



Australian
Human Rights
Commission

Review of the age of criminal responsibility

Submission to the Council of Attorneys-General Age of Criminal
Responsibility Working Group

26 February 2020

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Information Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

1	Introduction	3
2	Recommendations.....	4
3	International human rights law.....	4
4	Reasons for raising the minimum age of criminal responsibility	6
4.1	<i>Most child offenders have disadvantaged backgrounds and complex needs</i>	6
4.2	<i>Aboriginal and Torres Strait Islander children are overrepresented in the younger youth justice population</i>	8
4.3	<i>Children have not developed the requisite level of maturity by 14 years</i>	10
4.4	<i>Younger cohorts commit less serious offences.....</i>	10
4.5	<i>Younger cohorts are more likely to reoffend if they encounter the justice system</i>	11
4.6	<i>Detention has an adverse impact on children.....</i>	11
4.7	<i>The minimum age of criminal responsibility is low compared to other countries.....</i>	12
5	Doli incapax.....	14
6	Early intervention, rehabilitation and diversion.....	17
6.1	<i>Early intervention.....</i>	17
6.2	<i>Diversionary programs.....</i>	19

1 Introduction

The Australian Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group review.

The Commission is Australia's National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora. The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.

The National Children's Commissioner has made recommendations about the age of criminal responsibility to the UN Committee on the Rights of the Child as part of its consideration of Australia's periodic report on implementation of the *Convention on the Rights of the Child* (CRC).

The Commission considers the minimum age of criminal responsibility in Australia, of 10 years, to be too low. While offending by young children should not go unaddressed, criminalising children for their behaviour at such a young age is largely ineffective at preventing future offending behaviour while also running counter to human rights.

Reforming the youth justice system to apply children's rights properly is particularly important for Aboriginal and Torres Strait Islander children and those with disability who are overrepresented in our youth justice statistics. An approach focused on rehabilitation as opposed to retribution and punishment is required for the benefit of both children and society.

It is clear that raising the age of criminal responsibility alone will not solve the problem of youth offending. However, it is hoped that raising the age will open the door to a new approach to dealing with the younger cohort of offenders, one that focuses on their welfare and which aims to prevent future offending and reduce recidivism. While there are barriers to raising the age across Australia, these are not insurmountable and the potential benefits to society are substantial.

2 Recommendations

Recommendation 1

All Australian Governments should raise the minimum age of criminal responsibility to at least 14 years.

Recommendation 2

The Australian Government should commission a national review of the operation of doli incapax and its effectiveness in providing protection to children who lack the capacity to understand that what they did is seriously wrong.

Recommendation 3

If doli incapax is retained, Australian Governments should:

- fund legal education on doli incapax for magistrates, prosecutors, defenders and children in the youth justice system
- adequately resource the legal system to apply the doli incapax test in all cases and ensure pretrial assessments of a child's cognitive and mental capacity are conducted.

Recommendation 4

Australian Governments should expand the availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs.

Recommendation 5

Australian Governments should better implement the principle of detention as a last resort by identifying and removing barriers for young offenders accessing diversionary programs, in particular for Aboriginal and Torres Strait Islander children.

3 International human rights law

Children in contact with the criminal justice system have the same rights as other children—including the right to be safe, be heard, and be treated in a way that promotes their dignity and worth. They also have special rights specific to their

experiences and developmental needs. According to the CRC, reintegration and rehabilitation should be a key aim of how children are treated in youth justice.

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.¹

Wherever possible, States Parties should seek to promote measures for dealing with child offenders without resorting to judicial proceedings. Detention should only be used as a measure of last resort, and for the shortest appropriate period of time.

Importantly, the CRC states that the law must set a minimum age below which a child should not be considered to have the capacity to commit an offence:

Article 40 of the UN Convention on the Rights of the Child requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law.

While the CRC itself does not specify what this age should be, General Comments of the UN Committee on the Rights of the Child provide persuasive guidance on what is an 'acceptable' age.

General Comment 10 (2007) on children's rights in juvenile justice encouraged States Parties to increase the age of criminal responsibility to 12 years at an absolute minimum, and to continue to increase it to a higher age level. In a recent re-drafting of General Comment 10 (renamed General Comment 24), the Committee recommended all countries increase the minimum age of criminal responsibility to **at least 14 years of age**.²

The Committee also pointed to developments and neuroscientific evidence that shows adolescent brains continue to mature even beyond teenage years, and therefore commends States Parties to have an even higher minimum age, for instance 15 or 16 years.³

This guidance is now being reflected in the Committee's considerations of State Parties and their implementation of child rights. In its Concluding Observations on Australia in 2019, the Committee urged the Australian Government to raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14.⁴

Other international experts on child rights are turning their attention to the issue of raising the minimum age as a means to lower rates of detention of children. For example, Professor Manfred Nowak, the Independent Expert leading the Global Study on Children Deprived of their Liberty, in a summary of his report to the UN General Assembly in August 2019, recommended a minimum age of criminal responsibility which shall ‘not be below 14 years of age’.⁵

Recommendation 1

All Australian Governments should raise the minimum age of criminal responsibility to at least 14 years.

4 Reasons for raising the minimum age of criminal responsibility

In each jurisdiction in Australia, the law provides a conclusive presumption that a child under 10 years of age cannot commit an offence on the basis that they are not criminally responsible for that offence.⁶

The Commission considers the minimum age of 10 to be too low.

4.1 Most child offenders have disadvantaged backgrounds and complex needs

Many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs better addressed outside the criminal justice system.⁷ These include experiences of poverty, homelessness, educational exclusion and disengagement, abuse and neglect, drug and alcohol issues, disabilities and health concerns, including mental health problems.⁸

Although many of these problems also characterise adult criminal justice populations, they can cause greater problems among young people, who are more susceptible—physically, emotionally and socially—to them. Many of these problems are compounded by their psychosocial immaturity, and their susceptibility to exploitation and peer group pressure.

There is increasing research about the prevalence of mental health disorders and cognitive disabilities of young people in the youth justice system.⁹ Children with disability are overrepresented in the youth justice system, particularly children with intellectual disabilities or psychosocial disabilities.¹⁰ In one survey of the NSW youth justice system in 2015, 83.3% of children surveyed met the criteria for at least one psychological disorder—six times the prevalence rate for children in the general population.¹¹

Another study in Western Australia found that 89% of children in detention between May 2015 and December 2016 had at least one domain of severe neurodevelopmental impairment and 36% were diagnosed with Fetal Alcohol Spectrum Disorder (FASD).¹² The majority of those with FASD had not been previously identified, highlighting a need for improved diagnosis.¹³

Disability advocacy organisations have argued that the high incarceration rate for children with disability is due to the failures in mental health, child protection, housing, disability and community service systems to provide appropriate assessment and supports.¹⁴ The UN Committee on the Rights of Persons with Disabilities, in its Concluding Observations on Australia in September 2019, expressed concern about the overrepresentation of convicted young persons with disabilities in the youth justice system, especially male youth from Indigenous communities.¹⁵

The complex needs of children in the justice system are also highlighted by data on the crossover between the child protection system and the youth justice system. A four-year study between 1 July 2014 and 30 June 2018 found that 50% of those under youth justice supervision (4,035 young people) had also received child protection services during the period. The younger people were at first supervision, the more likely they were to have received child protection services during the period (62% of those aged 10 at first supervision, compared with 27% of those aged 17).

Children placed in out-of-home care are 16 times more likely than children in the general population to be under youth justice supervision in the same year.¹⁶ This risk increases when the child is Aboriginal or Torres Strait Islander.¹⁷

A recent Australian Institute of Criminology report presented the findings from a two-year study (2016-18) of Victorian children and young people involved in both the youth justice and statutory child protection systems. It found that these 'cross-over kids' were overwhelmingly affected by cumulative harm across their lives and faced considerable co-occurring challenges affecting their engagement

with statutory and non-statutory social systems. The study's findings suggest that early child and family support and intervention is central to the prevention of childhood maltreatment and other harm experienced by these children, which affects their behaviour. It also suggests that our responses to early offending need to be re-examined, with therapeutic responses encouraged, and the development of differential youth justice responses for these children.¹⁸

4.2 Aboriginal and Torres Strait Islander children are overrepresented in the younger youth justice population

Raising the age of criminal responsibility would help to decrease the rate of overrepresentation of Aboriginal and Torres Strait Islander children under youth justice supervision and detention.¹⁹

While the overall numbers of all children under youth justice supervision in Australia on an average day fell by 16% between 2012–2013 and 2016–2017,²⁰ the level of overrepresentation of Aboriginal and Torres Strait Islander children has risen over the same period.

On an average day in 2017–18, Aboriginal and Torres Strait Islander children aged 10–17 were 17 times more likely than non-Indigenous children to be under supervision. This level was higher in detention (23 times as likely) than community-based supervision (17 times as likely).²¹ In the Northern Territory, as at 20 June 2018, 38 juveniles in detention were Aboriginal or Torres Strait Islanders.²²

Aboriginal and Torres Strait Islander children are overrepresented in both detention and community-based supervision at all ages but are particularly overrepresented in the younger age groups (see Tables 1 and 2). According to the Australian Institute of Health and Welfare, on an average day in 2017–18, about half (48%) of all Aboriginal and Torres Strait Islander young people under supervision were aged 10–15 years, compared with one-third (33%) of non-Indigenous young people.²³

During 2017–18, 769 children aged 10–13 years had been under community-based supervision, and 588 children aged 10–13 years had been in detention, the majority Aboriginal and Torres Strait Islander boys.²⁴ About 47 Aboriginal and Torres Strait Islander children aged 10–13 years were in detention on an average day, compared to about 11 non-Indigenous children aged 10–13 years in detention on an average day, in 2017–18.²⁵

Table 1: Numbers of children under community-based supervision during the year by age, sex and Indigenous status, Australia (2017–18)							
	10-11 yrs	12 yrs	13 yrs	14 yrs	15 yrs	16 yrs	17 yrs
Male – Indigenous	43	98	270	474	657	729	740
Male – Non-Indigenous	5	37	155	365	683	927	1,085
Female – Indigenous	9	25	84	159	220	198	186
Female – Non-Indigenous	3	6	34	136	212	232	232

Table 1: Sourced from the Australian Institute of Health and Welfare, Youth justice, Data, Young people under community-based supervision during the year by age, sex and Indigenous, Australia, 2017-18, Table S40b.²⁶

Table 2: Numbers of children in detention during the year by age, sex and Indigenous status, Australia (2017–18)								
	10 yrs	11 yrs	12 yrs	13 yrs	14 yrs	15 yrs	16 yrs	17 yrs
Male – Indigenous	6	39	89	196	310	410	463	403
Male – Non-Indigenous	2	6	32	106	222	379	485	504
Female – Indigenous	0	8	24	55	95	104	96	72
Female – Non-Indigenous	1	3	6	21	83	114	90	77

Table 2: Sourced from the Australian Institute of Health and Welfare, Youth justice, Data, Young people in detention during the year by age, sex and Indigenous, Australia, 2017-18, Table S78b.²⁷

Reasons for overrepresentation of Aboriginal and Torres Strait Islander children in the justice system include legal and policy factors, such as restrictive bail laws and conditions and mandatory sentencing laws,²⁸ and socio-economic factors,

such as a history of social disadvantage, cultural displacement, trauma and grief, alcohol and other drug misuse, cognitive disabilities and poor health and living conditions.²⁹

4.3 Children have not developed the requisite level of maturity by 14 years

The current age of criminal responsibility of 10 years does not align with research into brain development. Children have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility.³⁰ Their developmental immaturity can affect a number of areas of cognitive functioning, such as impulsivity, reasoning and consequential thinking. Research indicates that

The maturation of the prefrontal cortex occurs gradually over adolescence and is near completion by 18 years. This protracted development occurs alongside greater reactivity of the socioemotional systems of the brain and a general increase in dopaminergic activity associated with heightened sensitivity to reward. This creates a window of potential vulnerability in the early to mid-adolescent period during which the likelihood of impulsivity, sensation-seeking and risk-taking behaviours is raised.³¹

Many children can lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings.³²

4.4 Younger cohorts commit less serious offences

In general, children are more likely than adults to commit less serious offences, and they commit more property offences than offences to the person.³³ Research has shown that young people aged 10–14 years are more likely than those aged 15–17 years to have principal offences of theft, unlawful entry with intent and property damage, and less likely to have principal public order and illicit drug offences.³⁴

Further, children aged 10–13 years make up only a small proportion of young offenders. Most young people under youth justice supervision on an average day in 2017–2018 were aged 14–17 (81%), about 12% of young people under youth justice supervision were aged 18 and over, and only 7% of young people under youth justice supervision were aged 10–13 (411 children).³⁵

Research has shown that many young offenders grow out of criminal behaviour and adopt law-abiding lifestyles as young adults. Because they are neither fully developed nor entrenched in the criminal justice system, early interventions can help to foster development away from criminal behaviours.

4.5 Younger cohorts are more likely to reoffend if they encounter the justice system

As one Australian Institute of Criminology study has pointed out, 'the potential exists for a great deal of harm to be done to juveniles if ineffective or unsuitable interventions are applied by juvenile justice authorities'.³⁶

Studies have shown that the younger children are when they encounter the criminal justice system, the more likely they are to reoffend. Between 2011 and 2012, children who were first subject to supervision under the youth justice system due to offending when aged 10–14 years were more likely to experience all types of supervision in their later teens (33% compared to 8% for those first supervised at older ages).³⁷

4.6 Detention has an adverse impact on children

There is increasing evidence that youth detention is not an appropriate environment for younger children.

As the NT Royal Commission found:

any apparent punishment and deterrent value of detention is far outweighed by its detrimental impacts, particularly for the minority group of pre-teens and young teenagers. The reality of this cohort's developmental status; the harsh consequences of separation of younger children from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth detention can interrupt the normal pattern of 'aging out' of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism.³⁸

Given these factors, the Royal Commission recommended that, for children under 14 years, detention should not be a sentencing option, nor should children under 14 years be remanded in detention. Minimum age thresholds for detention are in place in a number of European countries, such as Belgium, Switzerland, Finland and Scotland.³⁹

In 2019 the Global Study on Children Deprived of Liberty examined the impact of deprivation of liberty on the health of children. The Study found that children deprived of their liberty are, by and large, distinguished by poor health profiles. Complex health needs are common. Although in some settings the healthcare may be better in detention than in the surrounding community, these benefits may be undermined by the detention experience.⁴⁰ The available evidence regarding the longitudinal impacts of justice-related detention on health suggests that experiencing any period of detention during adolescence or young adulthood is associated with poorer general health, severe functional limitations, hypertension, and a higher prevalence of overweight and obesity during adulthood. Additionally, recent US-based research demonstrated that a longer cumulative duration of detention during adolescence and young adulthood was independently associated with poorer physical and mental health outcomes later in adulthood.⁴¹

Further, it is widely recognised that incarceration fosters further criminality. This may be particularly the case for young offenders, who, due to their immaturity, are especially susceptible to being influenced by their peers.⁴²

4.7 The minimum age of criminal responsibility is low compared to other countries

Although international comparisons are not in themselves a reason for raising the age, they show that many countries recognise the benefits of a higher age, and that it is possible to have a different approach to youth crime without adverse consequences.

The minimum age of criminal responsibility (MACR) in Australia is low compared with many other countries.⁴³ Although consistent with standards adopted by some other common law countries, such as England, Wales and the USA, the global standard is higher. An international study of 90 countries in 2008 revealed that 68% of those countries had a minimum criminal age of 12 or higher, and the most common minimum age was 14 years.⁴⁴

Most European countries set their age between 14 and 16 years. For example, the minimum age in Denmark, Finland, Norway and Sweden is 15 years of age. The minimum age in Austria, Spain, Hungary, Italy and Germany is 14 years of age. The Netherlands and Ireland have a MACR of 12.

Scotland, which previously had a MACR of 10 years of age, raised it to 12 in June 2019. The Scottish law provides certain safeguards to ensure that harmful

behaviour by children under 12 can be responded to in an ‘appropriate and meaningful way’, which will not criminalise children. The impact of the new law will be reviewed by an expert panel after three years.

Recent data collected by the Global Study on Children Deprived of Liberty showed that the worldwide average MACR was 11.3 years, with a median of 12 years, which falls below the minimum of 14 years recommended by the Committee on the Rights of the Child in General Comment 24. Australia’s MACR of 10 is well below both of these.

The Global Study also pointed out a wide variety of responses to setting a lower limit. Most commonly, as in Australia, a single lower limit is set at which point a child may be charged and prosecuted for any criminal offence. However, at least 39 States set different age limits for different offences, usually allowing children to be held criminally responsible for more serious offences at a lower age. For example, in Ireland, the MACR is 12 but children aged 10 and over can be charged with serious offences, including murder, manslaughter and aggravated sexual assault. In New Zealand, the MACR is 10; however, 12–13 years olds can only be prosecuted for an offence when the maximum penalty is 14 years imprisonment or more (subject to a presumption of incapacity).

While carving out exceptions to the minimum age of criminal responsibility may help to assuage community concern about young offenders of serious crimes, the UN Committee on the Rights of the Child has indicated concern about this practice:

The Committee is concerned about practices that permit the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children’s development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.⁴⁵

Sweden

The minimum age of criminal responsibility in Sweden is 15. Offending by children is viewed as a welfare issue, and social services determine the response to the offending (taking into account the social situation and the previous criminal conduct).⁴⁶ For those aged between 15 and 17, the responsibility is divided between social services and the judicial authorities.⁴⁷

Norway

Norway has a minimum age of criminal responsibility of 15 years. No person can be punished for an offence committed while under the age of 15. Further, a prison sentence can only be imposed on persons under the age of 18 when especially necessary.

The Netherlands

The age of criminal responsibility in the Netherlands has stood at 12 years since 1965. Children under 12 years cannot be prosecuted criminally but are still subject to government intervention and prevention measures such as the voluntary Halt scheme, aimed at diverting children under the age of 12 away from the criminal justice system through conferencing or learning assignments.⁴⁸

In 1995, the Netherlands juvenile criminal law was simplified and modernised by introducing various substitutes to imprisonment for young people.

The number of crimes committed by young people and rates of juvenile recidivism have been reduced, and a 60% decrease in youth crime from 2007 to 2017.⁴⁹ The approach of the Netherlands in diverting children away from the criminal justice system and various sentencing practices appears to play a role in this reduction.

Following the 2010 CRC Committee Observations on Norway, a newly formed emphasis was placed on preventative and restorative justice measures for young persons.

There has been a reduction in the number of criminal offences in children between the ages of 10 and 14 years in the last 10 to 15 years.⁵⁰

5 Doli incapax

In addition to the minimum age, the principle of doli incapax operates throughout Australia.⁵¹ The principle of doli incapax assumes that children aged 10 to 14 years are 'criminally incapable' unless proven otherwise.⁵²

Unlike a criminal prosecution, the onus is on the prosecution to rebut the presumption of doli incapax. If the prosecution fails to prove beyond reasonable doubt that the child understood their conduct was seriously wrong by adult

standards (rather than mischievous or naughty), the child is incapable at law of committing the offence and must be acquitted. The question of whether the presumption of *doli incapax* applies should be asked in every matter involving a child between the ages of 10 and 14.⁵³

If properly applied, *doli incapax* may serve to avoid unnecessary incarceration of children at a young age. The NT Royal Commission argued that if the MACR is raised only to 12, *doli incapax* should be retained in order to provide some protection to 12 and 13 year-olds.⁵⁴

However, the application of *doli incapax* should reflect increasing knowledge of children's development, in particular the knowledge that children's capacity for abstract and consequential reasoning matures through adolescence, and that this capacity develops at a different pace for different children.⁵⁵

The UN Committee on the Rights of the Child has cautioned against systems such as *doli incapax* that set a low MACR but have a higher age below which sufficient maturity must be demonstrated. It points out:

Initially devised as a protective system, it has not proved so in practice. Although there is some support for the idea of individualized assessment of criminal responsibility, the Committee has observed that this leaves much to the discretion of the court and results in discriminatory practices.

States are urged to set one appropriate minimum age and to ensure that such legal reform does not result in a retrogressive position regarding the minimum age of criminal responsibility.⁵⁶

In Australia, there have been ongoing questions raised about whether *doli incapax* is operating effectively.⁵⁷ Early on, a comprehensive review of children's legal rights in 1997 by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission acknowledged that *doli incapax* can be problematic:

For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.⁵⁸

In June 2019, the then Law Council President, Arthur Moses, suggested that *doli incapax* is extremely difficult to apply in court:

the presumption continues to wreak confusion as to whether the defence or the prosecution bears the burden of proving that a child knew their conduct to be wrong. This leads to errors and results in children being held in custody for lengthy periods of time before the presumption can be led or tested in court, and the child acquitted.⁵⁹

The Commission is also concerned that the principle of doli incapax may not be routinely applied across Australia, and is failing to protect children aged 10-14, in particular those who may have cognitive or other difficulties or those in rural, regional and remote areas. However, there is little research on how it operates nationally.⁶⁰ There needs to be an evidence-based review of how doli incapax operates in practice, across all jurisdictions, and whether it provides adequate protection to children who lack the capacity to understand what they did is seriously wrong.

If doli incapax is retained, the Commission recommends comprehensive education of magistrates, prosecutors, defenders and children themselves take place, and the provision of adequate resources to apply the test in all cases.

Recommendation 2

The Australian Government should commission a national review of the operation of doli incapax and its effectiveness in providing protection to children who lack the capacity to understand that what they did is seriously wrong.

Recommendation 3

If doli incapax is retained, Australian Governments should:

- fund legal education for magistrates, prosecution, defence and children in the youth justice system on doli incapax
- adequately resource the legal system to apply the doli incapax test in all cases and ensure pretrial assessments of a child's cognitive and mental capacity are conducted.

6 Early intervention, rehabilitation and diversion

6.1 Early intervention

As discussed above, there is a strong association between youth offending and economic and social disadvantage. The health needs of young people in the youth justice system are particularly alarming, with high rates of cognitive impairment.

Early health and social interventions are needed to address these social and economic risk factors, in particular for those groups overrepresented in the youth justice system. The NT Royal Commission found that

while there is a ‘paucity of robust evaluation data’ in Australia about the effectiveness of mainstream and Aboriginal-specific prevention and early intervention programs that address criminogenic needs, international analysis of prevention programs has found strong evidence in the capacity of family-based programs, including behavioural parent training, to reduce youth delinquency and antisocial behaviour. There is also strong evidence that family-focused interventions can be built into a public health approach to improving parenting capacity. School retention and engagement are important factors in reducing the risk of criminal justice involvement.⁶¹

The Royal Commission’s inquiries established that early intervention efforts must involve the full spectrum of services engaged with children and young people.

When early intervention fails, and children engage in offending behaviours, responses should still be focused on assessing the therapeutic and basic needs of the children and their families and providing appropriate support to manage these behaviours.

Money spent on criminal justice responses to youth offending, especially detention, would be better spent on preventing youth offending in the first place. One approach which prioritises prevention is the justice reinvestment approach.

Justice Reinvestment in Bourke

The Senate Legal and Constitutional Affairs Committee, Social Justice Commissioners at the Australian Human Rights Commission and the National Children’s Commissioner, have recommended justice reinvestment strategies

which involve diverting and reinvesting funds used for tertiary services like imprisonment to those designed to address underlying causes of crime and dysfunction, in communities with high rates of offending.⁶² There are a number of trials and initiatives using justice reinvestment in the Australian Capital Territory, New South Wales, Northern Territory, Queensland and South Australia.⁶³

Key elements of justice reinvestment include the need for it to be place-based, data-driven, supported by a centralised strategic body, and with fiscally sound and targeted measures.

The Maranguka Justice Reinvestment Project in Bourke, northwest NSW, is the first major pilot of the program in Australia. The Project emerged as Bourke was concerned about the number of Aboriginal families experiencing high levels of social disadvantage and rising crime. Bourke has worked for many years to develop a model for improving outcomes and creating better coordinated support for vulnerable families and children through the empowerment of the local Aboriginal community.

Since 2012, the Project has undertaken activities designed to create change within the community and the justice system. Those activities have included: Aboriginal leaders inspiring a grassroots movement for change amongst local community members, facilitating collaboration and alignment across the service system, delivering new community based programs, comprehensive health assessments for young children, partnering with agencies such as the police, to evolve their procedures, behaviour and operations, and working with schools to reduce suspensions and expulsions.

A report by KPMG assessed the impact achieved in 2017 in Bourke,⁶⁴ highlighting improvements in three key areas:

- Family strength: a 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of reoffending
- Youth development: a 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories
- Adult empowerment: a 14% reduction in bail breaches and 42% reduction in days spent in custody.

6.2 Diversionary programs

In keeping with children's rights, a rehabilitative and therapeutic approach should be applied to all children who engage in criminal behaviour. Children should be diverted away from the criminal justice system wherever possible, and from detention in particular. The availability of appropriate diversionary programs is essential to reducing the numbers of children in youth detention.

While all states and territories offer some form of diversion for young offenders, it appears to be underutilised for a variety of reasons, including:

- limits to who can access the programs
- insufficient staffing allocated to diversion
- lack of appropriately funded and culturally appropriate programs.⁶⁵

For example, the NT Royal Commission showed that, in 2015–16, only 35% of children apprehended in the Northern Territory were diverted. This is despite evidence that diversion has been successful in reducing recidivism.⁶⁶

Nationwide, research also shows that Aboriginal and Torres Strait Islander children are less likely to be diverted than non-Indigenous children.⁶⁷ Given the level of contact of Aboriginal and Torres Strait Islander peoples with criminal justice processes, and the integral role that juvenile offending plays in this, diversionary processes are particularly important for ensuring lasting reductions in the rates of Aboriginal and Torres Strait Islander overrepresentation in detention.⁶⁸

In its Concluding Observations (2019), the Committee on the Rights of the Child urged the Australian Government to actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial sentences, such as probation or community service.⁶⁹

Recommendation 4

Australian Governments should expand the availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs.

Recommendation 5

Australian Governments should better implement the principle of detention as a last resort by identifying and removing barriers for young offenders accessing diversionary programs, in particular for Aboriginal and Torres Strait Islander children.

-
- ¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(1).
- ² United Nations Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) para 22.
- ³ United Nations Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) para 22.
- ⁴ United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 49(a).
- ⁵ Report of the Independent Expert leading the United Nations global study on children deprived of liberty, General Assembly, 74th session (11 July 2019), <https://undocs.org/en/A/74/136>.
- ⁶ *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Criminal Code Act 1995* (Cth), *The Criminal Code Part 7.1*; *Criminal Code 2002* (ACT), s 25; *Criminal Code Act* (NT), s 38(1); *Criminal Code Act 1899* (Qld), s 29(1); *Young Offenders Act 1993* (SA); *Criminal Code Act 1924* (Tas), s 18(1); *Children, Youth and Families Act 2005* (Vic), s 344; *Criminal Code Act Compilation Act 1913* (WA), 29.
- ⁷ Sally Parnell, Jesuit Social Services, *Too Much Too Young: Raise The Age of Criminal Responsibility, Letter to Attorneys-General* (2015) <http://jss.org.au/wp-content/uploads/2016/01/Letter_to_AGs_Age_of_Criminal_responsibility.pdf>.
- ⁸ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 *Trends & issues in crime and criminal justice* 4.
- ⁹ Chris Cunneen, 'Arguments for raising the minimum age of criminal responsibility', Research Report, Comparative Youth Penalty Project, UNSW (2017).
- ¹⁰ Australian Human Rights Commission, *Information concerning Australia's compliance with Convention on the Rights of Persons with Disabilities* (25 July 2019) <www.humanrights.gov.au/about/news/disability-discrimination-commissioner-reports-un>.
- ¹¹ Justice Health and Forensic Mental Health Network and Juvenile Justice NSW, *Young people in custody health survey* (2015) 65 <www.justicehealth.nsw.gov.au/publications/research-publications>.
- ¹² Carol Bower, Rochelle Watkins and Raewyn Mutch, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia' (2018) 8 *BMJ Open* <<https://bmjopen.bmj.com/content/8/2/e019605>>.

- ¹³ Carol Bower, Rochelle Watkins and Raewyn Mutch, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia' (2018) 8 *BMJ Open* <<https://bmjopen.bmj.com/content/8/2/e019605>>.
- ¹⁴ Senate Standing Committee on Community Affairs, *Protecting vulnerable children: A national challenge* (2005) chapter 5 <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/inst_care/report2/c06>.
- ¹⁵ United Nations Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (Advance unedited version, 23 September 2019) para 25(d).
- ¹⁶ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2018) 487 <www.alrc.gov.au/publications/indigenous-incarceration-report133>.
- ¹⁷ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2018) 487 <www.alrc.gov.au/publications/indigenous-incarceration-report133>.
- ¹⁸ Susan Baidawi & Rosemary Sheehan, *Cross-over kids: effective responses to children and young people in the youth justice and statutory Child Protection systems. Report to the Criminology Research Advisory Council* (December 2019) <https://crg.aic.gov.au/reports/201920.html#a03>.
- ¹⁹ Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 (1) *Current Issues in Criminal Justice* 123, 131 <www.austlii.edu.au/au/journals/CICrimJust/2015/15.html>.
- ²⁰ Australian Institute of Health and Welfare, *Youth Justice in Australia 2016–2017* (Report, 2018) v <www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/contents/table-of-contents>.
- ²¹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (Report, 2019) 9 <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/overview>.
- ²² Evidence to Northern Territory Estimates Committee 2018, Northern Territory Legislative Assembly, Darwin, 20 June 2018, 62 (Ms Kerr, Territory Families) <<https://parliament.nt.gov.au/committees/previous/estimates/estimates-committee-2018>>.
- ²³ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–2018* (Report, 2019) 10 <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/overview>.
- ²⁴ Australian Institute of Health and Welfare, *Bulletin 145, December 2018: Youth detention population in Australia 2018* (Report, 2018) 20 <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>; Australian Institute of Health and Welfare, *Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2017-18* (2018) <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>.
- ²⁵ Australian Institute of Health and Welfare, *Table S78a: Young people in detention during the year by age, sex and Indigenous, Australia, 2017-18* (2018) <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>.
- ²⁶ These numbers do not include children whose Indigenous status was not collected or recorded. According to AIHW, 'nationally, the proportion of young people with 'not stated' Indigenous status ranged from 0.0% to 1.2% each quarter between the June quarter 2014 and the June quarter 2018': Australian Institute of Health and Welfare, *Bulletin 145, December 2018*:

Youth detention population in Australia 2018 (2018) 20 <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>.

- ²⁷ These numbers do not include children whose Indigenous status was not collected or recorded. According to AIHW, 'nationally, the proportion of young people with 'not stated' Indigenous status ranged from 0.0% to 1.2% each quarter between the June quarter 2014 and the June quarter 2018': Australian Institute of Health and Welfare, *Bulletin 145, December 2018: Youth detention population in Australia 2018* (2018) 20 <www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>.
- ²⁸ Australian Human Rights Commission, *Information concerning Australia's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (30 October 2017) 19 <<https://www.humanrights.gov.au/submissions/submission-cerd-2017>>.
- ²⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009) 45 <www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-0>.
- ³⁰ Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*, 86, 87.
- ³¹ Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*, 86, 87.
- ³² Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services* 86, 86-95.
- ³³ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 *Trends & issues in crime and criminal justice* 3.
- ³⁴ Australian Institute of Health and Welfare, *Young people aged 10-14 in the youth justice system 2011-2012* (Report, 2013) 7 <www.aihw.gov.au/publication-detail/?id=60129543944>.
- ³⁵ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-2018* (2019) 8.
- ³⁶ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 *Trends & issues in crime and criminal justice* 4.
- ³⁷ Australian Institute of Health and Welfare, *Young people aged 10-14 in the youth justice system 2011-2012* (Report, 2013) vi <www.aihw.gov.au/publication-detail/?id=60129543944>.
- ³⁸ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) Chapter 27, 419.
- ³⁹ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) Chapter 27, 418.
- ⁴⁰ Manfred Nowak, United Nations Global Study on Children Deprived of Liberty (November 2019) 178 <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/3>.
- ⁴¹ Manfred Nowak, United Nations Global Study on Children Deprived of Liberty (November 2019) 137 <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/3>.
- ⁴² Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 *Trends & issues in crime and criminal justice* 7.
- ⁴³ Australian Human Rights Commission, *Children's Rights Report 2016* (2016) 189 <www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>.
- ⁴⁴ Neal Hazel, Cross-national comparison of youth justice, Youth Justice Board for England and Wales, United Kingdom (2008). https://www.google.com/search?source=hp&ei=eU5bXaS_G8f-9QPylJ_wAg&q=Neal+Hazel%2C+cross+national+comparison+of+youth+justice&oq=Neal+Hazel%2C+cross+national+comparison+of+youth+justice&gs_l=psy-

[ab.3..33i160.1859.30290..30547...20.0..0.227.11053.2j74j2.....0...1..gws-wiz.....0..0i131j0i22i30j33i21j0i3j0i10j0i22i10i30.MdxZSJrBr4k&ved=0ahUKewjk37LRp5DkAhVHf30KHVjKBy4Q4dUDCAc&uact=5](https://www.gws-wiz.com/0/0i131j0i22i30j33i21j0i3j0i10j0i22i10i30.MdxZSJrBr4k&ved=0ahUKewjk37LRp5DkAhVHf30KHVjKBy4Q4dUDCAc&uact=5)

- ⁴⁵ United Nations Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) para 25.
- ⁴⁶ Sophie Anderson, *Keeping youth away from crime: searching for best European practices, Sweden. National Report* (2014) 4–5.
- ⁴⁷ Ilona Kronberga and Sanita Sle, *Keeping youth away from crime: searching for the best European practices Summary* (2015) 47.
- ⁴⁸ PJP Tak, *The Dutch criminal justice system* (2008) 124; Jennifer Rubin et al, 'Interventions to reduce anti-social behaviour and crime: A review of effectiveness and costs' (Report, RAND Corporation, 2006) 18.
- ⁴⁹ Bert Berghuis and Jaap De Waard, 'Declining juvenile crime—explanations for the international downturn' (2017) 43(1) *Justitiele Verkenningen* 1.
- ⁵⁰ Norway statistics, 'Reported crime and police criminal proceedings 2018', Strasak (Report 2019).
- ⁵¹ *The Queen v M* (1977) 16 SASR 589, 590 (Bray CJ) for South Australia; *R v CRH* Unreported BC 9606725 (18 December 1996) (Newman J) or *DK v Rooney* (Unreported, BC 9607716, 3 July 1996, McInerney J for New South Wales; *R (A Child) v Witty* (1993) 66 A Crim R 462 (Harper J) for Victoria.
- ⁵² Neal Hazel, Youth Justice Board for England and Wales, *Cross-national comparison of youth justice* (2008) <https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf>.
- ⁵³ Marie Shaw and Brittany Armstrong, Law Society of South Australia, 'The presumption of doli incapax' (Paper, 31 January 2019).
- ⁵⁴ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) Chapter 27.
- ⁵⁵ Tim Bateman, Keeping up (tough) appearances: the age of criminal responsibility, *Criminal Justice Matters*, 102 (1) (2015) 36.
- ⁵⁶ United Nations Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) para 26, 27.
- ⁵⁷ Wendy O'Brien and Kate Fitzgibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled reform', *Youth Justice* 17(2) 134–152; Office of the SA Guardian, 'Doli incapax—an odd word with profound significance for South Australian children' (2019) <http://www.gcyp.sa.gov.au/doli-incapax-and-odd-word-with-profound-significance-for-south-australian-children/>.
- ⁵⁸ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* (1997) para 18.19 <https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/>.
- ⁵⁹ Law Council of Australia, Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax (Media Release, 26 June 2019) <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>.
- ⁶⁰ Chris Cunneen, 'Arguments for raising the minimum age of criminal responsibility', Research Report, Comparative Youth Penalty Project, UNSW (2017).
- ⁶¹ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) Chapter 27, 412.

- ⁶² Senate Legal and Constitutional Affairs Committee, *Value of a justice reinvestment approach to criminal justice in Australia* (2013) 124
<www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index>; Australian Human Rights Commission, *Social Justice and Native Title Report 2014* (2014) 12 <www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-0>.
- ⁶³ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2018) 135–6
<www.alrc.gov.au/publications/indigenous-incarceration-report133>.
- ⁶⁴ KPMG, Maranguka Justice Reinvestment Project Impact Assessment (27 November 2018)
<http://www.justreinvest.org.au/impact-of-maranguka-justice-reinvestment/>.
- ⁶⁵ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) vol 2B, 249–277.
- ⁶⁶ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, (Final Report, 2017) vol 2B, 259.
- ⁶⁷ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, (Final Report, 2017) vol 2B, 278.
- ⁶⁸ Human Rights and Equal Opportunity Commission, *Social Justice Report* (2001) 188
<www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-5>.
- ⁶⁹ United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 48(d).