Chapter 9

Children and Young People

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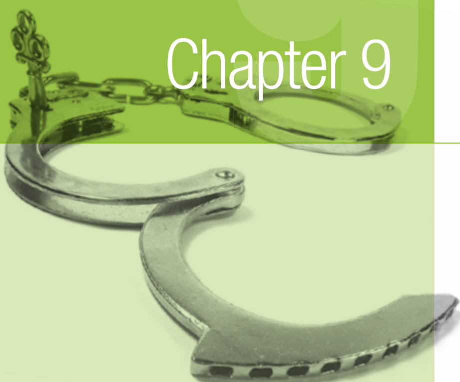

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Data from 2003–04 showed that Indigenous children were almost twice as likely as non-Indigenous children to be proceeded against by arrest rather than summons.

Children are particularly vulnerable in their dealings with the criminal justice system. This is recognised in various ways in Victoria: through legislation—the *Children, Youth and Families Act 2005* (CYFA); the use of the Children's Court for matters involving children; and specific custodial facilities for children known as detention centres. In Victoria a 'child' is defined as a person aged over 10 years and under 18 at the time of the alleged commission of an offence.[1]

As with adults, police are the principal bail decision makers for children. In 2004–05 approximately 87% of bail applications for children were granted by police, 1% by bail justices and 12% by the Children's Court.[2]

ARREST

In Chapter 4 we looked at the police decision to arrest or summons. Section 345(1) of the CYFA provides that children should be proceeded against by summons except in exceptional circumstances. Although it appears from the section heading that this is a general rule, it actually only applies when police seek to have a charge and warrant issued by a registrar. Only a very small number of warrants of this type are issued in the Children's Court.[3] In most cases involving children police arrest the accused, issue the charge and then file it with the court.

In our Consultation Paper we discussed police practice regarding arrest of children. We also discussed a 2001 study which found an increasing tendency by Victoria Police to use arrest rather than summons or caution against Indigenous children.[4] We asked whether police were using their powers to arrest children, particularly Indigenous children, appropriately. Concerns were raised in some consultations that arrest is sometimes used inappropriately.

PREFERENCE FOR SUMMONS

Should section 345(1) of the CYFA be amended to provide a general requirement that children be proceeded against by summons? This was not addressed in submissions to our Consultation Paper. From discussions at our Children and Young People roundtable it appears this was because many people assumed from the heading—'Children to be proceeded against by summons except in exceptional circumstances'—that this section had general application.

There was discussion at the roundtable about how the section should be amended. Some participants thought it would be difficult for police to apply an exceptional circumstances test to the charge and bail of children. There was concern that police in different locations and with differing levels of experience would interpret the test differently. There was also concern about what the consequences would be of not complying with the exceptional circumstances test.

Roundtable participants thought it was important for police to receive direction in the exercise of their discretion to charge and bail children. Concern was raised about inappropriate use of charge and bail for children accused of minor offences such as shoplifting. This was also raised in submissions from defence lawyers and DHS.[5] Victoria Legal Aid submitted: '… children charged with minor offences such as shoplifting are regularly proceeded against by way of charge and bail—with excessive exclusion conditions and a curfew'. Submissions from other defence lawyers voiced similar concerns about excessive conditions.[6] DHS thought that police generally use their power to arrest appropriately but there are instances where summons or caution would be more appropriate.

In our Consultation Paper we noted the views of Melbourne Children's Court magistrates who thought police used their arrest powers appropriately.[7] Youthlaw's submission responded to this perception:

> *With respect to those magistrates, they rarely need to consider the issue of how the matter is brought before their court unless they are dealing with a charge of failing to appear, or the matter is being adjourned and some issue concerning bail is raised.*

Many roundtable participants noted that there seemed to be 'no rhyme or reason' to police decisions in some instances to charge and in others to summons. Participants generally agreed that it did not seem logical for the CYFA to impose an obligation on the registrar when making a decision about charge but not police. The same considerations should apply in each case.

The commission strongly supports a legislative preference for children to be proceeded against by summons rather than arrest and charge, especially children accused of committing minor offences. We agree with our roundtable participants that it is illogical for the CYFA to impose an obligation on a registrar to proceed by summons and not police.

We note the concerns raised at the roundtable about police applying an exceptional circumstances test to the decision to charge or summons. We recommend simplification of this provision to ensure more consistent application. The heading of section 345 should be amended to read 'children to be proceeded against by summons', and the section amended to contain a presumption in favour of summons. This should sufficiently direct police that summons is to be used unless arrest and charge can be justified. We believe arrest is only justified to prevent the child from continuing to offend at that time or there is good reason to believe it will be difficult to serve a summons.[8]

We also recommend legislation to direct magistrates to consider the appropriateness of charge and bail when the accused is a child. If it appears charge and bail was used inappropriately, the magistrate should question the informant on oath about why a summons was not issued. This provision will provide a further disincentive for police to use charge and bail unless it can be justified.

INDEPENDENT PERSON

The CYFA requires police to ensure a 'parent or guardian … or an independent person' is present when deciding whether to grant bail to a child.[9] The same requirement applies when a person under 18 years is being formally questioned.[10] At our Children and Young People roundtable it was noted that the CYFA does not impose the same requirement on hearings by bail justices. This was considered anomalous and required amendment.

A roundtable participant asked whether the CYFA considers bail justices to fulfil the role of an 'independent person'. Bail justices are decision makers—it would be inappropriate for them to fulfil the role of an independent person. Independent persons attend hearings to assist the child. Roundtable participants thought it was important to clarify that the two roles are separate, particularly to avoid situations where a person who is both a trained 'independent person' and a bail justice tries to fulfil both roles in a hearing.

The CYFA states that an independent person 'may take steps to facilitate the granting of bail, for example, by arranging accommodation'.[11] There was some discussion at the roundtable about whether CAHABPS fulfilled the role of an independent person at bail justice hearings, or whether a separate independent person was required.[12] This arose from a suggestion that the police may not view CAHABPS as independent, but as an advocate for the child. The CYFA clearly envisages the independent person taking 'steps to facilitate the granting of bail'. The commission considers the involvement of CAHABPS to be sufficient to fulfil the requirement for an independent person.

ARREST OF INDIGENOUS CHILDREN

In our Consultation Paper we noted the higher arrest rate of Indigenous children compared with non-Indigenous children. Data from 2003–04 showed that Indigenous children were almost twice as likely as non-Indigenous children to be proceeded against by arrest rather than summons.[13] By 2005–06 the arrest rate of Indigenous children had increased to more than double that of non-Indigenous children: 8% of non-Indigenous children arrested compared with 21% of Indigenous children.[14] Detailed data for 2004–05 and 2005–06 is included in Appendix 5.

VALS submitted the available data is 'evidence that recommendation 87(a) of the Royal Commission into Aboriginal Deaths in Custody that Indigenous Australians be arrested as a last resort is not being implemented'. It suggests that police policy should reflect the Royal Commission's recommendation that arrest should only be used if the alleged offence is serious and it appears the child is likely to repeat the offence or commit other offences at that time.[15]

The Magistrates' Court submission noted the views of an experienced Children's Court magistrate:

RECOMMENDATIONS

123. Section 346 of the *Children, Youth and Families Act 2005* (CYFA) should be amended so that the requirements of subsections 7 and 8 also apply to hearings before bail justices.

1 *Children, Youth and Families Act 2005* s 3. This Act replaces the *Children and Young Persons Act 1989*. The majority of provisions in the new Act commenced on 23 April 2007.

2 For comprehensive data see Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 118.

3 Information provided by Principal Registrar, Children's Court of Victoria, 13 March 2007.

4 Victorian Law Reform Commission (2005) above n 2, 119–120.

5 Submissions 24, 30, 32, 38, 34, 42.

6 Submissions 30, 32, 38.

7 Victorian Law Reform Commission (2005) above n 2, 119.

8 This is based on Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, recommendation 239.

9 *Children, Youth and Families Act 2005* s 346(7).

10 *Crimes Act 1958* s 464E(1)(a).

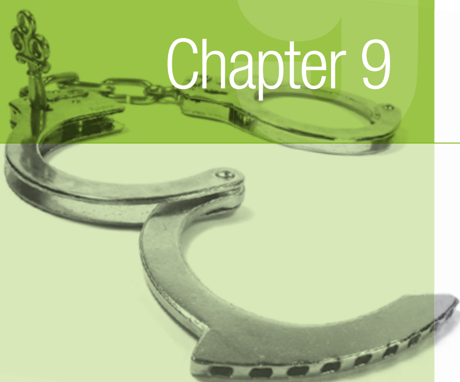
11 *Children, Youth and Families Act 2005* s 346(8).

12 Police have access to trained 'independent persons' who are coordinated by the Youth Referral and Independent Person Program.

13 Victorian Law Reform Commission (2005) above n 2, 120.

14 Victoria Police data, provided by the Department of Justice Indigenous Unit, 29 March 2007.

15 Commonwealth (1991) above n 8, recommendation 239.



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In my view the question is being asked in the wrong place in the system. Even though the statistics show a significant over-representation of indigenous children in the arrest statistics, I have no evidence that it has any other cause than a significant over-representation of indigenous children committing serious offences and a significant over-representation of indigenous children in the child protection system. To reduce the arrest rate of indigenous children one needs to start at the other end of the process and reduce the recidivism rate and the rate of child protection notifications. Initiatives like the Children's Court (Koori Division) are a good starting point.

We do not have sufficient information to make a definitive statement about why the arrest rate of Indigenous children is so much higher than that of non-Indigenous children, and the cautioning rate so much lower.[16] This is another example of the need for improved data collection (as recommended in Chapter 3) to accurately identify where the problem lies and allow informed and targeted policy. There is no doubt that systemic disadvantage is the overwhelming reason for the over-representation of Indigenous Australians in the criminal justice system.[17] However, this is not to say that other factors, including procedural decisions such as arrest or summons, do not also play a part. The Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody noted:

Some Aboriginal respondents also indicated to the Review that the self-fulfilling prophecy whereby, in their view, unnecessary arrests and convictions for minor offences lead cumulatively to a serious record is still at work.[18]

The review goes on to cite the example of a very minor offence—a $1.50 shop theft—where the accused was charged and convicted. Previous convictions make it less likely the person will receive the benefit of a caution or diversion for further offences, however minor.[19]

Chris Corns discussed the issue of appropriate use of arrest and police culture in his submission:

The topic of police culture is problematic. Whilst there is considerable literature confirming the existence of a police 'culture' in most western societies, the focus of these studies have been on aspects such as corruption, code of silence, alienation, racism, and so on … there is considerable literature relating to police culture and police practices which suggest that practical and administrative considerations do influence police practices and I would not at all be surprised if this was found in Victoria in relation to bail decisions … Whilst there are some studies indicating that the police disproportionately use arrest more than summons for aboriginal youth, it does not necessarily follow that these patterns are a manifestation of a police culture.

Research over the past decade shows that throughout Australia police tend to use arrest, 'move on' and search powers more often with Indigenous young people than they do for the general population.[20] In most Australian states Indigenous youth are more likely to be arrested than non-Indigenous youth.[21] A study by Cunneen and White in NSW found:

This pattern of differential treatment was maintained when the offence type was held constant. For example, 91.2 per cent of Aboriginal first offenders apprehended for break-and-enter offences were charged rather than cautioned, while only 83 per cent of non-Aboriginal first offenders apprehended for the same offence were charged.[22]

Police decision making has therefore been demonstrated to impact on the disparate treatment of Indigenous young people. Cunneen and White note: 'all the available evidence demonstrates that the discretionary decisions that are made [by police] work against the interests of Indigenous young people'.[23]

Some of these issues will be addressed by the Police Cautioning and Youth Diversion Pilot Project run by VALS and Victoria Police, which began in March 2007.[24] The pilot arises from the Aboriginal Justice Agreement, with funding from the Department of Justice. It aims to decrease children's contact with the criminal justice system, increase cautioning and improve cautioning outcomes, and improve local relationships between Indigenous youth and police.

The pilot project includes a criminal justice component—local level police protocols for cautioning—and a community-based follow-up component. Police are linked with local diversionary services that will work with children to encourage their participation in activities, emphasise the seriousness of contact with the criminal justice system, and demonstrate community support. This will include workers employed at Aboriginal co-ops who are funded by DHS through its Youth Justice Indigenous Australian Program. The workers are employed by the co-ops to provide support for children in the youth justice system and those at risk of entering the system. Police, support services and community members are involved in follow-up meetings and programs based on the recommendations made at the caution.

The program encourages cautioning for up to a third offence, where appropriate. A Victoria Police Youth Resource Officer will be nominated in each region to organise the cautions with VALS. One or two officers in each region, of senior sergeant rank or above, will issue cautions. If a first-time offender is not issued with a caution, the informant must fill out a 'failure to caution' form listing the reasons. This is reviewed by the youth resource officer and officer in charge to determine whether a caution is appropriate.

The pilot aims to increase cautioning rates and community support for Indigenous youth to increase diversion from the criminal justice system. The pilot is operating in Mildura, which has the lowest cautioning rate of Indigenous children, and the Latrobe Valley, which has the highest cautioning rate but also a high recidivism rate after caution. The pilot looks at both the rate and effectiveness of cautioning and will monitor outcomes through local reference groups and data collected by youth resource officers, which will be entered into a VALS database.

The commission endorses the pilot program and its roll-out across Victoria if the pilot is successful. Use of cautioning rather than charge has been found to have an impact on juvenile recidivism. A recent Australian Institute of Criminology study of all people born in Queensland in 1984 found that child offenders who are cautioned for their first offence are less likely to re-offend by the age of 17 than those who are charged and dealt with by the court.[25] Of those who initially received a caution, 31% re-offended by the age of 17. Of those who went to court, 42% re-offended. The study also found that Indigenous children who went to court were more likely to re-offend than non-Indigenous children who went to court. This suggests that being charged and going to court may have a greater negative impact on Indigenous children than non-Indigenous children. Not surprisingly, the study also found that children who have had contact with the child protection system because of maltreatment are also more likely to re-offend. The authors noted that this indicates the importance of targeted crime prevention programs for children with multiple risk factors.

The Aboriginal Justice Agreement Phase 2 (AJA2) outlines other initiatives aimed at crime prevention and early intervention with young Indigenous Australians at risk of coming into contact with the criminal justice system. The agreement's stated intention is to 'give the highest implementation priority to initiatives that have the potential to make the largest impact on over-representation and to those targeting young Koories'.[26] Except where otherwise stated, these initiatives are the responsibility of DHS:

- services to help families support youth so they are less likely to offend
- reducing the progression of Indigenous youth from the child protection system into the youth justice system
- the Preventative Youth Early School Leaver and Youth Employment Program—intensive outreach support to assist Koori youth to remain in school or connect with other educational and training programs
- community grant programs—provide Indigenous youth with activities that protect them from risks in their environment
- Youth at Risk Program—Victoria Police
- drug and alcohol service—work more effectively with the regional and local Aboriginal Justice Advisory Committees to reduce substance abuse by Indigenous youth
- increasing Indigenous youth's access to mainstream opportunities, particularly sport and recreation, youth programs, services and performing arts—Department of Justice Indigenous Unit and Aboriginal Affairs Victoria
- continuation and possible expansion of the Koori Night Patrol Program—Department of Justice Indigenous Unit

16 Victorian Law Reform Commission (2005) above n 2, 119–120.

17 Department of Justice [Victoria], *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A Partnership between the Victorian Government and the Koori Community* (2006) 13. This issue is discussed further in Chapter 9.

18 Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, *Review Report, Volume 1* (2005) 425.

19 Ibid 426.

20 Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (2007) 155–7.

21 Ibid 156–7.

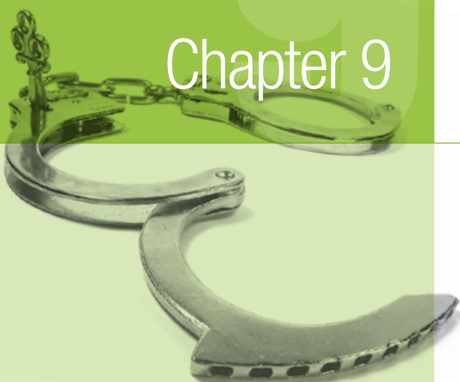
22 Ibid 155.

23 Ibid 153.

24 Information about the pilot obtained from Victorian Aboriginal Legal Service Co-operative Limited, *Police Cautioning and Youth Diversion Pilot Project: Final Progress Report* (2007).

25 Susan Dennison et al, *Police Cautioning in Queensland: The Impact on Juvenile Offending Pathways* (2006). 'Re-offend' means re-offending detected by police, bringing the child into contact with the criminal justice system.

26 Department of Justice [Victoria] (2006) above n 17, 31.



- strategies to reduce alcohol-related incidents leading to arrest or negative contact with police, with an emphasis on custody as a last resort for intoxicated people—Victoria Police
- expansion of the Aboriginal Community Liaison Officer Program and continuation of the Police Aboriginal Liaison Officer Program to develop positive relationships between the Indigenous community and Victoria Police and implement jointly planned local initiatives—Victoria Police.

As already discussed, use of arrest for minor offences is a continuing problem. While endorsing the cautioning program, we remain concerned about the disproportionate use of arrest rather than summons for Indigenous children. In Chapter 4 we recommend that Victoria Police develops and publishes a clear policy detailing the criteria to be used to determine whether to arrest or summons accused people. This policy should specifically address what factors should be taken into account when deciding whether to arrest rather than summons a child. While changes in police policy cannot overcome other systemic issues, police should be aware of the impact of the decision to caution, summons or charge on a child's future progress through the system. The arrest policy should direct police to consider:

- the recommendation of the Royal Commission about limitations on when arrest should be used
- the disadvantage faced by Indigenous children in the criminal justice system
- the importance of utilising support services for Indigenous children to increase caution and summons rates.

Other recommendations in this chapter may help reduce arrest rates by reducing re-offending, particularly the recommendations about imposition of appropriate conditions and improved bail support for children.

The commission has only been able to consider arrest as a peripheral issue to bail. An independent reviewer who could look at this issue more broadly may also improve policy in this area. We note the submission of the Law Institute of Victoria:

> *The LIV has been advocating the establishment of a Victorian Children and Young People's Commission for some time. The LIV considers that such a commission would be able to identify policy issues that might lead to the … disproportionate arrest rates for indigenous children. Importantly the LIV sees the commission as being able to recommend appropriate ways of dealing with and overcoming such issues.*

The Child Safety Commissioner, established by the Victorian Government in 2005, sits within the Office of Children. The commissioner is not independent, but provides advice to DHS and the Minister for Children and is answerable to the minister. We believe there is a need for an independent children and young person's commission that could monitor and investigate issues such as the use of caution, arrest and summons for Indigenous and other children, and systemic discrimination against Indigenous children in the criminal justice system.

RECOMMENDATIONS

124. Section 345 of the CYFA should be amended. The heading should be amended to read 'Children to be proceeded against by summons'. The section should be amended to provide for a presumption in favour of proceeding against children by summons rather than arrest and charge, regardless of whether the proceedings are commenced by police directly charging the accused, or by filing a charge with the court as currently provided for in the section.

125. The following addition should be made to section 345 of the CYFA: If it appears to a magistrate that the informant has used the arrest and charge procedure inappropriately against a child, the magistrate should question the informant on oath as to why the child was not summonsed.

126. Victoria Police should develop a clear, published policy detailing the criteria used to determine whether to proceed against children by caution, arrest or summons. The policy should contain a preference for the use of caution where possible, and summons except where arrest is justified. The policy should take into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody relating to arrest of children, particularly Recommendation 239.

CHILD SPECIFIC FACTORS IN BAIL ACT

The potentially harmful effect of sentencing a child to detention is acknowledged in the CYFA, which states that all other sentencing options must be considered before detention.[27] However, there is no similar legislative provision about remand of children—the Bail Act applies to children in the same way as adults.

The CYFA imposes some special protections for children, and where there is inconsistency with the Bail Act it takes precedence.[28] The Bail Act contains no reference to these provisions, which are:

- a child cannot be remanded for more than 21 days without being brought back before the court[29]
- a bail justice cannot remand a child for more than one day, or in some areas of the state two[30]
- a parent, guardian or independent person must be present when a police officer is considering bail for a child[31]
- children must not be refused bail solely on the basis that they do not have adequate accommodation[32]
- if children do not have the capacity or understanding to enter into an undertaking of bail they can be released on bail by a parent or guardian entering an undertaking to bring them to court[33]
- police do not have power under the CYFA or the Bail Act to remand a child in custody.[34]

In our consultation with CAHABPS, we heard that bail justices do not always read the Bail Act and CYFA together. CAHABPS thought that some bail justices do not always consider the specific provisions that apply to children, tend to deal with them as adults, and take a punitive approach to bail. This can result in remand of children who are then released by the court the following day. This is inappropriate when CAHABPS is available to put support in place for children after hours.

In addition, bail justices are not bound by police policy that requires CAHABPS to be contacted when considering remand of a child. We were told bail justices do not always wait for CAHABPS to arrive to perform an assessment. This is also inappropriate, particularly if the child is then remanded. This problem would be remedied through adoption of the new bail justice roster system currently being trialled by the Department of Justice. Under that system the call centre will only arrange a bail justice to attend after CAHABPS has been contacted, has commenced an assessment, and has advised a bail justice may be called. The new roster system is discussed in Chapter 5.

In our Consultation Paper we asked whether the Bail Act should contain a provision similar to section 362 of the CYFA, so that child-specific factors must be considered when making a bail decision.[35] We also asked what matters a decision maker should be required to consider. Section 362 requires a court to consider particular matters when deciding what sentence to impose on a child. These include the need to preserve and strengthen the family relationship, the desirability of allowing a child to live at home and that detention should be a last resort.[36]

In consultations some people noted that it was odd to treat children like adults at the start of the criminal justice process but then legislate special considerations for sentencing at the end of it.[37] A similar set of provisions in the Bail Act would ensure that all decision makers consider child-specific issues when deciding bail.

Submissions largely supported inclusion of child-specific factors in the Bail Act.[38] A senior Children's Court magistrate said:

> *Because the sentencing objectives and sentencing provision for adults and children are so different, there is an underlying tension involved in having essentially the same bail provisions applying to each … Assuming that a single Bail Act, in whatever form emerges from these consultations, is likely to apply both to children and adults, I would strongly support the inclusion of child-specific factors. It would be logical that s. 139 of the CYPA [now s 362 CYFA], which sets out matters to be taken into account in sentencing a child, should also be relevant to the determination of whether or not a child should be granted bail.*

All participants at our Children and Young People roundtable supported the inclusion of child-specific considerations in the Bail Act.

27 *Children, Youth and Families Act 2005* s 361.

28 *Children, Youth and Families Act 2005* s 346(6).

29 *Children, Youth and Families Act 2005* s 346(3).

30 *Children, Youth and Families Act 2005* s 346(4)(b).

31 *Children, Youth and Families Act 2005* s 346(7).

32 *Children, Youth and Families Act 2005* s 346(9).

33 *Children, Youth and Families Act 2005* s 346(10).

34 *Children, Youth and Families Act 2005* s 346(2): a child who is not bailed from police custody must be brought before a court or bail justice 'within a reasonable time' but 'not later than 24 hours after being taken into custody'.

35 Victorian Law Reform Commission (2005) above n 2, 137. The Consultation Paper question referred to s 139 of the *Children and Young Persons Act 1989* which was then in force. Section 362 is the equivalent provision in the CYFA.

36 *Children, Youth and Families Act 2005* s 361.

37 Consultations 7, 14, 25; submission 2.

38 Submissions 9, 22, 23, 24, 29, 30, 32, 38, 39, 41, 42, 46 supported; submissions 18, 45 opposed.

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Concern was raised in consultations and submissions that inappropriate and punitive conditions are being imposed on children.

Most supportive submissions thought the types of matters listed in section 362 of the CYFA were appropriate. The OPP suggested: 'All relevant matters pertaining to the alleged offences and the child's age and personal circumstances'. Some submissions thought the Act should require remand to be used only in limited circumstances and as a last resort.[39] The Law Institute of Victoria also thought the decision maker should consider the likely sentence that would be imposed if the child was found guilty.

Two submissions did not support inclusion of child-specific factors in the Bail Act. One from bail justice Steve Kirby did not provide any reason. The other, from the Criminal Bar Association, said: 'A Magistrate will inevitably take matters of this type into account when dealing with a young accused'. However, the vast majority of bail decisions for children are not made by magistrates.

We also asked in the Consultation Paper whether the CYFA provisions that apply to bail should be moved to the Bail Act. Submissions generally supported the move, including Victoria Legal Aid, the OPP, the RVAHJ, and the Magistrates' Court, which had 'no objection'.[40] We did not receive any opposing submissions to this proposal.

The commission believes the special considerations that apply to children in other legislation such as the CYFA and the Charter of Human Rights and Responsibilities Act should also apply to bail decisions. Inclusion of these considerations in the Bail Act will make it clear that children should be treated differently to adults. The majority of bail decisions for children are made by lay decision makers who are not as familiar with the principles contained in the CYFA as Children's Court magistrates. It is important for the Bail Act to direct their attention to the specific considerations that apply to children. We also believe that it is important for all legislation about bail to be in one Act. This will simplify application of the law for lay decision makers.

We recommend that the provisions relating to bail in the CYFA be moved to the Bail Act. A note should be inserted into the CYFA at the beginning of Chapter 5, indicating that provisions about bail of children are in the Bail Act.

We also recommend the inclusion of child-specific considerations in the Bail Act. This should include the first four provisions of section 362(1) of the CYFA, as well as a requirement for decision makers to consider the likely sentence that will be imposed if the child is found guilty. Although police and bail justices will not be as familiar with likely penalties as magistrates, this will at least require them to consider the likelihood of the child receiving a sentence of detention. This may prevent some children from being unnecessarily remanded. We also recommend a provision that makes it clear remand of children should be a last resort. Police policy requires remand be considered 'as a last alternative'.[41] Detention as a last resort in sentencing is already provided for in the CYFA. It is logical and consistent to have a similar legislative provision for remand.

RECOMMENDATIONS

127. The provisions of the CYFA that apply to bail should be moved to the Bail Act, and the CYFA should contain a note referring to the provisions in the Bail Act.

128. The Bail Act should contain a provision based on section 362 of the CYFA that requires a decision maker to consider child-specific factors when making a bail decision for a child. In addition to the factors that must be weighed up by a decision maker under the unacceptable risk test, a decision maker should have regard to:
    - the need to consider all other options before remanding the child in custody;
    - the need to strengthen and preserve the relationship between the child and the child's family;
    - the desirability of allowing the child to live at home;
    - the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
    - the need to minimise the stigma to the child resulting from a court determination; and
    - the likely sentence should the child be found guilty.

We do not recommend inclusion of the last two provisions of section 362(1). They relate to children being aware they must bear responsibility for any illegal action, and the need to protect the community from the violent or other wrongful acts of children. These considerations are not appropriate at the bail stage when the child is presumed innocent. Protection of the community is a consideration under the unacceptable risk test. The child-specific provisions work with the unacceptable risk test and are intended to provide guidance to decision makers in its application.

In Chapter 9 we recommend the inclusion of Indigenous-specific provisions into the Bail Act. These will apply to all bail applications by Indigenous Australians, including children.

BAIL CONDITIONS FOR CHILDREN

In Chapter 7 we recommended that bail conditions must relate to the purposes of bail and be no more onerous than necessary. These recommendations apply to adults and children. However, as discussed in our Consultation Paper, particular issues arise with bail conditions imposed on children.[42] We asked whether decision makers are imposing appropriate special conditions on children and young people.

Concern was raised in consultations and submissions that inappropriate and punitive conditions are being imposed on children. Those generally considered problematic were geographical exclusions, curfews, residential conditions, bans on public transport, and bans on drugs, alcohol or chroming.[43]

Fitzroy Legal Service raised particular concerns about geographical exclusions and curfews:

> *For example geographical exclusion zones are often unnecessarily broadly defined or impractical. Such broad exclusion conditions are more likely to be imposed by police or bail justices than courts however. In our experience, young people tend to agree to overly punitive conditions by way of bail undertakings, as their overriding and immediate concern is to be released from police custody.*

> *Curfews have been similarly criticised … Curfew conditions are said to be preventative measures, 'keeping children off the streets' and away from negative influences. They are said to promote the re-establishment of family relationships. We believe these objectives are largely unrealistic and ineffective for their stated purposes. Instead, unfairly and unjustly and contrary to the purposes of bail law, they impose a form of pre-sentence punishment on unconvicted or sentenced accused.*

Youthlaw submitted:

> *We would concur with the concerns raised in the Consultation Paper regarding the imposition of excessive geographical conditions, curfews and residential conditions, and the problems these conditions can create for our clients. Given the difficulties and lack of support faced by many of our young clients, we would argue for a provision in the Bail Act which provided that in the case of young offenders, the number of conditions imposed should be kept to a minimum, and should only be directed to what is necessary to achieve the object of bail (namely the attendance of the defendant at court and the minimization of the risk of re-offending).*

DHS's submission raised issues about inappropriate conditions and lack of structured support:

> *The special conditions imposed on bail are generally appropriate, however the monitoring and lack of consequences of these special conditions does not support the structure of supervised bail. Bail conditions should be achievable and able to be monitored and enforced so as not to undermine the credibility of the decision makers.*

> *At times special conditions can be onerous or less than appropriate. For example if a child has addictive behaviours in relation to chroming it may be more appropriate to require assessment and treatment for the addiction than to impose a blanket ban on chroming.*

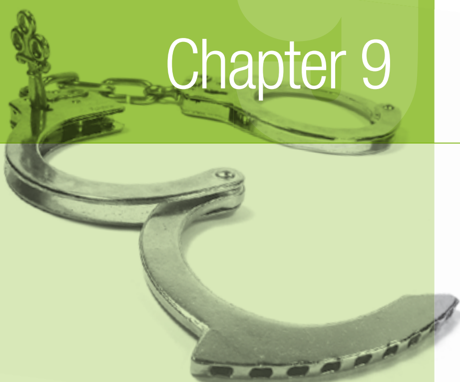
39 Submissions 9, 38, 42.

40 Submissions 22, 24, 29, 30, 38, 39, 41, 46.

41 Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) Instruction 113-6: Bail and Remand [1].

42 Victorian Law Reform Commission (2005) above n 2, 128–130.

43 Ibid. Similar issues have been raised in NSW, see Roslyn Cook and Joe McNamara, 'Bandaid Bail: Current Bail Practices in NSW Come Under Fire' (2006) 6 (17) *Indigenous Law Bulletin* 6. The *Bail Act 1978* (NSW) specifically provides for 'place restriction': s 36B.



Children and Young People

In one consultation, CAHABPS noted that punitive and unrealistic conditions were imposed on young people, such as not going to the Melbourne CBD and drug use bans.

Another concern frequently raised was that too many conditions are imposed on children. Legal Aid submitted:

> *The more numerous or onerous conditions that are placed on bail, the more likely it is that the accused will breach the conditions. This is particularly so with children or young people—who may not have the maturity to comply with some conditions for extended periods or at all. A breach of bail may have serious and long term consequences for the child. Special bail conditions should only be imposed if they are necessary to ensure that the accused appears to answer the charges, does not interfere with witnesses or commit another offence while on bail. As special conditions are a restriction on the right to liberty, they should only be used as a last resort. They should never be imposed as a punitive measure—prior to a finding of guilt and the fixing of the appropriate sentence.*

The commission is concerned that bail conditions more onerous than sentencing orders are sometimes imposed on children. Exclusion conditions, bans on substance abuse and curfews are onerous, and are often made without organising support for the child. These conditions, while well meant, may not take into account the child's age and maturity and ability to comply with them.[44] It is also inappropriate to impose punitive conditions before a finding of guilt. As discussed in Chapter 7, curfews and geographical exclusion conditions may also be inconsistent with the provisions of the Charter of Human Rights.

We recommend the decision maker take into account factors similar to those contained in section 362(1) of the CYFA when deciding on appropriate conditions. As discussed, the parts of section 362(1) about accepting responsibility are not appropriate at the bail stage, when the child is still presumed innocent. We also do not consider it appropriate to include the provision about protecting the community from the child because it will be taken into account under the unacceptable risk test. The ACT Bail Act contains child-specific provisions for the bail decision and for the imposition of conditions.[45] We have, to some extent, used that Act as a model.

BAIL SUPPORT FOR CHILDREN

Support for children at an early stage in the criminal justice process may help reduce or prevent re-offending. However, the Children's Court has no bail support program. A recent NSW study suggests that a high proportion of children who appear in the Children's Court will continue to offend into adulthood, especially if their first court appearance occurred when they were young.[46] While analysis of developmental prevention programs is beyond the scope of this reference, early intervention to reduce the likelihood of future offending is now well recognised as an effective strategy: 'There is now a strong evidence base that problem behaviour by young children is one of the strongest predictors of both adolescent delinquency and later adult offending'.[47]

RECOMMENDATIONS

129. The legislative provisions about bail conditions recommended in Chapter 7 should apply to children as well as adults. However, the Bail Act should contain a specific provision for the imposition of conditions on children. When considering the bail conditions to be imposed on a child, a decision maker must consider:
    - the need to strengthen and preserve the relationship between the child and the child's family;
    - the desirability of allowing the child to live at home;
    - the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
    - the need to minimise the stigma to the child resulting from a court determination.
130. A child-specific bail support program should be established in the Children's Court. It should be developed and administered by CISP, but funded by DHS. Protocols for information sharing should be put in place between DHS and CISP to ensure an integrated service for children. As with the service in the Magistrates' Court, culturally appropriate support should be provided for Indigenous children.

Bail support services—CREDIT and ACAS for young people and CAHABPS for children—are discussed in detail in our Consultation Paper.[48] During our review we found that these programs are well regarded across the criminal justice system. The CAHABPS and ACAS programs have been evaluated positively by DHS, which has led to their continuation and expansion. Evaluation of the CREDIT program and other Magistrates' Court support services has led to their expansion and integration into CISP, which is discussed in Chapter 7.

In our Consultation Paper we asked what could be done to encourage police and bail justices to use supervised bail support programs for children and young people.[49] Responses focused on the lack of supervised bail support for children, such as this from Victoria Legal Aid:

> *This question presupposes that supervised bail support programs for children are readily available. However, in VLA's experience, this is not the case. We have found that publicly funded programs are few and far between. Juvenile [now Youth] Justice workers will sometimes provide bail support on an unofficial basis to previous clients. However, they have no mandate to provide such assistance unless and until the child … (is) bailed on a deferral of sentence.*

Other community and defence lawyers and DHS also commented on the lack of bail support for children.[50]

Most responses wanted bail support services established for children but did not specify how this should be done.[51] In its submission, the Law Institute advocated for a legislative mandate for DHS to supervise young people on bail. The Mental Health Legal Centre submitted there should be a specialised bail support program for children separate from DHS because it may have removed children on bail from their families under its protective mandate. The centre also noted the problem of DHS not being able to confirm accommodation until after a person has been bailed. The centre preferred a court-annexed bail support program with funding to ensure the availability of accommodation, like CREDIT. DHS's submission supported the establishment or expansion of bail support programs such as CREDIT in the Children's Court.

Although CAHABPS exists to provide bail support to children after hours, there is no bail support service at Children's Courts. There is a further anomaly in service provision because young people dealt with in the Magistrates' Court have the benefit of the CISP or CREDIT programs, as well as ACAS, but children have no court-based bail support. The commission believes bail support is crucial for children—every effort should be made to divert children from further offending at the earliest possible stage. Supervised support would be more effective than the imposition of onerous or punitive behavioural conditions.

We recommend that a child-specific bail support program be established in the Children's Court. It should be operated by CISP because it has infrastructure in place in Magistrates' Courts and expertise in bail support.[52] However, it should be funded by DHS, which should share information with CISP about mutual clients to ensure children receive an integrated service. In courts where CISP does not yet operate, bail support for children should be provided by CREDIT or Rural Outreach Diversion workers, who should be sufficiently resourced and trained to do so.[53]

Given the proportion of Indigenous children who are arrested, and therefore on bail, culturally appropriate support is essential. Youth Justice (in DHS) recently commenced the Koori Youth Intensive Bail Support Program—one of the initiatives from AJA2. This program supports Indigenous children on bail during deferral of sentence in the Children's Court, and Indigenous young people on any bail order in the Magistrates' Court. Children or young people are only eligible for the program if they are assessed as being at high risk of breaching bail or re-offending, and considered likely to be remanded in custody. Workers provide support to children or young people and their families, and assist them to engage with appropriate services, as well as providing reports and advice to the courts. The program covers the northern and western metropolitan regions of Melbourne as well as Shepparton and the Latrobe Valley.[54]

The Koori Youth Intensive Bail Support Program will work with a small number of high needs clients. Culturally appropriate bail support should be available for all Indigenous children on bail. The Melbourne Children's Court operates a Koori Court, and a second Children's Koori Court will

44 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) Recommendation 228 says: 'Children should not be subject to inappropriate bail conditions, such as 24 hour curfews, that disrupt their education and have the effect of forcing constant contact with their families or that impose policing roles on carers'.

45 *Bail Act 1992* (ACT) s 23 contains the criteria for granting bail to children, s 26 the conditions on which bail may be granted to children.

46 NSW Bureau of Crime Statistics and Research, *The Transition from Juvenile to Adult Criminal Careers*, Crime and Justice Bulletin No 86 (2005).

47 Ross Homel et al, *The Pathways to Prevention Project: Doing Developmental Prevention in a Disadvantaged Community* (2006) 1.

48 Victorian Law Reform Commission (2005) above n 2, 122–126.

49 Ibid 126.

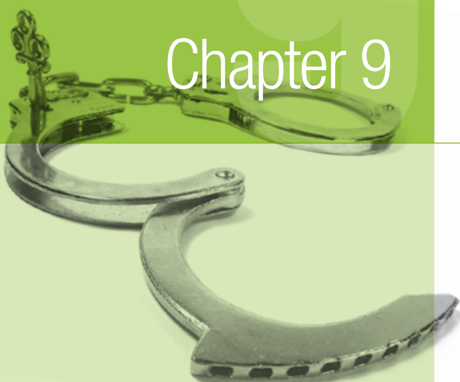
50 Submissions 29, 30, 32, 38, 42.

51 Submissions 24, 30, 32.

52 Children's Courts are generally located in Magistrates' Courts—the only stand-alone Children's Court is in the Melbourne CBD.

53 Rural Outreach Diversion workers are funded by DHS to provide a service to court regions that do not have a CREDIT worker. They provide a similar service and liaise with the closest CREDIT worker to put in place appropriate support services for accused people on bail: Information provided by Ms Jo Beckett, Program Manager CISP and CREDIT Bail Support Program, 2 May 2007.

54 Information provided by the Manager, Program Development Unit, Juvenile Justice, DHS, 13 March 2007.



be established in Mildura by the end of 2007. In those courts the Children's Koori Court Officers should fulfil the role of an ALO in the bail support program where their workload allows. As noted in Chapter 10, the workload of Koori Court officers should be monitored to determine whether they are able to fulfil this role, and if not, an Aboriginal Liaison Officer should also be employed. In Chapter 10 we also recommend that in courts that do not incorporate a Koori Court, an ALO should be employed to provide assistance.

It appears that the services provided to young people in the Magistrates' Court by CISP and CREDIT and ACAS are sufficient, as no criticisms were raised in submissions. These programs are viewed positively and have broad support in the criminal justice system. The CISP and CREDIT programs are discussed in more detail in Chapter 7, including better referral by police.

The police policy should be enforced to ensure diversionary support is put in place for children at the earliest opportunity.

INCREASING REFERRALS

In addition to the need for more services for children, better utilisation of current services was also raised in submissions. Victoria Police policy requires: that CAHABPS be contacted to attend hearings before bail justices when a child is not legally represented; that CAHABPS must be given access to the child before the hearing; and that the hearing be organised to accommodate bail justices and CAHABPS.[55] In our Consultation Paper we noted CAHABPS feedback that police do not always make contact.[56] This was substantiated by the Victorian Ombudsman in 2002.[57] The Ombudsman indicated that he would review the situation in the following year, however, that does not seem to have occurred. The police policy should be enforced to ensure diversionary support is put in place for children at the earliest opportunity.

Bail justices' utilisation of support services is also an issue according to CAHABPS. Bail justice Steve Kirby's submission seems to confirm this:

> *At the moment with a remand application various entities offer alternatives to remand placement, but as they cannot guarantee … (secure welfare and transport to the court) generally their services are inadequate for the application.*

On the other hand, bail justice Michael Wilson submitted that he relies on the services provided by DHS 'who seem to have adequate services in place'.

CAHABPS was established because many children were being remanded by bail justices only to be released by a court the following day. It is still the case that a significant number of children are bailed by the court after refusal by a bail justice.[58] In the Consultation Paper we provided information from DHS about reasons given by bail justices for refusing bail. This indicated that bail justices most often refuse bail to children because they have not 'shown cause', rather than because they pose an unacceptable risk.[59] Our recommendations to simplify the tests for bail, discussed in Chapter 3, may reduce unwarranted remand of children by bail justices.

CAHABPS provides an assurance to bail justices that support will be provided for children who are released on bail. This should ensure bail is granted except where a realistic concern remains about unacceptable risk. The risk must be of such seriousness that it warrants placing a child in custody. As discussed in Chapter 5, bail justices may also make release of children conditional on release to a particular person, such as a parent.

Victoria Police suggested one way of ensuring consideration of bail support programs by police and bail justices in its submission: 'One option may be to require police and bail justices to report by exception and detail individually why the child/young person was not deemed suitable for specific supervised bail support programs'. The CISP and CREDIT programs allow referral of accused people by anyone, including police. When a similar program is established in the Children's Court, police will be able to refer children to it. Police policy should ensure this occurs. Police referral of adults has been very low in the past but has recently increased considerably.[60] The new Department of Justice training for bail justices should emphasise that remand of children is a last resort and should only occur when CAHABPS and other bail supports do not sufficiently reduce unacceptable risk. The department should also consider the reporting requirement suggested by Victoria Police in its submission. In Chapter 7 we recommend that magistrates review conditions of bail set by police and bail justices at the first mention of a matter. Many matters in the Children's Court are finalised on the first mention date but for those that are not, the magistrate could refer children to the bail support program if appropriate.

REMAND TO SECURE WELFARE

The need for intensive support for some children on bail was raised in our roundtable. One participant noted that on rare occasions there can be a need to bail a child to the secure welfare facilities operated by DHS as part of its protective, rather than criminal, mandate. It was suggested this should be provided for in the Bail Act.

In certain circumstances magistrates can make orders confining children to secure welfare for their own protection, on application by DHS. This is done when there is a 'substantial and immediate risk of harm' to children.[61] It was noted at our roundtable that sometimes magistrates are concerned that there is a risk of harm to children appearing before them on criminal charges—such as a need for immediate medical care due to mental health or substance abuse issues.

These orders are currently made by bailing children to reside at secure welfare facilities on the condition they are not to be released on bail unless a DHS representative transports them to the facility. The order is only made after a DHS court advice worker contacts the secure welfare facility and an over-the-phone assessment determines a child's suitability for placement. Children are often already known to the staff. If they are found suitable the order can be made. If not, the court must find other support for them.

The commission is concerned that making this process more easily accessible may lead to inappropriate use of secure welfare facilities. The admission of children to secure welfare should not occur unless staff assess a child as suitable. Although the current process required to bail a child to secure welfare is somewhat involved, we believe it is appropriate.

BAIL UNDERTAKINGS BY PARENTS

Children who do not have the capacity to enter an undertaking may still be released on bail if their parent or 'some other person' enters the undertaking on their behalf.[62] In our Consultation Paper we asked whether the Bail Act should be amended to allow the court to require a child's parents, or some other person, to enter an undertaking when the child *does* have the capacity to enter into a bail undertaking.[63] This was suggested on the basis that some children may forget about or disregard their obligation to the court, especially young children.[64] We also asked whether the Act should refer to specific matters that a decision maker must consider when deciding whether an undertaking should be entered by a parent or other person.

Relevant submissions were divided on this issue. In the Magistrates' Court submission an experienced Children's Court magistrate says:

> *There is often a world of difference between a child's capacity to* ***enter into*** *a bail undertaking and the child's subsequent capacity to* ***comply with*** *the undertaking. It is highly desirable to have the ability to require an adult, whether a parent or other adult, to enter into a bail undertaking on behalf of a child so that they will be under some obligation to ensure that the child complies with conditions, notably the requirement to attend court on the specified date. In my view this is an essential and urgent amendment.*

Victoria Police, the OPP and some bail justices also supported the amendment, although the OPP noted there may be 'legitimate concerns against imposing such obligations'.[65]

Other submissions opposed the amendment.[66] The Law Institute of Victoria said:

> *The LIV does not support the imposition of bail undertakings on 3rd parties where the direct party has the capacity to enter into the condition. The LIV submits that this could add an unnecessary burden to the relationship between the bailed person and the 3rd party. The LIV is particularly concerned that in the case of children and young people this may lead to added tension from the only supportive adult the child identifies with.*

55 Victoria Police (2 October–5 November 2006) above n 41, Instruction 113-6 Bail and Remand [4.4.5].

56 Victorian Law Reform Commission (2005) above n 2, 137.

57 The Ombudsman Victoria, *Twenty-Ninth Report of The Ombudsman: 30 June 2002* (2002) 30–2.

58 Victorian Law Reform Commission (2005) above n 2, 48. The data does not enable us to establish whether bail was granted by the court on the following day or a later date.

59 Ibid 122.

60 Information provided by Ms Jo Beckett, Program Manager CISP and CREDIT Bail Support Program, 2 May 2007.

61 Eg, *Children Youth and Families Act 2005* ss 263(1)(e), (3), (5) allow for placement of a child at substantial and immediate risk of harm in secure welfare as part of an Interim Accommodation Order.

62 *Children Youth and Families Act 2005* s 346(10). This is discussed in detail in Victorian Law Reform Commission (2005) above n 2, 130–131.

63 Victorian Law Reform Commission (2005) above n 2, 131.

64 Consultation 14.

65 Submissions 11, 18, 23, 41, 46.

66 Submissions 8, 24, 29, 30, 32, 38, 42.

Chapter 9

Children and Young People

The Mental Health Legal Service also expressed concern that it 'interferes with relationships and may sever the crucial family supports'. Three submissions agreed with the concerns raised in our Consultation Paper about possible criminal liability faced by parents if children breach bail conditions.[67] DHS noted:

> *The philosophy of the Juvenile Justice program is focussed on rehabilitation of young offenders. Onus is placed on young people taking responsibility for their behaviour. Holding parents or some other person responsible for the young person's behaviour is inconsistent with this, but may be appropriate with younger children and in relation to parental responsibilities such as ensuring that a child goes to school.*

The commission is concerned that the amendment would encourage decision makers to impose obligations on parents whenever they were concerned that a child may not comply. The criminal part of the CYFA emphasises the need for children to take responsibility for their behaviour.[68] Guidelines could be put in place detailing when the obligation may be imposed on a parent, but these would necessarily have to be broad.

Many children who appear before the court may be immature and need support to comply with their obligations. This should be provided through bail support programs, which could involve parents where appropriate, rather than imposing obligations on parents. Imposition of obligations on parents is more congruent with the family division of the Children's Court. The suggested amendment raises issues about parental responsibility—it assumes they are able to exercise control over their child. The commission does not support imposition of obligations on others in the criminal context when breach of conditions raises criminal sanctions. Parents who are unable to control their child may face prosecution for breach of the undertaking if the child fails to appear—failure to appear is a criminal offence.[69]

REMAND OF YOUNG PEOPLE

There is an anomaly in the options available to a decision maker for remanding and sentencing young people. Young people aged 18–20 can be sentenced to a Youth Justice Centre (YJC), but not remanded to one.[70] The sentencing option is provided for in the *Sentencing Act 1991*, but there is no corresponding provision about remand in the Bail Act. The CYFA only applies to children aged up to 18—therefore only children aged up to 18 can be remanded to YJCs.[71] Young people are remanded to adult correctional facilities, but when sentenced may be moved to a YJC. This anomaly has been the subject of debate for some time, and strong views on this issue were expressed in consultations and submissions.

There is an exception to the general rule that a young person will be remanded with adults. The Port Phillip Prison at Laverton has a youth unit, established in 1999, to reduce the risk of suicide and self-harm among young men who enter adult jail.[72] A youth unit has also been established in the new Metropolitan Remand Centre, which opened in May 2006. The unit accommodates prisoners aged 18–24 who are immature, vulnerable, naïve, have poor coping skills, and/or high anxiety levels. It is geographically separate from the mainstream prisoner area. During the day young people in the unit can mix with other prisoners within that part of the prison—which houses people who are vulnerable, at risk or detoxing and low risk—if they wish. However, there are also separate areas for young people who do not wish to mix with older prisoners.[73] The two youth units can house approximately 100 young people.

There is no such facility for young women in Victoria.[74] Women on remand are held in the Dame Phyllis Frost Centre in Melbourne. Women on remand can be segregated from women serving sentences.[75] This is up to the prisoner—they are given the option to be segregated in the reception and remand area. Alternatively, they are also able to reside in the mainstream accommodation units with sentenced prisoners.[76] Although remand of women has increased considerably in the past 10 years, the numbers of women on remand are still small, making it impractical to segregate young women from older women.

RECOMMENDATIONS

131. There should be no change to the current legislation regarding undertakings by parents or another person.

Magistrates and judges have no power to direct that young people be assessed for or placed in a youth unit. Once remanded, young people are held in police cells until a place becomes available at the Metropolitan Assessment Prison. All prisoners are processed through that prison and then may be sent to another facility.[77] They may therefore spend several days in police custody and then further time in a remand facility with adult mainstream prisoners. Decision makers can note risk factors on the remand warrant and these will be taken into account on reception to prison. However, there is no 'fast-tracking' of young people to a youth unit. They may experience harm while associating with older and hardened prisoners, and they may be at greater risk of self harm.

In our Consultation Paper we asked whether it should be possible for decision makers, in appropriate circumstances, to remand young people aged 18–20 to YJCs.[78] Submissions supported this suggestion, except that from DHS:

> *Young people are only sentenced … to a Youth Training Centre [now Youth Justice Centre] if the court is satisfied they have reasonable prospects for rehabilitation or are particularly impressionable, immature, or likely to be subject to undesirable influences in adult prison. Before reaching this conclusion the court considers a suitability assessment by Juvenile Justice, the nature of the offence, and the age, character and past history of the offender.*
>
> *This is a complex assessment process that would be hampered by the lack of time and information available at the point of remand, where there has been no finding of guilt. There would be risk of unsuitable young adults being remanded to a Youth Training Centre. This would be an issue for Juvenile Justice centres given that they are not high security and have an emphasis on rehabilitation.*
>
> *A more suitable option would be to expand the facilities available in Youth Units as discussed in the VLRC Paper. Juvenile Justice and Department of Justice are working together to meet the needs of young people held in adult facilities and there is value in developing distinct facilities for young people who do not fall within the jurisdiction of the Children's Court.*

This ignores the reality that many young people are already being remanded to YJCs through the section 49 procedure. Section 49 of the Magistrates' Court Act allows a magistrate to 'return' young people to a YJC rather than remanding them in an adult prison if they are undergoing a sentence of detention in a YJC.[79] There are several situations in which this procedure may be used. It exists to ensure appropriate treatment of young people who offend before and after turning 18, who therefore may be dealt with by the Children's and Magistrates' Courts.[80]

A practice has developed whereby young people facing multiple charges in the Magistrates' Court plead guilty to one or more charges for which a YJC sentence is likely. They are then held in a YJC on sentence, and section 49 is used to allow them to be 'returned' to a YJC on the remaining charges.

The commission is concerned that young people may be pleading guilty inappropriately to avoid being held in an adult prison. There are also other problems with this procedure. A YJC sentence may finish before the remaining charges have been finalised. In that situation the accused would be transferred directly from the YJC to remand in an adult prison. The procedure may also result in young people spending additional time in custody because the time served at a YJC cannot be taken into account when the remaining charges are dealt with. This is because they were serving a sentence in the YJC, not being held on remand. DHS noted this in its submission:

> *Furthermore, young people with numerous outstanding matters who receive a section 49 order have been known to serve additional sentence time. Although this is not common practice, it is becoming an issue when serious matters take a number of months to be addressed in court resulting in the young person receiving an additional sentence.*

All other submissions that addressed this issue supported the ability to remand to YJCs. For example, the Magistrates' Court said: 'The Magistrates' strong view is that there should be a presumption that all young persons be remanded to YTC'. Magistrates told us the decision to remand vulnerable and immature young people to an adult prison was always very difficult.[81] They also advised that they consider the custodial setting to which a young person will be remanded when deciding bail.

67 Submissions 24, 30, 32.

68 Eg, *Children Youth and Families Act 2005* s 362(1)(f).

69 *Bail Act 1977* s 30.

70 *Sentencing Act 1991* s 32(1). Youth Justice Centres were known as Youth Training Centres under the *Children and Young Persons Act 1989* and were referred to in that way in our Consultation Paper.

71 Remand of children is discussed in Victorian Law Reform Commission (2005) above n 2, 120–122.

72 The Port Phillip Youth Unit is discussed in detail in ibid 132–133.

73 Information provided by Executive Officer, Metropolitan Remand Centre, 18 July 2006.

74 Information provided by Jessamy Nicholas, Project Coordinator, Better Pathways Implementation, Corrections Victoria, 23 April 2007.

75 This is required by the *Charter of Human Rights and Responsibilities Act 2006* s 22(2).

76 Information provided by Jessamy Nicholas, Project Coordinator, Better Pathways Implementation, Corrections Victoria, 23 April 2007.

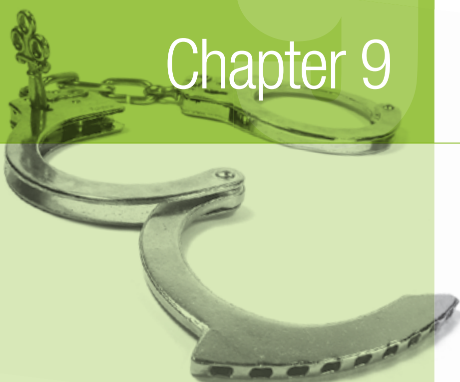
77 Young people are generally transferred out of the Metropolitan Assessment Prison unless they have higher risk needs that cannot be provided for at the Melbourne Remand Centre: Information provided by Executive Officer, Metropolitan Remand Centre, 17 April 2007.

78 Victorian Law Reform Commission (2005) above n 2, 133–135.

79 The *Magistrates' Court Act 1989* and the *Bail Act 1977* do not refer to this process as being 'remanded' in a YJC but as a 'return' to a YJC. The young person is not 'remanded' because they are serving a sentence of detention on another charge.

80 The section 49 procedure is discussed in detail in Victorian Law Reform Commission (2005) above n 2, 135–136.

81 Consultation 18.



Chapter 9

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Many submissions did not distinguish between YJCs and youth units in adult prisons. Victoria Legal Aid said:

> *Adult remand facilities are totally inappropriate for young people—due to the dangers posed by older or more hardened offenders and the risk of suicide or self-harm. VLA supports giving decision-makers the power to remand young people to a … YTC or specialised youth unit instead of an adult facility. In fact, VLA suggests that the Act should go further and require decision-makers to do so, unless the young person is assessed as unsuitable … The Act should also impose a duty on the decision-maker to provide reasons if the decision is made to remand a young person elsewhere. There should be clear criteria about suitability for YTC and there should be an ability to cross-examine the assessor about their reasons for assessing the young person as unsuitable. Adequate resourcing will be required to ensure that sufficient YTC or youth unit places are available to cater for young remandees.*

Youthlaw, Fitzroy Legal Service, the Law Institute of Victoria and Mental Health Legal Centre all raised the issue of provision of reasons by the court if an order is not made for placement in a youth-specific remand facility.

The ability to remand to YJCs was recommended by the LRCV.[82] It recognised this would not automatically mean that every 17–20 year old would be remanded to YJCs. As with sentencing to YJCs, a suitability assessment would be conducted by Youth Justice. The ability for all courts to remand to YJCs was also recommended by Professor Arie Freiberg in a 2002 sentencing review.[83] He noted:

> *Implementation of these proposals would significantly increase the accommodation pressures upon youth training centre facilities, which are currently at their limits. However, if it is considered appropriate to segregate sentenced young offenders by creating such facilities, it would seem even more appropriate to provide separate facilities for unsentenced young offenders who have not yet been found guilty of any offence … sentencing practices are being distorted by the nature of the correctional facilities available.*

In July 2005 a 26-bed unit opened at the Melbourne Youth Justice Centre for young men on remand. This considerably increased the capacity of the centre—from 60 to 86—and was in response to an expected increase in demand following the increase of the age jurisdiction of the Children's Court criminal division from 17 to 18 years. This means additional capacity need only be found for 18–20 year olds. As noted, not all 18–20 year olds will be considered by the court to require remand to a YJC.

The commission recommends that the Bail Act allow magistrates and judges to remand young people aged 18–20 to either a YJC or a prison youth unit, following an assessment by Youth Justice or Corrections Victoria. This is consistent with the current power in the Sentencing Act to sentence young people aged 18–20 to a YJC. It is also consistent with the service currently provided by ACAS in the Magistrates' Court for people aged 18–20. The final decision about placement should reside with the decision maker, taking into account the assessment. The ability to remand to either facility should alleviate concerns about placement of inappropriate young people in YJCs.

Young people facing remand will often be in that situation because of ongoing offending, and will therefore be known to Youth Justice or Corrections Victoria, or both. This will assist with assessment for appropriate placement. In cases where young people are not already known, we believe the issues noted by DHS in its submission can be covered by an assessment by Youth Justice or Corrections Victoria at the court. This is already occurring through use of the section 49 procedure. Although young people must be sentenced on at least one matter to use section 49, the majority of their charges usually remain outstanding. We cannot see that this results in a substantially different situation to assessing a young person who has all charges outstanding. Assessments of this type for YJCs are done by ACAS workers. ACAS workers are now available at all Magistrates' Courts in Victoria, and the ACAS unit at Melbourne Magistrates' Court also provides a service to the higher courts.

Assessment will be assisted by the development of clear suitability criteria by Youth Justice and Corrections Victoria. This criteria must be available to all those involved in the young person's matter, including lawyers and decision makers. Lawyers need to know when it is appropriate to ask the magistrate or judge to order assessment of clients for remand to YJCs if bail is refused. The court needs to know when it is appropriate to make such an order, particularly as it will have the power to make the order in opposition to assessment by Youth Justice. Although we do not recommend a presumption that all young people be remanded to YJCs, we think the court should be required to provide reasons for not remanding young people to a youth-specific facility if they are assessed as suitable. As submitted by Youthlaw, this would assist with any appeal. We do not make any recommendation about the ability to cross-examine the assessor, as suggested by Victoria Legal Aid, because this can already be done and does not need a specific provision. Such cross-examination would be unlikely because it would generally result in the court hearing information that may not support the accused's application.

Adequate resources must be provided to ensure there are sufficient YJC and youth unit places for young people on remand, and sufficient staff and programs to meet their needs. Much of this may be met by the increase in places in YJCs which has already occurred and the Melbourne Remand Centre's new unit. However, we agree with Professor Freiberg that the need for resources to establish this scheme does not outweigh the clear need for young people to be treated appropriately on remand.

The increase in accommodation options discussed is only for young men. As noted, women held on remand are not segregated by age, and segregation of remand and sentenced prisoners is not enforced but offered to prisoners as an option. Young women who are sentenced to a YJC are held in the Parkville Youth Residential Centre. This is the sole facility in Victoria for female children and young women. It is a 30-bed unit, which also houses sentenced and remanded boys aged 10–14. They are segregated from the girls and women. As there is no youth unit for young women, our recommendation will really only provide decision makers with one option for vulnerable young women—remand to the YJC. As there is only one small unit to accommodate young women, more accommodation options may be required. However, the numbers of female children held in custody on remand or sentence are likely to be small.[84]

The commission accepts that inappropriate behaviour by young people once in a YJC or youth unit would need to be acted on. We therefore recommend creation of an administrative power allowing for the transfer of young people to an adult facility if they are subsequently found to be unsuitable for placement in a YJC. This is currently provided for in section 469 of the CYFA for young people sentenced to YJCs. A similar provision should be created to cover transfer of young people on remand. The transfer decision should be made by an independent body similar to the Youth Parole Board.

No such provision is required for transfer from a Youth Unit because young people would simply be moved from one part of an adult prison to another.

RECOMMENDATIONS

132. The new Bail Act should provide magistrates and judges with the power to remand a young person (18–20) to either a Youth Justice Centre (YJC) or a Youth Unit within an adult correctional facility following an assessment by Youth Justice or Corrections Victoria. The placement decision should reside with the decision maker, taking into account the assessment. If a young person is assessed as suitable for placement in either facility and the decision maker remands the young person elsewhere, the decision maker should be required to provide reasons for that decision.

133. Youth Justice and Corrections Victoria should develop and distribute clear criteria for the assessment of a young person's suitability to be remanded to a YJC or Youth Unit.

134. The Bail Act should include an administrative power allowing for the transfer of young people to an adult facility if they are subsequently found to be unsuitable for placement in a YJC, similar to that in section 469 of the CYFA.

82 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 15.

83 Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 161–162.

84 A solicitor from the Youth Unit at Victoria Legal Aid advised on 27 April 2007 that he was not aware of any problems with capacity of the unit, and that there are often no young women there.

In both cases there is no need to create a right to appeal the transfer decision because transfer will trigger a new facts or circumstances bail application. Continued remand of the young person will then be reconsidered by the court in light of the young person's incarceration in an adult facility. For young people transferred from YJCs, the court should decide whether to order assessment for the Youth Unit if that has not already been done administratively. For young people transferred from the Youth Unit to mainstream adult prison, the court will decide whether this is sufficient reason to release them on bail. The commission recognises that this is currently the only option open to the court, and young people are often released on bail because the decision maker does not want to incarcerate them with mainstream adult prisoners.