



**An escalating problem:
Responding to the increased
remand of children in Victoria**

October 2015



Children should be deprived of liberty only as a last resort for the shortest appropriate period of time.

United Nations Convention on the Rights of the Child
Article 37b

Introduction

In 2014 and 2015 the number of children* held on remand in Victoria has dramatically increased, including a significant increase in children under 15. This is being driven by reforms to the Bail Act in December 2013 that impose the same conditions and restrictions on children as are applied to adults.

Failing to distinguish between children and adults in this way puts Victorian practice out of step with the core principles of the *Children Youth and Families Act 2005* to act in the best interests of children and to use prison only as a last resort, and is also inconsistent with our international commitments under the UN Convention on the Rights of the Child.

Victoria's strong record in youth justice

Most young offending is episodic, transitory and unlikely to constitute a risk to the safety and welfare of the community.¹ In recognition of this and of the particular vulnerabilities of children, most modern youth justice systems both in Australia and overseas aim to divert children away from the criminal justice system.² This approach is also informed by evidence that diversion, and use of welfare-based and restorative justice approaches, are more effective in reducing re-offending among children than use of custody and prison sentences.^{3 4}

Victoria has developed a particularly strong approach to youth justice that has effectively diverted most children from further contact with the justice system, at the same time as consistently having a youth crime rate that is far lower than the national average.

- In 2013-14, Victoria had 1.4 per 1,000 children under supervision, compared to 2.3 per 1000 nationally⁵
- In the June quarter 2015 Victoria had 1 in 8,500 children in detention, both sentenced and unsentenced, compared to 1 in 3,000 nationally⁶
- In 2013-14 recidivism, measured by the proportion of children with more than one supervised sentence, was 33% in Victoria, compared with 38% nationally⁷

- The youth crime rate in 2013-14 was 24.6 per 1,000 children in Victoria, compared with 30.8 per 1,000 children nationally.⁸

In addition, Victoria is the only Australian jurisdiction to have a 'dual track' system in which some young people aged 18 to 20 can be sentenced to youth detention instead of an adult prison. As a result of the dual track system around half of all 18-20 year old offenders are detained in youth facilities.⁹

When can a child be placed on remand?

How the police decide to deal with a child who has allegedly committed a criminal offence directly affects their risk of remand. Where police issue a caution or commence proceedings by issuing a summons, the question of bail or remand will not arise. However, where police choose to arrest and charge a child, decisions over whether or not to grant bail or remand must be made. A child can be placed on remand (i.e. refused bail) after being arrested by police in relation to a suspected criminal offence, before entering a plea, while awaiting trial, during trial or awaiting sentence.

Increase in children on remand

Recent data showing a sharp rise in the remand of children in the past 12 months including among children under 15 and Aboriginal children, is a worrying departure from this approach. This rise is not explained by a concurrent increase in crime rates or offending patterns over that period.

Statistics from the Victorian Department of Health and Human Services¹⁰ (DHHS) reveal that in the 12-month period following the introduction of Bail reforms, there was:

- a 57% increase in the number of children being admitted to remand (from 112 to 176)
- a large increase in the number of children admitted to remand charged with breach of bail, either singularly or with other charges (from 14 to 136)
- a 45% increase in the number of children remanded after hours (from 128 to 186)
- a significant increase in the number of Aboriginal and Torres Strait Island children admitted to remand (from 12 to 32), including those aged between 10-14 years (from 1 to 12).

These recent increases represent a serious escalation of a trend previously highlighted as a problem in Jesuit Social Service's 2013 report *Thinking Outside:*

* Throughout this paper, the term 'children' is used purposefully to refer to persons under 18 years of age. This is consistent with the definition of the governing legislation, the *Children, Youth and Families Act 2005* (CYFA).

*Alternatives to remand for children.*¹¹ Data from the 2014-15 Victorian Youth Parole Board Annual Report highlights the rise in the number of remand orders issued for children from 2004 to 2015.¹²

Drivers of increased rates of remand

A close analysis of the offences leading to remand indicates that the 2013 amendments to the *Bail Act 1977* have been a significant contributor to increase in remand for all ages, with a disproportionate impact on children.

Jesuit Social Service's analysis of Victorian Crime Statistics Agency data between 2013-14 and 2014-15 shows that children are being disproportionately charged with breaches of bail offences, when compared with those aged 18-20 and older adults. Breaches of bail offences:

- more than doubled for 10-17 year olds from 463 to 1,145 (147% increase);
- increased from 825 to 1,329 for 18-20 years olds (61% increase); and
- increased from 6,166 to 9,146 for adults 21 and over (48%).

To a much lesser extent amendments to the *Family Violence Protection Act 2008*, which came into effect in April 2013 appear to have also had an impact on remand. Breaches under the family violence legislation:

- have risen from 86 in 2010-11, to 131 in 2012-13 to 159 in 2014-15 for those aged 10-17; a 20% rise from 2012-13 to 2014-15¹³
- increased from 4,433 in 2012-13 to 7,432 in 2014-15 for adults 21 years and over; a 68% rise.

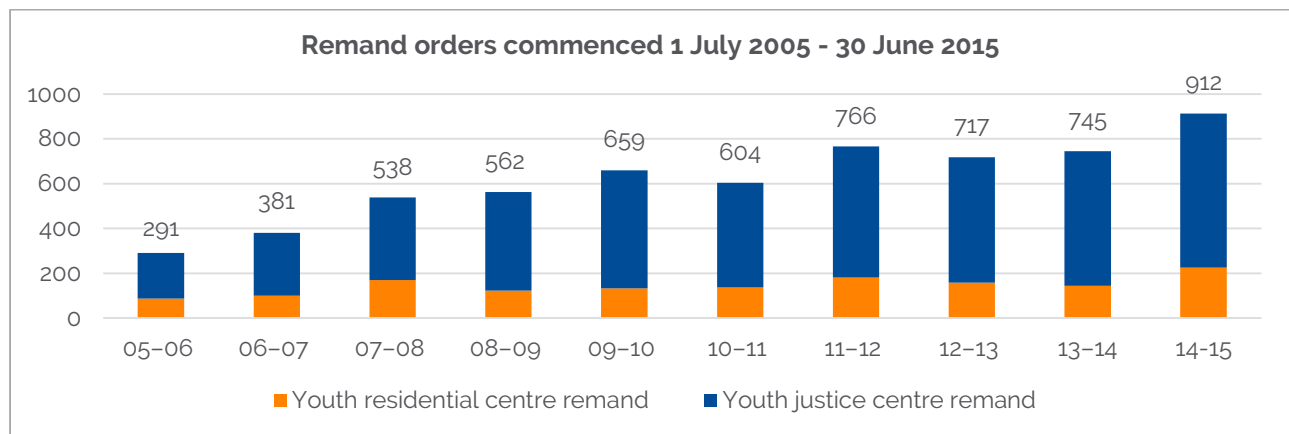
Changes to the Bail Act 1977

New offence codes under the amendments to the *Bail Act 1977* came into effect in December 2013, including contravention of certain bail conditions and committing an indictable offence whilst on bail. The amendments also include a list of bail conditions that may be imposed such as residing at a particular address; being subject to a curfew; being subject to a geographical exclusion zone; not driving a motor vehicle; and not contacting specified persons or classes of person.

Prior to the amendments being passed, concerns were raised that these changes would increase the number of children and young people on remand.¹⁴ A review of the Bail Act by the Victorian Law Reform Commission (VLRC) in 2007 specifically recommended that youth provisions be included in the Act to ensure children were provided with a child appropriate response.¹⁵ The VLRC also recommended against making it an offence to breach bail conditions, on the basis that this would have the potential to further criminalise children. The VLRC stated that 'bail conditions more onerous than sentencing orders are sometimes imposed on children', often 'without organising support for the child'.¹⁶ Unfortunately, the VLRC's recommendations were not taken up.

Changes in police practice

Changes in police practice appears to have coincided with the amendments to the Bail Act, with police issuing fewer summons and more strictly policing bail. This is clear in data from the Victorian Crime Statistics Agency on arrest and summons (as it relates to new offences under the Bail Act and Family Violence Protection Act), which shows:



- In 2012-13 for 10 to 17 year olds, 172 offences resulted in arrest, while 337 resulted in summons or intent to summons.¹⁷
- In 2014-15 this ratio was reversed with 720 offences resulting in arrest, while 377 resulted in a summons or intent to summons.

This change in police practice is one of the key factors, underpinned by the legislative changes, driving the rising rates of young people on remand.

No increase in crime rates

The data demonstrates that the rise in remand cannot be blamed on other factors such as a rise in crime rates.¹⁷ In fact ABS statistics for 2013-14 find that the number of youth offenders in Victoria decreased by 14% (or 2,668 offenders) over the 12-month period from 19,691 to 17,023.¹⁹ Nor is there evidence that children are committing more serious or violent crimes and therefore being less likely to be granted bail.

Rather, ABS statistics show a steady decrease in children committing crimes against the person over 2008 to 2014.²⁰ Recent sentencing data from the Children's Court also shows there has not been an increased number of children being sentenced.²¹

What protections in law protect children in relation to remand?

The *Children, Youth and Families Act (CYFA) 2005* provides the overarching framework for the youth justice system in Victoria and sets out a number of protections for children, including restrictions on remand and bail and the requirement that, unless exceptional circumstances exist, children should be proceeded against by summons rather than by arrest (Part 5.2, Division 1. 345). The CYFA requires that a child cannot be refused bail simply because they have inadequate or no accommodation; and limits remand of children to a maximum of 21 days.

Australia also has international obligations under several United Nations instruments to use youth detention of any kind as a last resort only and for the minimum necessary period. These obligations include the Convention of the Rights of the Child (United Nations 1989), the standard minimum rules for the administration of juvenile justice (the 'Beijing Rules') (United Nations 1985) and the rules for the protection of juveniles deprived of their liberty (the 'Havana Rules') (United Nations 1990).

Other factors that may be contributing to the rise in remand

Jesuit Social Service's *Thinking Outside* (2013) report identified a number of issues that were contributing to a trend of increased use of remand, many of which continue to be problems. These included:

• Responses to children in residential care

Thinking Outside highlighted that children in out-of-home care are highly vulnerable to being placed on remand, often because police are called by staff in residential care facilities to respond to behaviour that in other circumstances would not merit police involvement (such as taking food from the fridge);²² or because they come under additional scrutiny in residential care and staff call police to report breaches of bail, such as being late for a curfew. Often children in out of home care are remanded over the weekend, then released on a Monday when the issue comes before the Children's Court.

• Inadequate availability of suitable accommodation and other supports

The Victorian Sentencing Advisory Council (2012) report into the sentencing of children and young people describes how practical difficulties such as lack of appropriate accommodation can influence bail and remand decisions. The report highlights how factors such as mental health issues, intellectual disability, family violence, substance abuse issues, and limited family support contribute to young people being placed on remand rather than granted bail. Further the report finds that Youth Justice staff at the Melbourne Children's Court experience difficulty finding residential unit vacancies for young people awaiting trial or sentence. As they note, this is despite the fact that under the *Children, Youth and Families Act 2005*, the court cannot refuse a child bail on the sole ground that the child has no or inadequate accommodation.²³

• Uneven access to diversion, bail support and assessment

Access to bail assessment, bail support and diversionary programs play an important role in reducing rates of remand, but are not available at all times or in all locations. Currently there is significant variation in the availability of bail support and diversion options across Victoria, and many children, particularly in rural areas miss out. After-hours support with assessment for bail is provided through the Central After Hours Assessment and Bail Placement Service

(CAHABPS). CAHABPS operates outside of business hours (Monday–Friday, 5pm–3.00am; Saturday–Sunday, 9.30 am–3.00am) and provides a single point of contact for police in matters where police and/or a bail justice are considering remand of a child; but have very few after-hours referral options, are unable to provide in-person assessments outside the metropolitan area, and are not available after 3.00am when 10 per cent of arrests happen.

Remand compounds existing disadvantage

Children who are highly vulnerable are also highly overrepresented among those on remand and in sentenced detention. A snapshot survey reported in the 2015 Youth Parole Board Annual Report of 157 boys and 8 girls detained on sentence and remand shows:²⁴

- 43 per cent had a previous Child Protection order
- 19 per cent had a current Child Protection order
- 62 per cent were victims of abuse, trauma or neglect
- 58 per cent had been suspended or expelled from school
- 33 per cent presented with mental health issues
- 23 per cent had a history of self-harm or suicidal ideation
- 22 per cent presented with issues concerning their intellectual functioning
- 9 per cent were registered with Disability Services
- 87 per cent have a history of alcohol and/or drug misuse
- 82 per cent had offended whilst under the influence of alcohol and/or drugs
- 10 per cent were parents.

Many of these children have grown up in communities in which disadvantage is entrenched and persistent. Jesuit Social Services previous research *Young people on remand in Victoria: Balancing individual and community interests* revealed that 25% of children on youth justice orders in 2010 came from only 2.6% of postcodes.²⁵

This report also revealed that people's level of disadvantage, and/or minority status had more impact on their likelihood of being remanded than the offence or their history of offending.²⁶ Further research in the Jesuit Social Services *Thinking Outside* (2013) report found that

the youngest children remanded are the most severely disadvantaged; with all 27 children first remanded at 10 to 12 years of age in the study period known to Child Protection; 52% before their third birthday.

Aboriginal and Torres Strait Islander children make up the largest increase in the numbers of children admitted to remand – including those under the age of 14 years. Aboriginal children also come in contact with the criminal justice system at an earlier age than other children and are more likely to have repeated contact.²⁷

The experience of remand tends to compound the disadvantage and vulnerability of children in the justice system²⁸ increasing their likelihood of reoffending.²⁹ Remand disrupts children's support networks and engagement in education.³⁰ Remand also demystifies the experience of youth detention, reducing the influence the apprehension of being sentenced to a youth custodial centre may have for a child engaged in a pattern of problem behaviour. Remand also provides vulnerable children with opportunities to mix with others involved in criminal behaviour, leading to peer connections that increase the likelihood of engaging in criminal activity, and in a more entrenched identity formation as a young offender.

The evidence shows that even when the type of charge and prior criminal record are controlled for, children who are remanded in custody before trial are more likely to be sentenced to a period of incarceration.³¹ This is in part because children on remand miss the opportunity to demonstrate to the court that they have 'mended their ways' between the offence and their court appearance.³²

The costs of increasing rates of youth remand

Increasing rates of remand mean higher costs to the community, both in terms of the financial cost of remand but also the costs to the community when young people are more likely to go on to reoffend. The rising rates of remand places pressure on youth detention facilities, police, courts and custodial services in general. The Victorian Government estimates that it currently costs approximately \$528 a day to keep a young person in a youth justice facility, compared to approximately \$52-54 a day for community based supervision.³³

Conclusion

The recent escalation in use of remand for young Victorians has been a direct consequence of amendments to the Bail Act in December 2013, combined with an associated change in police and judicial practice in the granting of bail and the policing of bail breaches.

This increase in remand is undermining an approach to children in the justice system that has consistently achieved positive outcomes for both the children involved and the broader community. It is in contravention of our international obligations to use detention of children only as a last resort, and of the principles and protections for children in our own *Children, Youth and Families Act 2005*.

The damage being caused to extremely vulnerable children, and the risk posed for the inevitable increase in offending that will result necessitates an urgent and thorough response. Most critical is legislative reform to bring Victoria's response into line with the Convention on the Rights of Child and more effectively enact the principle of best interest.

Reforms are also needed to police practices and to the supports and alternatives available to children, and police and the courts in responding to them. Too often problem behaviour is a signal that children are at risk and experiencing serious distress and trauma. This requires rapid assessment and response to protect and effectively support children, and not a punitive reaction.

Children also need the opportunity to learn from their mistakes, and where appropriate to make amends for behaviour that has harmed others. The Victorian Government has already strengthened diversion options by making pre-plea diversion available in eight courts across Victoria. This now needs to be further strengthened with a legislative framework, and expansion of programs to all courts.

Recommendations

Legal and legislative reforms:

1. Strengthen legal protection for children by:

- a. amending the *Children, Youth and Families Act 2005* to provide a child and youth specific bail process, and
- b. amending the *Bail Act 1977* to exclude its application to children.

In our view children will be more effectively and consistently protected by consolidating bail legislation relating to children into the CYFA with its overarching principle of best interests.

2. Implement the recommendations of the Victorian Law Reform Commission Review of the Bail Act 1977 to:

a. amend Section 345 of the *Children, Youth and Families Act 2005* to:

- i. impose a presumption in favor 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 section 345; and
- ii. to provide for the Magistrate to question the informant on oath as to why the child was not summonsed, if it appears to a magistrate that the informant has used the arrest and charge procedure inappropriately against a child.

3. Developing a clear, published policy for Victoria Police 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.

4. Increase the age of criminal responsibility from 10 to 12 years

Victoria's current practice of holding 10 and 11 year old children in detention is particularly concerning and is in clear breach of our international Convention obligations. Raising the age of criminal responsibility from 10 to 12 years will reduce the number of young children (aged 10 or 11) who are currently admitted to remand, and better align our legislation with evidence about children's development of capacities to be criminally responsible.

5. Amend the *Children, Youth and Families Act 2005* to include a legislative framework for diversion that imposes a presumption in favor of diversion and provides a flexible range of diversion options for police and courts.

Program reforms and responses:

6. Expand the Koori Children's Court throughout Victoria.

7. Enhance Bail Support by ensuring 24 hour coverage of CAHABPS and statewide coverage of Intensive Bail Support.

8. Reduce the over-representation of children in out of home care in remand by:

- a. providing a restorative model, such as Youth Justice Group Conferencing, as an alternative approach to addressing problem behaviours
- b. revising residential care protocols around involving police to manage anti-social behaviour of children, and
- c. strengthening coordination between youth justice and child protection where children are involved in both systems.

9. Implement a Bail Justice Training Package and enhance police bail training to include a focus on the unique vulnerabilities of children and the provisions of current legislation.

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