

'They're not bad kids': Submission to the
review of the age of criminal responsibility



The Youth Coalition of the ACT acknowledges the Ngunnawal people as the traditional owners and continuing custodians of the lands of the ACT and we pay our respects to the Elders, families and ancestors. We acknowledge that the effect of forced removal of Indigenous children from their families as well as past racist policies and actions continues today. We acknowledge that the Indigenous people hold distinctive rights as the original people of modern day Australia including the right to a distinct status and culture, self-determination and land. The Youth Coalition of the ACT celebrates Indigenous cultures and the invaluable contribution they make to our community.

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

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“They’re not bad kids.

They’ve made terrible mistakes and they need help.

They’re not getting help in that place.”

- Dylan Voller

Survivor of Darwin's Don Dale Detention Centre

From the age of 11 indigenous Australian Dylan Voller cycled in and out of youth detention. While incarcerated in Darwin's Don Dale Detention Centre he was placed in solitary confinement and forced to wear a spit hood and shackles. Images of Voller enduring these conditions became prolific following the airing of ABC's 4 Corner 2016 report

Australia's Shame.

Voller has publicly apologised for his past criminal actions and is now an advocate to improve the conditions for young people involved in Australia's youth justice system (Dunlop 2018).

Introduction

The Youth Coalition of the ACT (the Youth Coalition) is the peak body for youth affairs in the ACT, representing the rights, interests, and wellbeing of young Canberrans aged 12–25 and those who work with them. We undertake policy analysis, sector development, advocacy, research and projects that respond to ongoing and current issues.

This submission to the review of the age of criminal responsibility is structured by the guiding questions provided by the Council of Attorneys-General Age of Criminal Responsibility Working Group.

1. Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.

The Youth Coalition strongly supports raising the Minimum Age of Criminal Responsibility (MACR) to at least 14 years in all circumstances. Young people who enter the criminal justice system often experience compounded forms of disadvantage and should be supported not criminalised (Holloway et al. 2018). Our position on this issue is underpinned by the notion that offending children and young people should have their needs, and not only their deeds addressed.¹ Historically, the incarceration of a young person has been centred in determining the individual's ability to assess the wrongfulness of their actions (Crofts 2015). Yet, recent research has clearly shown "the very youngsters who are assumed to have the capacity to take responsibility for their behaviour are those who have the least capacity to do so" (Holloway et al. 2018, p. 10). This is evidenced by the high rates of compounded and complex forms of disadvantage, disability, and vulnerability young offenders experience (McCarthy et al. 2016, White 2019). Some suggest 80% of young people in juvenile Australian detention settings have been subject to severe trauma prior to incarceration (Bradley et al. 2016, p. 15).

A 2018 study at the Banksia Hill Detention Centre in Western Australia found almost every young person at the facility had a severe brain impairment (Bower et al.

¹ Our position stems from Kilbrandon approach to youth justice implemented in Scotland (Holloway et al. 2018).

2018, Passmore et al. 2018). 88 young people (89%) had at least one domain of severe neurodevelopmental impairment, with 36 diagnosed with Fetal Alcohol Spectrum Disorder (FASD)(Bower et al. 2018, p. 6). Individuals with a cognitive disability may experience lower impulse control and impaired consequential reasoning which can place them at much higher risk of:

- **Being easily coerced into engaging in criminal activities**
- **Being unfairly blamed by co-offenders for the act/s**
- **Being easily apprehended and/or uncooperative during arrest**
- **Engaging in inappropriate displays of sexuality that are misunderstood by others**

(Berelowitz 2011, Hughes et al. 2012, Law and Justice Foundation, 2009).

Therefore, children and young people who commit crimes are not simply “born bad” (Berelowitz 2011). This population often have histories of hardship, abandonment, violence, disability, and instability (Hughes et al. 2012).

Before a child or young person commits a crime, they have most likely experienced one or more of the following:

- **Abusive (physically, emotionally or sexually) or neglectful home environments**
- **Domestic violence at a young age**
- **Intergenerational trauma**
- **Homelessness**
- **Learning difficulties**
- **Growing up in a disadvantaged area / a lower socio-economic background**
- **Having an undiagnosed disability or mental illness**
- **The incarceration of a parent or older sibling**
- **Racism and discrimination (particularly for Aboriginal and Torres Strait Islander young people)**
- **Involvement in the Child Protection system and/ or Out-Of-Home-Care (OOHC)**

(Gerard et al. 2019, McFarlane 2018, Noroozi et al. 2018).

Due to the factors above, at-risk young people are therefore more likely to:

- **Engage in alcohol and substance abuse**
- **Struggle with employability and retaining work**
- **Disengage with school and experience declining academic performance**
- **Be at increased risk of increased self-harm, suicide and eating disorders**
- **Be at increased risk revictimisation of sexual abuse (particularly if they have suffered sexual abuse as a child)**
- **Ultimately be involved in crime**

(Knight et al. 2018, Matthews 2000, Wong et al. 2016).

The Australian Institute of Health and Welfare found children in Australia aged 10-16 years involved in the child protection system were 12 times more likely to be incarcerated compared to the general population. Aboriginal and Torres Strait Islander young people were found to be 16 times more likely to be involved in both systems compared with non-Indigenous young people (2017).² Additionally, a survey conducted in juvenile justice detention facilities in NSW demonstrated 81% of young women and 57% of young men had been abused or neglected, with 49% of young women and 19% of young men classifying their experiences as “severe” (Indig et al. 2011).

One can clearly see how focusing on children and young people’s criminal deeds at the exclusion of their needs can result in rendering these “negative compounding and cumulative factors invisible” (Baldry and Dowse 2013, p. 224). When incarcerated, these factors become invisible, and children and young people cannot receive a diagnosis, treatment and long-term support. To avoid locking young offenders into cyclic serial institutionalisation there is a pressing need to raise the minimum age of criminal responsibility to at least 14 years in all circumstances. This change can act as a step towards enacting what is termed “positive youth justice” where the focus of youth justice moves away from focusing on young people’s deeds and deficits, towards supporting their long-term growth and development (Butts et al. 2010).

² This data was drawn from the period from 1 July 2014 to 30 June 2016. The data set excluded children and young people from NSW and NT.

2. If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.

We propose that the minimum age of criminal responsibility be raised to at least 14 years in all circumstances. This would involve no ‘carve-outs’ to this legislation, even for serious offences. We argue that the treatment of young people should not solely focus on the young person’s type of offence, but instead centre on identifying and treating the underlying causes of their offending behaviour (McCausland & Baldry 2017, McLaren 2000). This cannot happen if the MACR remains at 10 years of age. Our position on this is underpinned by two key bodies of evidence. Firstly, we highlight how incarceration locks young people into a cycle of recidivism, leading to negative short and long-term impacts for this population group. Secondly, our position is supported by growing neuroscientific evidence that indicates young people’s maturity of judgment may be further impaired by the presence of a neuro-disability.

Recidivism

Research has shown that immersing children and young people in custody culture increases the likelihood of recidivism (Little et al. 2018, McCarthy et al. 2016). When young people are exposed to “deviant peer contagion” they can bond, forge connections and learn skills from other young offenders (Becroft 2014, p. 2, Holloway et al. 2018, Urbas 2000). As a result, incarceration can act as a “school of crime” where young people acquire and build “criminal capital” (McCarthy et al. 2016, p. 13). The acquisition of criminal capital equips young people to reoffend quicker and can teach them how to maximise profits from criminal enterprise post-release (Nguyen et al. 2016, p. 207). For young people aged 10-12 years of age in Victoria, the recidivism rate is 86% (Victorian Sentencing Advisory Council 2016).³ By raising the MACR to 14 years in all

³ Moreover, the rates for 13-14 year-olds stands at 84% and is at 51% for 17 year-olds (Victorian Sentencing Advisory Council 2016).

circumstances, children under 14 will not be subject to a system that sets them up to pursue a criminal pathway for life.

Additionally, incarcerating children and young people has been shown to have long-term negative impacts on their life post release such as:

- **Increasing their chances of homelessness**
- **Increasing their chance of experiencing self-harm, depression, and Post-Traumatic Stress Disorder (PTSD)**
- **Decreasing their chances at employment and a fulfilling life long-term due to having a criminal record**
- **Entrenching a distrust of police, institutions and the government which has a long-lasting influence on young people's future decisions and actions (For more detail refer to the Royal Commission into the Protection and Detention of Children in the Northern Territory).**

(Cunneen 2017, Holloway et al. 2018).

Neuroscientific Evidence and the MACR

The Youth Coalition firmly supports raising the MACR to at least 14 years in all circumstances due to emerging neuroscientific research which indicates individuals aged under 14 with a neuro-disability do not thrive in incarceration. Emerging evidence has consistently supported the notion that adolescents' brain development, specifically their impulse control and consequential reasoning, is significantly decreased when compared to adult populations (Crofts 2015, Cunneen 2017). Young people's decision-making processes and motivated reasoning are highly dependent on specific circumstances (Cunneen 2017). Their decisions are therefore significantly shaped by hot and cold cognition (Lennings & Lennings 2014). Cold conditions are characterised by low stimulus and stable environments which aid adultlike decisions (ibid, p. 5). Contrastingly, hot conditions encompass intense emotional, physical and/or psychological stimulation which significantly impair young people's rational decision-making abilities (ibid, p. 5).

We argue that the existence of a pre-existing neuro-disability further amplifies a young person's hyperactivity and impulsivity, and thus greatly increases the temperature of hot conditions. In 2012 the study *Nobody Made the Connection: The Prevalence of Neuro-Disability in Young People Who Offend* highlighted the high prevalence of neuro-disabilities for young offenders (Hughes et al. 2012). The study found incarcerated youth commonly suffered from undiagnosed:

- **Communication Disorders**
- **Speech and Learning Disabilities (up to 60% of incarcerated young people in the UK)**
- **Attention Deficit Hyperactivity Disorder (ADHD)**
- **Autistic Spectrum Disorders (ASD)**
- **Traumatic Brain Injury (TBI)**
- **Epilepsy**
- **Foetal Alcohol Syndrome Disorders (FASD)**
- **Comorbidity (a combination of above disorders and syndromes)**

We firmly believe that the MACR be raised to at least 14 years in all circumstances for all offences, as this population requires therapeutic and rehabilitative service provision regardless of the type of their offence. Incarcerating children and young people with a neuro-disability can experience a negative looping effect inside youth justice facilities. This can complicate and worsen young people's interactions with police and the youth justice system over their lifetime (Berelowitz 2011, Wild 2016, White 2019).

Young offenders' behaviours such as avoiding eye contact or not following instructions may be misrecognised as acts of non-compliance or resistance, when in fact these behaviours may be a product of an undiagnosed disability (Baldry et al. 2018). An incarcerated 15-year-old boy in the United Kingdom explains:

"I am getting into trouble because I can't make eye contact. They think I'm being rude. I am not being rude it's because I've got Asperger's and I can't make eye contact and they don't understand. I then get frustrated and angry as they think I'm rude. With my peers I get into trouble, I take things literally. I don't always understand instructions. I need things in short simple sentences, because that way I can understand them"

(Berelowitz 2011, p. 27).

When prison staff misrecognise these behaviours, young people may receive punishment or mistreatment (Baldry et al. 2018). Environments characterised by these tactics of confinement, punishment and control further contribute to raising the temperature of these situations and thereby compelling young people to act out again (Berelowitz 2011, Hughes et al. 2012). Young people under the age of 14 do not thrive in these environments.

Instead, they often experience a worsening of symptoms and negative behaviours. Our position is that this population requires an environment that fosters healthy adolescent development and provides ongoing disability support, regardless of their offence (McCarthy et al. 2016). We agree that:

"If more than half of all people in custody have a disability that impairs their capacity to make and act on such conscious choices, the veracity of such frameworks for the most vulnerable in our society should be questioned"

(McCausland & Baldry 2017, p. 303).

3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of doli incapax (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of doli incapax differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of doli incapax be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.

We argue that the minimum age of criminal responsibility should be increased and therefore not retain the presumption of doli incapax. Raising the MACR to 14 would remove the need for courts to consider the confusing and complex doli incapax presumption. Our position on this issue is informed by research which asserts doli incapax is harmful and problematic for the following reasons:

- **Its highly discretionary nature**
- **It's capacity to neglect specific psychosocial factors which impact on a young person's decision-making processes and understanding of moral responsibility**

- **A young person’s chronological and mental age may differ**
- **The test of understanding under the doctrine of doli incapax may be subjective and unreliable**
- **Doli incapax can involve the inclusion of unfair prejudicial evidence**
- **Racial bias can be embedded in the process**
- **Doli incapax has been criticised by both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission**

(Australian Law Reform Commission 1997, Fitz-Gibbon & O'Brien 2019, Johnson 2006, Lennings & Lennings 2014, UN 2019).

For more evidence demonstrating the limitations of doli incapax and how its application differs across jurisdictions refer to barrister Matthew Johnston’s response to the Children’s Magistrates’ Conference (Johnston 2006). Moreover, the case study of a 15-year-old male “M” outlined in *Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study* provides a detailed example that illustrates the incongruencies and ineffectiveness of implementing doli incapax in practice (Lennings & Lennings 2014, p. 795-796).

4. Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

The Youth Coalition advocates for children under 14 years not to be detained for serious crimes. This position is informed by and aligned with the Royal Commission into the Protection and Detention of Children in the Northern Territory recommendations and findings.

In detention the Commission found that children experience:

- **A lack of rehabilitation**
- **Abuse and humiliation**
- **An environment of violence**

- **Use of restraints and unnecessary use of force**
- **Psychological damage from isolation practices**

Youth justice advocate Antoinette Carroll from the Central Australian Aboriginal Legal Aid Service notes:

"I was seeking help.... I in no way thought he would be hooded and chained to a chair or thrown in isolation for 200 days at a time. I don't see that as counselling or helping him. I really feel like I failed him by ringing the police that day when he broke my window, to be honest"

(Wild, 2016, McCausland & Baldry 2017, p. 291)⁴

Young people's mental health and future outcomes can be severely impacted by placing them in these traumatic environments, which foster a distrust of systems and adults at a young age (O'Brien & Fitz-Gibbon 2017, White 2019). In sum "youth prisons communicate to young people constantly and in a variety of ways that they are dangerous, feared, worthless, and have no real future" (McCarthy et al. p. 5). We, therefore, argue for the adoption of a therapeutic approach that supports young people's development and long-term functioning.

5.What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

We propose if the age of criminal responsibility is raised, programs and frameworks should aim to integrate not segregate at-risk young people.

Incarcerating young people has consistently been shown to isolate young people from their communities and consequently expose them to increased harm (Becroft 2014, McCausland & Baldry 2017). It is apparent:

⁴ Carroll refers here to the treatment of Dylan Voller in an interview on ABC's 2016 7.30pm report *Dylan Voller's Troubled Past* (McCausland & Baldry 2017).

“The majority of young people will grow out of offending if they are kept away from the criminal justice system, are made accountable for their actions and are given the right support”

(Becroft 2014, p. 15).

Neuroscientific evidence suggests young people possess the resilience and capacity to change their ways, particularly when placed in healthy environments as:

*“Resilience, it seems, is often overlooked in contemporary discussions of adolescent maturity and brain development. Indeed, the focus on pathologic conditions, deficits, reduced capacity, and age-based risks overshadows the enormous opportunity for brain science to illuminate the unique strengths and potentialities of the adolescent brain. **So, too, can this information inform policies that help to reinforce and perpetuate opportunities for adolescents to thrive in this stage of development, not just survive”***

(Johnson et al. 2009, p. 8)

The Youth Coalition advocates that the resilience of young offenders can be fostered and supported through the implementation of service models that combine both therapeutic and diversionary responses. Recent research has evaluated the effectiveness of youth justice prevention programs (Knight et al. 2018).

This research developed a standardised intervention model which shows effective youth justice prevention is underpinned by five evidence-based service components:

- **1. Engagement**
- **2. Case management**
- **3. Diversionary activities**
- **4. Personal development, identity, and team identity**
- **5. Training and skill development**

These five components can be operationalised through Multi-Systemic Therapy (MST) and Functional Family Therapy (FFT). MST and FFT aim to keep children connected to the existing relationships they have with their families and strengthen family functioning, including parenting capacity and parent-child relationships (Gan et al. 2018). Meta-analytic studies demonstrate less young people engage in criminal

activities after involvement with family-centred therapies (Baldwin et al., 2012; Woolfenden et al. 2002).

The strengths of Multi-Systemic Therapy (MST) and Functional Family Therapy (FFT):

- Holistically addresses the root causes of offending behaviour
- Increases the chance for young people with undiagnosed mental and cognitive disabilities and/ or mental illnesses to receive screening, diagnosis and ongoing support
- Works with the whole family to identify needs
- Keeps children and young people connected to their communities
- MST targets four social environments of the young person: family, school, neighbourhood/community and their peer group.
- Is more cost-effective than detention
- It can be led and implemented by Aboriginal and Torres Strait Islander communities which promote and incorporate cultural awareness for at-risk indigenous young people.

(Baldry et al. 2015, Knight et al. 2017, McLaren 2000, p. 64).

These approaches have been found to:

- Reduce reoffending
- Reduce family conflict and breakdown to improve the well-being of children and young people
- Change life trajectories away from statutory services, including child protection and the criminal justice system
- Reduce education disengagement, including in transitions from primary to high school and reduce school suspensions
- Reduce young people's substance misuse
- Benefit a large cohort of at-risk young people, not just a small population of offending young people

- Potentially reduce the likelihood of generational, repeated cycles of incarceration
(Hansson et al. 2000, Thøgersen 2012)

Family Group Conferencing & Restorative Justice Conferencing

We recommend Multi-Systemic Therapy (MST) and Functional Family Therapy (FFT) are delivered in conjunction with diversionary approaches such as Family Group Conferencing and Restorative Justice (RJ).

Research has consistently demonstrated that Restorative Justice Conferencing is effective in reducing young people's rates of recidivism (Sherman et al. 2000, Wong et al. 2016). A recent longitudinal Australian study, however, showed restorative justice conferencing does not necessarily improve rates of recidivism for Indigenous Australians (Little et al. 2018). The study highlighted how indigenous young people are more likely to reoffend within 2 years of their first conference (ibid, p. 4079). While this is discouraging, the study argued diversionary approaches can be improved through:

- **The implementation of Family Group Conferencing and Restorative Justice Conferencing undertaken in conjunction with other therapeutic approaches – such as MST and FFT.**
- **Inviting and incorporating Aboriginal and Torres Strait Islander leadership throughout the process**
- **Supporting and sustaining the authentic engagement of Aboriginal and Torres Strait Islander families throughout the process**

Indigenous young people may experience reintegrative shame from the conferencing process, yet the underlying structural issues of disadvantage and marginalisation they experience must be addressed.

6. Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

As previously mentioned, we suggest implementing service models that combine both therapeutic and diversionary responses to effectively divert young people from a criminal life trajectory. In this section, we shed light on three initiatives that offer promising early outcomes for at-risk children and young people.

The Safe and Connected Youth Project, ACT

In 2019, the Safe and Connected Youth Project commenced in the ACT, coordinated by the Youth Coalition. This project aims to support young people aged 10-15 who are at risk of or experiencing homelessness. Experiences of homelessness have been shown to increase young people's chances of committing crime and/or reoffending post-release (Holloway et al. 2018, Knight et al. 2018).

The pilot of the Project includes the provision of early intervention supports to prevent young people from families and to keep families safe, by providing therapeutic outreach support to families. Therapeutic caseworkers provide youth-focused family support and work in collaboration with family mediators to improve family functioning. In doing so, the Project seeks to prevent adverse outcomes, changing life trajectories away from involvement with the youth justice and child protection systems, disengagement from education, problematic alcohol and other drug use, and health / mental health concerns.

For more detailed information on the Safe and Connected Youth Project refer to the Youth Coalition's *Action Plan To Prevent Child Homelessness: A service model for children aged 8-15 in the ACT*.

The Bourke Maranguka Justice Reinvestment project

The 'Bourke Maranguka Justice Reinvestment project' is another example of a current evidence-based program that we see as effective in supporting young at-risk people. These programs are centred in early intervention and encompass trauma-responsive elements. Moreover, these programs are community-led, strengths-based and embed Aboriginal and Torres Strait Islander communities into their design and delivery.

The 'Bourke Maranguka Justice Reinvestment project' focuses on justice reinvestment in Bourke. The project's justice reinvestment approach seeks to address the underlying causes of crime by investing in community-led initiatives.

The organisation's 2018 impact assessment revealed promising results such as:

- **23% decrease in police-recorded incidents of domestic violence**
- **14% decrease in bail breaches for adults**
- **42% reduction in days spent in custody for adults**
- **31% increase in year 12 student retention rates**
- **38% reduction in charges across the top five juvenile offence categories**

The 'Backtrack' initiative

The 'BackTrack' initiative works with young people aged 12-19, equipping young people to claim and live "a decent, happy life". BackTrack was established during 2006 in Armidale in northern New South Wales (NSW) (<http://www.backtrack.org.au>). The program has been evaluated by researchers as highly effective in diverting youth away from crime, due to its incorporation of all five evidence-based service components (as outlined in section 6) (Knight et al. 2018, p. 5). The program has facilitated young people to engage in meaningful employment and social activities, which has shown to shift their trajectory away from a life of crime (BackTrack 2018).

Do these approaches include mechanisms to ensure that children take responsibility for their actions?

We propose that the notion of individual responsibility is reformulated and expanded to encompass community responsibility. It is apparent:

“For decades, adolescents in trouble with the law have been portrayed as scary, predatory, and less than human. Black and brown youth predominate in these images...these images dominate our understanding and prevent us from seeing them as they actually are, as we would see them if they were our own children or a neighbour’s child. **They prevent us from seeing them as young people with creativity, and energy, and smarts, and possibility, in need of help to get back on track and very much worth the investment**”

(McCarthy et al. 2016, p.17).

Due to the compounded factors which shape young people’s actions we argue that it is reductionistic and unhelpful to propose young people simply “take responsibility” for their actions. This is not to say that the impact of young people’s crime/s should be excused or minimised. Diversionary approaches such as Family Group Conferencing and Restorative Justice Conferencing facilitate young offenders to acknowledge the negative impact of their actions on the victim/s and families. Yet, as previously mentioned in section 5, the use of reintegrative shaming is ineffectual in preventing recidivism for indigenous Australians.

We, therefore, propose communities help take responsibility for at-risk young people by:

- **Implementing homelessness services which provide safe and stable accommodation**
- **Providing timely access and culturally appropriate mental health services**
- **Providing thorough diagnostic and screening to divert children and young people with complex support needs from the youth justice system**
- **Engaging in justice reinvestment mechanisms**
- **Improving access to drug and alcohol rehabilitation services**
- **Encouraging Aboriginal leadership and self-determination to address the challenges at-risk youth face**

- **Strengthening families to have fewer interactions with the justice system**
- **Encouraging youth development – such as increasing the retention rate for year 12 students and within VET courses. As well as providing pathways to pursue meaningful employment**

(Bartels 2019, Matthews 2000, O'Brien & Fitz-Gibbon 2017).

The Safe and Connected Youth Project, Bourke's Maranguka Justice Reinvestment project and BackTrack provide examples of how a community responsibility approach could work in practice.

Suggestions in regard to any perceived shortcomings

- **Shifting the "Tough on crime" paradigm:** While these community-led approaches indicate early promising results, a potential shortcoming is resistance from communities. The 'Tough on crime' paradigm, which asserts that young people pay for their crimes, can be a historically entrenched and community-wide attitude (O'Brien & Fitz-Gibbon 2018). The promotion of a therapeutic approach to youth justice may be required to maximise community uptake.
- **The need for trust-building:** We highlight trust-building as essential to this approach. Distrust and disengagement of services and systems by young people and their families can be a significant barrier to help-seeking and service use, particularly for Aboriginal Australians. This highlights the need for community-based initiatives that build strong partnerships with local communities. This trust-building process is essential for Aboriginal Australians to access and engage with disability and mental health services long-term (DiGiacomo et al. 2013).
- **The unintentional harms of medicalisation –** While our position is to address the needs not the deeds of at-risk young people, we argue therapeutic approaches must be community-based. Put another way, this approach should not involve swapping one institution for another. The mistreatment of children

and young people can occur in mental health and disability institutions, as recently outlined in the findings of Victoria's Interim Mental Health Royal Commission (State of Victoria 2018–19). Where possible, children and young people should be engaged with programs such as the Safe and Connected Youth Project, Bourke's Maranguka Justice Reinvestment project and BackTrack, not placed in other similar and potentially damaging institutional settings (Bradley et al. 2016).

7. If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views and, if available, provide any supporting evidence.

Please refer to our detailed responses to questions 5 and 6.

8. If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold?

Please refer to our detailed responses to questions 5 and 6.

9. Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered doli incapax) to participate in activities or behaviours which may otherwise attract a criminal offence?

Aligned with Aboriginal and Torres Strait Islander Rights Unit's perspective at the Human Rights Law Centre we argue there is no need for the creation of any new criminal offences for persons who may exploit or incite children under the minimum age of criminal responsibility to engage in or participate in activities or behaviours that could result in the commission of a criminal offence (AMA 2018, Musk 2017).

10. Are there issues specific to states or territories (eg operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

The Youth Coalition notes the significant overlap between youth justice and children and young people in the child protection system. Young people involved with child protection in the ACT were more likely to have been supervised by a youth justice agency than any other Australian jurisdiction (AIHW, 2019a). ACT statutory child protection and youth justice functions are managed by Child and Youth Protection Services within the ACT Government, with out-of-home care services provided by a consortium of community-based providers.

Operationally, adequate community-based services are required to support families, and to prevent children and young people from coming into contact with the youth justice system. A very small number of children under the age of 14 are incarcerated in the ACT (AIHW, 2019b). This highlights the benefits of providing evidence-based approaches within communities that support at-risk young people and their families early, including models such as FFT and MST.

Conclusion

In sum, the Youth Coalition of the ACT promotes a therapeutic, rehabilitative and holistic approach to youth justice which is underpinned by the following three key principles:

- 1. At-risk and offending children and young people should have their needs, and not only their deeds, addressed**
- 2. Program and frameworks should aim to integrate, not segregate children and young people from their families and communities**
- 3. In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led**

We propose raising the Minimum Age of Criminal Responsibility to at least 14 years in all circumstances for all offences as:

“Such youth need positive adult-youth interactions, feedback loops, and learning opportunities that help them with the developmental tasks of impulse control, judgment, future orientation, and emotional maturity. The punitive, coercive atmosphere of youth prisons provides none of these critical experiences”

(McCarthy et al. 2016, p. 5).

Reference List

- ACT Government: Community Services 2019, *Blueprint for Youth Justice Taskforce Final Report*, pp. 1-42, https://www.communityservices.act.gov.au/youth/the_blueprint_for_youth_justice_in_the_act
- AMA 2018, "Minimum age of criminal responsibility: Policy Statement", *Law Council of Australia*, pp. 1-9.
- Australian Institute of Health and Welfare 2019a, *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018*, Canberra: AIHW.
- Australian Institute of Health and Welfare 2019b, *Youth Justice in Australia 2017-18*, Canberra: AIHW.
- Australian Law Reform Commission 1997, *Seen and Heard: Priority for Children in the Legal Process*, <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC84.pdf>
- BackTrack 2018, *BackTrack Annual Report 2018*, pp. 1- 48, <https://backtrack.org.au/wp-content/uploads/2019/03/BackTrack-Annual-Report-2018-Low-Res.pdf>
- Baldry, E, Briggs, DB, Goldson, B & Russell, S 2018, "Cruel and unusual punishment': an inter-jurisdictional study of the criminalisation of young people with complex support needs", *Journal of Youth Studies*, vol. 21, no. 5, pp. 636-652.
- Baldwin, SA, Christian, S, Berkeljon, A & Shadish, WR 2012, "The Effects of Family Therapies for Adolescent Delinquency and Substance Abuse: A Meta analysis", *Journal of Marital and Family Therapy*, vol. 38, no. 1, pp. 281-304.
- Bartels, L 2019, "Australian governments should follow the ACT's lead in building communities, not prisons", *The Conversation*, February 21, <https://theconversation.com/australian-governments-should-follow-the-acts-lead-in-building-communities-not-prisons-111990>
- Bennett, J & Rizmal, Z 2019, "What to expect as Victoria's mental health royal commission wraps up", *ABC News*, <https://www.abc.net.au/news/2019-07-28/victorian-mental-health-royal-commission-wraps-up/11351220>
- Berelowitz, S 2011, "'I Think I Must Have Been Born Bad': Emotional Wellbeing and Mental Health of Children and Young People in the Youth Justice System", *Office of the Children's Commissioner*, https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/I_think_I_must_have_been_born_bad_-_full_report.pdf
- Bower, C, Watkins, RE, Mutch, RC, Marriott, R, Freeman, J, Kippin, NR, Safe, B, Pestell, C, Cheung, CSC, Shield, H, Tarratt, L, Springall, A, Taylor, J, Walker, N, Argiro, E, Leitão, S, Hamilton, S, Condon, C, Passmore, HM & Giglia, R 2018, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia", *BMJ Open*, vol. 8, no. 2, pp. 1-10.
- Bradley, K, Kashyap, K, Klippan, L, Lulham, R, McGregor, F, Munro, T, Tomkin, D 2016, "Reframing the purpose, practice and place of juvenile detention in Victoria:

- Submission to the 'Inquiry into Youth Justice Centres in Victoria', *Designing OUT Crim Research Centre*, pp. 1- 42,
https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Youth_Justice_System/Submissions/Submission_46-Design_out_Crime.pdf
- Butts, JA, Bazemore, G, and Meroe, AS 2010, "Positive Youth Justice – Framing Justice Interventions Using the Concepts of Positive Youth Development", *Washington, DC: Coalition for Juvenile Justice*.
- Crofts, T 2015, "A Brighter Tomorrow: Raise the Age of Criminal Responsibility", *Current Issues in Criminal Justice*, vol. 27, no. 1, pp. 123-131.
- Crofts, T 2016, "Reforming the age of criminal responsibility", *South African Journal of Psychology*, vol. 46, no. 4, pp. 436-448.
- Cunneen, C 2017, "Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report", *Comparative Youth Penalty Project*, University of New South Wales, Sydney.
- DiGiacomo, M, Delaney, P, Abbott, P, Davidson, PM, Delaney, J & Vincent, F 2013, "Doing the hard yards': carer and provider focus group perspectives of accessing Aboriginal childhood disability services", *BMC health services research*, vol. 13, no. 1, pp. 326-326.
- Dunlop, G 2018, "The youth justice advocate says he fears for the teenagers who are currently being held behind bars in Darwin", *ABC News*, <https://www.sbs.com.au/nitv/nitv-news/article/2018/11/07/dylan-voller-don-dale-shows-nothing-has-changed-royal-commission>
- Fitz-Gibbon, K & O'Brien, W 2019, "A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)", *International Journal for Crime, Justice and Social Democracy*, vol. 8, no. 1, pp. 18-33.
- Gan, DZQ, Zhou, Y, Hoo, E, Chong, D & Chu, CM 2019, "The Implementation of Functional Family Therapy (FFT) as an Intervention for Youth Probationers in Singapore", *Journal of Marital and Family Therapy*, vol. 45, no. 4, pp. 684-698.
- Gerard, A, McGrath, A, Colvin, E & McFarlane, K 2019, "'I'm not getting out of bed!': The criminalisation of young people in residential care", *Australian and New Zealand Journal of Criminology*, The, vol. 52, no. 1, pp. 76-93.
- Government of Australia 2017, *Royal Commission into the Protection and Detention of Children in the Northern Territory: Report Overview*, pp. 1-6,
<https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-report-overview.pdf>
- Hall, A 2019, "Why Australia needs to raise the criminal age of responsibility to 14", *SBS News*, 24 September, <https://www.sbs.com.au/news/why-australia-needs-to-raise-the-criminal-age-of-responsibility-to-14>
- Holloway, R, Kaliani Lyle, Wishart, R 2018, *Kilbrandon Again – How well does Scotland Support Children and Young People in Trouble?*, *Action for Children (AfC) & The Office of the Children and Young People's Commissioner Scotland*,
https://www.cypcs.org.uk/ufiles/Kilbrandon_Report.pdf

- Hughes, N, Williams, H, Chitsabesan, P, Davies, R, & Mounce, L 2012, "Nobody Made the Connection: The Prevalence of Neuro-Disability in Young People Who Offend", *Office of the Children's Commissioner*, https://yjlc.uk/wp-content/uploads/2015/03/Neurodisability_Report_FINAL_UPDATED__01_11_12.pdf
- Indig, D, Vecchiato, C, Haysom, L, Beilby, R, Carter, J, Champion, U 2011, "2009 NSW Young People in Custody Health Survey: Full report", *Sydney: Justice Health and Juvenile Justice*.
- Inman, M 2019, Bimberi Youth Justice Centre apologises to Indigenous detainee over alleged human rights breaches, *ABC News*, <https://www.abc.net.au/news/2019-10-18/bimberi-youth-detention-centre-apologises-to-indigenous-detainee/11613754>
- Johnson, SB, Blum, RW & Giedd, JN 2009, "Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy", *Journal of Adolescent Health*, vol. 45, no. 3, pp. 216-221.
- Johnston, M 2006, "Doli Incapax - The Criminal Responsibility of Children", *The Children's Court of NSW*, pp. 1-14.
- Knight, A, Maple, M, Shakeshaft, A, Shakeshaft, B & Pearce, T 2018, "Improving the evidence base for services working with youth at-risk of involvement in the criminal justice system: developing a standardised program approach", *Health & justice*, vol. 6, no. 1, pp. 8-9.
- Law and Justice Foundation 2009, "Cognitive impairment, legal need and access to justice", *Law and Justice Foundation of NSW Paper 10*, Sydney.
- Lennings, N & Lennings, C 2014, "Assessing Serious Harm Under the Doctrine of Doli Incapax : A Case Study", *Psychiatry, Psychology and Law*, vol. 0, no. 0, pp. 1-10.
- Little, S, Stewart, A & Ryan, N 2018, "Restorative Justice Conferencing: Not a Panacea for the Overrepresentation of Australia's Indigenous Youth in the Criminal Justice System", *International Journal of Offender Therapy and Comparative Criminology*, vol. 62, no. 13, pp. 4067-4090.
- Matthews, B 2000, "Children's criminal responsibility in Australia : some legal, psychological and human rights issues", *Australia and New Zealand Journal of Law and Education*, vol. 5, no. 2, pp. 27-45.
- McCarthy, P, Schiraldi, V & Shark M 2016, "The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model", *New Thinking in Community Corrections*, no. 2, pp. 1-36.
- McCausland, R & Baldry, E 2017, "I feel like I failed him by ringing the police': Criminalising disability in Australia", *Punishment & Society*, vol. 19, no. 3, pp. 290-309.
- McFarlane, K, Colvin, E, McGrath, A & Gerard, A 2019, "'Just another policy document?': Can a protocol end the criminalisation of kids in care?", *Alternative Law Journal*, vol. 44, no. 1, pp. 37-42.
- McFarlane, K. 2018, "Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system", *Australian and New Zealand Journal of Criminology, The*, vol. 51, no. 3, pp. 412-433.

- Musk, S 2017, "The 'tough on crime' approach failed NT youth", *Human Rights Law Centre*, <https://www.hrlc.org.au/opinion/2017/7/4/the-tough-on-crime-approach-failed-nt-youth>
- Nguyen, H, Loughran, TA, Paternoster, R, Fagan, J, and Piquero, AR 2016, "Institutional placement and illegal earnings: Examining the crime school hypothesis", *Journal of Quantitative Criminology*, vol. 33, no. 2, pp. 207-235.
- Noroozi, M, Singh, I & Fazel, M 2018, "Evaluation of the minimum age for consent to mental health treatment with the minimum age of criminal responsibility in children and adolescents: a global comparison", *Evidence-based mental health*, vol. 21, no. 3, pp. 82-86.
- O'Brien, W & Fitz-Gibbon, K 2017, "The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform", *Youth Justice*, vol. 17, no. 2, pp. 134-152.
- O'Brien, W & Fitz-Gibbon, K 2018, "Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?", *The International Journal of Children's Rights*, vol. 26, no. 2, pp. 197-227.
- Passmore, HM, Bower, C & Mutch, RC 2018, Almost every young person in WA detention has a severe brain impairment, *The Conversation*, <http://theconversation.com/almost-every-young-person-in-wa-detention-has-a-severe-brain-impairment-90695>
- Sherman, LW, Strang, H, & Woods, D 2000, "Recidivism patterns in the Canberra reintegrative shaming experiment", *Canberra: Centre for Restorative Justice, Research School of Social Sciences*, Australian National University, Canberra.
- State of Victoria 2018-19, Royal Commission into Victoria's Mental Health System, Interim Report, Parl Paper, no. 87, pp. 1-666.
- The Canberra Times, December 9 2017, *Canberra should increase the age of criminal responsibility*, <https://www.canberratimes.com.au/story/6025040/canberra-should-increase-the-age-of-criminal-responsibility/>
- The Youth Coalition of the ACT 2019, *Action Plan To Prevent Child Homelessness: A service model for children aged 8-15 in the ACT*, pp. 1-6, <https://youthcoalition.net/2019site/wp-content/uploads/2019/02/Action-Plan.pdf>
- Thøgersen, DM 2012, "Implementation of FFT in Norway", *Annual Blueprints for Violence, Prevention Conference*, San Antonio, TX.
- United Nations Committee on the Rights of the Child 2019, *General Comment No 24 on children's rights in the child justice system*, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en
- Urbas, G 2000, The Age of Criminal Responsibility, *Australian Institute of Criminology*, https://www.researchgate.net/profile/Gregor_Urbas/publication/237285097_The_Age_of_Criminal/links/5407fbb0cf2bba34c24872f.pdf
- Victorian Sentencing Advisory Council 2016, *Reoffending by Children and Young People in Victoria*, https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending_by_Children_and_Young_People_in_Victoria.pdf

- White, M 2019, "Youth justice and the age of criminal responsibility: Some reflections", *Adelaide Law Review*, The, vol. 40, no. 1, pp. 257-271.
- Wild K 2016, "Dylan Voller's Troubled Past", *ABC 7:30*, 8 August, <https://www.abc.net.au/7.30/dylan-vollers-troubled-past/7702938>
- Wong, JS, Bouchard, J, Gravel, J, Bouchard, M, & Morselli, C 2016, "Can at-risk youth be diverted from crime? A meta-analysis of restorative diversion programs", *Criminal Justice and Behavior*, vol. 43, no. 1, pp. 1310-1329.
- Woolfenden, SR, Williams, K, & Peat, JK 2002, "Family and parenting interventions for conduct disorder and delinquency: A meta-analysis of randomised controlled trials", *Archives of Disease in Childhood*, vol. 86, no. 4, pp. 251-256.
- Wyles, P 2009, "Building a Human Rights Youth Justice System", *Youth Studies Australia*, vol. 28, no. 3, pp. 4-12.