a young person and the young person has not been released from custody, the young person shall be brought before the Children's Court as soon as practicable.
6. It is proposed that a new sub-section be inserted under s 19 stating that a child aged less than 14 years may not be placed in a detention centre prior to their sentencing for an alleged offence.

Aboriginality

Disparity exists between Aboriginal and non-Aboriginal people on a number of indicators including health, child mortality, life expectancy, education, housing and homelessness. Aboriginal people constitute 3.1%⁶⁵ of the population of WA, and 40.7% of the Aboriginal population in WA is younger than 18.

Aboriginal children and young people in WA are particularly over-represented in the criminal justice system. The rate of over-representation in WA has consistently been higher than the national average⁶⁶. Aboriginal offenders are significantly less likely than their non-Aboriginal counterparts to be diverted from court, and as a result less likely to receive the described benefits of diversion⁶⁷.

In 2012, Aboriginal children and young people were 40 times more likely to be in detention than non-Aboriginal children and young people⁶⁸ and 28.4 times more likely to be under community supervision⁶⁹. While Aboriginal young people generally make up around 75% of the detention population and 60% of the community based order (CBO) population within the youth justice system in Western Australia⁷⁰, this group comprises between only 6.2 – 6.8% of the general population of 10-17 year olds⁷¹.

Data indicates that young Aboriginal people are diverted away from court at a lesser rate than non-Aboriginal young people, despite the objects of the YOA. The Aboriginal Legal Service of Western Australia (ALSWA) notes that the dangers of remand in detention are particularly apparent with regards to Aboriginal young people. Aboriginal young people are often charged with numerous minor offences, which will have the cumulative effect of bringing them into contact with the justice system and invariably leads to increased detention rates.⁷²

Given the degree of disadvantage faced by Aboriginal people, reducing this disproportionate level of early involvement with the criminal justice system is critical. This section will consider potential legislative means of reducing the rate of over-representation of Aboriginal young people in the criminal justice system.

⁶⁵ ABS. 2011. *Census of Population and Housing*. Canberra, ACT: ABS.

⁶⁶ Richards, K., 2011. *Trends in Juvenile Detention in Australia*. Canberra, ACT: AIC.

⁶⁷ House Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011. *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*. Canberra, ACT: Parliament of Australia.

⁶⁸ Commissioner for Children and Young People (CCYP). 2014. *The State of Western Australia's Children and Young People*. Perth, WA: CCYP.

⁶⁹ Ibid, p. 301.

⁷⁰ DCS. 2016. *Statistics and Publications*. Perth, WA: DCS.

⁷¹ Commissioner for Children and Young People (CCYP). 2014. *The State of Western Australia's Children and Young People*. Perth, WA: CCYP.. 38.

⁷² ALSWA. 2009. *Submission to Select Committee on Regional and Remote Indigenous Communities*. Hansard, 26 August 2009, Commonwealth of Australia.

Proposed mechanisms to reduce the over-representation of Aboriginal young people include a consideration of more flexibility in CBOs.

Community based orders

The current statutory framework relating to CBOs under the YOA may limit the ability to tailor orders to the individual needs of offenders, factoring in consideration of age, training, education, employment and developmental needs. While agencies have tended to view justice reforms in terms of increasing access to community-based services for Aboriginal young people in regions, Aboriginal leaders note the need for investment in 'community-owned' services, managed and run by Aboriginal people under Aboriginal terms of reference⁷³. There is concern that the government approach to community justice is based on the notion of moving existing structures to a community setting without changing them to reflect community values and practices⁷⁴. There may be further concern that the suite of options available under the YOA, which include more flexible community-based options such as CBO's and Intensive Supervision Orders, have only been successful among non-Aboriginal young people⁷⁵.

In a 2010 review of effective practice in youth justice, the Noetic Group recommended that in addition to providing culturally-relevant programs, it is necessary to promote involvement by local and Aboriginal agencies and persons in both developing and delivering programs and prevention initiatives⁷⁶. Facilitating this is an important step in increasing the young person's sense of community acceptance and increasing their level of responsiveness to changing their offending behaviour.

Location is of both ritual and spiritual importance in this context. Allowing justice interventions to be based and carried out in country represents a step towards genuine self-determining communities and furthers the emerging view that traditional justice interventions do not necessarily provide effective solutions for Aboriginal young people. Allowing extra flexibility under the YOA would enable the Aboriginal services sector to grow and develop in the cultural engagement space. The YOA should be flexible enough to allow external, community involvement in individualised responses to offending where this is thought to be the best option for the child or young person in question. This flexibility may help to facilitate a move away from

⁷³ Blagg, H. 2012. "Re-imagining Youth Justice: Cultural Contestation in the Kimberley Region of Australia since the 1991 Royal Commission into Aboriginal Deaths in Custody". *Theoretical Criminology* 16(4).

⁷⁴ Australian Human Rights Commission (AHRC). 2006. *Social Justice Report*. Canberra, ACT: AHRC.

⁷⁵ Blagg, H. 2012. "Re-imagining Youth Justice: Cultural Contestation in the Kimberley Region of Australia since the 1991 Royal Commission into Aboriginal Deaths in Custody". *Theoretical Criminology* 16(4).

⁷⁶ Noetic Group. 2010. *Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice*. Canberra, ACT: Noetic Group.

paternalistic governance structures in Aboriginal youth justice towards the notion of 'governing from a distance'.

Some organisations in WA are developing and/or delivering options that may remedy this perceived disconnect. Kimberley Aboriginal Law and Cultural Centre (KALACC) have developed the Yiriman Project, an initiative designed to facilitate cultural immersion and healing on traditional lands for young offenders and at-risk young people⁷⁷. Yiriman is developed and run by cultural leaders in the Kimberley, with the support of youth workers. The Yiriman Project is an example of the way in which 'community-owned' justice mechanisms can operate. Traditional owner groups, such as the Jaru people of the Kimberley, want to partner with government in the provision of services for young people.

However, initiatives such as the Yiriman Project are most effective if able to operate in their own space. It may be the view of some groups that by branding such initiatives as 'programmes', they may automatically become subject to mainstream governance structures and regulation, ending any real notion of community ownership⁷⁸. For this reason, any legislative embodiment of this option must be broad enough to retain the elements of community ownership and operation.

Community owned justice interstate

An example of a community-owned and operated justice mechanism is the Koori Youth Justice Program in Victoria. The Koori Youth Justice Program is operated in the community and employs Koori Youth Justice Workers to provide access for young Aboriginal offenders to appropriate role models and culturally sensitive support, advocacy and casework. The program targets young people at risk of offending, clients on CBOs and custodial orders. This program demonstrates the operation of a less adversarial format when dealing with young offenders⁷⁹.

As part of a review of the youth criminal justice system in New South Wales, key agencies in that jurisdiction including the Department of Aboriginal Affairs, the Department of Education and Training and the Department of Human Services recommended that prevention and early intervention strategies be funded in local Aboriginal communities⁸⁰. The Department of Aboriginal Affairs, Children's Court of NSW and Department of Justice and Attorney General also recommended that a model for community-based sentencing of Aboriginal juvenile offenders be developed and implemented⁸¹.

⁷⁸ Blagg, H. 2012. "Re-imagining Youth Justice: Cultural Contestation in the Kimberley Region of Australia since the 1991 Royal Commission into Aboriginal Deaths in Custody". *Theoretical Criminology* 4(16).

⁷⁹ Ibid.

⁸⁰ Noetic Solutions. 2010. *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice*. Canberra, ACT: Noetic Group.

⁸¹ Ibid.

More innovative approaches and alternative interventions may be required in the context of WA youth justice, in which the direct involvement of Aboriginal individuals, communities and organisations will be critical. Community-owned justice mechanisms on Aboriginal country in WA could act as an alternative⁸² in circumstances where it is not expected that a traditional CBO under the YOA will be successful or in the best interests of the young person. A new Part or Order could create a layer of flexibility within the statutory framework to deal with Aboriginal young people, particularly those from rural or remote communities, in a more appropriate and individually tailored manner.

Principles of restorative justice

Some of the general principles of youth justice in the YOA reflect a restorative approach to justice. Restorative justice emphasises repairing the harm caused by criminal behaviour and requiring offenders to take responsibility for their actions.

Whether or not restorative justice in its current form is an appropriate approach for Aboriginal people has been questioned in recent years. Restorative justice has been criticised for undermining self-determination and presenting barriers to referral, acceptance and completion for Aboriginal young people and their families⁸³. While efforts have been made to increase the cultural competency and relevance of restorative justice initiatives (such as Juvenile Justice Teams), it remains that the underpinning principles of the YOA reflect an approach that may not be culturally competent.

On 30 June 1994 Aboriginal young people made up 58% of the total youth detention population of 131⁸⁴. On 30 June 2016 Aboriginal people made up 77% of the total youth detention population of 145⁸⁵. Given that the proportion of non-Aboriginal young people represented in detention has decreased by 11% since the inception of the YOA in 1994, it is possible that the restorative justice system has been more effective for some racial groups than others. At this point in time, the effectiveness of restorative justice for Aboriginal people or other racial minority groups is unclear and criminologists recommend further analysis⁸⁶.

⁸² Blagg, H. 2012. "Re-imagining Youth Justice: Cultural Contestation in the Kimberley Region of Australia since the 1991 Royal Commission into Aboriginal Deaths in Custody". *Theoretical Criminology* 16(4).

⁸³ Joudo J. 2008. *Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs*. Canberra, ACT: AIC.

⁸⁴ Bareja, M. and Charlton, K. 2003. *Statistics on Juvenile Detention in Australia: 1981 – 2002*. Canberra, ACT: AIC.

⁸⁵ DCS offender data 2016.

⁸⁶ Strang H. 2010. *Restorative Justice Research in Britain and Australia: What do we Know?* Paper presented for the Occasional Seminar Series, AIC.

Specific principles of the YOA which are based on restorative justice include:

(b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and

(e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so.

The inclusion of restorative justice as a guiding principle of youth justice legislation is consistent with some other Australian jurisdictions, including New South Wales. Guiding principles (b) and (e) impact Children's Court decisions in practice by encouraging the imposition of restorative interventions such as Juvenile Justice Teams and Court Conferencing. These types of interventions are valuable in encouraging young people to develop a sense of personal responsibility. However, these interventions alone do not rehabilitate young people in the system, whose offending is often linked to complex problems including trauma, neglect and substance abuse. These complex needs could be contributing to the declining use of Juvenile Justice Teams, as discussed on page 22 of this paper. By having these notions of restorative justice reflected so strongly in the principles of the YOA, there is a risk that restorative justice is viewed as an overriding approach, as opposed to just one element of a more rehabilitative approach to sentencing. For this reason, consideration should be given to reducing the emphasis on restorative justice and increasing the emphasis on wraparound support and rehabilitation for young people.

General principle (b) may not be necessary due to the existence of guiding principle (j), which provides that punishment of a young person for an offence should be designed to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways. General principle (e) may have the effect of reaffirming the use of interventions which involve victim participation over those that do not. Given the recent decline in victim willingness to participate in Juvenile Justice Teams, new mechanisms could now be considered to allow victims to participate in the youth justice process. The option for victims to be involved in the process will continue to exist, but consideration should be given to deemphasising the role of the victim in order to remove any barriers to more rehabilitative and treatment based sentencing options.

PROPOSALS

- 7. It is proposed that a new Order is created under the YOA to allow for non-government managed, culturally appropriate community justice.**
- 8. It is proposed that consideration be given to reducing the emphasis on restorative justice through general principles (b) and (e).**
- 9. It is proposed that consideration be given to whether the current general principles of youth justice under the YOA adequately reflect the need to support and rehabilitate young people.**

Pre-release

Under the YOA, a custodial sentence is a sentence of last resort and the court cannot impose such a sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter.

Certain young offenders will inevitably serve a sentence of detention, due to the nature, severity and/or repetitiveness of their offending. For this group of offenders, the YOA endeavours to provide mechanisms which minimise the amount of time spent in detention. The YOA also attempts to ensure that time spent in detention or under supervision is as constructive as possible for the young person by readying them for their return to the community and building the necessary skills to avoid re-offending.

Legislative amendments may be necessary in order to better facilitate these goals. This section considers existing and alternative mechanisms of pre-release, their effectiveness and how they may be improved by legislative amendment.

Proposed mechanisms to facilitate pre-release include:

- i) extension of day release
- ii) Graduated Release Orders
- iii) expanded Supervised Release Orders
- iv) amended duration for Conditional Release Orders

Pre-release (day release) scheme

Section 188(4) of the YOA enables detainees to be absent from a detention centre for a period not exceeding 72 hours for an authorised purpose. This practice is commonly referred to as day release. Authorised purposes typically include attending job interviews, school or training enrolments, visiting family or attending events such as funerals. Current day release provisions may be disproportionately disadvantageous to children and young people from regional or remote areas⁸⁷, which may not be easily accessible by airplane. Given that the WAs only detention centre is located in the metropolitan area, many rural/regional young people may not get the opportunity to see their families, attend ceremonies or benefit from community reintegration due to the 72-hour time limit. For this reason, it may be useful to consider amending the YOA to extend the maximum period of day release that can be authorised.

Between 1999 and 2011, a day leave/day release program was available to young offenders using sections 188(3)(c) and 188(4) of the YOA. The YOA was amended to allow for this in 1999 on the basis that the transition from detention to the community was believed to be a critical period in a young offender's rehabilitation. Day release programs were placed on hold in late 2011. Presently under section 188(4), a pre-release program could include any educational, employment or

⁸⁷ Office of the Auditor General. 2008. *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*. Perth, WA: Office of the Auditor General.

development rehabilitative opportunity, allowing the detainee to be absent from the Centre for a period not exceeding 72 hours.

Pre-Release for Adults

In WA, re-socialisation programmes are available to life/indefinite sentenced prisoners under the *Sentence Administration Act 2003*⁸⁸. The programmes are structured to ensure the prisoners successful re-integration into society by addressing the need and risks of the particular prisoner⁸⁹. The programmes aim to include activities that contribute to the rehabilitation of the prisoner. Minimum security adult prisoners may also apply for activity programs⁹⁰ and the Prisoner Employment Program⁹¹ (usually within 12 months of their earliest eligible release date). The effectiveness of pre-release schemes amongst adult offenders in Western Australia has not yet been established.

Section 83 of the *Prisons Act 1981* allows for permits to be absent from prison. This is similar to the day release allowed for under the Act, but the permits may last for a period determined by the Commissioner or his/her delegate, as opposed to being limited to 72 hours. Permits to be absent may be used to spend time at home or in a prisoner employment program. The objectives are to enable rehabilitation and facilitate reintegration into the community.

Supervised Release Orders

A SRO is an order made by the SRRB to release a young offender from detention before the expiry of their sentence, subject to specified conditions. An SRO may only be made on or after the earliest release day and the offender must consent to the making of the order. The SRRB determines the suitability of the young offender for an SRO and sets the conditions of the order. The SRRB also has the power to amend or cancel an SRO.

Currently, SROs expire at the end of the term of detention⁹². The young offender is no longer at risk of being returned to detention after this time, removing the incentive to comply with conditions of the order. The expiry of the SRO also ends the relationship between the Youth Justice Officer and the young offender. Unless a minimum sentence has been set, a young offender can apply for supervised release after serving half their sentence. An SRO may be made by the SRRB after considering evidence and setting conditions, to which the young person must agree and commit.

At this stage of the process, evidence relating to the progress of, and risks facing, the young offender is pivotal. Psychological, psychiatric and Department of Child

⁸⁸ *Sentence Administration Act 2003* (WA) ss 13,14.

⁸⁹ *Sentence Administration Regulations 2003* (WA) s 3E.

⁹⁰ *Prisons Act 1981* (WA) s 95.

⁹¹ DCS Policy Directive 68, Prisoner Employment Program.

⁹² YOA s 134.

Protection and Family Support reports, together with the reports of Youth Justice Officers and custodial case managers, form a mosaic of information regarding the suitability of the young person for supervised release.

The limitations of this process include:

- terms of detention are typically short, particularly where sentences are backdated to include time spent in custody on remand
- consequently, the time available to assemble evidence is short, putting substantial pressure on Youth Justice Officers
- because of the short period of time involved, there is a limited capacity for the SRRB to defer the release of an offender and still frame a suitable SRO⁹³
- as a result, a SRO may be denied without fault on the part of the young offender.

A statutory amendment to allow for elements of an SRO to remain in force after a term of detention has expired would contain the features of back-end sentencing. Sentencing processes would not be amended, and the amendments would only apply in the cases of those serious offenders who are required to serve a sentence of detention.

Consideration may be given to amending the process outlined in Part 8 of the YOA so that the SRRB, Youth Justice Officers and any other officers involved in providing evidence upon which the SRRB will make a decision, have more time to assemble evidence. An amended process may also allow more time for those officers involved with the young offender to work on the remediation of the young offender while he or she is still in detention, which may improve the young offender's prospects of being found suitable for supervised release by the SRRB. Any amendment to the current scheme will give rise to a number of issues for consideration, including the potential need for amendments to associated pieces of legislation, such as the *Sentence Administration Act 2003*.

The process may also be amended where an SRO has been granted to allow the SRRB to maintain control of the young person's behaviour and apply sanctions for any breach of the SRO for a period longer than the term of detention. An order that extends past the term of detention may occur during the period in which the measures designed to achieve the young person's rehabilitation need to be pursued. Reasonable certainty as to when the order will end should not be removed in these circumstances. This will provide greater protection to the community from offending as well as ensuring rehabilitation processes are not prematurely ended.

In relation to this potential option, elements of a viable release plan typically sought by the SRRB, which may be modified, added to or deleted from time to time, include the following:

- stable, supportive accommodation

⁹³ Supervised Release Review Board of Western Australia (SRRB). 2012. *Annual Report 2011/2012*. Perth, WA: SRRB.

- appropriate educational opportunities or vocational training, including an apprenticeship
- a job, or at least the opportunity to pursue a vocation
- recreational activities which offer the chance to be occupied out of work or school hours and to make good peer associations
- the avoidance of harmful peer associations and opportunities to offend;
- the benefit of victim mediation
- a curfew, when helpful and feasible
- a culturally appropriate mentor, and guidance and supervision generally, in effective form, rather than as a token effort
- psychiatric and/or psychological treatment or counselling
- any other medical treatment for matters which relate to offending behaviour, including counselling generally
- substance abuse (alcohol, illicit drugs, solvents) treatment and counselling, monitored by random urinalysis, where appropriate and available.

Such a scheme would be controlled by the SRRB at all points of the decision-making process. There would be more opportunity to gather evidence to ensure that the SRRB is completely informed of all relevant considerations, and more opportunity to begin rehabilitating the young offender while in custody. It is appropriate that the SRRB retains control and governance of the process of supervised release, even in case of a breach that occurs after liability to serve a term of detention has expired. Imposition of sanctions for breach at that time is not an act of passing sentence, but an act of maintaining control of governance of supervised release.

The essential element of the proposed statutory scheme is that it would not interfere in any way with the sentencing process of the Court, but would enable the SRRB to set the period of supervised release having regard to the needs of a particular child or young person. The SRRB would have power to enforce compliance with an SRO, by the threat of further detention or other punishment, even after the original sentence of detention had expired.

An alternative way of allowing for the extension of an SRO would be for the SRRB to suspend the whole or part of the detention sentence for a protracted period of time. This would effectively increase the amount of time during which the young person faces consequence for their breach. This would be a departure from current practice, which sees the sentencing court imposing sentence suspension, but may be a useful way of dealing with the identified problems. Such an option may also be valid in relation to Graduated Release Orders (discussed below).

Graduated Release

Currently, Graduated Release Orders (GROs) do not exist under the YOA. A Graduated Release Scheme has been considered as an option for statutory change by the Department of Corrective Services since 2006⁹⁴. The option was discussed in

⁹⁴ Ibid

light of apparent inequality of pre-release options for adults as compared to young offenders. It is proposed that graduated release would assist young offenders to effectively reintegrate into the community, build supportive relationships and develop useful skills prior to their release date⁹⁵.

Consideration of a new type of order will give rise to a number of issues for consideration, including the potential need for amendment to associated sentencing legislation. The introduction of a GRO would provide an additional stage between detention and a Supervised Release Order (SRO). Additionally, while SROs afford young offenders an opportunity to minimise the length of their stay in detention, SROs are not always available or deemed suitable for high risk, maximum security young offenders. This group stands to benefit from supervised, gradual integration back into the community.

A GRO may be:

- a strict condition pre-release order for medium and maximum security young detainees available 3 months before eligibility for an SRO
- targeted to all offenders serving a 12 month sentence or more. This would ensure that medium and maximum security young offenders, who typically have the greatest need for reintegration, are not excluded from pre-release eligibility
- more stringent than a SRO
- available during the last three months of a term of detention, or during the three months leading up to eligibility for an SRO
- flexible and individualised in form, depending on the particular circumstances and needs of the young person in question
- able to involve electronic monitoring, and would require intensive supervision from a Youth Justice Officer
- useful in providing evidence to the SRRB as to whether an SRO would be appropriate in the circumstances
- useful in providing an alternative option for when an SRO is breached. The SRRB may have the option of returning a young person to a GRO upon breach of an SRO, as opposed to returning them to detention.

A GRO would constitute a statutory scheme to deal with young offenders who commit serious crimes and are sentenced to detention as the punishment of last resort. These young people may be dealt with in a way that is best calculated to achieve their reintegration into the community, with the intended consequence that they will not offend again and a reasonable degree of protection of the community from their recidivism may be provided.

⁹⁵ Ibid

Role of the Supervised Release Review Board

The role of the SRRB is to manage the supervised return to the community of young offenders. Therefore, the task of setting GROs under a new statutory scheme may also be performed by the SRRB. The SRRB may possess the capacity to secure compliance by returning the young person to custody for a period or by the threat of further punishment. This represents a diversion of effort into remediation with the prospect of saving expenditure on custody, if there is a reduction in re-offending in the immediate and longer term.

The proposal is designed to maximise the use of time in detention for remedial and training purposes. Additionally, the proposal would give the relevant agencies involved with the young person in their community more time to guide the young offender in the effort to achieve rehabilitation.

Family responsibility conditions

Responsible Parenting Orders have been available in Western Australia for some time. Under this arrangement, authorised officers from specific agencies, including the Department of Education and the Department of Corrective Services, may apply to the Children's Court for a Responsible Parenting Order where a parent has failed to adhere to a voluntary Responsible Parenting Agreement.

The Agreement and Order were previously legislated for under the *Parental Support and Responsibility Act 2008 (WA)* (PSR). The PSR has been repealed. Responsible Parenting Agreements continue to operate under the *Children and Community Services Act 2004 (WA)*. However, Responsible Parenting Orders have not been continued. The Orders were never used, primarily because they were particularly difficult to enforce. The issuing of an Order must imply a punitive consequence for breach, but because parents have not committed a crime it is difficult to apply a sanction (such as a fine) without causing further hardship to the family and the young person.

A Court Order has not proven to be an appropriate or effective way of dealing with families who fail to assist their child in developing a non-offending way of life. However, it is clear that a basic level of family support and cooperation is often required to enable successful rehabilitation and reintegration in a young offender. This support may be particularly imperative for a young offender to complete an SRO, as a secure and stable home environment is integral to success. For this reason, there may be a role for the SRRB in prescribing conditions upon family members.

The ability to make conditions contingent on the behaviour of particular family members would provide greater scope for the SRRB and DCS to ensure family cooperation during the course of the SRO. There would be no punitive sanctions for family members who breach conditions relating to them, but a breach may result in the terms of the SRO being reconsidered by the SRRB. It may not be necessary to amend the YOA in order to allow the SRRB to make an express condition relating to

family members, but it may be necessary to amend if the condition is intended to become implied.

Duration of a Conditional Release Order

A Conditional Release Order (CRO) is a type of Intensive Youth Supervision Order which involves a custodial sentence. A CRO is a strict, condition based order which may be suitable for more serious offenders. However, it may be that the provisions surrounding the expiry of CROs do not reflect their intended seriousness.

Section 76 of the YOA specifies that a youth community based order (CBO) is satisfied when every attendance condition or community work condition imposed by it is fulfilled and the period for which it imposes supervision conditions has elapsed. While a CBO is set for a specific duration, a Youth Justice Officer may apply to the Children's Court to have a CBO extended if the stated conditions (reporting, community work and any others) have not been met.

Conversely, section 105 of the YOA states that a CRO runs until the end of the term for which the offender would be liable to be detained if there were no CRO and cannot impose any obligation that binds the offender after the end of that term. Section 107 states that the period of conditional release is not to exceed 12 (continuous) months.

Given that a CRO is a more serious order than a CBO, it may be necessary to amend the YOA to allow for the extension of a CRO past the term during which the offender would be liable to be detained in order to ensure that the conditions of the order are satisfied.

Duty of care post-release

Young people cannot always leave the detention facility on the day they are due for release. This may be because they have nowhere to go, are waiting on flights, or a responsible family member may not yet have been located. The Department of Child Protection and Family Support will accept responsibility for young people leaving detention who are eligible for state care, but there is concern about young people who are outside of this scope.

The YOA does not currently account for young people who may need to stay in detention for a day or two after they are eligible for release. There may be a risk that a young person who remains in BHDC past their due date for release could be deemed unlawfully incarcerated. However, caution would need to be applied in considering an amendment to address this issue, as it is not the intention to legislate for indefinite detention.

PROPOSALS

10. It is proposed that section 188(4) of the YOA be amended to provide that the CEO may, in writing, authorise a detainee to be absent from a detention centre for a period not exceeding 5 days.

11. It is proposed that the following amendments are made to provide the framework for rehabilitative SRO's:

- a) the Court having imposed a sentence of detention, the offender would have to serve 50% of the term, or the minimum fixed by the Court, before becoming eligible for release;
- b) the SRRB would then determine when, and upon what conditions, accepted by the offender, they were to be released, service of the term of detention being suspended upon release;
- c) the conditions might be amended in any way by the SRRB as the need arose, and with the consent of the offender;
- d) as is the case now, after 6 months the SRRB could cancel any or all of the conditions except the condition, applicable in every case, that the offender must not commit any offence;
- e) the SRO would have duration of 6-12 months, fixed by the SRRB, having regard to the evidence as to the time needed to complete applicable programs. If successfully completed, the offender would be discharged from the service of any unserved portion of the term of detention;
- f) a breach of the SRO, by re-offending or by otherwise failing to comply with a condition of the order, would result in the SRRB:
 - i. taking no action in the case of a minor breach;
 - ii. leaving the SRO in place, but amending its terms; or
 - iii. returning the offender to custody to serve any unserved period of the detention imposed, the service of which would be conditionally suspended upon the making of the SRO. The offender would be immediately eligible for an SRO to be made as before;
- g) if the SRO was breached and there was no further liability to serve any portion of the term of detention, the SRRB should have the power:
 - i. to take no action in the case of a minor breach;
 - ii. to leave the SRO in place, but amend its terms; or
 - iii. to order the young offender to be returned to detention for a short period by way of punishment, and to terminate the SRO. In this last case the young person would have the

opportunity to be heard, which they would have upon the question of any proposed amendment to the terms of the SRO.

12. It is proposed that the following amendments are made to facilitate graduated release:

- a) the YOA be amended to give the SRRB power to make pre-release (graduated release) orders in the case of those detainees whom it is thought may be relied upon to comply;
- b) the power should be available during the last 3 months of service of their detention prior to the earliest release date for the making of an SRO;
- c) the SRRB's power should be in addition to that conferred upon the CEO by s188(4) of the YOA, but the Minister's approval of its exercise should not be required;
- d) the power should be exercisable for purposes described generally as being concerned with cultural matters; the pursuit of education or vocational training; the obtaining of employment or the pursuit of job readiness; undertaking psychiatric, psychological or other medical treatment, including for the use of illicit substances and the abuse of alcohol; to obtain suitable, stable accommodation; and for family and compassionate reasons; and
- e) the order should be made in such terms and upon such conditions as the SRRB thinks fit, including conditions concerned with supervision, reporting, a curfew and others, and there should be no assumption that successful service of a period of pre-release in the community will lead to the making of an SRO in any particular terms or at all.

13. It is proposed that consideration be given to whether the YOA requires amendment in order for the SRRB to make a 'family responsibility' condition on an SRO.

14. It is proposed that consideration be given to amending Part 7, Division 7 to clarify that CRO's may be extended beyond the period of time for which an offender is liable to be detained if conditions/obligations associated with the CRO have not been met.

15. It is proposed that the YOA be amended to explicitly provide for situations where a young person cannot leave a detention facility on the day they are due for release.

Detention facilities

Youth detention centres can represent environments in which to facilitate quality supervision and rehabilitation. However, youth detention centres can also represent high risk and tense environments in which there is possibility for crisis situations, violent outbursts and bad behaviour. A youth detention centre must be a suitable environment for all of its inhabitants and staff.

Many jurisdictions have separate detention centres tailored for separate cohorts. With only one detention centre in WA, Banksia Hill Detention Centre (BHDC) must be a suitable environment for the diverse needs of children, young people, young adults, males, females, remandees, sentenced detainees, mothers and fathers. For these reasons, it is necessary to ensure that the Act makes appropriate provision for due process, quality control and responsiveness of detention facilities.

This section will consider existing and alternative statutory mechanisms for improving detention facilities. Proposed mechanisms for improving the statutory framework relating to detention facilities include:

- i. implementing a Statutory Board governing BHDC;
- ii. enabling transfers to adult facilities; and
- iii. contracting for custodial services.

Statutory board governing Banksia Hill Detention Centre

Statutory bodies are typically established to carry out specific functions which a government considers may be more effective outside a traditional department structure. Statutory bodies, such as boards, are formed when there is a perceived need for some operational independence from a government, specific expertise, alternative funding arrangements or a separate legal entity⁹⁶.

There may be scope to consider the establishment of a statutory body to support each detention centre in WA (currently limited to one facility, BHDC). BHDC is currently privy to adequate level of independent oversight provided by statutory bodies such as the Office of the Inspector of Custodial Services and the Ombudsman. However, there is no statutory framework in place for independent facility operational decision making or support to management.

Local and international models can provide insight into the functions and operations of statutory boards.

- **School Boards (WA)**

All WA schools have a school council or board under the *School Education Act 1999*. Every Independent Public School has a board, and all other schools have a council.

⁹⁶ Queensland Treasury. 2016. *Establishment of Statutory Bodies: Considerations and Contacts*. Brisbane, QLD: Queensland Treasury.

Councils or boards can be incorporated or unincorporated. The principal of the school must be a member.

School boards/councils have the following functions⁹⁷, as stipulated in the *School Education Act 1999* and the *School Education Regulations 2000* and, if incorporated, the *Associations Incorporation Act 1987*:

1. To take part in:
 - a) establishing and reviewing from time to time, the school's objectives, priorities and general policy directions
 - b) the planning of financial arrangements necessary to fund those objectives, priorities and directions
 - c) evaluating the school's performance in achieving them and
 - d) formulating code of conduct for students at the school
2. To determine in consultation with students, their parents and staff a dress code for students when they are attending or representing the school
3. To promote the school in the community
4. To approve:
 - a) charges and contributions for the provision of certain materials, services and facilities
 - b) extra cost optional components of educational programmes;
 - c) items to be supplied by a student for use in an educational programme and
 - d) any agreements or arrangement for advertising or sponsorship in relation to the school
5. To provide advice to the principal of the school on:
 - a) a general policy concerning the use in school activities of prayers, songs and material based on religious, spiritual or moral values being used in a school activity as part of religious education and
 - b) the implementation of special religious education;
6. With the approval of the Minister or delegate, take part in the selection of, but not the appointment of, the school principal or any other member of the teaching staff.

The council or board cannot:

1. Intervene in the educational instruction of students;
2. Exercise authority over teaching staff or other persons employed at the school;
3. Control or manage the school unless the intervention is by way of performing a function prescribed for incorporated councils or boards; or
4. Intervene in the management or operation of a school fund.

⁹⁷ Department of Education WA - School Councils Policy

- **Youth Justice Board (United Kingdom)**

The Youth Justice Board (UK YJB) in the United Kingdom is a non-departmental public body created by the *Crime and Disorder Act 1988*. The role of the UK YJB is to oversee the youth justice system in England and Wales and to support the strategic aims of the UK Government⁹⁸.

The extensive but specific functions of the UK YJB are outlined in section 41 of the *Crime and Disorder Act 1988* and in the *UK YJB for England and Wales Order 2000*. These functions include to:

- monitor the operation of the youth justice system and the provision of youth justice services
- advise the Secretary of State for Justice on:
 - the operation of the youth justice system and the provision of youth justice services
 - how the principal aims of the youth justice system might most effectively be pursued
 - the content of any national standards the Secretary of State may see fit to set with respect to the provision of youth justice services or the accommodation in which children and young people are kept in custody
 - the steps that might be taken to prevent offending by children and young people
- to identify, make known and promote good practice
- to make grant payments, with the approval of the Secretary of State, to local authorities or other bodies for them to develop good practice or to commission research in connection with such practice
- to commission research and publish information in connection with good practice
- to enter in to agreements for the provision of secure accommodation for children and young people.

As a facility which has vulnerable young people in its care, it may be beneficial for BHDC to have an independent, statutory board. The board would meet regularly to decide on issues of concern to the facility. Any new provisions under the YOA should specify that every detention centre must have a facility board, allowing for potential future facilities or the splitting of the current facility.

In WA, a dedicated independent statutory board may be established under the YOA to assist management with the operations and direction of the facility. The board, which would include the superintendent/director of the facility, would act as a

⁹⁸ MoJ. 2015. *Youth Justice Board for England and Wales Strategic Plan 2015-18*. London, England: MoJ.

mechanism for decision-making support and oversight for the facility. An independent board comprised of appointed experts in a range of relevant fields and respected community members would provide genuine support to facility management in addressing difficult issues facing the facility and matters of funding and appropriation.

Transfer to adult facility

Young detainees who are sentenced to a term of detention before they turn 18 often remain in BHDC after reaching the age of 18. This situation may be detrimental to the detainee, younger detainees and facility staff.

Presently, the Commissioner has the power to make an application to the Children's Court under section 178 of the YOA to have a young offender or a young adult who was originally detained as a young offender transferred to an adult prison facility. At the time of sentencing, Children's Court magistrates will generally be able to ascertain if the young person in question is likely to be unsuitable for BHDC upon reaching 18 years of age. Based on pre-sentences reports, the nature of the offence and any behaviour displayed while on bail or in remand, the Court may be able to conclude that the young person will be a damaging influence or distraction to the other young detainees at BHDC, or that BHDC may not meet their needs. For this reason, there may be a greater role for the Children's Court to play in determining when a young detainee should be transferred to an adult facility.

If the President of the Children's Court was able to make this determination at the time of sentencing, there may also be a consequential reduction in applications to transfer under section 178.

Contracts for custodial services

The introduction of the *Court Security and Custodial Services Act 1999 (WA)* created a statutory framework for employing mixed economy models in custodial operations and service delivery. Since the amendment of the *Prisons Act 1981 (WA)* in 1999⁹⁹, aspects of custodial operations have been open to the involvement of other sectors. Acacia Prison, Wandoo Reintegration Facility and Melaleuca Remand and Reintegration Facility are privately managed under this legislative framework, consisting of the *Court Security and Custodial Services Act 1999 (WA)* and the *Prisons Act 1981 (WA)*.

There is currently no provision under the YOA to allow for the contracting of custodial services in relation to young people. While there may not be an immediate plan to contract any aspect of the operations of BHDC, the fact that there is no scope under the YOA to do so may be problematic in the future.

To contemporise the YOA and facilitate the changing environment in which government services are delivered, consideration may be given to allowing contracts for the delivery of custodial services under the YOA.

⁹⁹ Sections 15A – 15ZC of the *Prisons Act 1981 (WA)* deal with contracts for prison services.

Dealing with detention offences

Part 9 of the YOA outlines what constitutes a detention offence and how they are heard and dealt with. Section 173 outlines the actions that may be taken with regard to a detainee who has committed a detention offence.

a) Ability to alter earliest release date

Section 173 outlines the actions that may be taken in relation to a detainee who is found to have committed a detention offence. Detention offences may be heard and dealt with by the Superintendent or a Visiting Justice (a Justice of the Peace appointed to preside over cases within the prison system). Options for dealing with detention offences include ordering the temporary cancellation of gratuities and ordering temporary confinement to sleeping quarters or a designated room.

Section 173(2)(a) allows the Superintendent or Visiting Justice to alter the earliest release date of the detainee by up to three days if the order is made by the Superintendent and up to 14 days if the order is made by the Visiting Justice.

The ability of Superintendents and Visiting Justices to alter the earliest release date of the detainee for a detention offence should be removed. The power to alter the earliest release date of a prisoner no longer exists under the *Prisons Act 1981*. It is inappropriate that young detainees should be treated more severely than adult prisoners. Professional standards questions may arise as to the ability of Superintendents and Visiting Justices to effectively extend the length of a court ordered sentence.

If it is thought that the option of altering the earliest release date should remain, it may be considered that such an order could be determined by a high office such as the Commissioner for Corrective Services, President of the Children's Court or Chairman of the Supervised Release Review Board on the recommendation of the Superintendent or Visiting Justice.

b) Standard of proof for detention offences

The YOA and *Young Offenders Regulations 1995* (YOR) do not address the standard of proof required to establish a detention offence. The *Prisons Act 1981* distinguishes between minor prison offences and aggravated prison offences¹⁰⁰. Minor offences are attached to administrative hearings and therefore only require proof on the balance of probabilities (civil standard). Aggravated offences (including assaults) are heard in a court of summary jurisdiction and as such require proof beyond reasonable doubt (criminal standard).

A similar scheme may be appropriate for the YOA whereby minor and aggravated detention offences are distinguished; allowing separate categories of detention offences to be dealt with differently. A standard of proof is probably not required for minor detention offences, such as the use of bad language. However, for the sake of clarity and consistency it is appropriate to adopt a civil or criminal standard of proof

¹⁰⁰ *Prisons Act 1981* (WA) Part 9.

in the event of detention offences that may attract a material consequence. The result of this would be either that:

- a) Superintendents or Visiting Justices dealing with detention offences would require training on what level of proof satisfies the standard
- b) aggravated detention offences (if distinguished) would be heard and determined by the Children's Court.

PROPOSALS

16. It is proposed that consideration is given to establishing a new division under the YOA to create an independent incorporated statutory board for a detention facility. This division should be set up so that any detention centre established in WA has its own board.

17. It is proposed that a provision is inserted at section 50 of the YOA to grant the President of the Children's Court the discretionary power to order, when sentencing a young person aged 17.5 – 18 years of age to a custodial sentence, that the young person be transferred to an adult facility upon reaching 18 years of age.

18. It is proposed that provisions are inserted reflecting section 15A – 15Z of the *Prisons Act 1981 (WA)*, allowing for contracts for custodial services.

19. Section 173(2)(c) and 173(3) be amended to remove the power of Superintendents and Visiting Justices to alter the earliest release data of the detainee.

20. It is proposed that a standard of proof for establishing detention offences be determined, and either Part 9 of the YOA or Part 6 of the YOR be amended to reflect these standards.

Interaction with other legislative provisions

Current arrangements

During the 2008 state election the WA Government committed to introducing legislation to prescribe minimum mandatory sentences for certain categories of offences. To date, amendments to create minimum mandatory penalties have been enacted for the assault of public officers and dangerous driving to evade police. In 2015, legislative changes were made to create minimum mandatory penalties for aggravated burglaries.

Section 46(5a) of the YOA states that where a written law provides that a mandatory penalty or minimum penalty shall be imposed in relation to an offence, the court is not obliged to impose such a penalty. This provision may create limitations to the intent of other enactments relating to mandatory or minimum sentencing.

At present, minimum penalties for the assault of a public officer apply to young people aged 16 and 17. The changes made in 2015 relating to mandatory sentences for aggravated burglaries also apply to young people aged 16 and 17. At this point in

time it is necessary to consider how young people aged 10 to 15 should be dealt with in relation to these specified offences.

Assault of public officers

The *Criminal Code Amendment Act 2009* had the effect of amending sections 297 and 318 of the *Criminal Code 1913* (the Code) to prescribe mandatory minimum sentences of detention or imprisonment for offenders who inflict bodily harm on certain categories of public officers. The public officers protected by these amendments are police officers, prison officers, transit guards, ambulance personnel, and contract workers providing court security services, custodial services and other functions under the *Prisons Act 1981*. In 2013, the protection was extended to youth custodial officers (now known as youth justice workers).

Under these amendments, the court sentencing a young person aged 16 or 17 for such an offence must sentence the offender to either a minimum term of three months imprisonment or detention. These amendments are notwithstanding section 46(5a) of the YOA, which provides that where a written law requires a mandatory or minimum penalty, the court dealing with a young person is not obliged to impose such a penalty.

Police pursuits

The *Road Traffic (Miscellaneous Amendments) Bill 2012* inserted a new provision into the *Road Traffic Act 1974* to create a circumstance of aggravation for the offences of reckless and dangerous driving and failing to stop, committed when a person is attempting to evade pursuit by police. Mandatory minimum penalties, including licence disqualification, fines and custodial sentences, have been inserted for these offences if they are committed when the person was attempting to evade pursuit by police.

Home burglaries

The *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (the Bill) was assented to in 2015. The Bill amended a number of provisions in the Code and dealt with two separate issues – minimum penalties for aggravated home burglaries (where the offender is, or pretends to be, armed with a dangerous or offensive weapon and does or threatens bodily harm) and current ‘three strikes’ provisions for repeat burglaries.

The amendments were introduced to address increasing community concern that home burglaries are frequently resulting in harm to the occupant. For the purposes of these amendments, a ‘juvenile offender’ is an offender who had reached 16 but not 18 years of age when the offence was committed. The effect of the amendments was to create a minimum term of detention or imprisonment of three years for the offence of aggravated home burglary.

The changes also amended the framework for dealing with repeat burglars. In 1996, the Code was amended to introduce provisions commonly referred to as ‘three-strike rules’. The effect of these amendments was to ensure that upon a third conviction for

a home burglary, the Court must sentence a young offender to at least 12 months imprisonment or detention. Prior to 2015, multiple offences could be counted as one offence for the purposes of the three strikes rule. The Court was also able to interpret this provision flexibly to permit conditional release to an Intensive Youth Supervision Order.

The amendments introduce clarity regarding what constitutes a 'strike' by altering the counting system to provide that each burglary committed on a separate day constitutes an individual offence for the purposes of the legislation. The changes also removed the potential for the Court to suspend a sentence of detention. These amendments apply to all young offenders aged 10-17.

Graffiti

The *Graffiti Vandalism Act 2016* creates a new offence for graffiti and enacts minimum mandatory sentences for graffiti vandals. This legislation has a different intent and will result in different outcomes to other amendments forming the mandatory sentencing framework and should therefore be considered separately. Under this Bill, a young offender who damages or defaces the property of another person without their consent is subject to a minimum penalty of a youth community based order. This provision operates despite section 46(5a) of the YOA, which provides that the court is not obliged to impose a minimum mandatory penalty.

The graffiti provisions differ in two ways from the home invasion and public officer assault frameworks. Firstly, the legislation applies to all young people who have attained the age of criminal responsibility (10 years) as opposed to young people aged 16 and over. This legislation also does not impose a minimum mandatory custodial penalty. The imposition of community based orders here is for the specific purpose of ensuring graffiti damage is cleaned up by graffiti offenders. In this sense, the outcomes of the legislation are intended to be restorative as opposed to punitive, which is consistent with community expectations around this type of criminal activity.

Alternative arrangements for young people

There is significant debate around the effectiveness of mandatory sentencing, particularly in relation to young people. Proponents of mandatory sentencing argue that the imposition of a mandatory sentence for a third offence will have a significant deterrent effect as well as increasing consistency in sentencing. Opponents argue that the shift in discretion from the Court to the Government makes it difficult to consider the circumstances of the individual young person.

Current mandatory sentencing legislation already deals with offenders who are 16 and 17 years old at the time of offending. The framework does not presently deal with young offenders aged 10 to 15. For young people under the age of 16, considerations such as development during adolescence and the impact of detention play a role. For this reason, it is necessary to consider alternative frameworks which are appropriate for young offenders of a certain age while reflecting community expectations in sentencing for certain serious offences.

Any proposed legislative framework will include the following offence categories:

- Aggravated burglaries
- Repeat burglaries
- Assault of public officers
- Dangerous driving to evade police

The following arrangements may be considered:

1. Consider application of mandatory sentencing to 16 and 17 year old offenders

This option is reflective of current arrangements in WA. Where a framework of mandatory sentencing exists for adult offenders in a jurisdiction, it may be necessary to consider a phased approach to the application of the penalty. Excluding all young people from the mandatory sentencing scheme may give rise to a culture of adults committing violent crimes through young people who are not subject to the penalty. For example, 18 year old men and women may encourage or force their younger friends and relatives to encourage in riskier offending behaviours on their behalf. This may lead to young people participating in offending of a more serious nature than they would otherwise.

A considered policy response is required in order to prevent this result. A phased approach to mandatory sentencing is one option. As with the current ‘three strikes’ rules, some penalties will apply when a young person attains 16 years of age and the full extent of the penalties will apply at the age of 18.

2. Consider no change to framework for young offenders under 16

In relation to young offenders under the age of 16, the first option for consideration is to pursue no change to current sentencing arrangements for the specified offence categories. Given the legislative separation between young and adult offenders, it does not necessarily follow that a mandatory sentencing framework designed for adults must also be adopted for young offenders. To refrain from enacting these arrangements in relation to young people would be consistent with most Australian jurisdictions.

3. Consider alternative sentencing frameworks for young offenders under 16 which reflect the intent of mandatory sentencing and community expectations

If it is decided that a stricter mechanism is required to deal with young people who have committed the specified offences, alternative sentencing frameworks may be considered for young people aged 10 to 15. An alternative approach would contribute to meeting community expectations around sentencing, as young offenders would be engaged in productive rehabilitation or community work. Shrinking the sentencing gap between young people under 16 and those aged 16 and over may also have the effect of disincentivising participation in crime on behalf

of an older person. Two alternative sentencing frameworks are proposed here, although other options may be considered.

3(a) Consider prescribing minimum sentence consisting of community based order

As stated in the YOA, detention should be a sentence of last resort for young people. A mandatory youth community based order may be a more appropriate option for young people that would allow them to remain with their families and in their schools and hometowns. The imposition of a community based order as a minimum sentence means that the Court retains a larger degree of discretion in sentencing. For example, serious cases may result in a sentence to detention. Less serious cases will result in a standard community based order, but the Court will have the ability to assign specific conditions that are appropriate for the offender and his or her circumstances.

A suite of youth community based orders exist under the YOA to suit offences of varying degrees of seriousness. A standard youth community based order can have many or few conditions depending on the needs of the individual young person. For serious and violent offences such as aggravated home burglaries, a mandatory option such as an Intensive Youth Supervision Order (IYSO) may be considered. An IYSO issued with a detention element is a Conditional Release Order (CRO), meaning a breach leads to detention. Program attendance, community service work and strict supervision (for example, GPS monitoring) are all components of these more stringent community based orders.

A mandatory community based order would give government remit over young people who have committed serious or repeat offences. This option may create greater opportunities to achieve rehabilitation and produce restorative outcomes. However, it should be considered that mandatory community based orders will likely result in additional caseloads for Youth Justice Officers.

3(b) Consider issuing a guideline judgement

A guideline judgement to Children's Court Magistrates on sentencing young offenders could stipulate that a particular sentence should be issued for specified offences. Such a guideline will be strongly influential, but not binding. A substantial departure by Children's Court magistrates from the sentencing guideline would give rise to the potential for appeal against the leniency of a sentence.

The use of a guideline would mean that in clear-cut cases the sentence advocated for by government would be imposed. However, a guideline allows the Court to retain a degree of flexibility to depart from the prescribed sentence in appropriate circumstances. The introduction of a guideline judgement would address leniency in sentencing while presenting a less severe alternative to minimum mandatory sentencing.

PROPOSALS

21. It is proposed that consideration is given to the application of a mandatory sentencing framework for 16 and 17 year old young offenders.

22. It is proposed that if it is decided that new arrangements for young offenders aged 10-15 are necessary and appropriate that one of the following options is pursued:

- a) issuing guideline judgements for certain offences; or**
- b) prescribing a minimum sentence of a community based order for certain offences; or**
- c) another alternative sentencing framework.**

Appendix 2

Technical and procedural issues

Referral to Juvenile Justice Team

Division 2 of the YOA deals with referral to Juvenile Justice Teams. Section 28 of the YOA deals with referrals to Juvenile Justice Teams by the Court. Section 28(3) specifies that if the court refers a matter for consideration by a Juvenile Justice Team, the Court is not to make any order against the young person concerned at the time the matter is so referred¹⁰¹. Section 28 does not directly stipulate that a referral to a Juvenile Justice Team by the Court constitutes an order of the Court. As a result, there is potential for a referral made under section 28 to be thought of as a suggestion rather than a legally binding order. However, it is possible that making a Juvenile Justice Team referral an order of the Court may detract from the diversionary intent of the mechanism.

The YOA does not presently specify that decisions made by Children's Court Magistrates to refer a young person for consideration by a Juvenile Justice Team are reviewable by the President of the Children's Court. It is accepted that the President of the Children's Court may review certain referrals made by officers of the Court (Magistrates and Justices of the Peace), but not all.

Recording conviction

The YOA is unclear on what constitutes recording a conviction. Section 55(1) of the YOA requires that the court record a conviction when a young person is found guilty of a scheduled offence, or another offence for which a custodial sentence is imposed.

It is not common practice for Children's Court Magistrates to specifically state on the transcript that a conviction is being recorded. To state this would potentially interfere with the statement of reasoning. The transcript is the record of the reasons for the decision.

There is a perceived need to simplify and streamline provisions relating to pleading guilty, entering a finding of guilty, finding a charge proved and recording a conviction. Various legislative provisions concerning these procedures have been ad hoc with the result that they have been somewhat inconsistent, unclear and practically difficult to apply.

¹⁰¹ YOA s 28(3).

Definition of a responsible adult

The current definition of 'responsible adult' at section 3 of the YOA is as follows:

"Responsible adult, in relation to a young person, means a parent, guardian, or other person having responsibility for the day to day care of the young person but does not include a person who the regulations may provide is not a responsible adult."

The current definition is restrictive and makes it difficult to place young people on bail. The definition should be broadened in order account for broader family structures. This is particularly relevant for Aboriginal families.

The definition of 'responsible person' under section 2 (child to have qualified right to bail) Schedule 1, Part C of the *Bail Act 1982* (WA) means a parent, relative, employer or other person who, in the opinion of the judicial officer or authorised officer, is in a position to influence the conduct of the child and provide the child with support and direction.

This definition is preferable in the context of children who may not have family in the position to influence, support or direct. Additionally, it is desirable that the definition used in the YOA should reflect, as closely as possible, that in the *Bail Act 1982* (WA).

Where remand or sentence of detention to be served

Section 21 provides that a young person may be detained in a detention centre while awaiting trial. Section 118A provides that young people who receive a sentence of detention are to serve that sentence in a detention centre and not a prison.

Following the disturbance at BHDC in January 2013, it was necessary to temporarily relocate 100 young detainees to two units at nearby Hakea Prison. The YOA does not presently address or allow for circumstances such as these. For this reason, there may be a need to statutorily allow for the emergency reallocation of young persons in such situations.

An application seeking orders to quash the decision to declare two units at Hakea Prison as a juvenile detention centre and the decision to transfer children from BHDC to the units was dismissed by the Supreme Court of Western Australia in May 2013. It may be worth considering whether a legislative amendment limiting to 'emergency' situations could remove or limit the Court's discretion in these circumstances. Caution must be exercised here to ensure that an amendment doesn't have the effect of making such arrangements more difficult than at present.

Membership of the Supervised Release Review Board

Section 152(1) of the YOA sets out who shall be members of the SRRB. Section 152(1)(d) provides that one member will be a police officer nominated by the Commissioner for Police. A retired police officer would be suitable to perform the required role on the SRRB.

Scheduled offences

Currently, a young person can be charged and penalised under sections 321(2) and (7) of the *Criminal Code 1913 (WA)* (the Code) for the sexual penetration of a child. The wording in sections 321(7)(a) and (c) of the Code does not match the wording used in Schedule 1 of the YOA. As a result, these offences may not constitute scheduled offences. The practical effect of this is that a young person guilty of such an offence may still be eligible for a caution or Juvenile Justice Team referral, which is undesirable from a community safety and security perspective and not consistent with the level of supervision and care the young person requires.

The descriptions of offences under Schedules 1 and 2 often do not exactly reflect the wording of the provisions containing the offences. For example, the descriptions against sections 321(3) and 330(3) of the Code use the abbreviation 'procuring, etc.' where the full description differs. Consideration should be given to whether the Schedules should exactly reflect the legislative provision from which the offence originates or whether the Schedules are intended to refer the reader back to the true provision.

Powers of specific positions

In order to modernise the YOA, consideration could be given to removing references to specific operational position titles such as 'superintendent'. Modern enabling legislation typically confers all or most powers on the Minister or Chief Executive Officer of the agency and uses instruments of delegation to confer powers on other officers. This creates organisational flexibility through the ability to change functions and delivery arrangements without the requirement to amend legislation. This amendment will align the assignment of legal powers with the function of the Chief Executive Officer as the accountable authority of the agency.

PROPOSALS

- 1. It is proposed that consideration is given to inserting an express subsection within section 28 stating that court referral to a Juvenile Justice Team is reviewable by the President of the Children's Court.**
- 2. It is proposed that consideration is given to statutorily reinforcing that a referral to a Juvenile Justice Team made under section 28(3) is an order of the Court.**
- 3. It is proposed that section 23(3) be amended to provide that the Children's Court is not to make any other order against the young person concerned at the time when the young person is referred to a Juvenile Justice Team.**
- 4. It is proposed that consideration be given as to whether oral reasoning provided on a transcript constitutes recording a conviction for the purposes of section 55(1). If oral reasoning is not considered sufficient, an amendment is required.**

- 5. It is proposed that the definition of ‘responsible adult’ at s 3 be amended to reflect the definition of ‘responsible person’ in Schedule 1, Part C of the *Bail Act 1982 (WA)*.**
- 6. It is proposed that consideration is given to whether a provision is required to expressly provide that in defined emergency situations detainees can be transferred to a prison (if kept separate from its population) and that during any such period that part of the prison is deemed to be a detention centre for the purposes of the Act.**
- 7. It is proposed that section 152(1)(d) be amended to provide that a serving or retired police officer nominated by the Commissioner of Police may be a member of the SRRB.**
- 8. It is proposed that Schedule 1 be amended to include sections 321(7)(a) and (c) of the Code.**
- 9. It is proposed that consideration is given to whether descriptions in schedules of offences should exactly reflect legislative provisions.**
- 10. It is proposed that consideration is given to conferring powers in the YOA in a manner consistent with modern enabling legislation.**

Appendix 3

Summary of interstate and international frameworks

A number of similarities in youth justice systems exist across all Australian jurisdictions. For example, the age of criminal responsibility is uniformly 10. All Australian jurisdictions provide for youth conferencing in some capacity. However, there are many distinct differences. For example, in most other Australian jurisdictions, youth justice is part of an agency other than Corrective Services.

The statutory framework and/or youth justice context in WA also shares similarities with a number of international jurisdictions, which may be useful in informing any potential amendments to the YOA.

South Australia

The *Young Offenders Act 1993* (the Act) governs youth justice in South Australia. The Act is administered by the Department of Family and Community Services South Australia. The Act outlines provisions for cautioning, police sanctions, court proceedings, sentencing, family conferencing and a range of community-based options.

The structure of the Act is unique in that it applies general state law with specified limitations. For example, section 14 provides that the law of the State relating to criminal investigation, bail, remand and custody before proceedings for an offence are finally determined applies, subject to the Act, to youths with necessary adaptations¹⁰². The Youth Court is given the same sentencing powers as the Magistrates Court for summary offences and the same sentencing powers as the District Court for indictable offences¹⁰³. Provisions in the Act then adapt or limit those powers appropriately to the context of youth justice.

Division 2 of the Act is dedicated to procedures on preliminary examination and trial. This Division outlines provisions for committal for trial, change of plea and recording of convictions in a straightforward manner.

Victoria

The Department of Human Services is responsible for providing youth justice services in Victoria. Youth Justice is governed by the *Children Youth and Families Act 1995*. This legislation outlines both the welfare/protection and justice frameworks for youths.

Victoria has a unique dual track system for offenders aged 10-14 and those aged 15-20. Young people aged 18-20 can be sentenced to youth detention as opposed to adult prison where the court deems appropriate.

¹⁰² *Young Offenders Act 1993* (SA) s 14

¹⁰³ *Ibid.*

The Children's Court of Victoria is comprised of a Family Division and a Criminal Division. The Criminal Division includes the Children's Koori Court, which hears matters relating to criminal offending by Koori children and young persons, other than sexual offences. The Koori Court provides an informal atmosphere and allows greater participation by the Aboriginal (Koori) community in the court process¹⁰⁴. Koori Elders or Respected Persons, the Koori Court Officer, Koori defendants and their families can contribute to the Court hearing.

The Koori Youth Justice Program operates in the community and employs Koori Youth Justice Workers to provide access for young Aboriginal offenders to appropriate role models and culturally sensitive support, advocacy and casework. The program targets young people at risk of offending, clients on community based orders and custodial orders¹⁰⁵.

New South Wales

Youth justice in New South Wales (NSW) is covered by two related pieces of legislation – the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW). The two Acts are distinguished based on the type of offence committed or alleged to have been committed and the involvement of court proceedings.

- ***Young Offenders Act 1997 (NSW)***

The *Young Offenders Act 1997* (NSW) covers summary offences and indictable offences that may be dealt with summarily which have been committed, or are alleged to have been committed, by children. The *Young Offenders Act 1997* (NSW) contains a hierarchy of responses to youth offending, including warnings, cautions and youth justice conferences. Youth justice conferencing was first introduced in NSW as part of this Act.

- ***Children (Criminal Proceedings) Act 1987 (NSW)***

The *Children (Criminal Proceedings) Act 1987* (NSW) deals with young people who have committed, or who are alleged to have committed, children's indictable offences and serious children's indictable offences. This Act contains a provision which allows for expedition of criminal proceedings where the child is in custody¹⁰⁶. The Act outlines the jurisdiction of the Children's Court of NSW.

Part 3: Sentencing Procedures Generally and Part 4: Sentencing Procedures for Imprisonment of the *Crimes (Sentencing Procedure) Act 1999* (NSW) apply to children, as stipulated in the *Children (Criminal Proceedings) Act 1987* (NSW)¹⁰⁷.

Orders that can be made by the Children's Court under this Act include fines, cautions, good behaviour bonds, youth conduct orders, probation orders, community

¹⁰⁴ Courts & Tribunals Victoria. <<https://www.courts.vic.gov.au/>>

¹⁰⁵ Ibid.

¹⁰⁶ *Children (Criminal Proceedings) Act 1987* (NSW) s 9.

¹⁰⁷ Ibid s 33.

service orders and control orders, which place the child or young in detention and may be suspended.

The *Young Offenders Act 1997* (NSW) does not affect any jurisdiction conferred on the Children's Court under the *Children (Criminal Proceedings) Act 1987* (NSW)¹⁰⁸.

- **Youth Justice Reforms in New South Wales**

A number of reforms have been undertaken in the youth justice realm in NSW over the past 20 years. Notably, the *Children (Criminal Proceedings) Amendment (Adult Detainee) Act 2001* (NSW) had the effect of requiring the transfer to prison at age 18 of a young offender guilty of a serious children's indictable offence, unless the sentencing court determines there are special circumstances which justify the young person remaining in a juvenile justice centre¹⁰⁹. In 2010 NSW replaced Periodic Detention (also known as weekend detention) with Intensive Supervision Community Based Orders after a review of their Periodic Detention¹¹⁰ raised significant concerns. The review identified issues including a lack of availability of the order throughout NSW due to limited resources, the discriminatory effect of this, the underutilisation of current facilities and the absence of meaningful case management for periodic detainees. Young people aged over 16 years can also now be ordered to complete up to 250 Community Service Order hours.

Queensland

The upper age limit for young offenders in Queensland is 16. Following a change in Government in March 2012, a range of youth justice services were relocated from within the Department of Communities to the Department of Justice and Attorney General. In 2013, Queensland commenced a trial of an early intervention Boot Camp and Court ordered Boot Camp. This initiative was enabled by the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012* (QLD).

Age appropriate conditions regarding community work is legislated for in Queensland. Community work is only available to offenders 13 years or over. If a young person is aged between 13 and 15 years, a maximum of 100 hours community work may be ordered. If the young person is 15 or over, over 200 hours may be ordered. Queensland legislation requires that offenders 18 years of age must be transferred to an adult prison facility.

Queensland has recently passed the *Youth Justice and Other Legislation Amendment Bill 2013* (QLD) which allows the identities of repeat offenders to be published by the media, creates a new offence for breach of bail and removes the principle of detention as a last resort, among other measures.

¹⁰⁸ *Young Offenders Act 1997* (NSW) s 7.

¹⁰⁹ Department of At Justice, Government of New South Wales, *Juvenile Justice in NSW – a Snapshot* <http://www.djj.nsw.gov.au/publications_jjac_snapshot.htm>

¹¹⁰ NSW Sentencing Council. 2007. *Review of Periodic Detention*. Sydney, NSW: Sentencing Council.

Tasmania

The youth criminal justice system in Tasmania is overseen by Youth Justice Services within the Department of Health and Human Services, and is governed by the *Youth Justice Act 1997* (TAS) (YJA).

The YJA has a basis in restorative justice principles and encourages diversion through mechanisms such as cautions (which may be administered by a Police Officer, Aboriginal Elder, Aboriginal representative or community representative)¹¹¹ and community conferences. Community work is only available to offenders 13 years or over¹¹². Community conferences may be referred by police or ordered by the Youth Justice Division of the Magistrates Court.

The YJA contains a Restitution Order¹¹³, which provides that the youth restore stolen goods to the person entitled to them or restore the value of the stolen goods to the person entitled to it.

Australian Capital Territory

The *Children and Young People Act 2008* (ACT) (CYPA) governs young people in the criminal justice system as well as dealing with welfare for children and young people. The CYPA requires that offenders 21 years of age must be transferred to an adult prison facility.

The ACT specifically allows for domestic violence offences to be referred to conferencing in certain circumstances. The ACT legislation provides for Periodic Detention, which the ACT has found to be an effective alternative to full time imprisonment for offenders.

Northern Territory

Youth Justice in the Northern Territory is governed by the *Youth Justice Act 2005* (NT) (YJA). The YJA provides for Alternative Detention Orders, commonly referred to as home detention orders, which mandate that a young person must reside or remain at a particular place. This order may involve electronic monitoring. However, a review of the Northern Territory Youth Justice System in 2011 found that this order has been used sparsely, and had seldom involved electronic monitoring¹¹⁴.

The YJA also provides for Periodic Detention Orders¹¹⁵, which requires that the youth must report to the relevant detention centre or prison on the day and date specified in the order and comply with any conditions set by the Youth Justice Court (the Court) and any instructions or directions of the Director or Superintendent of the relevant detention centre or prison.

¹¹¹ *Youth Justice Act 1997* (TAS), Division 2.

¹¹² *Ibid* s 10.

¹¹³ *Ibid* s 95.

¹¹⁴ Northern Territory Government. 2011. *Review of the Northern Territory Youth Justice System: Report*. Darwin, NT: NT Government.

¹¹⁵ *Youth Justice Act 1997* (TAS), Division 9.

A Family Responsibility Agreement under the YJA involves the parent/s of the youth entering into an agreement with an appropriate Agency where the youth's family circumstances may have caused or contributed to the youth's behavioural problems, and where the Agency believes an Agreement may assist to resolve the problems¹¹⁶.

The Court may, on application, conduct an inquiry into the family circumstances of a youth. If following an inquiry the Court forms the opinion that a Family Responsibility Order is likely to improve the youth's family situation, the Court may make such an Order¹¹⁷.

Canada

The *Youth Criminal Justice Act (YCJA)* governs the Canadian youth justice system, applying to young people between the ages of 12 and 17 who are alleged to have committed criminal offences. The YCJA was enacted in 2003 to replace the *Young Offenders Act (YOA)*. Prior to the YCJA, Canada had one of the highest rates of youth detention in the world. The YCJA introduced reforms which addressed concerns regarding the YOA, such as the over-use of courts and detention in less serious cases and a lack of effective reintegration following release from custody¹¹⁸. Further amendments were adopted in 2012 to strengthen the ways in which the youth justice system deals with repeat and violent offenders.

The YCJA requires police officers to consider the use of extrajudicial measures (non-court responses) before deciding to charge a young person¹¹⁹. Extrajudicial measures are presumed to be adequate to hold first time, non-violent offenders accountable. Such measures include warnings, police cautions, crown cautions, referrals to community programs or agencies and extrajudicial sanctions. Extrajudicial sanctions may only be used if the young person admits responsibility for their offending. If the young person fails to comply with the terms and conditions of the sanction, the case may progress to court proceedings. Due to the more formal nature of the extrajudicial sanction, this measure may only be used if a warning, caution or referral is ineffective¹²⁰.

Since the introduction of the YCJA, charging of young people has decreased and as a result, diversion from court processes has increased by 21% between 1999 and 2010¹²¹. Furthermore, the number of youth court cases has declined by 26% between 2002/2003 and 2009/2010. This is likely to have resulted in a significant

¹¹⁶ Ibid, Part 6A Division 2.

¹¹⁷ Ibid, Division 3.

¹¹⁸ Government of Canada. 2016. "The Youth Criminal Justice Act Summary and Background." Department of Justice.

¹¹⁹ *Youth Criminal Justice Act 2003 (CAN)*.

¹²⁰ *Youth Criminal Justice Act 2003 (CAN)*.

¹²¹ Government of Canada. 2016. "The Youth Criminal Justice Act Summary and Background." Department of Justice.

cost saving for Canada. However, 17% of court cases involving young people still relate to less serious offences, such as breaching probation conditions¹²².

The YCJA extended the range of sentencing options available for young people to include attendance orders, deferred custody and supervision order and reprimands, amongst others. Due to the increased availability of community-based sentences and increased diversion from court, the number of custody sentences ordered dropped by 64% between 2002/2003 and 2009/2012¹²³.

Pre-trial detention rates remain a concern for Canada. The average daily number of young people in remand had increased by 15% between 2003/2004 and 2008/2009¹²⁴. The most common offences leading to pre-trial detention were administration of justice offences.

United Kingdom

The United Kingdom comprises England, Scotland and Wales. However, Scotland has a separate criminal justice system. For the purposes of this discussion, United Kingdom should be taken as meaning England and Wales.

The *Criminal Justice and Immigration Act 2008* (UK) (CJIA) was passed in May 2008, making significant changes to the youth justice system¹²⁵. The CJIA deals with young offenders, adult offenders and immigration issues. The CJIA amends a number of other pieces of legislation pertaining to youth justice.

- *Crime and Disorder Act 1998*
- *Children and Young Persons Act*
- *Sexual Offences Act 2003*

The CJIA specifies that the purposes of sentencing a young offender under the age of 18 are punishment, reform and rehabilitation, protection of the public and reparation to persons affected by offences. Pre-court measures include the Community Resolution, Youth Cautions and Youth Conditional Caution. The Youth Conditional Caution (YCC) is an additional, higher-tariff pre-court disposal which aims to reduce the number of young people being taken to court for low-level offences. Anti-social behaviour measures include the Acceptable Behaviour Contract and the Anti-Social Behaviour Order.

The following community based orders are available under the CJIA:

- Youth Rehabilitation Order (YRO): a generic community sentence used for the majority of children and young people who offend. It aims to simplify sentencing for young people while increasing the flexibility of interventions. These orders may only be imposed if the offence is imprisonable for adults.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Government of the United Kingdom. 2014. "Youth Justice – Courts and Orders". Ministry of Justice.

- Youth Conditional Caution (YCC): an additional, higher tariff pre-court disposal which aims to reduce the number of young people being taken to court for low-level offences. A YCC may be issued by the Police or the Crown Prosecution Service if the offender has not previously been convicted of an offence, admits guilt and consents to the caution.
- Youth Default Orders (YDO): enables the Court to impose an unpaid work requirement (if the young person is aged 16 or 17), curfew requirement or attendance centre requirement on a young offender in lieu of an unpaid fine.

The CJIA also allows for electronic monitoring to be included as a bail condition.

New Zealand

The *Children, Young Persons and their Families Act 1989* (NZ) (the Act) was a significant tool of reform in the New Zealand youth criminal justice system when it was first introduced. In the time leading up to the introduction of the legislation, there was much progress in the arena of Maori self-determination and a sharp focus on Maori concerns¹²⁶.

The Act succeeded the *Children and Young Persons Act 1974* (NZ). The new Act applies to children and young people in need of care and protection as well as those who have, or are thought to have offended. The preceding Act also applied to both groups, but did not necessarily provide for the jurisdictional separation of the two groups. The youth justice aspects of the *Children, Young Persons and their Families Act 1989* are effectively an Act within the Act¹²⁷.

The Act contains general principles as well as a set of principles specific to the care and protection aspects of the Act and a set of principles specific to the youth justice aspects of the Act. Youth justice specific principles include that:

- unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter
- criminal proceedings are not to be instituted solely to provide assistance or services needed to advance the welfare of the young person or their family group
- young offenders should be kept in the community where practicable and consonant with the need to ensure public safety
- measures taken should be designed to strengthen families and foster their own means of dealing with their offending youth, and
- the vulnerability of young people entitles them to special protection during any investigation relating to the commission or possible commission of an offence by them.

¹²⁶ Doolan, M. 1989. *Youth Justice Reform in New Zealand*. Canberra, ACT: AIC.

¹²⁷ Ibid.

A key feature of the New Zealand legislation is Family Group Conferencing (FGC), which involves conferences convened and facilitated by a Youth Justice Coordinator. Where charges are laid or an offender has been arrested, the matter must be referred to an FGC before information is laid or a plea is entered.

The upper age limit for young offenders is 16. Separate processes exist for children offending between 10-13 and 14-16. New Zealand legislation provides for conferencing for all young offenders (excluding non-imprisonable traffic offences), as opposed to only for less serious crimes¹²⁸.

New Zealand is the only jurisdiction that has specific provisions regarding lay advocates for offenders to be involved in conferencing. Section 326(2) of the *Children, Young Persons their Families Act 1989* (NZ) provides for the appointment of a lay advocate:

- (1) Where a child or young person appears before a Youth Court charged with an offence, the court may, on application by any person entitled to make representations in those proceedings on behalf of any person, or of its own motion, appoint any person, not being a barrister or solicitor, to appear in support of that child or young person in those proceedings.
- (2) Where the court appoints a lay advocate under subsection (1), it shall, so far as practicable, appoint a person who has, by reason of personality, cultural background, knowledge, and experience, sufficient standing in the culture of the child or young person in respect of whom the appointment is to be made to enable that person to carry out his or her duties under this Act.
- (3) The court may make an appointment under subsection (1) notwithstanding that the child or young person is represented in the proceedings by a barrister or solicitor.

The principal functions of a lay advocate are set out in section 327:

- (a) to ensure that the court is made aware of all cultural matters that are relevant to the proceedings;
- (b) to represent the interests of the child's or young person's whanau, hapu, and iwi (or their equivalents (if any) in the culture of the child or young person) to the extent that those interests are not otherwise represented in the proceedings.

¹²⁸ In Western Australia, only non-scheduled offences may be referred to Juvenile Justice Teams. In WA a trial to refer Schedule 1 and 2 offences to Court Conferencing (similar to JJT but referral can only be made from Children's Court) is operating under existing legislative provisions (ss 67,68) that allow the court to refrain from imposing any punishment upon being satisfied that such undertakings as the court may approve have been completed.

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