

Submission to the Australian Human Rights Commission on Youth Justice and Child Wellbeing Reform across Australia

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Acknowledgments

We respectfully acknowledge and celebrate the many Traditional Owners of the lands throughout Australia and pay our respects to ancestors of this country and Elders past and present. We recognise that Aboriginal and Torres Strait Islander communities, culture and lore have existed within Australia continuously for 65,000 years.

The Uluru Statement from the Heart says: *Proportionally, [Aboriginal and Torres Strait Islander peoples] are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.*

We acknowledge the ongoing leadership of Aboriginal and Torres Strait Islander communities across Australia, who have and continue to work tirelessly to address inequalities and improve Aboriginal and Torres Strait Islander justice outcomes for children and young people.

Introduction

Australia is a signatory to and should abide by key international human rights instruments, such as the *Convention on the Rights of the Child*, the *Convention on the Rights of People with Disabilities* and the *United Nations Declaration on the Rights of Indigenous Peoples*. International approaches to youth justice emphasise the rights of young people and people, including those with a disability. Australia is receiving international pressure to raise the minimum age of criminal responsibility in line with recommendations from the United Nations.

Australia has high rates of incarceration of Aboriginal young people. In 2022, over half (56%, or 461 of 818) of all young people aged 10-17 years in detention were Aboriginal or Torres Strait Islander people, although Indigenous Australians made up just 6% of the Australian population aged 10–17.⁽¹⁾ Nationally, there is a need to identify and invest in evidence-based alternatives to incarcerating children.

The National Children's Commissioner is conducting a project that investigates opportunities for reform of youth justice and related systems across Australia, that is based on evidence and fulfils the protection of human rights. The project will explore ways to reduce children's involvement in crime, including through prevention and early intervention and reform of the juvenile justice system.

The University of Sydney and the CICADA Centre at The Sydney Children's Hospital Network welcome the opportunity to provide input into the Australian Human Rights Commission's consultation on Youth Justice and Child Wellbeing Reform across Australia.

Summary

Our submission takes a holistic approach to consider the broader social determinants of health, focussing on the needs of children and young people with neurodevelopmental impairment, including Fetal Alcohol Spectrum Disorder (FASD).

Our key recommendations are that

1. There is a need to invest in addressing the social determinants of health in order to reduce inequalities, better support disadvantaged children and young people and their families and decrease their contact with the justice system.
2. The justice system nationally must enable assessments to identify disability, including neurodevelopmental impairments, in children and young people at the earliest possible opportunity so they can receive adequate support to prevent re-offending or incarceration.
3. The justice system needs reform:
 - The minimum age of criminal responsibility should be increased from 10 to 14 years in all States and Territories.
 - There is a need for investment in evidence-based diversion programs for young people as alternatives to incarceration.
 - Children and young people in custody should be separated from adults and protected from cruel, inhumane or degrading treatment.
4. There is a need for long-term infrastructure investment in Aboriginal community-controlled organisations to support Aboriginal young people and families, and in novel approaches such as the Youth Koori Court (and interstate equivalents) for those involved in the justice system.

Question 1. What factors contribute to children's and young people's involvement in youth justice systems in Australia?

Social determinants of health

Children and young people who have come into contact with the youth justice system often experience complex and intersecting challenges and barriers, including those related to their living situation, health, development, race, employment and education.⁽²⁾

Marginalised young people often experience multiple complex issues.⁽³⁾ These issues include poverty, domestic and family violence, disability, mental health problems, family breakdown, drug and alcohol use, disengagement from school and homelessness.

Navigating health and social service systems is complex and challenging, particularly for marginalised young people who lack support.⁽⁴⁾ Marginalised children and young people need active support to navigate service systems.⁽⁴⁾ Without this support, many will not develop and thrive.

Recommendations

1. Reduce poverty and socioeconomic inequalities, which increase the risk of complex early life trauma and act as barriers to connection with health and development services, education and employment.
2. Invest in housing, healthcare, and support for marginalised children and young people to enable them to maintain a connection to education and gain employment.
3. Invest in support to enable disadvantaged children, young people and their families to access and navigate the health system, including via the NDIS.^(5, 6)
4. Prevent alcohol harm by supporting community alcohol restrictions.

Underdiagnosis of FASD in children and young people

FASD is a neurodevelopmental disorder with lifelong impacts that results from prenatal alcohol exposure.⁽⁷⁾ FASD includes a range of physical, cognitive, behavioural and neurodevelopmental impairments that can increase the likelihood of contact with the justice system.⁽⁸⁾

Alcohol use in pregnancy is problematic throughout Australia. Almost half of all pregnancies are unplanned, 60% women report alcohol use during pregnancy and many are unaware of the risks to the unborn child. Disadvantage and historic trauma are determinants of frequent, risky drinking of alcohol.⁽⁷⁾ In a population-based study in remote Western Australian communities 55% of children aged 7-9 years had been exposed to alcohol in pregnancy and 19% had a diagnosis of FASD.^(9, 10) Due to the brain injury caused by prenatal alcohol exposure, children and youth with FASD have poorer conduct and attention, social and emotional skills, and more clinically concerning behaviours and emotional dysregulation than peers without FASD.⁽¹¹⁾ FASD is often associated with attention deficit hyperactivity disorder, autism spectrum disorder, speech and language disorders, inadequate memory, mental health disorders, conduct disorder, intellectual disability, and oppositional defiant disorder.^(12, 13)

Thus, children and youth may have impulsive behaviour, be easily misled, have difficulty distinguishing right from wrong, and fail to learn from their mistakes. It is not surprising then that they are vulnerable to getting into trouble with the law. Once in the justice system they have difficulty providing reliable witness statements and may not understand or remember court instructions.

Despite the availability of an *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder*⁽¹⁴⁾ since 2016 many health professionals are unaware of the FASD diagnostic criteria and do not routinely ask pregnant women about their alcohol use, so FASD often goes undiagnosed. FASD is usually diagnosed once developmental, learning and behavioural difficulties become more evident, often in early primary school.

Young people with FASD are more likely to be in youth justice custody or have contact with the justice system than people without FASD.⁽¹⁵⁾ An international review of 245 articles (mainly from high-income countries) found the prevalence of FASD was higher among young people in justice systems than in the general population.⁽¹⁶⁾ Internationally, FASD rates are higher than in the general population for Aboriginal populations (15.6 to 24.6 times higher), correctional populations (30.3), low socioeconomic status populations (23.7); those undergoing psychiatric care (18.5); and children in care (5.2 - 67.7).⁽¹⁷⁾

It is likely that a high proportion of young people who enter the justice system are not currently diagnosed with FASD by health professionals. Research at Western Australia's Banksia Hill (State-wide) youth detention centre found that of the 99 young people aged 13 to 17 years who underwent the complete FASD assessment, over a third (36%) had a diagnosis of FASD, and 89% had severe impairment in at least one neurodevelopmental domain.⁽¹⁵⁾ The prevalence of FASD among Aboriginal young people was 47%. Yet only two children who met the criteria for FASD had a previous diagnosis.

Economic analyses confirm that FASD is expensive to society – in health, education, disability and justice.⁽⁷⁾ The implications of a late diagnosis of FASD include a lack of recognition of the support needs of these young people and a missed opportunity to prevent adverse health and social outcomes.

Recommendation:

5. Mandate assessments to identify disability, including neurodevelopmental impairment such as FASD, in children and young people at the earliest possible opportunity in their engagement with youth justice services so they can receive adequate support to develop pro-social life outcomes.

Question 2. What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

Justice system reform

What needs to be changed?

The UN Committee on the Rights of the Child, *International Standards for the Minimum Age of Criminal Responsibility* recommends increasing the minimum age of criminal responsibility to reflect current research in child development and neuroscience that the capacity for abstract reasoning is not fully developed in children aged 13 years and under.⁽¹⁸⁾

There is a need for a health lens to understand and support children and young people presenting to the justice system who may have a brain-based disorder e.g., FASD. The youth justice system should be responsive to children's and young people's needs and provide appropriate support to enable them to grow and thrive. "Punitive and incarceration-focused policies and practices directly undermine the key outcomes that governments are seeking to achieve through these policies, including to reduce recidivism and improve community safety."⁽²⁾

Reframe Training, developed by researchers at the Telethon Kids Institute, is an evidence-based program that aims to educate frontline professionals to recognise and understand neurodisability in young people, reframe their behaviours, and respond appropriately to their needs.⁽¹⁹⁾

Barriers to change

Barriers to change in the justice system include entrenched justice structures and processes, perceived lack of alternatives to incarceration, and lack of physical infrastructure to separate incarcerated children and adults. There is also lack of national consensus regarding the need to raise the age of criminal responsibility and the appropriate lower age for incarceration. These barriers may be underpinned by racism.

There is documented lack of knowledge and skills among justice professionals, especially with regard to dealing with children and young people with intellectual and other neurodevelopmental impairments. There is also a lack of capacity and training in child and adolescent services and a lack of funding to support these essential services within the justice system. These factors limit access to multi-disciplinary assessments and definitive diagnosis of conditions including FASD in the justice system.

Recommendations:

6. Increase the minimum age of criminal responsibility nationally, from 10 to 14 years to reflect current research evidence in child development and neuroscience that the capacity for abstract reasoning is not fully developed in children aged 13 and under.
7. When there is a need to incarcerate children and young people, they should be separated from adults.
8. Children and young people should be protected from cruel, inhuman or degrading treatment, including the use of isolation, segregation, force or restraint.
9. All children in contact with the justice system should be screened for evidence of neurodevelopmental impairment and children at risk should be reviewed by a paediatrician and/or multi-disciplinary allied health team and assessed for their capacity to engage and interact with the justice system processes. Assessment should be trauma- and FASD-informed and will enable professionals to understand how to support the young person to prevent reoffending and incarceration.
10. Children and young people need to be provided with support programs, education and healthcare that are adapted to their unique needs, including their disability and/or neurodevelopmental impairment.
11. Fund Reframe training to enable Youth Justice staff to be better equipped to support young people with FASD.

Prevention, early identification and support for young people with FASD

The *National Fetal Alcohol Spectrum Disorder Strategic Action Plan 2018-2028*⁽²⁰⁾ aims to reduce the prevalence of FASD; reduce the associated impact of FASD; and improve the quality of life for people living with FASD in Australia.

Prevention strategies need to be multifaceted. A review published by Nature concluded, “Although the role of national guidelines, community education and family support is important, these efforts must be underpinned by strategies proven to drive behavioural change and reduce alcohol harm, including legislated restrictions on the advertising and promotion of alcohol, appropriate taxation and pricing, and limited access to alcohol through restricted liquor outlets and opening hours and community-initiated alcohol restrictions.”⁽⁸⁾

Early identification, diagnosis, continuous services, and support for individuals living with FASD and their families, has the potential to improve health and wellbeing and to prevent the development of adverse long-term consequences.⁽⁸⁾ Early diagnosis and receipt of disability support are important protective factors for avoiding involvement with the justice system for individuals with FASD.⁽²¹⁾

The Australian Early Development Census (AEDC) is a holistic measure of children’s development in their first year at school which can be used by communities and service providers to develop support for children and their families.⁽²²⁾ This measure provides an opportunity to screen children early in life to identify those who may have developmental problems including FASD.

A life course approach to supporting people with FASD is needed. FASD is a lifelong disability but services and supports for young people and adults are sparse. Health professionals, families, educators, justice professionals, and service providers need to be aware of the impacts across the lifespan.⁽²³⁾

Recommendations:

12. Promote measures to prevent or minimise harms of alcohol use in pregnancy, including restricting access to alcohol via taxation and pricing, limiting advertising and promotion of alcohol, and access to alcohol, and supporting Aboriginal community-led alcohol restrictions.
13. Raise community awareness of the harms of alcohol use in pregnancy⁽²⁴⁾
14. Promote early diagnosis of FASD to optimise child and adult outcomes.
15. Provide social support for people with FASD across the lifespan.

Question 3. Can you identify reforms that show evidence of positive outcomes, including reductions in children’s and young people’s involvement in youth justice and child protection systems, either in Australia or internationally?

Investment in justice diversion programs

Children and young people should be first seen as ‘victims of circumstance’ and disadvantage rather than being viewed as offenders. Diversion for children and young people should be used at the earliest stage possible to help identify and respond to the causal factors of offending and reduce recidivism and incarceration.

There is a need to invest in community-based services to ensure cultural security for Indigenous and ethnically diverse communities both before and after contact with the justice system. There is also a need to identify young people with FASD, ideally before they reach custody or otherwise at the earliest possible opportunity and provide appropriate support. Children and young people who are diverted need follow-up assistance so they can receive the help they need to prevent future offending.⁽²⁵⁾

Diversion programs are significantly cheaper than placing young people in custody and also reduce reoffending.^(25, 26) The Productivity Commission identified in 2020-21 the total nationally recurrent expenditure on detention-based supervision, community-based supervision and group conferencing for young people aged 10–17 years was \$1.1 billion. Detention-based supervision accounted for the majority of this expenditure (64.6% or \$723.9 million).⁽²⁷⁾

Nationally in 2020-21, the average cost per day per young person subject to community-based supervision was \$247 – much lower than detention-based supervision which was \$2518 per day in 2020-21, an increase of 34% from 2019-20 (\$1883).⁽²⁷⁾

Without appropriate and widely available community programs, children and young people experiencing disability and multiple disadvantage will continue to be criminalised.⁽²⁾

Recommendation:

16. Invest in the delivery of evidence-based, culturally informed diversion programs for young people with neurodevelopmental impairment, especially for children aged 14 and under, and program evaluation in an Australian context.
17. Ensure young people who are diverted, are screened and assessed to determine what help they need and supported long-term to access required services.

Screening for FASD in Youth Justice settings

Screening can help identify the capacity of young people to understand and interact with the youth justice system. Screening also identifies individuals who can benefit from further clinical assessment for neurodevelopmental impairments including FASD.

The National Aboriginal Community Controlled Health Organisation (NACCHO) and The Royal Australian College of General Practitioners (RACGP), recommend that all children and young people at high risk for FASD should be screened for FASD when they initially come in contact with the child protection, police or justice systems.⁽¹²⁾ However, to date, there is no single recommended screening tool for use in the Australian context.^(28, 29)

In Canada, the Manitoba FASD Youth Justice Program was established to promote access to FASD assessments to young people.⁽³⁰⁾ A ‘red flag’ model for screening for FASD is used by the Manitoba FASD Youth Justice Program.^(30, 31) Young people are referred to the FASD program if they exhibit the following ‘red flags’: repeated failure to comply; lack of empathy; trouble in school/drop-out; difficulties with intuition; compliance and peer interactions; inability to connect actions with consequences; does not seem affected by past punishments; followers rather than leads in crime; participates in crimes involving risky behaviour for little gain; and gang involvement. This tool is likely to pick up children who do not have FASD and might be strengthened by inclusion of specific questions about prenatal alcohol exposures and early life trauma and neurodevelopment.

Recommendation:

18. Develop an Australian FASD screening tool for use in justice settings so young people at risk of having disability, including neurodevelopmental impairments such as FASD, can be referred for a comprehensive diagnostic assessment and appropriate care.

Support for young people with FASD and their families

Support services for young people with FASD can improve health and wellbeing, address secondary disability, and reduce exposure to risks such as substance use.⁽³²⁾ Intensive community-based support programs for young people with FASD can facilitate education, life skills training, therapeutic and diversionary activities and address family relationships and is likely to be crucial to facilitate community reintegration.⁽³³⁾ Positively evaluated programs include case management by workers trained in FASD interventions. The case managers support young people to access healthcare and support, establish a network of service providers and secure stable housing.⁽³²⁾

In conjunction with the Western Australian Banksia Hill FASD prevalence study, interviews with 38 young people explored recovery and support needed.⁽³⁴⁾ The researchers identified elements that would contribute to positive justice capital. To address neurodevelopmental disability, the researchers recommended access to strength-based, holistic diagnostic assessments, disability services and special education support; legal representation and advocacy; and language support (via interpreter services and plain language explanations). They also recommended focusing on hope and future aspirations, goal setting, skill development and engagement with the community (e.g., via sport and employment).

Young people's voices

In conjunction with the Banksia Hill FASD prevalence study in WA, qualitative interviews were conducted with 38 young people who agreed to undergo the FASD assessments.⁽³⁴⁾ The interviews focused on recovery and what made the young people happy.

The young people spoke about hope for the future. They spoke about education and employment that they hoped to engage in.

I am hoping to go to an alternative type of schooling. I would like to see a bush school for the young people in my [remote] community.

I want to get a [drivers] licence and work on the mines or on a station.

I want to be a [Indigenous] ranger and look after the country.

I just want to stay off the drugs and keep out of trouble. If I have cravings [for drugs] I will do sport. I plan to do bricklaying. I know where to get help to do bricklaying, but the community doesn't understand why I get into trouble [alluding to FASD].

Family relationships were very important to young people and provided a source of identity, happiness and cultural connection. Being connected to schools was viewed positively by young people as social and sporting opportunities for some and learning for others. But for some, the complexity of their lives and neurodevelopmental challenges meant they were unable to complete schooling.

I like hangin' with my bruz [brothers] but not the work; it's too hard.

I didn't attend school for years. I am trying to do a course [high school] while I am here [at Banksia].

I went to primary school sometimes but not high school. I didn't mind school, but I don't go to school no more.

I didn't like school. I was told I was stupid regularly.

Miss, I hated school – anyway, school gave up on me.

One Aboriginal participant from a remote community was keen to return to school if it differed from what they had previously experienced, such as an alternative 'bush school'.

Learning in a classroom first for reading and writing maybe, and the rest of the day learning how to survive—like our own first aid—how to eat, ya know, hunting and how to heal like, traditional medicines like. Then the kids might stay in school.

A Canadian *Youth Outreach Program* for Aboriginal young people with suspected FASD was evaluated positively.⁽³⁵⁾ The program involves one-to-one support and advocacy by youth support workers. The Canadian *Youth Outreach Program* activities⁽³⁵⁾ included providing intensive support, facilitating transport to appointments with various professionals; assisting young people in understanding legal, medical or service systems; advocating for young people to access legal, health, education, recreational and/or support services; connecting young people to school, employment, and safe recreation; connection with trusted supports; assisting in finding safe housing, peer and family relationships and promoting harm reduction and healthy lifestyles.

Positive outcomes of the Canadian *Youth Outreach Program* included improved safety (e.g., via housing) and reduced risk of harm and victimisation; improved sexual health, mental wellbeing, nutrition and dental health; healthier social relationships and support from peers; and increased self-confidence. Substance use was reduced. Participants had increased practical support, assistance in emergencies, and support to attend appointments, improved life skills, school outcomes and job skills.⁽³⁵⁾ They also had improved knowledge and/or use of other community resources and increased participation in healthy recreational activities.

Although young people were initially distrustful of the Canadian *Youth Outreach Program*, the outreach focus of supporting young people within the community, and building trusting relationships over time allowed the intensity of the support to deepen.⁽³⁵⁾

Recommendation:

19. Invest in intensive holistic long-term community-based support for young people with FASD and their families.

Indigenous solutions

The *Australian FASD Indigenous Framework* guides Aboriginal and non-Aboriginal peoples' journey together to address FASD in Aboriginal communities.⁽³⁶⁾ Understanding of non-Aboriginal and Aboriginal ways of knowing, being and doing are proposed to enable space for two-way learning, and development of respect and trust. The Framework draws on Aboriginal wisdom and practices, which are inherently strengths-based, culturally acceptable, and healing-informed. There is also a need to increase the availability of Aboriginal Community controlled services that can support the management of FASD impairments and provide treatment options.

Aboriginal young people with FASD can also benefit from being diverted into non-stigmatising therapeutic alternatives run by Indigenous people.⁽³⁷⁾ Examples of successful initiatives provide a basis for a new model of Indigenous youth justice. For example, the Yiriman Project run by Elders from around Fitzroy Crossing in Western Australia, takes young people at risk of offending onto remote desert country to engage in culturally based activities, such as assisting Indigenous rangers to care for country.⁽³⁸⁾ A three-year review of the Yiriman project found: "Yiriman has assisted in the campaign to minimise young people's involvement in the justice system."⁽³⁷⁾

Statewide access to FASD assessments are provided by the *FASD NSW Assessment Services*, located at the CICADA Centre. A recent grant from the Australian Government Department of Health has allowed increased focus on children in disadvantaged populations including juvenile justice, out-of-home care, rural and remote Aboriginal communities and children born to substance using mothers. This includes increasing access to assessments through the CICADA service for children and youth engaged in the Youth Koori Court. The Youth Koori Court in NSW aims to identify risk factors and health issues that may impact young people's involvement with the criminal justice system.⁽³⁹⁾ An *Action and support plan* is developed with the young person to help them address these risk factors and improve connections with their culture and community. The Youth Koori Court monitors the implementation of the *Action and support plan* over months with the young person and considers the steps the young person has taken to address issues before sentencing.

About the CICADA Centre, The Sydney Children's Hospital Network

The CICADA Centre NSW brings together three teams of experts from the Fetal Alcohol Spectrum Disorders (FASD) Clinic, Family Service and the Adolescent Drug and Alcohol Service, at The Sydney Children's Hospital Network to assist children, adolescents, families and NSW health professionals to build leadership and research into the prevention of harm to children and adolescents from drugs and alcohol.

The CICADA Centre aims to:

- Provide **Care and Intervention for Children and Adolescents** affected by **Drugs and Alcohol**, including prenatal exposure, family alcohol and/or other drug use (AOD) or young person AOD use.
- Support leading research and education in key areas of need in Fetal Alcohol Spectrum Disorder (FASD), parental drug and alcohol use and adolescent drug and alcohol use.
- Undertake capacity building across NSW by providing online and face-to-face training for paediatricians, GPs, allied health, child protection staff, educators and adult drug and alcohol services.
- Develop prevention and intervention strategies to support local services and guide policy across NSW.

Recommendation:

20. Strengthen Aboriginal community-controlled organisations and the Youth Koori Court to support Aboriginal young people and families.

Question 4. Are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

A national approach to youth justice and child wellbeing reform in Australia

A national approach to youth justice and child wellbeing reform is supported to provide consistency of practice. The *Royal Commission into the Protection and Detention of Children in the Northern Territory* identified the many ways the justice system has failed children and young people. The primary recommendation was to invest in early intervention to prevent family issues, legal problems or being placed in out-of-home care. The proposed recommendations for *national* action are informed by the *Royal Commission into the Protection and Detention of Children in the Northern Territory*.

Recommendations

21. Invest in increased diversion and therapeutic approaches and provide a protocol for alternative pathways to access diversion programs.
22. Raise the age of criminal responsibility to 14 years and only allowing children under 14 years to be detained for serious crimes.
23. Ensure mandatory screening for neurodevelopmental concerns and access to comprehensive multidisciplinary health assessments.
24. When leaving custody, adopt a standard process to connect young people with community-based support and prevent reoffending.
25. Establish standards for management that avoid isolation and restrictive practices and promote access to education and health.
26. Provide training for staff working in the justice system on understanding neurodevelopmental disability and mental health and how to support young people.
27. Involve children and young people in decision-making at individual and system levels.

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