

# Reforming Tasmania's Youth Justice System

Submission to the Tasmanian Government

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**CREATE Foundation**

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## Introduction

CREATE welcomes the opportunity to comment and share information as Tasmania seeks to reform its youth justice system.

Young people with an out-of-home care experience are significantly overrepresented in the youth justice system, particularly statutory detention (Australian Institute of Health and Welfare, 2020; Mendes et al., 2014b). CREATE believes this overrepresentation is unacceptable. Children and young people typically enter out-of-home care because of abuse, neglect or domestic violence, and consequently many have experienced complex relational trauma (Bailey et al., 2019). This population are at risk of contact with the justice system, and often present with complex needs, which the youth justice system is frequently not equipped to meet (Baidawi, 2020). Rather than being therapeutic, contact with the justice system can further entrench disadvantage and re-traumatise young people with an out-of-home care experience.

CREATE continues to advocate for a trauma-informed youth justice system. CREATE recommends that justice system professionals are provided with additional training in trauma-informed responses to young people, and that at every level of contact, young people are provided wholistic, trauma informed support. The provision of increased trauma-informed support aligns with research and the recommendations of young people with experiences with out-of-home care and the justice system (CREATE, 2018b).


As the national peak body and systemic advocate representing children and young people with a care experience, we would like to highlight the words of young people. Our submission below is based on the responses of young people who have participated in CREATE's consultations and research reports, and is supported by academic research.

### **Young people with an out-of-home care experience are overrepresented in the youth justice system**

Research shows that children and young people who have been abused or neglected are at greater risk of engaging in criminal activity and of entering the youth justice system (Atkinson, 2018). Oftentimes, these children and young people also have an out-of-home care experience and CREATE believes the over-representation of young people with a care experience in the youth justice system is unacceptable (CREATE, 2018a).

The Australian Institute of Health and Welfare found that of the 7,904 young people under youth justice supervision in 2018-2019, more than half (54%) had also received child protection services in the previous five years. The proportion of "cross-over" contact was increased further when young people were First Nations Australians, female, or had their first contact with youth justice between the ages of 10 and 13 (61%, 71%, and 71% respectively had contact with child protection services in the previous five years). It is worth noting that although the proportion of young people under youth justice orders who had contact with child protection was approximately 1 in 2, among the general population in Australia, only 1 in 33 (3%) young people had contact with the child protection system in 2018 - 2019 (Australian Institute of Health and Welfare, 2020). These figures highlight the extreme overrepresentation of young people with an out-of-home care experience in the youth justice system. CREATE believes this overrepresentation is unacceptable and warrants serious concern from all Australian governments.

Of particular concern is the overrepresentation of First Nations young people in the justice system. First Nations young people are 17 times more likely to have youth justice contact compared to non-Indigenous young people (Baidawi, 2020). Moreover, Indigenous youth are more likely to be charged with a higher number of offences, more likely to be convicted at an earlier age and more likely to be placed in detention facilities (Baldry et al. 2016). The Uluru Statement from the Heart states, "Proportionally, we are the most incarcerated people on the planet. We are not innately criminal



people...And our youth languish in detention in obscene numbers. They should be our hope for the future. The dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.” (2017).

Young people with disabilities, particularly cognitive, mental, or neurodevelopmental disabilities, are also disproportionately involved in the youth justice system at an earlier age (Maclean et al., 2017). In general, young people who have had early justice system involvement have more complex support needs, and have experienced greater maltreatment in their lives (Cho et al., 2019). However, earlier contact with the justice system can entrench disadvantage as it is associated with an increased likelihood that a young people will re-offend (Australian Institute of Health and Welfare, 2020).

Findings from CREATE’s latest report, *Transitioning to adulthood from out-of-home care: Independence or interdependence?*, presenting data from 325 care leavers, showed that 37% of respondents had been involved with the youth justice system whilst in care, and 21% were involved after exiting care (McDowall, 2020). Aboriginal and Torres Strait Islander care leavers were also more likely to have been involved with youth justice after leaving care (31%) compared to non-Indigenous care leavers (18%).

CREATE advocates that there needs to be a prioritisation of prevention strategies across state and territory governments that address the root causes of youth offending to ensure the needs of these young people are met. This includes raising the minimum age of criminal responsibility from 10 years to at least 14 years of age (as advocated by the United Nations), and additional strategies such as greater investment in diversionary strategies that utilise existing community-based services, increased collaboration between youth justice and child protection systems, and the adoption of a trauma-informed youth justice system. Such reform will assist young people achieve their best outcomes, but also lead to reduced recidivism and increased safety for communities (CREATE, 2018a).

## How do we better deliver services to meet the needs of children and young people who are at greatest risk of offending?


Consideration of the risk factors for youth offending gives insight into the early intervention strategies which may meet the needs of this population. Many of these risk factors are relevant or specific to young people with an out-of-home experience. These include: maltreatment (such as abuse or neglect), placement in out-of-home-care, exposure to offending peers, placement instability and lack of support when transitioning from out-of-home care (Cutuli et al., 2016; Malvaso et al., 2017; Mendes et al., 2014a; Widom, et al., 2018). Young people often enter care due to maltreatment, may experience additional trauma in out-of-home care and be unable to access needed support services to address complex trauma, mental illness, or developmental difficulties (Mendes et al., 2014a, Mendes et al., 2014b). The prevalence of youth with an out-of-home-care experience in juvenile detention makes it evident that the needs of this population are not being adequately met.

In CREATE’s Youth Justice Report (2018b), young people described some of the factors involved in their offending:

*they just bought you clothes you didn't get much choice ...so I had to go and steal better clothes., I was only 15 and my first time in care was in a house with other kids doing crime, I never did this stuff before I came into care. (Male, 15)*

*...needed money as I had been released from detention, I was living in a shelter and had nowhere to live and the residential unit wouldn't have me back, so I re-offended. (Male, 15)*

A risk factor of particular concern is systemic bias and criminalisation of young people with an out-of-home care experience. Young people in out-of-home care are more likely to receive a conviction when arrested, have longer remand periods, greater policing of criminal orders and more serious sentences (Baidawi, 2020; Malvaso et al., 2017). Young people in out-of-home care, particularly residential care, can also experience justice system involvement as a response to “challenging behaviour”, or in



situations which other households would probably not involve police, e.g., minor property damage (Gerard et al., 2019; Staines, 2017; Victorian Legal Aid, 2016). When CREATE spoke to 77 young people about factors involved in their offending, the most frequent theme identified was justice system involvement in actions which may have been tolerated in a family home, e.g., smoking marijuana in a residential unit and a young person charged with trespassing for entering the office area of a residential accommodation.

*Police were called out to the residential facility because I was using bad language towards the workers* (Female, 14)

*There was new workers on and they didn't know how to deal with me and my brother arguing and escalated the situation. Me and my brother had a fight and I did property damage.* (Male, 16)

The involvement of police officers in relatively minor incidences for young people in out-of-home care may indicate that some residential workers, foster and kinship carers are having difficulty supporting the young people in their care. Research shows that the complex trauma that many young people in out-of-home care have experienced can affect neurobiological development, e.g., a young person's ability to regulate emotions and cope with stress (Kezelman & Stavropoulos, 2016). While this can manifest in distressing ways ("challenging behaviour"), trauma-informed approaches can provide young people with more sustainable tools to cope rather than punishment (Buffington, et al., 2010). In CREATE's National Youth Justice Report, young people expressed that they felt unsupported before, during, and after their contact with the justice system and identified lack of support as a factor in their offending.

*If I had more adult support prior to that time I might not have felt the need to get so drunk.* (Female, 17)

*I don't think they get trauma or behaviours expressed by children and young people in care so there isn't a lot of understanding towards them. It's a lot about punishment rather than rehabilitation. It's more you did the wrong thing regardless of the reasons behind it.* (Female, 15)

*There is a reason why young people offend...more often than not it's a call for help* (Female, 14).

*The residential workers should have been a bit more trained to deal with us. We would often get new workers every day, so they didn't really know us.* (Male, 16)

*(I would have liked) More support from my carer and caseworker to talk through feelings about why it happened and how I felt after.* (Male, 14)

#### **CREATE recommends:**

- Government funding and support for carers, caseworkers, and other professionals in contact with young people in out-of-home care to be provided with training in trauma-informed approaches and de-escalation. This may include planning surrounding the identification of "triggers" for young people and the early provision of specialist support services, e.g., mental health support, occupational therapy or other allied health support.
- The development of a shared policy between out-of-home care providers and police departments regarding when police involvement is necessary, particularly in minor incidences in residential care, to ensure that young people are not having contact with police that would not occur in other family environments.

## How might police be better supported to deliver diversionary processes for young people with an out-of-home care experience?

Police officers are usually a young person's first contact with the justice system. However, relationships between young people and police officers are often adversarial and hostile (Richards et al., 2019). Negative interactions between young people and police can engrain attitudes about the other, which affect behaviour; for example, young people who expect to be treated unfairly by police officers may respond to them with hostility. This, in turn, can affect the behaviour of police officers. Concerningly, this dynamic affects young people's access to diversion options, as police officers use their discretion to assess whether to deliver diversion, and make these decisions in part based on a young person's attitude (Green et al., 2020).

When CREATE interviewed 195 young people with a care experience who had experience with the justice system (either as offenders, victims, because they were absent from placement, or another crisis), young people frequently commented on negative interactions with police officers and the lasting emotional consequences of these interactions. Young people most frequently described feelings of disrespect, humiliation, and fear and some described police officers using excessive force. Moreover, when asked if anything would make their experience with the justice system better, the most frequent response among young people was that they would like more empathy and less antagonism from police officers (CREATE, 2018b).

*I felt I was treated unfairly. The police dragged me by my hair out of the vehicle... I was scared, I did not want to be there, I was sedated. I woke up in a nappy and t-shirt ... That experience made me feel scared and degraded, I felt helpless. I was just a child, I had no authority and felt like it was my resi worker's words over mine. (Female, 17)*

*They made me feel like a bad person, I don't know why someone didn't just sit down and talk to me about what was going on and why. I had no support, no one cared. If they had asked me why I could have told them why I was doing it and it might have been able to be fixed earlier. (Male, 15)*

*The police should be trauma informed when dealing with young people. I was only one young person acting out, I didn't need four officers sitting on me... (Female, 14)*

*If the police had treated me with more respect and not like a violent criminal and handled me like one, then I would have been more calmer. (Male, 17)*

Research shows that police officers' views of young people and of diversionary processes affect their discretionary decision-making, and therefore can affect the outcomes for young people (Green et al., 2020; Vera Sanchez & Adams, 2011). Green and colleagues found through 25 in-depth interviews that while police officers generally thought that youth offenders had complex needs that required support through diversion options and referral, they experienced barriers to offering diversion such as heavy workloads and lack of training and knowledge. Additionally, some police indicated they were more likely to give leniency for young people who they thought had better prospects in mainstream education/work, young people who expressed remorse, or had a pleasant attitude. For example, a police officer spoke about an "ideal" young person to deliver diversionary processes to, "He's going through his HSC, he's looking for a career—you know, he's not a dropkick. He's not a troubled youth...That's exactly what the Young Offenders Act is designed for." (Green et al., 2020, p. 10). Unfortunately, beliefs among police officers that more privileged young people are more deserving or will receive more benefit from diversion means that the young people who need support most are excluded. Police officers relying on stereotypes about who is a "troubled youth" may also account for research showing that First Nations young people are less likely to receive diversion options than non-Indigenous young people (Cunneen et al., 2021). Additionally, if police officers make decisions about diversion based on young people's attitude or demeanour, young people who have complex trauma,

disabilities, and those who have difficulty with emotional regulation are more likely to be excluded from diversion options.

*We were treated as criminals by default. I had a lot of dreams and looking into doing courses and doing things to better my life. I feel that the police and courts contributed to making me feel like crap by not listening to me - I was just another resi kid in their eyes. (Female, 17)*

*They were abrupt, no discussion on what the issue was or why I did what I did, they just charged me without even thinking about talking to me... I was another welfare kid running around that they didn't have the time or respect for which just made me act up even more. (Female, 15)*

#### **CREATE recommends that:**

- Police officers receive additional training about youth specific trauma-informed practice, complex needs, and de-escalation. Police officers and staff may also require information about diversion and support services, including their aims and benefits to increase staff's motivation to refer young people.
- Police officers keep records of young people they choose to provide diversion options to and those they don't, in order to improve equitable access for First Nations young people, those in out-of-home care and young people experiencing other disadvantages. This could be used to engage in reflective practice regarding police officers' attitudes towards young people.
- Governments fund the implementation of Youth Specialist Officers in police departments.
- Governments ensure that diversionary programs are available at all points of the justice system.
- Aboriginal and Torres Strait Islander elders be formally involved in decisions about whether to include diversion options for young people and are invited to be leaders in diversion programs for First Nations young people (Cunneen et al., 2021).

#### **What might a therapeutic youth justice court look like?**

Despite the higher likelihood of young people who have contact with the youth justice system having experienced complex trauma, many characteristics of youth justice court are not trauma-informed. Research has shown that young people strongly value feeling respected, included and listened to in the justice process, regardless of the final outcome (Commonwealth of Australia, 2017). Unfortunately, youth justice court often uses complex language and adversarial processes which can exclude and re-traumatise young people (Gal, 2006; Quas & Goodman, 2012). In CREATE consultations, young people have described fear and worry related to not understanding what was happening (CREATE, 2018b).


*They took my fingerprints. That made me felt violated. No one was explaining anything. I didn't tell them anything because they were against me not with me. (Female, 15)*

*I was quite freaked out throughout the whole process because I didn't know what was going to happen. (Female, 9)*

*The process between being arrested and my court date. I had no idea what was going on. (Male, 17)*

*(The lack of communication felt) Like you are being left behind again, like when you are coming into care. (Female, 14).*

Moreover, despite the complexities of justice processes, young people with an out-of-home care experience are often unsupported when they are questioned by police and in youth justice court. In CREATE's National Youth Justice Consultation, 40% of young offenders reported having no support during initial contact with police and 19% reported no support person during court, including a lawyer



(CREATE, 2018b). Moreover, some young people perceived that the “support” person who accompanied them was not supportive at all.

*It would of helped a lot to have a support person with me while I spoke with the police.*

(Female, 12)

*Me, myself and I, except when they interviewed me and they got an independent person to witness it, but they did not really help me.* (Female, 14)

CREATE recommends the adoption of trauma-informed approaches in youth-justice courts. Trauma-informed approaches involve recognition that complex trauma affects a young persons’ development and ability to cope with stress and that some offending behaviours may serve protective purposes. Therefore, when young people exceed their capacity to cope with overwhelming circumstances, automatic “survival” responses can override the ability to consider the threat of punishment, e.g., becoming frightened by a police officer while being arrested and striking them (Randall & Haskell, 2013). Practices which may be utilised in youth-justice court include: empowering, non-judgemental language and providing young people clear, developmentally appropriate explanations of what is happening. Trauma-informed approaches reduce the stress associated with justice-system involvement, increase cooperation and make police interviews and court less likely to be traumatising for young people (Kezelman & Stavropoulous, 2016).

*There is a reason why young people offend, we need professional workers, police and lawyers who understand why young people offend, more often than not it’s a call for help.* (Female, 14)


CREATE is concerned that children and young people as young as twelve are reporting having interviews with police officers or going to youth justice court unaccompanied by a supportive adult. Research has identified interagency confusion and lack of information sharing as a factor in circumstances where young people are unsupported in youth justice contact (Mendes et al., 2012). Moreover, an “interview friend” is not a legal requirement in all Australian states and territories when children are questioned by the police, including Tasmania. Despite the Federal *Crimes Act 1914* (2021) stating that young people under 18 years must having an “interview friend” with them during questioning by police officers (if suspected of a Commonwealth Crime), Tasmania’s *Youth Justice Act 1997* only states that if practicable a young person’s guardian should be notified of the young persons’ arrest. This does not guarantee that a child or young person will be accompanied by an adult support person when questioned by police officers in Tasmania. The *Youth Justice Act 1997* (TAS) would certainly be strengthened and more aligned with trauma-informed approaches if this were changed.

#### **CREATE recommends:**

- The adoption of trauma-informed training and practices for all youth court professionals.
- The development of clear policies and procedures between child protection, youth justice, and community service agencies regarding who is responsible for supporting young people in each step of the youth justice process, i.e., police interviews, court proceedings, visits in detention etc. This may involve sharing information as necessary.
- Review of the *Youth Justice Act (1997)*, specifically regarding whether additions should be made which explicitly require young people under 18 years of age to be accompanied by an adult support person when interviewed by police officers.

## **Conclusion**

Thank you again for the opportunity to provide comment on the upcoming reforms in the Tasmanian youth justice system. Youth justice is a complex field that requires integrated, sustained support from Governments, and approaches which are evidence based and informed by young people’s experiences. CREATE welcomes the leadership the Tasmanian government is taking with this reform.





Should you have any questions or require additional information, please do not hesitate to contact Dr Joseph McDowall, Executive Director (Research) CREATE Foundation E: [joseph.mcdowall@create.org.au](mailto:joseph.mcdowall@create.org.au)



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## About CREATE

CREATE Foundation is the national peak consumer body for children and young people with an out-of-home care experience. We represent the voices of over 45,000 children and young people currently in care, and those who have transitioned from care up to the age of 25. Our vision is that all children and young people with a care experience reach their full potential. Our mission is to create a better life for children and young people in care.

To do this we:

- **CONNECT** children and young people to each other, CREATE and their community to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.

We achieve our mission by providing a variety of activities and programs for children and young people in care, and conducting research and developing policy to help us advocate for a better care system.