Government of Western Australia
Department of Justice

At the Standing Council of Attorneys-General (SCAG) on 9 December 2022, participants agreed to release a draft report on the Age of Criminal Responsibility, which was originally prepared for the then Council of Attorneys-General (CAG) but was never agreed by all jurisdictions at officer level nor provided to CAG for consideration.

DRAFT Final Report 2020

Council of Attorneys-General

Age of Criminal Responsibility Working Group

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The information in this Report is indicative only and may not reflect the final views of jurisdictions on the Working Group.

Contents

Executive summary

On 23 November 2018, the Council of Attorneys-General (CAG) agreed that 'it would be appropriate to examine whether to raise the age of criminal responsibility from 10 years of age.' The CAG announced that a working group would be established to review the matter, drawing from relevant jurisdictional and international experience and would report back within 12 months.

The Age of Criminal Responsibility Working Group (Working Group) was established in February 2019 and is chaired by the Western Australian Department of Justice. The Working Group is comprised of policy officers from each State, Territory and the Commonwealth.

The Working Group's Terms of Reference required it to consider whether the age of criminal responsibility should be maintained, increased or increased in certain circumstances only and whether the common law presumption in criminal law of *doli incapax* should be retained and, if so, whether the current age threshold should change. The Working Group also examined whether there should be a separate minimum age for children in detention.

Across Australia, the minimum age of criminal responsibility is currently legislated at 10 years of age. In addition, children aged between 10 and 14 years are presumed to legal incapable. The Working Group has heard from stakeholders that the *doli incapax* presumption is complex and often difficult to apply in practice. The presumption only becomes operative at the point at which a child has reached the trial stage of the process, resulting in a child still being subjected to the trauma of the criminal justice system.

This report has found that the reasons for children coming into contact with the criminal justice system are varied and complex. The entry of children into the youth justice system disproportionately impacts Aboriginal and Torres Strait Islander children. Most children under youth justice supervision come from backgrounds that are disadvantaged. These children have often experienced violence, abuse, disability, homelessness and drug or alcohol misuse. They may have witnessed family members who are part of the criminal justice system, thereby normalising their own potentially criminal behaviour.

There is a direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment and having one or more parents with a criminal record.

Studies have shown that the younger the child is when first having contact with the justice system, the more likely they are to go onto reoffend. This may suggest that criminalising the behaviour of young children may result in them becoming entrenched in the justice system.

The Working Group has examined State and Territory youth justice frameworks and found that, despite legislative differences, they share many features in common. A focus on rehabilitation of young offenders, often with separate court systems to deal with defendants aged under 18 years and the use of diversion programs to move children away from further progression into the criminal justice system are some shared features across Australian jurisdictions.

Early intervention and diversion programs with a focus on education, community/family and health are common methods through which States and Territories provide support for children who may be at risk of entering the youth justice system. This report has found that the ability to successfully divert children and young people away from the justice system, while still

ensuring they are made accountable for their actions, is crucial regardless of the minimum age of criminal responsibility.

The interaction between programs and any change to the minimum age of criminal responsibility would need to be carefully considered along with other relevant issues such as associated costs and management of children already in the criminal justice system who are under any new minimum age.

Different options for setting the minimum age of criminal responsibility are contemplated in this report and the Working Group acknowledges that consensus was not reached by jurisdictions that raising the minimum age of criminal responsibility to 14 years without exception is the preferred approach. The Working Group notes that each member of the Working Group has local issues unique to its jurisdiction that must be taken into account when considering this report.

The Commonwealth Attorney General's Department requested that the Working Group include the following statement:

> The Commonwealth does not endorse the report. In the Commonwealth's view, the report does not give sufficient consideration to broader implications of raising the minimum age of criminal responsibility for the justice system and community safety. The Commonwealth considers the findings and recommendations are not properly balanced and does not agree with all of them.

However, the majority of the Working Group[1] does not agree with the Commonwealth, and, satisfied that the report comprehensively reflects the evidence reviewed and the consultation undertaken, presents below its preferred options for CAG to consider.

Findings and Recommendations

Findings and Recommendations are found throughout this report and are reproduced here:

Finding 1: Australia's minimum age of criminal responsibility has been criticised for being too low by the United Nations Committee on the Rights of the Child.

Finding 2: Australia's minimum age of criminal responsibility is one of the lowest among OECD member countries.

Finding 3: The evidence regarding the psychological, cognitive and neurological development of children indicates that a child under the age of 14 years is unlikely to understand the impact of their actions or to have the required maturity for criminal responsibility.

Finding 4: Detention may not be an effective deterrent for a child because of their immature brain development and cognitive functions and lack of capacity to understand the consequences of their actions.

Finding 5: Complex or cumulative trauma in early childhood can disrupt brain development and the effects may manifest as risk factors for future contact with the justice system. Most children in the youth justice system have experienced childhood trauma.

[1] Any references to the Working Group in the following findings and recommendations should be construed as meaning the majority of the Working Group.

Finding 6: Children and young people who engage with the criminal justice system have comparatively higher rates of childhood neglect and trauma (including physical, psychological and sexual abuse), familial instability and substance abuse, and experience in the child protection and out-of-home care systems, as well as lower levels of education. Placing a child in detention can disrupt normal brain development and compound pre-existing trauma. Detention creates life-long negative outcomes.

Finding 7: Children, particularly Indigenous children, in the youth justice system are more likely to come from disadvantaged backgrounds, have experienced trauma, or have a disability or neurodevelopmental impairment and consequently have complex needs.

Finding 8: An educational, medical, psychological, social and cultural response that deals with the underlying causes of child and youth offending, rather than a purely justice-based approach, can lead to better outcomes for children.

Finding 9: 10 to 13 year olds make up only seven per cent of children under supervision in Australia and almost never commit the most serious offences. During 2018-19, there were 567 children aged under 14 years in unsentenced detention and 34 in sentenced detention.

Finding 10: Indigenous children and young people are vastly over-represented in the youth justice system.

Finding 11: Early contact with the justice system is a key predictor of recidivism: 85 per cent of young people who were supervised between the ages of 10 and 14 years returned to, or continued under, supervision when they were aged 15 to 17 years.

Finding 12: *Doli incapax* does not consistently operate as intended and may not always protect children aged 10 to 14 years who did not know that their behaviour was 'seriously wrong.' Even in cases where *doli incapax* operates to prove that a child was incapable of criminal responsibility, the late stage at which the presumption is triggered still results in a child being subjected to the criminal justice system, including a criminal trial.

Recommendation 1: Based on the findings of this report, but subject to Recommendation 2, the Commonwealth, State and Territory governments should raise the minimum age of criminal responsibility to 14 years of age, without exception.

Alternative options for reform include raising the minimum age of criminal responsibility to 14 with exceptions for serious crimes, or raising the minimum age of criminal responsibility to 12 and the minimum age of detention to 14 (with exceptions for serious offences). These options are further outlined in Table 9 of this report.

Recommendation 2: Prior to implementing a change to the minimum age, the following matters should be considered by each jurisdiction:

Recommendation 2.1: A gap analysis be undertaken with regard to the current prevention, early intervention and diversionary frameworks in the context of a potential change to the minimum age of criminal responsibility.
Recommendation 2.2: Broad consultation be commenced, including with government agencies and community members who were not part of the Working Group's consultation.
Recommendation 2.3: Current family and community responses/programs be strengthened, ensuring that programs are evidence-based, culturally safe, trauma informed and, where appropriate, community-led.

Recommendation 2.4: 'Places of safety' be established or ensured. Each government review, develop and expand safe accommodation for children that is culturally appropriate and takes into account the need for connection with family and community.
Recommendation 2.5: The police or other authorities be given the power to refer a child and/or caregivers to appropriate agencies, diversionary programs and services where the authorities become aware that the child is under the age of criminal responsibility and is displaying risks or needs in their behaviour. This recommendation relates to circumstances where, if the child had been over the age of criminal responsibility, they would have been reasonably suspected to have committed a criminal offence.
Recommendation 2.6: Consideration be given as to whether there should be a minimum age of detention for children above the minimum age of criminal responsibility, such as 16 years of age, with exceptions for serious offences.

Recommendation 3:If there is a decision to keep the minimum age of criminal responsibility below 14 years, the presumption of *doli incapax* ought to be retained from that minimum age to 14 years.

The presumption should be standardised in legislation across jurisdictions, with a specification that the onus of proof rests with the prosecution.

The assessment as to whether a child is *doli incapax* should occur at the earliest possible opportunity.

Table 9: Alternative options for raising the minimum age of criminal responsibility (MACR)

	MACR	Exceptions to the MACR	*Doli incapax*	Age of detention	Policy objectives
Alternative A	14	Certain specified serious offences for children aged 10-14 or 12-14	Retain for specified serious offences	10 or 12 – serious offences only	*Meets key policy objectives 2 and 4, partially meets policy objectives 1 and 3.* *Similarities with New Zealand's approach and may manage perceptions regarding community safety.* *But, not in line with medical science regarding child development.* *UN prefers an absolute MACR without exceptions. Expect ongoing UN criticism.*
	Alternative A recommendations: 1. Raise the MACR to 14 years, with exceptions for serious offences. 2. For specified serious offences, implement an appropriate lower age threshold for the MACR. 3. Standardise the operation of the *doli incapax* presumption across jurisdictions so as to ensure that the onus is on the prosecution and it is fit for purpose. 4. Where police or other authorities become aware of a child under the minimum age of criminal responsibility displaying risks or needs in their behaviour, they are given the power to refer the child and/or caregivers to appropriate agencies, diversionary programs and services. This would be subject to the condition that if the child had been over the age of criminal responsibility they would have been reasonably suspected to have committed a criminal offence. 5. If those children pose a serious risk to themselves or the community, police and authorised persons have the power to take the child to an appropriate place of safety (not being a place of detention) and caregivers and relevant agencies are notified. **Implementation and supports:** • Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led. • Maintenance of data of all behaviour by children under the age of criminal responsibility that would otherwise be considered criminal. • Ensure or establish appropriate 'places of safety'. • Review the operation and effectiveness of the revised MACR of 14 years within 5 years of commencement to consider the incidence of serious offending by children aged 10-13 and whether any other changes are required.				

	MACR	Exceptions to the MACR	*Doli incapax*	Age of detention	Policy objectives
Alternative B	12	None	Retain for children aged 12 to 14	14 (with exceptions for defined serious offences)	*Meets policy objective 5 and partially meets other objectives.* *In line with NT Royal Commission recommendations. May be more acceptable to the community.* *Not in line with medical science regarding child development.* *UN prefers an absolute MACR without exceptions. Expect ongoing stakeholder and UN criticism.*

Alternative B recommendations:

1. Raise the MACR to 12 years.
2. Establish a minimum age of 14 years for custodial sentences with exceptions for specified serious offences.
3. Standardise the operation of the *doli incapax* presumption across jurisdictions so as to ensure that the onus is on the prosecution and it is fit for purpose.
4. Where police or other authorities become aware of a child under the minimum age of criminal responsibility displaying risks or needs in their behaviour, they are given the power to refer the child and/or caregivers to appropriate agencies, diversionary programs and services. This would be subject to the condition that if the child had been over the age of criminal responsibility they would have been reasonably suspected to have committed a criminal offence.
5. If those children pose a serious risk to themselves or the community, police and authorised persons have the power to take the child to an appropriate place of safety (not being a place of detention) and caregivers and relevant agencies are notified.

Implementation and supports:

- Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led.
- Maintenance of data of all behaviour by children under the age of criminal responsibility that would otherwise be considered criminal.
- Ensure or establish appropriate ‘places of safety’.
- Review of the operation and effectiveness of the revised MACR of 12 years within 5 years of commencement, and consider the effects of not sentencing children under 14 to detention except for serious offences. Consider further increasing the MACR to 14 years of age.

1 Introduction

1.1 Purpose of this report

On 23 November 2018, the Council of Attorneys-General (**CAG**) agreed that 'it would be appropriate to examine whether to raise the age of criminal responsibility from 10 years of age'. The CAG announced that a working group would be established to review the matter, drawing from relevant jurisdictional and international experience, and would report back within 12 months.[2]

The Age of Criminal Responsibility Working Group (**Working Group**) was established in February 2019. The Working Group is chaired by the Western Australian Department of Justice, and includes representation from each State, Territory and the Commonwealth.[3]

Working Group representatives have been appointed from each jurisdiction's justice departments. The Working Group therefore notes that the views expressed in this report are based on officer-level discussions and may not necessarily reflect the views or priorities of each jurisdiction's Attorney General or non-justice government agencies.

Appendix 1 lists the current jurisdictional representatives on the Working Group.

The Terms of Reference for the Working Group were approved by the CAG Senior Officials' Group in May 2019 and are as follows:[4]

In accordance with the **Terms of Reference**, the Working Group considered the following key issues (amongst related matters) in preparing this report:

1. Should the age of criminal responsibility be maintained, increased in certain circumstances only, or increased?
2. Should the principle of *doli incapax* be retained, or should the age threshold applied to the presumption change?

The Working Group also considered the related question of whether there should be a separate minimum age for a court to be able to order a sentence of detention.

Finally, the Working Group reiterates that this report is a result of research and evidence-gathering in a justice context. In examining matters related to its Terms of Reference, the Working Group has considered the further research that will be necessary to implement its preferred reforms, which has informed its conclusions and the recommendations as outlined in this report.

The Working Group has not reached consensus on all issues raised in this report but has agreed that the minimum age of criminal responsibility cannot be raised without a clear framework for implementation and supports being put in place first.

Throughout this report, references to any findings or recommendations made by the Working Group should be construed as meaning the majority of the Working Group.[5] Each member of

[2] Council of Attorneys-General, *Communiqué*, 23 November 2018, p.4.
[3] The New Zealand Ministry of Justice respectfully declined representation on the Working Group.
[4] Council of Attorneys-General, *Summary of Decisions*, 23 November 2018, p.5. The Council of Attorneys-General agreed that the terms of reference for the Working Group be finalised by its Senior Officials Group.
[5] The Commonwealth does not endorse the report, including the findings and recommendations.

the Working Group has local issues unique to its jurisdiction that must be taken into account when considering this report.

1.2 Methodology

This report was prepared after an initial desktop review of a range of government and non-government resources, including:

- contemporary Australian inquiries and government responses, reviews and experience
- relevant international reports, agreements and standards
- overseas experience
- stakeholder reports and commentary
- relevant evidence-based research
- current youth justice statistics across Australian jurisdictions.

This report considers key policy and legal considerations in regard to sentencing, detention, rehabilitation, recidivism, child welfare and development, community safety and the desirability of dealing with children and young people outside of judicial proceedings.

Relevant data, statistics and evidence, including in regard to child and adolescent cognitive and behavioural development, have also helped to inform the Working Group's considerations.

1.2.1 Difficulties encountered during consultation

The Working Group encountered difficulties in effectively engaging with its respective internal stakeholders during this review. The circumstances of the COVID-19 pandemic in the first quarter of the year hampered government consultation and resulted in a shift in priorities for many stakeholders who otherwise could have participated more fully in the review.

Consequently, there will need to be further multi-agency consultation required at the implementation stage of this important project. It is the Working Group's expectation that any further consultation can build upon the work in this report.

A summary of the responses received from agencies is attached to this report at **Appendix 4**.

1.2.2 Stakeholder consultation

The Terms of Reference provide for targeted consultation where required, to help inform consideration of relevant circumstances across Australian jurisdictions.

In November 2019, the CAG noted there was 'strong interest' in the review of the age of criminal responsibility, and recognised the importance of the views, knowledge and expertise of interested stakeholders and individuals. Attorneys-General agreed that the Working Group would undertake targeted and public consultation as soon as practicable. The CAG also noted that the Working Group will continue to progress the review, taking into account stakeholder contributions.[6] This report is the culmination of targeted consultation with stakeholders and the Working Group's own research.

[6] Council of Attorneys-General, *Communiqué*, 29 November 2019, p. 4

In accordance with CAG decisions, on 16 December 2019 the Western Australian Department of Justice published a series of consultation questions on behalf of the Working Group. A copy of the consultation questions is provided at **Appendix 2**.

1.2.3 Stakeholder submissions

A total of 93 public submissions were received by the Working Group. See **Appendix 3** for a list of non-government stakeholders who provided a public submission.

See Chapter 3 for detailed consideration and analysis of submissions received.

The submissions, together with feedback from relevant jurisdictional agencies, have been taken into account as part of a detailed assessment of key considerations and have informed the development of the proposed reform options and recommendations.

1.3 Structure of this report

Chapter 1 contains introductory information regarding the background and purpose of this report and provides a brief background to Australia's international obligations with regard to the minimum age of criminal responsibility.

Chapter 2 outlines the key policy considerations that have underpinned the Working Group's inquiry and have informed the findings and recommendations in this report for CAG.

Chapter 3 considers submissions from both government agencies and non-government organisations. This chapter outlines the concerns raised by stakeholders and provides high level analysis of recurring themes amongst submissions.

Chapter 4 introduces important concepts in youth justice that relate to the minimum age of criminal responsibility, such as *doli incapax* and the varying minimum ages of criminal responsibility that are currently in force in Australian jurisdictions.

Chapter 5 discusses the Australian approach to youth justice and factors related to sentencing and the diversion of children and young people from the criminal justice system.

Chapter 6 presents international perspectives on the age of criminal responsibility and Australia's obligations pursuant to conventions. The Working Group has also undertaken a comparative analysis of other common law jurisdictions and European approaches to the minimum age of criminal responsibility.

Chapter 7 focuses on children in the justice system and particular factors which affect children and their mental and physical development. This chapter discusses the particular disadvantage faced by Indigenous children in Australia.

Chapter 8 contains data related to the youth justice system, including rates of recidivism and the over-representation of Indigenous children.

Chapter 9 poses the question: should the minimum age of criminal responsibility be raised in Australia and deals with the possible risks of this decision. This chapter also outlines positive reasons why the age of criminal responsibility may be raised.

Chapter 10 sets out this report's conclusions and summarises the preferred options for reform for CAG. This chapter then considers what the legal and policy implications would be if CAG decided to raise the age of criminal responsibility and how these reforms might be implemented in practice.

1.4 Background

Across Australia, the minimum age of criminal responsibility is legislated at 10 years. In addition, children aged 10 to 14 years are presumed to be criminally incapable, a concept known as *doli incapax*. This presumption may be rebutted by prosecutorial evidence which proves otherwise.[7]

However, the age of criminal responsibility in Australia has been increasingly subject to domestic and international scrutiny, including through individual human rights complaints.

1.4.1 International obligations

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (**Beijing Rules**) recognise that the minimum age of criminal responsibility varies across the world, depending upon a country's history and culture, but the 'modern approach' would be to:

> *consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour*.[8]

In September 1990, the United Nations Convention on the Rights of the Child (**CROC**) came into force. Article 40(3) of CROC requires that:

> *States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:*
>
> *(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;*
>
> *(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.*

The Working Group notes that CROC does not specify a specific minimum age.

Until recently, the UN Committee on the Rights of the Child (**UN Committee**) recommended 12 years of age as an 'internationally acceptable' minimum age of criminal responsibility. The UN Committee has continued to express concern over exceptions that permit the use of a lower minimum age, for example in cases where the child is accused of committing a serious offence or where a presumption such as *doli incapax* is rebutted successfully.[9]

In September 2019, Australia appeared before the UN Committee and was harshly criticised for not moving to raise its 'very low' age of criminal responsibility, despite previous Committee recommendations to do so. The UN Committee now recommends that:

- Australia raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies
- children under 16 years of age not be placed in detention.[10]

[7] See further, paragraph 4.1.
[8] United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985, Article 4.1.
[9] See further, paragraph 6.1.1.
[10] United Nations, Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, paragraph 14.

The UN Committee updated its position to reflect developments that have occurred 'as a result of the promulgation of international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice'.[11] Its position also 'reflects concerns such as the trends relating to the minimum age of criminal responsibility and the persistent use of deprivation of liberty'.[12]

[11] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, paragraph 1.
[12] Ibid., paragraph 1.

2 Key policy objectives

The Working Group has identified five key policy objectives in its assessment of whether to raise the age of criminal responsibility. These are:

1 the best interests of the child
2 reducing the over-representation of Indigenous children in the justice system
3 Australia's compliance with international standards
4 community safety
5 national consistency.

Objective 1 – The best interests of the child

The paramount policy consideration in this report is the best interests of the child. Article 3.1 of CROC requires that:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

In addition, the UN Committee has commented that:

> *Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.*
>
> *…*
>
> *The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40(1) of the Convention. Where serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society*.[13]

Objective 2 – Reducing the over-representation of Indigenous children

A key whole-of-government policy objective across Australian jurisdictions is improving outcomes for Indigenous people.

This report highlights the significant over-representation of Indigenous young people across many areas of social disadvantage, which is also reflected in the rates of youth justice supervision. Indigenous young people aged 10-17 years are 23 times as likely as non-Indigenous young people to be in detention and 17 times as likely to be under community supervision.[14]

A key consideration in this report is therefore whether raising the age of criminal responsibility may improve outcomes for Indigenous children and young people.

[13] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, paragraphs 2 and 76.
[14] Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18,* 10 May 2019, p. 9.

Objective 3 – Australia's compliance with international standards

The Working Group has also considered how raising the age of criminal responsibility may affect Australia's international reputation and standing, in accordance with international obligations and recommendations.

Australia ratified CROC on 17 December 1990. The UN Committee continues to urge Australia to raise the minimum age of criminal responsibility to an internationally acceptable age to conform with the upper limit to which *doli incapax* currently applies: 14 years.

Australia's third cycle Universal Periodic Review (**UPR**) will take place in 2020-21. Australia's National Report is due in 2020 and the Australian delegation will appear before the UPR Working Group of the Human Rights Council for an interactive dialogue with other Member States in early 2021.

Objective 4 – Community safety

The Working Group considers community safety to be a key objective for any reform in the criminal justice sector.

The Working Group recognises that even the most effective programs and services will not prevent all 'criminal' behaviour and there may be instances where children aged between 10 and 13 years (inclusive) pose an ongoing serious risk to themselves or the community. The age of criminal responsibility and detention should not be raised without ensuring that there is an appropriate alternate framework in place to assist and manage the children who fall into this category.

The Working Group also recognises that detaining younger children is not in the best interests of the community as early contact with the youth justice system is a key predictor of recidivism. Several stakeholders also raised this issue in submissions received.[15]

The Northern Territory Royal Commission observed that there will always be a need for secure detention as a last resort for a very small minority of children who commit the most serious of offences.[16] Whilst detention would not be available for children under the minimum age of criminal responsibility, consideration would need to be given to an alternative appropriate therapeutic response.

Objective 5 – National consistency

It is the constitutional right of States and Territories to legislate for their own criminal justice systems. The Working Group notes, however, that broad jurisdictional consistency remains a desirable outcome with respect to the treatment of children in the youth justice system.

The Northern Territory Government has committed to raising the age of criminal responsibility to 12 years of age by 2021 and implementing restrictions on children under 14 years of age being held in detention.[17]

The Working Group has therefore not considered options for reform which would place other States and Territories behind the Northern Territory's intended benchmark.

[15] Centre for Innovative Justice, Submission 60, February 2020, p. 1 and PeakCare Queensland Inc, Submission 69, 28 February 2020, p. 8.
[16] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Volume 2B, Chapter 27, p. 420.
[17] See further paragraph 4.2.1.

3 Summary of stakeholder views

3.1 Public submissions

In accordance with the CAG decisions, on 16 December 2019 a series of consultation questions were published by the Western Australian Department of Justice on behalf of the Working Group. The consultation questions are reproduced at **Appendix 2**.

The Working Group received 93 public submissions from external stakeholders.

Public submissions received expressed support for the minimum age to be raised, with the majority calling for the age to be raised to 14 years or higher. Common arguments for this view include:

- It would bring Australia into line with most other Western countries and the standards recommended by the UN.
- It would better reflect scientific and medical understanding of the psychological, cognitive and neuro-development of children.
- Children represented in the justice system are generally from disadvantaged backgrounds and have complex needs: they have often experienced trauma, abuse, homelessness, drug or alcohol misuse, and many have an intellectual disability or mental illness.
- It would help to address the over-representation of Indigenous people in the justice system.
- It is rare for children under 14 years to commit very serious crimes, and the majority of young people in detention are unsentenced.
- Involvement in the justice system, particularly at a young age, creates further harm and contributes to re-offending. This does not support community safety.
- A number of those in support of raising the minimum age to 14 years expressed the view that doing so would remove the need for courts to consider the application of the rebuttable presumption that a child under the age of 14 years is *doli incapax*. Those stakeholders argue that *doli incapax* is complex and may be difficult to apply in practice, and is not a sufficient protection for 10-13 year olds.
- The cost of placing children in detention is high and would be better invested in preventative, diversionary and community development initiatives.

Stakeholders opposed creating exceptions to the minimum age of criminal responsibility for serious offences; two submitters agreed that there should be exceptions.[18]

In general, stakeholders also advocated for the abolition of *doli incapax* in conjunction with raising the age to 14 years, though some were of the view that *doli incapax* should be extended to cover young people up to 16 or 18 years. A separate minimum age of detention was generally not favoured unless the minimum age of criminal responsibility were raised to less than 14 years, although some favoured a minimum age of 16 years for detention.

[18] Australians for Native Title and Reconciliation, Submission 17 and Youth Legal Service, Submission 24.

Stakeholders also advocated for a justice reinvestment and early intervention approach to juvenile justice. These stakeholders suggested that raising the minimum age of criminal responsibility must be accompanied by the implementation of whole-of-government strategies to address the underlying causes of offending for example, improving housing, education and health equality, and implementing targeted programs and services. Stakeholders further suggested that, with regard to Indigenous children, both children and their families should receive culturally-specific and community-led support.

Four public submissions opposed raising the age of criminal responsibility.[19] Stakeholders raised the following arguments for not supporting this change:

- The age should not be raised without heavy government investment in diversionary programs. As there has been no such commitment, raising the age is not supported.
- If the age were raised, towns that already experience a high amount of youth crime would become unliveable. There are already no meaningful consequences to the actions of children and young people.
- A higher age of criminal responsibility may result in adverse outcomes for young people aged 10 to 14 years, their families and communities: by virtue of a court's jurisdiction, young people gain the benefit of departmental supervision. There will be likely be a substantial increase in anti-social conduct.

The Working Group also asked stakeholders for their views on whether any new offences were required to capture people who procure or incite children under the age of criminal responsibility to commit what would otherwise be a criminal offence. Most stakeholders did not comment on this question. Those who did were mostly of the view that no new offences were required, or that minor amendments to existing offences would suffice.[20] Other stakeholders noted that any new offences will necessarily draw more Aboriginal people into the criminal justice system and therefore opposed their creation.[21]

Legal Aid Western Australia noted it would not support the introduction of new criminal offences in Western Australia that apply to persons under the age of 18 years who 'exploit or incite children to participate in activities or behaviours which may otherwise constitute a criminal offence.' However, if new laws were introduced, Legal Aid WA submitted that they should only apply to adults and they should be modelled on Victorian legislation.[22]

3.2 Government agency submissions

The Working Group acknowledges the difficulties faced by some members in obtaining timely responses to the request for submissions and also notes the widespread disruption and shift in government priorities that the pandemic in early 2020 created.

Further multiagency consultation will be required to support the implementation of this report's recommendations for reform.

A summary of the agency responses that were received by jurisdictions at the time of finalising this report is at **Appendix 4** to this report.

[19] Alex Atwell, Lino Paggi, Western Australia Police Union, Director of Public Prosecutions for Western Australia.
[20] For example, Legal Aid Western Australia noted that section 7(d) of the *Criminal Code* (WA) may not 'be sufficient to charge a person who procures a child under the MACR to offend, as a child under the MACR is not criminally responsible and therefore cannot "commit an offence"': Legal Aid Western Australia, Submission 12, 24 February 2020, p. 45.
[21] For example: Aboriginal Legal Service of WA, Submission 35, 28 February 2020.
[22] Legal Aid Western Australia, Submission 12, 24 February 2020, p. 45.

4 The age of criminal responsibility in Australia

The minimum age of criminal responsibility is currently consistent across Australia: each State, Territory and the Commonwealth has legislation to provide that the minimum age of criminal responsibility is 10 years of age.[23]

In Australia, the minimum age of criminal responsibility operates in conjunction with the legal presumption that children aged 10 to 14 years are incapable of committing a crime. This presumption is known as *doli incapax* at common law and has been codified in statute in some jurisdictions.[24]

History of the minimum age of criminal responsibility

Australian jurisdictions have historically adopted a similar approach to the age of criminal responsibility to that taken in England and Wales. This comprises two age levels, including:

- a lower absolute minimum age
- a second, higher age under which the presumption of *doli incapax* applies.

At the beginning of the 20th century, the minimum age of criminal responsibility in Australia was seven years of age with *doli incapax* operating as a further safeguard up to the age of 14.[25]

When the United Kingdom increased its age of criminal responsibility to eight years of age in 1933 and then to 10 years of age in 1963, not all Australian jurisdictions followed consistently.[26] Queensland was the first Australian jurisdiction to increase its age of criminal responsibility in 1976[27], followed by the Northern Territory (**NT**) in 1983.[28]

Most other Australian jurisdictions did not increase the minimum age to 10 years until almost 30 years later, as follows:

- New South Wales in 1987[29]
- Western Australia in 1988[30]
- Victoria in 1989[31]

[23] *Crimes Act 1914* (Cth) s. 4M and *Criminal Code Act 1995* (Cth) s. 7.1; *Criminal Code 2002* (ACT) s. 25; *Children (Criminal Proceedings) Act 1987* (NSW) s. 5; *Criminal Code Act 1983* (NT) s. 38(1); *Criminal Code Act 1899* (Qld) s. 29(1); *Young Offenders Act 1993* (SA) s. 5; *Criminal Code Act 1924* (Tas) s. 18(1); *Children and Young Persons Act 1989* (Vic) s. 127; *Criminal Code Act Compilation Act 1913* (WA) s. 29. See also: Jesuit Social Services, *Too much too young: Raise the age of criminal responsibility to 12*, October 2015, p. 2.
[24] See further, paragraph 4.1: *Doli incapax.*
[25] Urbas G, 'The age of criminal responsibility', *Trends & issues in crime and criminal justice*, No. 181, p 2, Australian Institute of Criminology, Canberra, https://aic.gov.au/publications/tandi/tandi181. Viewed on 6 April 2020.
[26] Urbas G, 'The age of criminal responsibility', *Trends & issues in crime and criminal justice*, No. 181, p 2, Australian Institute of Criminology, Canberra, https://aic.gov.au/publications/tandi/tandi181. Viewed on 6 April 2020. For further discussion of the alignment of Australian and United Kingdom approaches to the minimum age of criminal responsibility in England and Wales see: Crofts, T, 'The Common Law Influence over the Age of Criminal Responsibility - Australia' (2016) 67(3) *Northern Ireland Legal Quarterly*.
[27] *Criminal Code Amendment Act 1976* (Qld), s. 19. The presumption of *doli incapax* was also increased to 15 years of age as part of the same amendments. This was subsequently reduced to 14 years of age under the *Criminal Law Amendment Act 1997* (Qld), s. 12.
[28] *Criminal Code Act 1983* (NT), s. 38(1).
[29] *Children (Criminal Proceedings) Act 1987* (NSW), s. 5.
[30] *Criminal Code* (WA), s.29 as amended by the *Acts Amendment (Children's Court) Act 1988* (WA) s. 44.
[31] *Children and Young Persons Act 1989* (Vic), s. 127.

- South Australia in 1993.[32]

The Commonwealth changed its age of criminal responsibility to 10 years of age in 1995.[33] The amendment was introduced to correct the anomaly where:

> *a child from New South Wales on holidays in Tasmania could be accused and convicted of a federal offence committed during the holiday, when at home he or she could not be charged for doing the same thing. That is clearly anomalous and requires reform*.[34]

In 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that all Australian jurisdictions set the minimum age of criminal responsibility at 10 years of age.[35] In 2000, the Australian Capital Territory (**ACT**) and Tasmania raised the minimum age in their criminal codes to 10 years of age.[36]

In 1988, the United Kingdom abolished the rebuttable legal presumption of *doli incapax* but retained a minimum age of criminal responsibility of 10 years of age.[37]

The *doli incapax* presumption survives in some form in all Australian jurisdictions, but it is not without criticism.

4.1 *Doli incapax*

Doli incapax is a long-standing presumption at common law that a child aged between 10 and 14 years can only be held criminally responsible if it can be proven beyond reasonable doubt that at the time of the offence the child knew that he or she should not have committed the alleged act or omission as it was 'seriously wrong' in a criminal sense.[38] *Doli incapax* is a Latin term meaning 'incapable of crime'.[39] The onus on rebutting the presumption rests with the prosecution, but is irrebutable in any event for a child who is aged under seven years.[40]

The presumption is not a defence. The onus is on the prosecution to prove beyond reasonable doubt that the child knew at the time of the alleged conduct that it was seriously wrong in a criminal sense.[41] If the prosecution cannot present evidence to rebut the presumption then there is no further case to answer. Initially devised as a protective system[42], *doli incapax* is intended to allow a court to undertake an individualised assessment of a child's level of development and capability. The High Court in *RP v The Queen* highlighted that a *doli incapax* assessment necessarily 'directs attention to the child's education and the environment in which the child has been raised'.[43]

[32] *Young Offenders Act 1993* (SA) s. 5.
[33] *Crimes Amendment Act 1995* (Cth) s. 4.
[34] Hon Duncan Kerr, Minister for Justice, Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 1 March 1995, p. 1336.
[35] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84, 1997, Recommendation 194 at paragraph 18.16.
[36] *Criminal Code 2002* (ACT) s 25, in effect from 10 May 2000 (formerly the *Children and Young People Act 1999* (ACT) s 71(1)); *Criminal Code* (Tas) s 18(1), in effect from 1 February 2000.
[37] *Crime and Disorder Act 1998* (UK) s. 34.
[38] *RP v The Queen* [2016] HCA 53.
[39] *R v ALH* (2003) 6 VR 276 at paragraph 75.
[40] *RP v The Queen* [2016] HCA 53 at paragraph 8.
[41] *R v Vito Meola* (1999) NSWCCA 388.
[42] Crofts, T, 'The Common Law Influence over the Age of Criminal Responsibility - Australia' (2016) 67(3) *Northern Ireland Legal Quarterly*: 'From the earliest of times, allowance has been made for the differential treatment of children' who are involved in crime. This included a view that 'children generally deserved protection from punishment unless there was some form of behaviour that indicated they deserved treating as an adult below that age level' at pp287-88.
[43] *RP v The Queen* [2016] HCA 53 at paragraph 9. See further paragraph 4.1.1.

Most Australian jurisdictions have now codified the *doli incapax* presumption in statute.[44] Statutory formulations of the *doli incapax* test differ, however: Commonwealth and ACT legislation requires a child to have 'known' that the conduct was wrong in a criminal sense whereas other jurisdictions are framed in terms of a child's capacity to know.

Western Australia's and Queensland's criminal codes refer to a child's 'capacity to know'. Northern Territory legislation refers to both a child's 'capacity to know' and that they did know that the conduct was wrong.[45] The capacity to know is a lower threshold for the prosecution to overcome than the common law requirement of proving that the child had knowledge of the 'moral wrongness' of an act or omission.

Tasmania requires the prosecution to prove that a child had 'sufficient capacity to know' that the act or omission was criminal.[46]

Three Australian States, New South Wales, South Australia and Victoria, continue to rely on the common law presumption, which requires actual knowledge that the conduct is wrong.

The Working Group notes that proof of a capacity to know is different from proof of actual knowledge of wrongfulness, particularly in terms of the type of evidence that would need to be adduced.[47] Legal Aid Western Australia submitted that proving that the child had the capacity to know that he/she ought not do the act or make the omission is a lower threshold for the prosecution to overcome than proving that the child had actual knowledge of the moral wrongness of an act or omission.[48] Legal Aid Western Australia recommended that the Queensland and Western Australian provisions should be brought into line with the common law test set out in *RP v The Queen*.[49] The Northern Australian Aboriginal Justice Agency supported the same premise in regards to the Northern Territory legislation.[50]

The Working Group observes that, as far back as 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that the presumption of *doli incapax* be applied consistently throughout Australia and be legislatively based:

> ***Recommendation 195.*** *The principle of doli incapax should be established by legislation in all jurisdictions to apply to children under 14.*
> ***Implementation****. All States and Territories that have not already done so should legislate to this effect*.[51]

4.1.1 RP v The Queen

The High Court of Australia considered the common law presumption of *doli incapax* and the evidence that the prosecution must adduce to rebut it in *RP v The Queen*.

[44] *Crimes Act 1914* s. 4N (Cth) and *Criminal Code Act 1995* (Cth) s. 7.2; *Criminal Code 2002* (ACT) s. 26; *Criminal Code Act 1983* (NT) s. 38(2); *Criminal Code Act 1899* (Qld) s. 29(2); *Criminal Code Act 1924* (Tas) s. 18(2); *Criminal Code Act Compilation Act 1913* (WA) s. 29.
[45] For children between the age of 10 and 14 years, the *Criminal Code Act 1983* (NT) excuses a child from criminal responsibility if they 'had the capacity to know' that the act was criminal (section 38), but also refers to a child of that same age range only being criminal responsible for an offence 'if the child knows that his or her conduct is wrong' (section 43AQ) [emphasis added].
[46] *Criminal Code Act 1924* (Tas) s. 18(2).
[47] Urbas G. *The age of criminal responsibility* (2000). Trends & issues in crime and criminal justice no. 181. Canberra: Australian Institute of Criminology, p 4, https://aic.gov.au/publications/tandi/tandi181.
[48] Legal Aid Western Australia, Submission 12, 24 February 2020, p. 15.
[49] Ibid., p. 17.
[50] North Australian Aboriginal Justice Agency, Submission 42, February 2020, p. 7.
[51] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84, 1997, paragraph 18.20.

The presumption acknowledges differing levels of cognitive maturity between children and can protect a child who was 'merely mischievous'.[52] The High Court noted, however, that the paradoxical nature of *doli incapax* can result in an outcome where 'the more warped a child's moral standards, the safer he is from the correctional treatment of the criminal law'.[53] The High Court referred to the circumstances of the appellant's home life and suggested that 'unsatisfactory aspects' of his upbringing may have affected his sense of morality.[54]

The High Court, dealing with the presumption at common law in New South Wales, found that the presumption cannot be rebutted 'merely as an inference from the doing of that act or those acts' no matter how obviously wrong the act(s) may be. The prosecution must rely on more than the circumstances of the offences, and adduce 'evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct'. Rebutting the presumption of *doli incapax* will depend on the intellectual and moral development of the subject child, as children do not mature uniformly.[55]

4.2 Australian reviews of the age of criminal responsibility

Several Australian inquiries have recently recommended that the minimum age of criminal responsibility be raised from 10 years of age.

4.2.1 Northern Territory

Royal Commission

The Royal Commission into the Detention and Protection of Children in the Northern Territory (**NT Royal Commission**) was established in 2016 (jointly by the Northern Territory and the Commonwealth) to inquire into the treatment of children in detention facilities and the welfare system in the Northern Territory.[56]

The NT Royal Commission's inquiry received 500 submissions from stakeholders and heard evidence from 214 witnesses, including 18 recorded personal stories.[57] The NT Royal Commission's final report was tabled in the NT Parliament on 17 November 2017 and consisted of six volumes.[58]

The NT Royal Commission found that detention is counter-productive to younger children engaging sustainably in rehabilitation and to reducing recidivism. However, the NT Royal Commission considered that there will always be a need for secure detention as a last resort for a very small minority of children who commit the most serious offences.

[52] Bradley L, 'The age of criminal responsibility revisited'. *Deakin Law Review*, [2003] DeakinLawRw 4, http://classic.austlii.edu.au/au/journals/DeakinLawRw/2003/4.html, viewed on 2 April 2020.
[53] *RP v The Queen* [2016] HCA 53 at paragraph 11, quoting from Prof Glanville Williams, 'The Criminal Responsibility of Children', [1954] *Criminal Law Review* 493 at 495-6.
[54] *RP v The Queen* [2016] HCA 53 at paragraph 34.
[55] Ibid, paragraphs [8-12].
[56] Letters Patent issued to the Hon Margaret White AO and John Gooda, 1 August 2016, https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory, viewed on 2 April 2020.
[57] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, pp 65 and 71.
[58] All volumes of the final report and a consolidated version of the report's findings and recommendations are available from https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory, viewed on 2 April 2020.

The NT Royal Commission made the following recommendations with regard to the minimum age of criminal responsibility:

> *Section 38(1) of the Criminal Code Act (NT) be amended to provide that the age of criminal responsibility be 12 years.*
> *Section 83 of the Youth Justice Act (NT) be amended to add a qualifying condition to section 83(1)(I) that youth under the age of 14 years may not be ordered to serve a time of detention, other than where the youth:*
> - *has been convicted of a serious and violent crime against the person*
> - *presents a serious risk to the community, and*
> - *the sentence is approved by the President of the proposed Children's Court*.[59]

NT Government response

On 1 March 2018, the NT Government announced that it 'accepted the intent and direction' of all 227 recommendations of the NT Royal Commission.[60] The NT Government responded to the recommendations by supporting (either per se or in principle) 217 recommendations for action by the government directly and noting 10 other recommendations for action by others.[61]

The response mapped out the NT Government's action across 17 work programs, most relevantly 'Improving Youth Justice' in relation to raising the age of criminal responsibility according to the NT Royal Commission's recommendation.

The NT Government subsequently published 'Safe, Thriving and Connected: Generational Change for Children and Families', its plan for implementing the reforms required to support the recommendations.[62] The plan includes a commitment to implementing a 'Single Act for Children', which will include:

- restrictions on placing children younger than 14 in youth detention
- measures to accommodate an increase in the age of criminal responsibility to 12 years.

The Single Act for Children is intended to be complete by mid-2021 and will be 'the most significant legislation reform that concerns children in the Northern Territory'.[63]

4.2.2 New South Wales

Committee on Law and Safety

On 20 September 2018, the NSW Legislative Assembly's Committee on Law and Safety (**NSW Committee**) tabled its report into youth diversionary programs.[64]

The NSW Committee report made 17 findings and 60 recommendations with the committee's goal being 'to see a significant reduction in the amount of detainees within the juvenile justice

[59] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, Recommendation 27.1, p. 420.
[60] Northern Territory Government, Newsroom, *Safer Communities: Response to the 227 Recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory*, 1 March 2018.
[61] Northern Territory Government, Whole of Government Reform Management Office, *Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*.
[62] Northern Territory Government, *Safe, Thriving and Connected: Generational Change for Children and Families*, April 2018, https://rmo.nt.gov.au/, viewed on 2 April 2020.
[63] Northern Territory Government, Whole of Government Reform Management Office, *Generational Change for Children and Families.*
[64] New South Wales, Legislative Assembly, Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales*, Report 2/56, 20 September 2018.

system'. [65] The NSW Committee recommended reforms to various NSW Government agencies' policies and practices and changes to the way statutory, judicial and community bodies interact with young people who may come into contact with, or are already in contact with, the criminal justice system.[66]

The NSW Committee recommended that:

> *the NSW Government conduct a review, in consultation with all relevant stakeholders, to examine whether the current age of criminal responsibility, and the age at which a child can be detained, should be increased in NSW*.[67]

The NSW Committee noted stakeholder views that current legislation does not adequately protect younger children. In making its recommendation, the NSW Committee noted that raising the age of criminal responsibility would:

- reflect current research about adolescent brain development
- reflect research indicating that if a child can be kept out of the justice system, his/her prospects of staying out are enhanced
- better address issues around mental health and cognitive impairment
- bring NSW into line with Australia's international obligations
- address concerns that Aboriginal children are disproportionately affected by a low age of criminal responsibility as they tend to have contact with the police and the justice system at a younger age.[68]

The NSW Committee also noted that:

> *if criminal justice responses were taken away for younger children who committed wrongs, there would have to be an alternative response about which there would need to be serious consideration. Another serious question is how lifting the age of criminal responsibility would sit with concerns such as community safety and the prevention of vigilante activity in the rare cases where a younger child commits an extremely serious offence*.[69]

NSW Government response

On 28 August 2019, the NSW Government tabled its response to the NSW Committee's report. The NSW Government noted work underway across government to address the issues highlighted by the NSW Committee, both in response to the NSW Committee's recommendations and as part of broader strategic youth policy and program delivery.

The NSW Government also noted its participation in the Working Group and that it will consider the matter further once the Working Group has concluded its work.[70]

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[65] Mr Geoff Provest MP, Chair, Committee on Law and Safety, *Report on the Adequacy of Youth Diversionary Programs in New South Wales*, YouTube, https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2464, viewed on 3 April 2020.
[66] New South Wales, Legislative Assembly, Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales*, Report 2/56, 20 September 2018.
[67] ibid, p. 26.
[68] ibid, p. 27.
[69] ibid, p. 27.
[70] New South Wales, Legislative Assembly, *Government response to Report 2/56 of the Legislative Assembly Committee on Law and Safety entitled "The adequacy of youth diversionary programs in New South Wales"*, Tabled Paper 672, 28 August 2019, pp. 6, 27.

4.2.3 Queensland

The Atkinson Report

On 12 February 2018, the Queensland Government commissioned Mr Robert Atkinson AO, APM to examine and report on a range of youth justice matters, with terms of reference being to advise on:

- the progress of the Queensland Government's youth justice reforms and next steps
- other measures to reduce recidivism
- recommendations for youth detention from the Royal Commission into Institutional Responses to Child Sexual Abuse.

The *Report on Youth Justice* (**Atkinson Report**) was published on 8 June 2018 and contained 77 recommendations to improve Queensland's youth justice system and address the causes of offending.[71]

The key finding and recommendation in the Atkinson Report is that the Queensland Government as a whole adopt the 'Four Pillars' objectives as its policy position for youth justice. The Four Pillars are framed by two fundamental principles, that public safety is paramount and that community confidence is critical, and are as follows:

- Intervene early.
- Keep children out of court.
- Keep children out of custody.
- Reduce reoffending.[72]

The Atkinson Report contains a series of recommendations that focus on prevention and early intervention, increased options for police and courts to divert children from prosecution and detention, evidence-based interventions to reduce the risk of reoffending and reinforce connection to education, training, and work, and reducing the disproportionate representation of Aboriginal and Torres Strait Islander children in the youth justice system.[73]

Relevantly, the Atkinson Report also recommended:

> *That the Government support in principle raising the MACR to 12 years subject to:*
> *a. national agreement and implementation by State and Territory governments*
> *b. a comprehensive impact analysis*
> *c. establishment of needs based programs and diversions for 8-11 year old children engaged in offending behaviour.*
>
> *That the Government advocate for consideration of raising the MACR to 12 years as part of a national agenda for all states and territories for implementation as a uniform approach.*
>
> *In the interim, that the Government consider legislating so that 10-11 year olds should not be remanded in custody or sentenced to detention except for a very serious offence*.[74]

[71] Queensland Government, *Report on Youth Justice*, Mr Robert Atkinson AO APM, Special Advisor to Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic Violence, 8 June 2018.
[72] ibid, p. 6.
[73] ibid, pp. 8-13.
[74] ibid, Recommendations 68 to 70.

Queensland Government response

In December 2018, the Queensland Government released its response to the Atkinson Report. [75] The response comprised support (both per se and in principle) for 60 recommendations.

Seventeen recommendations were to be subject to 'Further consideration' including the recommendations relating to an increase in the age of criminal responsibility. The Queensland Government's response was that it would consider the matter further, 'pending any recommendations made … which arise from consideration of this issue at a national level'.[76]

Queensland's response to the Atkinson Report also comprised the *Working Together Changing the Story: Youth Justice Strategy 2019-23* and its supporting Action Plan. The strategy and action provide a high-level framework that will strengthen the prevention, early intervention and rehabilitation responses to youth crime in Queensland, based on the Atkinson Report's Four Pillars.[77]

4.3 Recent developments

The Working Group notes that the Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019 was introduced into the Parliament of Australia by Rebekah Sharkie MP on 14 October 2019.[78] According to the Explanatory Memorandum, the purpose of the Bill is to increase the age of criminal responsibility for Commonwealth offences contained in the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth) from 10 to 14 years of age.[79]

At the time of finalising this report for the Council of Attorneys-General, the Bill is still before the House of Representatives.

[75] Queensland Government, Department of Child Safety, Youth and Women, *Report on Youth Justice Government response to recommendations*, December 2018, https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/gov-response-atkinson-report.docx. Viewed on 2 April 2020.
[76] ibid, pp. 17-18
[77] Queensland Government, *Working Together Changing the Story: Youth Justice Strategy 2019-23* and Action Plan 2019-21.
[78] Parliament of Australia, House of Representatives, Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6421, viewed on 2 April 2020.
[79] Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019, *Explanatory Memorandum and Statement of Compatibility with Human Rights*, House of Representatives, 14 October 2019, p. 2.

5 Australian approaches to youth justice

5.1 Key features

A child or young person charged with a criminal offence is dealt with according to the specific laws and procedures of the State or Territory where the offence was allegedly committed. However, an analysis of State and Territory legislative and policy frameworks reveals many features in common. They:

- focus on the rehabilitation of young offenders
- have separate youth courts to deal with criminal matters where the defendant was aged under 18 years at the time of the alleged offence
- provide bail and court support services
- specify that detention is a measure of last resort and should be for the shortest possible period of time
- have a range of diversion programs in place to divert children and young people from further progression into the criminal justice system
- provide alternative sentencing options such as home detention, community service and rehabilitation orders.

In addition, all jurisdictions attempt to minimise the number of children and young people involved in the criminal justice system. This is principally achieved through employing:

- early intervention programs to try to prevent children from coming into contact with the justice system in the first place
- warnings, cautions and diversionary measures, such as youth justice conferences when contact with the system occurs.

5.2 Sentencing and detention

The Beijing Rules have a central value that 'the placement of a juvenile in detention shall always be a disposition of last report and for the minimum necessary period'.[80] The rules encourage the promotion of juvenile welfare to the greatest possible extent to minimise the intervention of the juvenile justice system, thus preventing harm to a child.[81] This approach is reflected in youth justice legislation across Australia.[82]

Australian courts have a range of options other than detention available when sentencing young offenders. Alternative sentencing options may include: no punishment (with or without conditions), restitution orders, home detention orders, community service orders, supervision orders, participation in rehabilitation programs, probation or good behaviour bonds. Offenders may also be referred to restorative justice teams, either as a diversion from the youth justice system or as an outcome of prosecution.

[80] United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985, Article 19.1. In the Beijing Rules, 'juvenile' refers to children under 18 years.
[81] United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985, Article 1.6 Commentary.
[82] See: *Children, Youth and Families Act 2005* (Vic) s. 362; *Children (Criminal Proceedings) Act 1987* (NSW) s. 6; *Youth Justice Act 1992* (Qld) Schedule 1; *Young Offenders Act 1993* (SA) s. 23; *Young Offenders Act 1994* (WA) s. 7; *Youth Justice Act 1997* (Tas) s. 5; *Children and Young People Act 2008* (ACT) s. 94; *Youth Justice Act 2005* (NT) s. 4.

A key feature of Australia's youth justice system are supervision orders for young people. The Australian Institute of Health and Welfare (**AIHW**) identifies two main types of supervision that may be ordered by a court:

- *Community-based supervision* for young people who reside in the community while they are supervised by youth justice authorities. This may be while young people are unsentenced (before a court hearing or while awaiting the outcome of a trial or sentencing) or have been sentenced to a period of community-based supervision by a court. Community-based supervision also includes young people who have been released from sentenced detention on parole or supervised release.
- *Detention* in a youth justice centre or youth detention facility on remand, or pursuant to a sentence of detention by a court.[83]

This report notes that detention may sometimes be ordered by a court where it is the only appropriate option for a child. A lack of community support or programs to provide effective rehabilitation or a lack of stable and safe accommodation may result in the child's detention meeting the 'last resort' requirement.[84]

5.3 Prevention of child offending

Early intervention and prevention programs aim to reduce risk factors and enhance protective factors that decrease the likelihood that a young person will engage or re-engage in offending behaviour. Risk factors which may increase the likelihood of a young person offending include:

- parenting practices, particularly those that are abusive and neglectful
- poor school performance and substance abuse, either by the young person or members of his or her household.[85]

Abuse and neglect are particularly significant risk factors as trauma is increasingly recognised as a fundamental contributor to a range of health and social problems, including youth offending. Research has consistently found that a high proportion of young people in juvenile justice settings have experienced abuse, neglect or 'multiple traumatic stressors'.[86]

In 2015, the Australian Research Alliance for Children and Youth conducted a review of the literature on early intervention and prevention. The review found that:

> *effective prevention and early intervention is possibly the most promising strategy for changing the life trajectories of children. There is clear evidence that children's life chances are influenced by their families and communities and that they are able to be changed for the better. Improving the wellbeing of children, young people and families at population-level requires flexible and responsive systems that are equipped to deliver preventive interventions and respond effectively early to emerging issues and challenges.*

[83] Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018*, 15 October 2019, p. 3, https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2014-18/contents/table-of-contents, viewed on 3 April 2020.
[84] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 325.
[85] Weatherburn, D, *Arresting Incarceration: Pathways out of Indigenous imprisonment*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2014, and Wasserman GA, Keenan K, Tremblay RE et al, 'Risk and Protective Factors of Child Delinquency', *Office of Juvenile Justice and Delinquency Prevention: Child Delinquency Bulletin Series,* April 2003, https://www.ncjrs.gov/pdffiles1/ojjdp/193409.pdf, viewed on 3 April 2020.
[86] See for example, Australian Child and Adolescent Trauma, Loss and Grief Network, *Trauma, young people and juvenile Justice*, 15 April 2013, https://www.ics.act.gov.au/__data/assets/pdf_file/0020/1323524/Trauma-and-juvenile-justice-in-Australia.pdf, viewed on 3 April 2020.

> *There is a strong and growing evidence-base that supports the effectiveness of many prevention and early intervention programs and approaches, and consistent evidence about the features of service systems that contribute to poorer outcomes*.[87]

In 2018-19, Australia spent $2.7 billion on youth crime, which includes hospital, police and court costs associated with youth offenders.[88] Prevention and early intervention programs which address the above risk factors may therefore be cost effective in generating long-term savings to governments through a reduction in future demand on the criminal justice system. Early intervention can take many forms, such as:

- *specialist support for a child around language development, or to help them manage emotions and behaviour following trauma or at the onset of depression and anxiety*
- *intensive, wrap-around services to prevent a family from becoming homeless or to prevent children from entering out-of-home care*
- *supporting a young person to build their confidence, friendships and positive relationships with trusted adults*.[89]

This report observes that all Australian jurisdictions offer early intervention programs, which cover three main areas: education, community and family and health. These programs typically offer assistance in the following diverse areas:

- parenting and early childhood support
- health care assistance and home help
- literacy training and alternative learning programs
- anti-bullying initiatives in schools
- programs addressing violence reduction
- self-esteem and self-empowerment development and training
- job skills training and development
- establishment of theatre and arts groups, sport and youth centres for recreation
- early school-leavers' programs.[90]

Education

South Australia Police has developed a suite of school-based programs for delivery across all schools, with topics such as bullying and violence, cyber laws, keeping safe, the role of the police, the juvenile justice system, theft offences, graffiti, domestic violence and the law, sexual offences awareness, and drugs and alcohol and their risks.

The NSW Department of Education offers specialist behaviour education settings to provide additional support for students with severely disruptive behaviour.

[87] Fox S, Southwell A, Stafford N, et al, *Better Systems, Better Chances: A Review of Research and Practice for Prevention and Early Intervention*, Australian Research Alliance for Children and Youth, 2015, Canberra, p. 1.
[88] Teager W, Fox S and Stafford N, *How Australia can invest early and return more: A new look at the $15b cost and opportunity*. Early Intervention Foundation, The Front Project and CoLab at the Telethon Kids Institute, Australia, 2019, p. 5.
[89] ibid, p. 12.
[90] Australian Institute of Criminology, *Developmental and early intervention approaches to crime prevention*, AICrime Reduction Matters No. 4, 1 July 2003, https://aic.gov.au/publications/crm/crm004, viewed on 3 April 2020.

The Navigator Program, run by the Victorian Department of Education, supports young people aged 12-17 years who are not connected to schools at all or are at risk of disengaging. It provides intensive case management and assertive outreach support to disengaged learners. The program works with young people and their support networks to return them to education.

Community and family

The Targeted Earlier Intervention Program (**TIEP**) reform, led by the NSW Department of Communities and Justice, targets vulnerable children, young people, families and their communities. There are three priority groups: 0-3 year olds; young parents; and Aboriginal clients. TIEP delivers services under two broad streams:

- community strengthening – activities that build cohesion, inclusion and wellbeing across all communities and empower Aboriginal communities
- wellbeing and safety – activities that support families and individuals and provide opportunities for personal development.

TIEP is designed to promote family and community stability and early childhood welfare.

In Western Australia, the West Pilbara Plan sees the State Government working with Aboriginal elders, community members and service providers in the West Pilbara to address intergenerational disadvantage and child sexual abuse. The West Pilbara Plan's six priority areas are:

- more support for children, carers and families
- safer children
- tackling alcohol and drugs
- greater engagement in school and work
- healing the community
- redesigning government funded services.[91]

In Queensland, intensive support is provided to Aboriginal and Torres Strait Islander families with children at risk of entering, or already in, the youth justice system. Aboriginal and Torres Strait Islander Family Wellbeing Services employs additional caseworkers in ten locations across Queensland with high rates of young people on remand to address risk factors identified by the families and re-engage young people with positive support.

Health

In the ACT, Menslink provides counselling support for 10 to 12 year old boys and other services for male youth aged 12 to 25 years old. Some of the challenges that this counselling program tackles are anger management issues, family relationship difficulties and managing addiction.

Navigate Your Health is a Queensland-based trial initiative for children in out-of-home care or who are in contact with the youth justice system. The initiative aims to improve their health and address underlying problems that may contribute to the child's offending, including poor mental health and undiagnosed disabilities or impairments. Health and Nurse Navigators

[91] Western Australia, Department of Communities, *About the West Pilbara Plan*, https://www.communities.wa.gov.au/projects/west-pilbara-plan/, viewed on 6 April 2020.

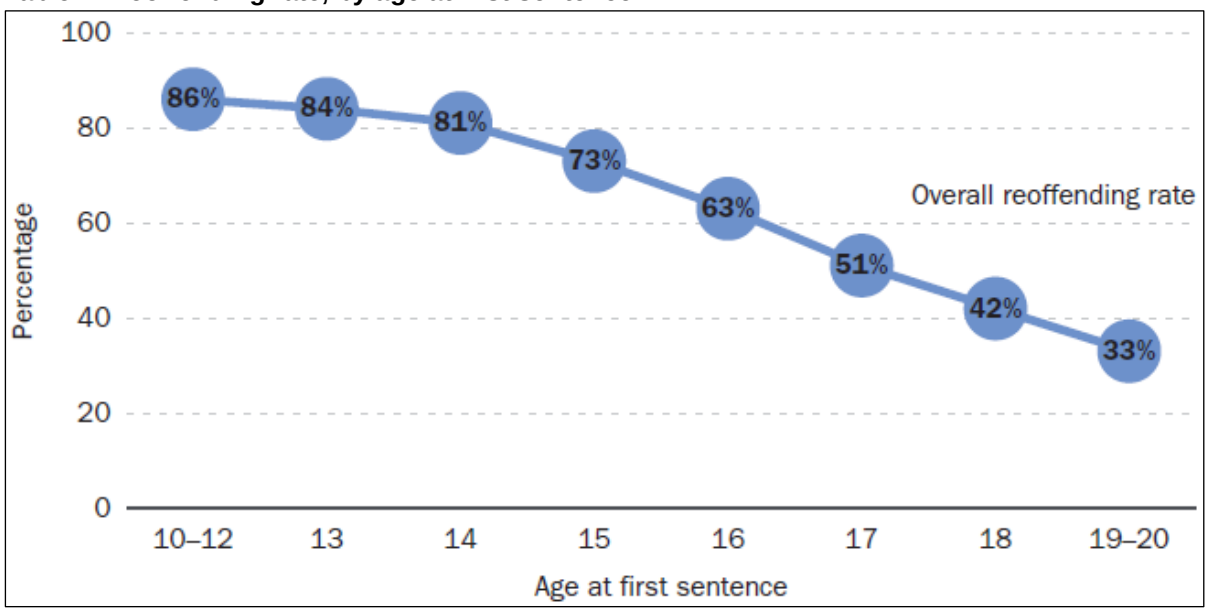
provide health and developmental assessments and connect young people with relevant health and support services.

5.4 Diversion from the criminal justice system

Diversion from the justice system into effective programs and services is a key method of tempering the punitive character of the criminal justice system for young offenders, recognising that they are a cohort with particular vulnerability.[92] Studies confirm that the justice system is criminogenic, and that the younger a child is when first engaging with the youth justice system, the more likely it is they will go on to reoffend and become entrenched in the system.[93]

In 2016, the Victorian Sentencing Advisory Council found a correlation between the age at which a child is first sentenced in the criminal justice system and the likelihood that they will reoffend (see **Table 1**).[94] The Sentencing Advisory Council's research revealed that the younger children are at their first sentence, the 'more likely they are to reoffend generally, reoffend violently and receive a sentence of adult imprisonment before their 22nd birthday'.[95]

Table 1: Reoffending rate, by age at first sentence



The ability to effectively divert children and young people away from the youth justice system remains important in considering changes to the age of criminal responsibility. It is vital that effective diversion and supports continue to be available to children when they come into contact with the youth justice system.

[92] The term 'diverted' includes diversions of offenders away from the courts by way of community conference, diversionary conference, formal cautioning by police, family conferences and other programs, for example drug assessment/treatment: see Productivity Commission, *Report on Government Services 2020: Police services interpretative material,* Box 6.9.

[93] Cain M, *Recidivism of Juvenile Offenders in New South Wales*, Department of Juvenile Justice, New South Wales, 1996; Cunneen C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney <http://cypp.unsw.edu.au/node/146>. See also O'Brien W and Fitz-Gibbon K 2017, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform, *Youth justice*, vol. 17, no. 2, pp. 134-152, <http://dro.deakin.edu.au/eserv/DU:30092014/obrien-minimumage-post-2017.pdf>

[94] Victoria, Sentencing Advisory Council, *Reoffending by Children and Young People*, 15 December 2016, https://www.sentencingcouncil.vic.gov.au/publications/reoffending-children-and-young-people-victoria. Viewed on 6 April 2020.

[95] ibid, p. 52.

Diversion alone is not an effective tool for reducing contact with the youth justice system. The young person must be diverted to, and engage with, available programs and services that are appropriate to their individual circumstances. The voluntary nature of many of these programs, along with a lack of local availability and inadequate screening are factors that impact on the effectiveness of diversion.[96]

Diversion can effectively occur at two points in time: through the exercise of police discretion when the child first comes into contact with police and, once the child is in the justice system, through referral to restorative justice conferencing and diversion programs.

5.4.1 Police diversion

In all Australian jurisdictions, young people who are accused of minor offences can be diverted from further involvement in the youth justice system at the very beginning of the process through the exercise of police discretion.[97] These kinds of diversionary options include warnings (informal cautions), formal cautions, and infringement notices.[98] As police are most often the first government agency to have contact with a young person who may have committed an offence, they are an important link between the young person and either youth justice diversion or early intervention programs.

Complete national data are yet to be available regarding the level of diversion undertaken by Australian jurisdictions. However, Productivity Commission data reveals that the proportion of youth diverted by police varies across Australia, from 20 per cent up to 57 per cent.[99]

5.4.2 Restorative justice and diversion programs

Diversion of a young offender away from the criminal justice system towards community support services may create opportunities to identify any family, behavioural and health problems that may be contributing to their offending behaviour. Community diversion has been shown to reduce costs to government and be an effective way to reduce further youth offending.[100]

The NT Royal Commission recognised the importance of effective diversion programs as a fundamental aspect of a good youth justice system. The NT Royal Commission found that diversion programs:

> *must be culturally appropriate, promote health and self-respect, foster a sense of responsibility and encourage attitudes and the development of skills that will help young people develop their potential as productive members of society*.[101]

[96] Western Australia, Auditor General, *Diverting Young People Away from Court*, Report 18, 1 November 2017, pp. 6-8.
[97] Not all diversion options are subject to police discretion in all jurisdictions. Young offenders who commit a serious offence or an offence specified in legislation cannot be diverted. This limits the proportion of youth diversions that can be achieved.
[98] Productivity Commission, *Report on Government Services 2020*, Chapter 17.
[99] Productivity Commission, *Report on Government Services 2020* – Police services, Table 6A.20 'Youth diversions as a proportion of offenders', https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/police-services. Viewed on 6 April 2020. Note that the data are not broken down into age groups.
[100] Western Australia, Auditor General, *Diverting Young People Away from Court*, Report 18, 1 November 2017; Victoria, Sentencing Advisory Council, *Reoffending by Children and Young People*, 15 December 2016, p. 52, https://www.sentencingcouncil.vic.gov.au/publications/reoffending-children-and-young-people-victoria. Viewed on 6 April 2020; Chen S, Matruglio T, Weatherburn D and Hua J, 'The transition from juvenile to adult careers', *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice,* NSW Bureau of Crime Statistics and Research, No. 86, May 2005.
[101] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 250.

Key features for an effective diversion strategy may include:

- built-in education
- rehabilitative programs
- cultural activities
- employment pathways
- mentoring and community service.[102]

A robust diversion program must also make mental health services and substance abuse programs available for youth who are being diverted.

Youth justice authorities and courts are responsible for administering the diversionary processes for those who have entered the justice system. For example, in Western Australia, the Department of Communities' Target 120 program aims to improve community safety and achieve better outcomes for young people by providing young offenders and their families with targeted, multi-agency support. A dedicated service worker works in partnership with multiple agencies, including police, health, education, child protection and justice and non-government service providers. Some examples of personalised services that have been provided include mentoring, housing, on-country tours and extra-curricular activities like football or basketball being offered as rewards for going to school.[103]

All jurisdictions offer some form of restorative justice conferencing as an alternative to court proceedings for young offenders who have admitted to an offence. The outcome of the conference is a plan that may include making an apology or reparation to the victim, undertaking community service or an education program, donating to charity, counselling, or working for the victim or their parent. It can also include drug and alcohol treatment where this has been identified as an influence on the offending behaviour.[104]

See **Appendix 5** for further information on jurisdictional youth diversion programs.

[102] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 250.
[103] Western Australia, Premier and Minister for Child Protection, *Target 120 expansion to Kalgoorlie, Kununurra and Mirrabooka*, Media Release, 9 September 2019.
[104] Australian Institute of Criminology, *Restorative Justice in Australia*, 3 November 2017, https://aic.gov.au/publications/rpp/rpp127/restorative-justice-australia

6 International standards and comparisons

6.1 Australia's international obligations

Over the last 30 years, a number of UN treaties and guidelines have influenced youth justice systems over the world.[105]

CROC has been ratified by most countries and includes a series of obligations related to children in the criminal justice system. Article 40(3)(a) of CROC requires States Parties to establish a minimum age of criminal responsibility, but does not specify a particular age. Under Article 40(3)(b) of CROC, States Parties are required to promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate. In practice, the measures generally fall into two categories: diversion measures that refer children away from the judicial system at any time prior to or during the relevant proceedings and measures in the context of judicial proceedings.

The philosophy underpinning CROC is underscored by a number of international principles and rules. The Beijing Rules are a non-binding UN General Assembly Resolution, but they have particular relevance with regard to the concept of a minimum age of criminal responsibility. The rules provide guiding principles to promote juvenile welfare to the greatest possible extent and minimise the necessity of intervention by the juvenile justice system.[106]

Rule 4 of the Beijing Rules provides that the minimum age of criminal responsibility should bear in mind 'the facts of emotional, mental and intellectual maturity.' The rules further indicate that the minimum age of criminal responsibility should mirror other social rights and responsibilities, such as eligibility to vote or to drive. The official commentary to this rule explains that:

> *The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless*.[107]

States Parties regularly report to the UN Committee on compliance with the obligations under the Convention. Whilst non-binding as a matter of international law, failure to adhere to the recommendations of the Committee or to promote the Beijing Rules can attract criticism and reputation risk on the global stage. For over twenty years, the UN Committee has criticised Australia for not taking efforts to raise the minimum age to what it considers to be the internationally acceptable level.[108]

[105] For information on ratification of United Nations international treaties see: United Nations, Human Rights, Office of the High Commissioner, *Status of Ratification Interactive Dashboard*. Available from https://indicators.ohchr.org/, viewed on 3 April 2020.
[106] United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985, p.1.
[107] ibid, p.3.
[108] United Nations, Committee on the Rights of the Child, *Consideration of reports submitted by states parties under Article 44 of the convention*, 21 October 1997, paragraph 11.

6.1.1 UN Committee General Comments

The UN Committee publishes its interpretation of the content of human rights provisions, called General Comments, which provide guidance on States Parties' obligations to protect child rights under CROC.[109] These comments are not binding.

The UN Committee provides guidance in its General Comments on the age that it considers to be an internationally acceptable standard for criminal responsibility.

2007 General Comment

The UN Committee published its General Comment No. 10 on 'Children's rights in juvenile justice' in 2007 (**2007 General Comment**).[110] The objectives of the 2007 General Comment included to:

- provide guidance and recommendations on juvenile justice policy content, with special attention to the prevention of juvenile delinquency, introduction of alternative measures allowing for responses without resorting to judicial procedures and for the interpretation and implementation of provisions contained in Articles 37 and 40 of the Convention
- promote the integration, in a national and comprehensive juvenile justice policy, of other international standards, in particular the Beijing Rules, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the 'Havana Rules'), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines').[111]

The 2007 General Comment concluded that:

> *a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR* [minimum age of criminal responsibility] *to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level*.[112]

The UN Committee also expressed concern about the practice of allowing exceptions to a minimum age of criminal responsibility that permit the use of a lower minimum age in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The UN Committee strongly recommended 'that States set a [minimum age of criminal responsibility] that does not allow, by way of exception, the use of a lower age.'

2019 General Comment

The UN Committee recently published General Comment No. 24 on 'Children's Rights in the Child Justice System' (**2019 General Comment**).[113]

The 2019 General Comment reflects developments that have occurred since 2007, including new knowledge about child and adolescent development and concerns about trends relating to the minimum age of criminal responsibility.

[109] United Nations, Committee on the Rights of the Child, *Monitoring children's rights*, https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx, viewed on 6 April 2020.
[110] United Nations, Committee on the Rights of the Child, *General Comment No.10 (2007) Children's rights in juvenile justice,* 25 April 2007.
[111] ibid, p. 4.
[112] ibid, p. 11.
[113] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019.

The UN Committee acknowledged that the aim of public safety is a legitimate aim of the child justice system. However, State Parties should serve this aim:

> *subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in article 40, every child alleged as, accused of or recognized as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles*.[114]

The UN Committee strongly recommends that States Parties abolish the use of a lower minimum age of criminal responsibility for serious crimes and instead sets 'one standardized age … without exception'.[115] The 2019 General Comment refers to evidence in child development and neuroscience that indicates that:

> *maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings.*[116]

The 2019 General Comment also notes that adolescence is a unique defining stage of human development characterised by rapid brain development and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. Further:

> *Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed*.[117]

While recognising that setting of a minimum age of criminal responsibility is important, the UN Committee recognises that an 'effective approach depends on how each State deals with children above and below that age'. Of particular relevance are:

- Interventions for children <u>below</u> the minimum age of criminal responsibility, including:
  - Early intervention requires child-friendly and multidisciplinary responses to the first signs of behaviour that, if the child were above the age of criminal responsibility, would be considered an offence.
  - Children below the minimum age of criminal responsibility are to be provided with assistance and services according to their needs by the appropriate authorities, and 'should not be viewed as children who have committed criminal offences'.[118]
- Interventions for children <u>above</u> the minimum age of criminal responsibility, including:
  - Diverting children away from the criminal justice system should be the preferred manner of dealing with children in the majority of cases. States Parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate.

[114] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, p. 2.
[115] ibid, p. 7.
[116] ibid, p. 6.
[117] ibid, p. 7.
[118] ibid, pp. 6 and 9.

- The child justice system should provide ample opportunities to apply social and educational measures, and to strictly limit the use of deprivation of liberty, from the moment of arrest, throughout the proceedings and in sentencing.[119]

6.1.2 United Nations Global Study on Children Deprived of Liberty

On 8 October 2019, the UN General Assembly delivered its *Global Study on Children Deprived of Liberty* (**GSCDL**). The GSCDL was prepared by an independent expert and used global data to:

> *comprehend the magnitude of children deprived of liberty, its possible justification and root causes, as well as conditions of detention and their harmful impact on the health and development of children*.[120]

The GSCDL collected data from 124 countries and found that there are 'an estimated 160,000–250,000 children in prison or pre-trial detention facilities on any given day' during 2018.[121] This data did not count the estimated one million children being held in police custody.

The GSCDL found that the average age worldwide at which a child can be held criminally responsible is 11.3 years, with a median age of 12 years, far below the minimum of 14 years recommended by the UN Committee.[122] The study also raised concerns with regard to determining the age of a child, as:

Lack of birth registration and the consequences within the justice system are also most likely to impact children who are already marginalised, whether as a result of poor accessibility in rural areas and a low socio-economic or immigration status.[123]

The study recommended that countries:

- Prevent the detention of children by reducing their criminalisation.[124]
- Avoid detention wherever possible in the administration of justice.
- Prohibit and eradicate all forms of violence against children in the administration of justice.
- Prohibit and eliminate discrimination of children in the administration of justice.
- Ensure that children in contact with the justice system are met with processes designed to meet their specific needs.
- Provide effective safeguards and ensure accountability and redress for violations of children's rights in the administration of justice.[125]

[119] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, pp. 5-6.
[120] United Nations, General Assembly, *Global study on children deprived of liberty: Note by the Secretary-General*, 11 July 2019, p. 1.
[121] United Nations, *Global Study on Children Deprived of Liberty*, November 2019, p. 261.
[122] ibid, p. 278.
[123] ibid, p. 281.
[124] This recommendation included the following strategies in relation to the age of criminal responsibility: '*Raise the minimum age of criminal responsibility at least to the age of 14 years, set a single minimum age for all criminal offences committed by children and under no circumstances reduce current minimum age limits … Establish a range of diversion mechanisms available for all offences to prevent children from becoming involved in the formal criminal justice system and make restorative justice mechanisms widely available.'*
[125] United Nations, *Global Study on Children Deprived of Liberty*, November 2019, Chapter 9.

6.2 UN observations on Australia's compliance

In 2005, in its consideration of the combined second and third periodic reports of Australia, the UN Committee recommended that Australia more fully comply with Article 40 of CROC and with the standards in the Beijing Rules. This included the recommendation that Australia raise its minimum age of criminal responsibility. The UN Committee remarked in this context that Australia's minimum age of criminal responsibility is too low, although there is a presumption against criminal responsibility until the age of 14.[126]

In 2012, the UN Committee noted a lack of progress in its consideration of the fourth periodic report of Australia, and reiterated its recommendation that Australia increase the minimum age of criminal responsibility to an internationally acceptable level.[127]

On 15 January 2018, Australia submitted combined fifth and sixth periodic reports to the UN Committee. On 9 and 10 September 2019, Australia appeared before the UN Committee. Australia submitted that the minimum age of criminal responsibility in Australia is 10 years of age, but in all Australian jurisdictions there is a rebuttable presumption that a child aged between 10 and 14 years is not criminally responsible: *doli incapax*.

On 30 September 2019, the UN Committee issued its concluding observations.[128] This included criticism of Australia's lack of implementation of previous UN Committee recommendations in a number of areas pertaining to child justice. In particular, the UN Committee 'remains seriously concerned' about the 'very low age of criminal responsibility in Australia'.[129]

The UN Committee, with reference to its 2019 General Comment, urged Australia to bring its child justice system fully into line with CROC. The UN Committee recommended that Australia raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years at which *doli incapax* applies.[130]

Finding 1: Australia's minimum age of criminal responsibility has been criticised for being too low by the United Nations Committee on the Rights of the Child.

6.3 International jurisdictions

6.3.1 Overview

The UN Committee has recently observed that 'the most common minimum age of criminal responsibility internationally is 14' years.[131]

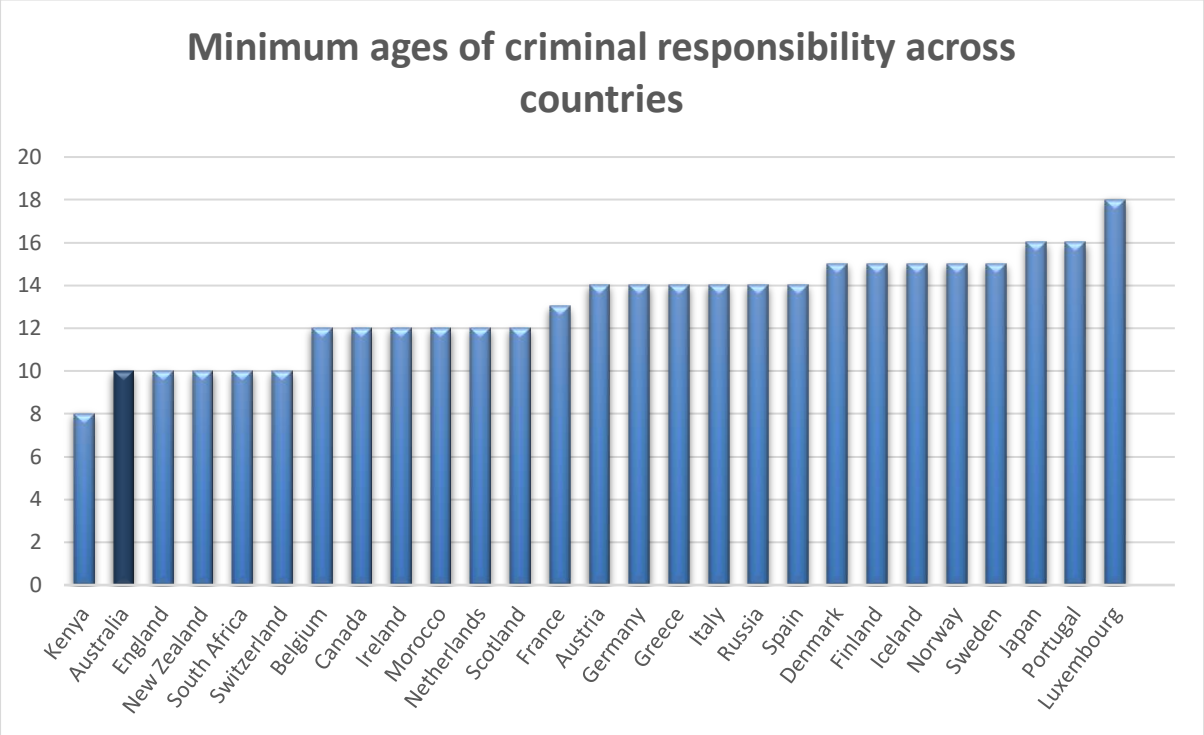
Across the world, the Working Group notes that the minimum age of criminal responsibility ranges from seven years of age (India) to 18 years of age (Brazil).[132] The average minimum age of criminal responsibility in the European Union is 14 years; the average age across

[126] United Nations, Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Australia*, 20 October 2005, paragraphs 72-74.
[127] United Nations, Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Australia*, 28 August 2012, paragraphs 82, 84.
[128] United Nations, Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Australia*, 30 September 2019, paragraphs 5-6.
[129] ibid, paragraph 47.
[130] ibid, paragraph 48(a).
[131] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, p. 7.
[132] Child Rights International Network, *Minimum ages of criminal responsibility in Asia*, 2019, https://archive.crin.org/en/home/ages/asia.html, viewed on 6 April 2020.

members of the Organisation for Economic Co-operation (**OECD**) is 14 years.[133] In New Zealand, the minimum age of criminal responsibility varies from 14 years of age for most crimes, through 12 or 13 years of age for certain other very serious offences to 10 years of age for murder or manslaughter.[134]

See **Graph 1** for the minimum ages of criminal responsibility for various other international jurisdictions.

Graph 1: Minimum ages of criminal responsibility across countries



Finding 2: Australia's minimum age of criminal responsibility is one of the lowest among OECD member countries.

Generally speaking, countries affected by English common law have tended to adopt low age levels for criminal responsibility. However, directly comparing minimum ages of criminal responsibility does not give a complete picture due to differences in overall approaches.[135]
The Working Group notes the following approaches to the age of criminal responsibility:

- An absolute single minimum age under which a child cannot be prosecuted: for example, England and Wales, Canada.
- A minimum age level generally but prosecution allowed below this age for specific offences: for example, Ireland and New Zealand.
- A minimum age of criminal responsibility tempered by a higher conditional age level under which a *doli incapax* presumption, or equivalent, applies: for example, Australia.

[133] There are 37 member economies in the OECD with minimum ages ranging from 10 years (Australia, New Zealand, Switzerland and the UK) to 18 years (Luxembourg, Mexico and the USA).
[134] *Crimes Act 1961* (NZ), ss. 21-22 and *Oranga Tamariki Act 1989* (NZ), s. 272.
[135] Crofts T, 'The Common Law Influence over the Age of Criminal Responsibility - Australia' (2016) 67(3) *Northern Ireland Legal Quarterly,* pp. 283-284.

- A low age of criminal responsibility, but a higher age for the prosecution of a child in criminal proceedings: for example, previously in Scotland.

In the United Kingdom, Canada and Ireland, the age of criminal responsibility had effectively been lowered in previous decades, through the removal of the *doli incapax* presumption and/or the introduction of exceptions for serious offences. New Zealand has a relatively high minimum age of 14 years for most crimes, with lower minima for certain serious offences subject to the presumption of *doli incapax*. Scotland has recently legislated to increase its age of criminal responsibility to 12 years and is to consider the need for further increases as part of a future review of these statutory changes.

By way of contrast, the minimum ages of criminal responsibility across Europe are generally much higher. Denmark has one of the highest minimum ages in Europe: 15 years, similar to Finland, Norway and Sweden, and interestingly had lowered, then re-established its minimum age in recent years. On the other hand, France has no absolute minimum age set at which children become able to be held criminally responsible, but a child will usually be considered to have 'discernment' between the ages of 8 and 10 years.[136] Children aged 13 to 18 years can be criminally sentenced, including to prison terms.[137]

This report observes that there are a number of nations in Africa and the Americas with a higher minimum age at which children can be held criminally responsible, but also a lower age-band under which children can be placed into institutionalised care or deprived of their liberty.

For example, in Egypt no child under 12 years can be held criminally responsible. But, the Child Court is empowered to order children to be reproached; delivered to parents, guardians or custodians; placed in a specialised hospital or in a social care institution from the age of 7 years if the child has committed a felony or misdemeanour. The minimum age of criminal responsibility is formally identified as 18 years in the Brazilian Constitution, but children over 12 years can be subject measures such as community service or placed in 'socio-educative' institutionalised care.[138]

The UN Committee has recognised that whilst the setting of a minimum age of criminal responsibility at a reasonably high level is important, an effective approach also depends on how each State Party deals with children above and below that age. The UN Committee has clarified that children below the minimum age of criminal responsibility 'should not be viewed as children who have committed criminal offences'.[139]

This report also highlights that when considering global comparisons of the minimum age of criminal responsibility, it is necessary to consider the broader justice context. This includes an examination of any conditions, exceptions or approaches to youth justice that may have the effect of lowering or increasing the age of criminal responsibility.

The various regimes in selected other countries are summarised in **Table 2**.

[136] Child Rights International Network, Minimum ages of criminal responsibility in Europe, https://archive.crin.org/en/home/ages/europe.html, viewed on 9 April 2020.
[137] ibid.
[138] ibid.
[139] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, paragraph 23.

Table 2: Comparison of the age of criminal responsibility across selected countries

	MACR	Legislation	Specific offences	*Doli incapax* presumption
England & Wales	10	*Children and Young Persons Act 1933*, s. 50	None	Abolished 1998
Ireland	12	*Children Act 2001*, s. 52	Children aged 10 or 11 can be charged with murder, manslaughter, rape or aggravated sexual assault	Abolished 2006
Australia	10	*Criminal Code 2002* (ACT) *Children (Criminal Proceedings) Act 1987* (NSW) *Criminal Code* (NT) *Criminal Code 1899* (Qld) *Young Offenders Act 1993* (SA) *Criminal Code Act 1924 (Tas)* *Children, Youth and Families Act 2005* (Vic) *Criminal Code* (WA) *Crimes Act 1914* (Cth)	None.	Yes for children aged 10 to 14
Canada	12	*Criminal Code, RSC 1985*, c C-46, s. 13	None	Abolished 1984
New Zealand	10	*Crimes Act 1961*, s. 21	Children aged 10 to 14 can be charged with murder or manslaughter Children aged 12 or 13 can be charged with offences for which the maximum penalty available is or includes imprisonment for life or for at least 14 years Children aged 12 or 13 can be charged where they are a previous offender for certain offences	Yes for children aged 10 to 14 - *Crimes Act 1961*, s. 22
Scotland	12	*Criminal Procedure (Scotland) Act 1995*, s. 41 Minimum age increased (from 10 years) by *Age of Criminal Responsibility (Scotland) Act 2019*, providing consistency with minimum age of prosecution	None	None
Denmark	15	Straffeloven, lovbekendtgørelse (The Criminal Code) nr 1028 22/08/2013, §15	None	None

6.3.2 Common law countries

England and Wales

The age of criminal responsibility in England and Wales is 10 years. A minimum age of 8 years was established in 1933 and raised to 10 years in 1963.[140]

Until 1998, children under the age of 14 years were presumed to be *doli incapax*. However, the presumption was abolished by section 34 of the *Crime and Disorder Act 1998* (UK). This

[140] *Children and Young Persons Act 1933* (UK), s. 50: this Act set the age at eight. This was increased to the age of ten by the *Children and Young Persons Act 1963* (UK) s. 16.

was preceded by considerable debate by British authorities including that the presumption was outdated, illogical and may hinder prosecution.[141]

In 2016, the United Kingdom Government commissioned an independent review by a child behaviour expert, Charlie Taylor: the *Review of the Youth Justice System in England and Wales*[142] (**Taylor Review**). The Taylor Review was commissioned to examine how the United Kingdom deals with children and young people who break the law and provide key recommendations for change.

The Taylor Review found that 'the criminal courts are not equipped to identify and tackle the issues that contribute to and prolong youth offending'.[143] This is because:

> *Almost all of the causes of childhood offending lie beyond the reach of the youth justice system. It is vital that health, education, social care and other services form part of an integrated, multi-agency response to a child's offending, but it is more desirable that these same services intervene with at-risk children and families before their problems manifest themselves in offending*.[144]

The United Kingdom Government's response to the Taylor Review acknowledged that the youth justice system was in need of greater flexibility and that 'children and young people who benefit from a range of protective factors – at an individual, family and community level – are much less likely to offend'.[145] The government's commitments to 'reducing the number of children who offend included to:

- work with other government departments and partners including the Home Office, Department for Education and the Youth Justice Board to gather information and share best practice across the system to inform further preventative work
- work with the National Health Service England and community health providers to improve how children and young people are assessed and ensure they get the treatment they need at the earliest possible stage
- work with the Home Office and the police to ensure children and young people are treated appropriately in police custody
- make the court experience more appropriate for young offenders and young victims and witnesses, by removing unnecessary appearances in court and holding first remand hearings in the youth court rather than adult magistrates' courts.[146]

Canada

While raising the minimum age of criminal responsibility from seven to 12 years in 1984[147], Canada also removed the rebuttable presumption of *doli incapax* for those aged 12 and 13 years.[148] This change reduced the uppermost minimum age of criminal responsibility from 14 years to 12 years.

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[141] Crofts T, 'Doli incapax: Why Children Deserve its Protection', *Murdoch University Electronic Journal of Law*, Vol. 10, No. 3, September 2003, paragraphs 16-40. See also: Bradley L (2003), Urbas G (2000), p.4.
[142] United Kingdom, Ministry of Justice, *Review of the Youth Justice System in England and Wales*, 12 December 2016.
[143] ibid, p. 28.
[144] ibid, p. 3.
[145] United Kingdom, Ministry of Justice, *The government response to Charlie Taylor's Review of the Youth Justice System*, December 2016, p. 4.
[146] ibid, p. 14.
[147] *Criminal Code RSC 1985, c C-46* (Canada), s. 13.
[148] The minimum age of criminal responsibility of seven years was established in the *Juvenile Delinquents Act 1908* (Canada). The *Young Offenders Act 1984* (Canada) subsequently raised the age to 12 years and removed the principle of *doli incapax*. The *Youth Criminal Justice Act 2003* (Canada) replaced the *Young Offenders Act 1984* (Canada).

The *Youth Criminal Justice Act 2003* (Canada) (**YCJA**) subsequently introduced significant reforms to the Canadian youth justice system. The Canadian Government undertook this initiative to reduce the youth incarceration rate, which was one of the highest of the Western world at the time.[149]

Since the introduction of the YCJA, youth involvement with the justice system and custody rates have declined significantly and police diversion of cases through extrajudicial measures has increased significantly.[150] This has occurred without an increase in the overall number of young people drawn into the system.[151] Canada's overall youth incarceration rate, which includes both custody and detention, has declined by almost 50 per cent under the YCJA.[152]

A key aim of the YCJA was to 'increase the use of effective and timely non-court responses to less serious offences by youth'.[153] Police in Canada are required under the legislation to consider whether extrajudicial measures would be appropriate prior to deciding to charge a young person. 'Extrajudicial measures' include warnings, cautions and referrals to a community program or agency.[154]

Ireland

Ireland has a minimum age of criminal responsibility of 12 years for most offences, but retains the lower age of 10 years for specific serious offences.

In 2001, Ireland legislated that children under 12 years of age shall not be charged with an offence.[155] This raised the minimum age of criminal responsibility from seven years.

In 2006, the *Criminal Justice Act 2006* (Ireland) made statutory exceptions for specific serious offences, so that children aged 10 or 11 years could now be charged with murder, manslaughter, rape or aggravated sexual assault.[156] The legislation also abolished the rebuttable presumption of *doli incapax* that children not less than 12 years but under 14 years of age are incapable of committing an offence.[157]

New Zealand

New Zealand has a minimum age of criminal responsibility of 14 years for most crimes. This is accompanied by exceptions for certain serious offences, resulting in a lower minimum age depending on the severity of the offence.

In 1961, New Zealand raised the minimum age of criminal responsibility from seven to 10 years of age[158] and formalised the *doli incapax* presumption.[159] In 1985, legislation was made preventing imprisonment of a person under 16 years of age except for a purely indictable offence.[160]

[149] Canada, Department of Justice, *The Youth Criminal Justice Act: Summary and Background*, 8 August 2017, https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html, viewed 7 April 2020.
[150] ibid.
[151] ibid.
[152] ibid.
[153] ibid.
[154] *Youth Criminal Justice Act 2003* (Canada), Part 1.
[155] *Children Act 2001* (Ireland), s. 52.
[156] *Criminal Justice Act 2006* (Ireland), s. 129(2).
[157] *Criminal Justice Act 2006* (Ireland), s. 129. This abolished the presumption in previous the previous section 52 of the *Children Act 2001* (Ireland).
[158] *Crimes Act 1961* (NZ), s. 21(1).
[159] *Crimes Act 1961* (NZ), s. 22(1).
[160] *Criminal Justice Act 1985* (NZ) s. 8.

The *Oranga Tamariki Act 1989* (NZ) amended those arrangements by providing that children who were aged 10 years but less than 14 years could only be charged with murder or manslaughter.[161]

In 2010, the legislation was further modified so that children aged 12 or 13 years of age can be prosecuted for an offence where the maximum penalty is 14 years imprisonment or more.[162] In addition, children aged 12 or 13 years who have been previously convicted of serious offences can be prosecuted for other offences with a maximum penalty of at between 10 and 14 years imprisonment.[163]

It is a fundamental principle of the New Zealand legislation that criminal proceedings should only be instituted against a young person where:

- the prosecuting authority believes that criminal proceedings against the young person for that offence are required for the public interest
- consultation has taken place with a youth justice co-ordinator and a family conference has been held.[164]

Accordingly, only the most serious youth offending reaches court in New Zealand. The majority of youth offending is dealt with out of court through alternative action, including police warnings or diversionary programs and family group conferences.[165]

Scotland

Since 1968, Scotland has used a children's hearing system with a 'welfare' approach for young offenders, rather than the traditional court system. Scotland does not detain or imprison children under the age of 16 years and is presently transitioning away from having any person under the age of 18 years in a prison.[166]

One of the fundamental principles of the children's hearings system in Scotland is that children and young people who commit offences and those who are otherwise in need of care and protection are dealt with in the same way.[167] The Children's Panel is a decision-making tribunal that may make compulsory supervision orders if necessary, such as stating where the child is required to live and other conditions with which they must comply.

When at risk children need to be held securely, there are a range of specialist facilities that offer this service, for example, the Kibble Education and Care Centre near Glasgow (**Kibble**)[168]. Kibble has both secure and non-secure housing for children, but most children are held in non-secure housing. Kibble also offers a full spectrum of care options that are integrated, and through which young people transition over time.[169]

[161] *Oranga Tamariki Act 1989* (NZ) s. 272(1)(a).
[162] *Oranga Tamariki Act 1989 Act* (NZ) s. 272(1)(b). As made by the *Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010* (NZ).
[163] *Oranga Tamariki Act 1989* (NZ) s. 272(1)(c).
[164] *Oranga Tamariki Act* 1989 (NZ), s. 245.
[165] New Zealand, Ministry of Justice, *Children and Young People in Court: Data notes and trends for 2019,* https://www.justice.govt.nz/assets/Documents/Publications/32n83u-Children-and-young-people-data-notes-and-trends-dec2019-v1.0.pdf.pdf, viewed on 7 April 2020.
[166] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 365.
[167] Age of Criminal Responsibility (Scotland) Bill, Policy Memorandum.
[168] Kibble Education and Care Centre, *About Kibble,* https://www.kibble.org/about-kibble/, viewed on 7 April 2020.
[169] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 365.

The services it runs include: residential care, primary and secondary education, community services, intensive fostering services, secure care, employment and training services, preventative and rehabilitative community services, and transitional support.[170]

Age of Criminal Responsibility (Scotland) Act 2019

In 2019, the minimum age of criminal responsibility in Scotland was raised to 12 years from the previous age of 8 years.[171] The *Age of Criminal Responsibility (Scotland) Act 2019* also provided that, for children under 12 years of age who engage in harmful behaviour, police can still investigate the matter and consider the disclosure of information about a child's behaviour at a later date. The powers in the legislation also allow police to take a child under 12 years of age who engages in behaviour that is harmful to others to a place of safety.[172]

Prior to the legislation coming into force, while children under 12 years could not be prosecuted, they could be held responsible for a crime from the age of eight years. Children between 8 and 11 years could be referred to the Children's Panel on offence and non-offence grounds.

Notwithstanding the welfare focus of the children's hearing system, eight was considered to be an unacceptably low criminal age (the lowest in Europe) and was the subject of criticism by the United Nations. It was also considered that if an offence has been committed by a child aged eight or over and is later disclosable as a conviction, it would potentially affect the child's life chances in the years thereafter.[173]

The recent legislative change means that children aged 8 to 11 years can no longer be referred to a children's hearing on the ground that they have committed an offence although the behaviour can still be dealt with under existing non-offence referral grounds. As a result, no child can receive a conviction for their behaviour when they are under 12 years of age.[174]

The Scottish Government is required to conduct a statutory review of the age of criminal responsibility within three years of the legislative changes taking effect. The review will consider whether there should be a further increase in the minimum age beyond 12 years.[175]

6.3.3 Europe

Denmark

The Working Group notes the difficulties with a comparison between the Danish and Australian criminal justice systems, as Denmark does not have a separate justice system for children or young people. Juvenile offenders who have attained the minimum age of criminal responsibility are sentenced by the same criminal law and in the same courts as adult offenders.[176]

This report nonetheless makes the following observations about developments in Denmark with regard to the minimum age of criminal responsibility.

[170] Kibble Education and Care Centre, *Our Services,* https://www.kibble.org/services/, viewed on 7 April 2020.
[171] *Age of Criminal Responsibility (Scotland) Act 2019* was passed unanimously by the Scottish Parliament on 7 May 2019.
[172] Age of Criminal Responsibility (Scotland) Bill, Explanatory Memorandum.
[173] Age of Criminal Responsibility (Scotland) Bill, Policy Memorandum.
[174] Age of Criminal Responsibility (Scotland) Bill, Explanatory Memorandum.
[175] *Age of Criminal Responsibility (Scotland) Act 2019*, Part 6, ss. 78-9.
[176] Damm AP, Larsen BØ, Nielsen HS & Simonsen M, 2017, *Lowering the minimum age of criminal responsibility: Consequences for juvenile crime and education,* Institut for Økonomi, Aarhus Universitet, Aarhus, Economics Working Papers, Nr. 2017-10.

In July 2010, Denmark lowered the minimum age of criminal responsibility from 15 to 14 years of age. In March 2012, the age limit was re-established at 15 years by a new government. A study conducted during the period when the age of criminal responsibility was briefly lowered concluded that there was no evidence that the reform deterred 14 year olds from committing crime, nor was there any reduction in the number of 14 year olds who committed criminal offences, even though they were subject to legal punishment during the reform period.[177]

The study also indicated that the 14 year olds who were captured by the law change had lower educational outcomes and higher recidivism rates than those processed in the social system.[178] In addition, where an offender is below the age of criminal responsibility (currently 15) the matter is dealt with by social authorities. A criminal investigation can still take place by the police, for example to clarify the scope of a crime or ensure stolen items are returned to their owner. Like adults, children may be detained by the police for not more than six hours if it is necessary to prevent public order or personal health from being threatened by the person.[179]

The social intervention is not defined as a sanction but as a welfare initiative based on the needs of the child and it is regulated in the law on social services.[180] Outcomes can include participation in supervised activities, support to the family and in the most severe cases, out-of-home placement in foster care or in an institution.[181]

Other European jurisdictions

Across Europe, the lowest minimum age of criminal responsibility is currently 10 years, set by Switzerland, followed by 12 years in Belgium and the Netherlands. The highest minimum ages of criminal responsibility are 16 years in Portugal and 18 years in Luxembourg.[182]

In Greece, children between the ages of eight and 13 years cannot be held criminally liable for an offence and can only be subject to educational or therapeutic measures for committing acts that would be criminal offences for an older person. Children aged 13 to 15 years at the time of committing a criminal act may only be subject to reformatory or therapeutic measures, and a child aged between 15 to 18 years may be sentenced to penalties including deprivation of liberty.[183]

In Luxembourg, the Law on the Protection of Children provides that persons under 18 years must generally be dealt with by the youth courts, where measures taken are aimed at protection, care, therapy and education.[184] However, children can be directed to the adult courts and subject to adult penalties from the age of 16 years. The powers of the Luxembourg Youth Court are in some circumstances of a penal or correctional nature, including deprivation

[177] Damm AP, Larsen BØ, Nielsen HS and Simonsen M, 2017, *Lowering the minimum age of criminal responsibility: Consequences for juvenile crime and education,* Institut for Økonomi, Aarhus Universitet, Aarhus, Economics Working Papers, Nr. 2017-10.
[178] ibid.
[179] International Juvenile Justice Observatory, *Alternatives to custody for young offenders: National report on juvenile justice trends*, Denmark, p. 8, http://www.oijj.org/sites/default/files/baaf_denmark1.pdf, viewed on 7 April 2020.
[180] ibid, p. 9.
[181] Damm, AP, Larsen, BØ, Nielsen, HS & Simonsen, M 2017, *Lowering the minimum age of criminal responsibility: Consequences for juvenile crime and education,* Institut for Økonomi, Aarhus Universitet, Aarhus, Economics Working Papers, Nr. 2017-10.
[182] See Child Rights International Network, *Minimum ages of criminal responsibility in Europe,* https://archive.crin.org/en/home/ages/europe.html.
[183] Greece, *Penal Code 1950 (No. 1492)*, Articles 126 and 127.
[184] Luxembourg, *Loi du 10 août 1992 relative à la protection de la jeunesse*, Articles 1 and 2.

of liberty generally and solitary confinement of up to 10 days. There is no lower age limit for these measures.[185]

In Portugal, while persons under the age of 16 cannot be held criminally liable, those between 12 and 16 years can be subject to penalties under the Guardianship and Education Law, which allows for the detention of children in closed educational centres.

Switzerland sets a clear minimum age of criminal responsibility whereby no person can be subject to criminal penalties for acts committed while under the age of 10 years.[186]

[185] Luxembourg, *Loi du 10 août 1992 relative à la protection de la jeunesse*, Article 32 and Cipriani D, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, 2009, Routledge Publishing, p. 212.
[186] Switzerland, *Loi fédérale régissant la condition pénale des mineurs, 2003*, Article 3(1).

7 Children and the justice system

A key consideration in determining an appropriate age of criminal responsibility is the age at which children typically will possess the maturity required to comprehend that their actions were 'seriously wrong' in a criminal sense. In this context, the Working Group notes that it is important to take into account contemporary scientific research on child and adolescent brain development. This chapter considers the usual developmental pathway of children, how this can be interrupted by trauma, and what this suggests about an appropriate age of criminal responsibility.

In addition, data show that children in the justice system share common backgrounds and developmental profiles, which are very different to those of children outside the justice system. Understanding the common issues and hardships faced by these children can inform the approach taken to address underlying causes of offending and ensure that the system can respond effectively.

7.1 Child development

Children differ from adults in their physical and psychological development. Such differences constitute the basis for having legal age limits for many activities that society deems inappropriate for children under that age. It is also the basis for a minimum age of criminal responsibility.

Criminal responsibility requires a cognitive element: the ability to orientate oneself on legal norms, to understand what the law requires a person to do or not to do and the ability to understand the nature of the act committed and its consequences.[187] It also requires a volitional element: the ability to control one's actions and thus the ability to behave according to the legal norms recognised.[188]

There is significant evidence to suggest that children under the age of 14 years are still undergoing significant growth and development, and may not have the maturity required for criminal responsibility.

7.1.1 Brain development

The immature moral understanding and limited behaviour control capacity in younger children lessens their culpability for certain behaviour.[189] The NT Royal Commission referred to the fact that:

The adolescent brain is structurally different to that of a mature adult, particularly in the area devoted to impulse control and decision-making. Adolescents engage in increased risk-taking, have poor impulse control and poor planning skills by virtue of the physical structures of their still-growing brains.[190]

Countries impose a criminal responsibility based on their views about the age at which most children can be expected to understand the impact of their actions and comprehend criminal

[187] Thomas Crofts, Submission 52, p. 2.
[188] ibid.
[189] Jesuit Social Services, *Too much too young: Raise the age of criminal responsibility to 12,* October 2015, http://jss.org.au/wp-content/uploads/2016/01/Too_much_too_young_-_Raise_the_age_of_criminal_responsibility_to_12.pdf, viewed on 7 April 2020.
[190] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, p. 133, footnotes 135-6.

proceedings. This is necessarily somewhat arbitrary, and may not reflect the capacity and stages of development of all individuals.

The UN Committee has noted that evidence in the fields of child development and neuroscience indicates that children aged 12 to 13 years are unlikely to understand the impact of their actions or to comprehend criminal proceedings. In addition, adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses.[191]

Many stakeholders agree that a minimum age of criminal responsibility of 10 years is too low when taking into account a child's usual path of development. This age is significantly lower than the age at which children and young people attain various other rights or entitlements that regulators consider have some connection with their perceived capacity and cognitive development, such as:

- consent to engage in sexual intercourse
- permission to drive or vote
- capacity to make independent decisions about medical treatment.

Young adolescents also exhibit characteristics that may make them more liable to engaging in delinquent activities: they are more prone to impulsivity and risk taking, peer influence, and less able to regulate their behaviour.[192]

A number of neuroimaging studies have shown that the frontal lobes, which are responsible for 'higher' functions such as planning, reasoning, judgment and impulse control, only fully mature when an adult is aged well into their twenties.[193] The majority of young offenders grow out of delinquent behaviour, with many longitudinal studies showing that only 5 to 10 per cent of young people who commit antisocial acts go on to become chronic offenders.[194]

Children may also lack the capacity to properly engage in the criminal justice system, which may result in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings.[195]

The Royal Australasian College of Physicians (**RACP**), along with the Australian Medical Association and the Australian Indigenous Doctors' Association recommend that the minimum age of criminal responsibility be raised to 14 years of age, as 'it is inappropriate for 10 to 13 year olds to be in the youth justice system'.[196] RACP further submits that:

> *A range of problematic behaviours in 10 to 13 year old age children that are currently criminal under existing Australian law are better understood as behaviours within the expected range in the typical neurodevelopment of 10 to 13 year olds with significant trauma histories (typically*

[191] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, pp. 6-7.
[192] Caskey M, Anfara V Jr, 'Developmental Characteristics of Young Adolescents', Association for Middle Level Education, October 2014, https://www.amle.org/BrowsebyTopic/WhatsNew/WNDet/TabId/270/ArtMID/888/ArticleID/455/Developmental-Characteristics-of-Young-Adolescents.aspx, viewed on 9 April 2020.
[193] Becroft A, *From little things, big things grow: emerging youth justice themes in the South Pacific*, Australasian Youth Justice Conference, Changing Trajectories of Offending and Reoffending, 20–22 May 2013, Canberra.
[194] Noting that the reasons for growing out of such behaviour could be a combination of brain development and other factors: Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 413.
[195] Farmer E, 'The age of criminal responsibility: developmental science and human rights perspectives', 2011, 6(2) *Journal of Children Services*, 86-95.
[196] Royal Australasian College of Physicians, Submission 19, February 2020, p. 3.

> *actions that reflect poor impulse control, poorly developed capacity to plan and foresee consequences such as minor shoplifting or accepting transport in a stolen vehicle)*.[197]

Finding 3: The evidence regarding the psychological, cognitive and neurological development of children indicates that a child under the age of 14 years is unlikely to understand the impact of their actions or to comprehend criminal proceedings.

Deterrent effect

The NT Royal Commission considered the deterrent effect of detention on children in detail, noting that:

> *Once a child or young person enters the criminal justice system, they may be labelled as an offender or criminal, which can affect their future behaviour. Punishment through detention may contribute to further engagement in criminal behaviour due to influence from 'deviant' peers …*
>
> *A youth justice system that prioritises deterrence, supervision and punishment does not reduce reoffending. In fact, research suggests that children and young people who think they will be severely punished actually commit more crime.*[198]

Research undertaken in 2006 found that detention has a 'profoundly negative impact' on the mental and physical wellbeing of a child and is not even an effective method of deterring children from committing crime:

> *There is credible and significant research that suggests that the experience of detention may make it more likely that youth will continue to engage in delinquent behaviour, and that the detention experience may increase the odds that youth will recidivate, further compromising public safety*.[199]

The Justice Policy Institute found that children in the United States are detained at levels that are not commensurate with a stated purpose of temporarily supervising only those most at-risk youth. Research collated from across United States jurisdictions also found the following negative impacts of detention on children and youth as they relate to the criminal justice system:

- Detention can increase recidivism.
- Congregating delinquent youth together negatively affects their behaviour and increases their chances of re-offending.
- Detention pulls youth deeper into the juvenile and criminal justice system.
- Alternatives to detention can curb crime and recidivism better than detention.
- Detention can slow or interrupt the natural process of 'aging out of delinquency.'
- There is little relationship between detention and overall crime in the community.[200]

The Human Rights Law Centre submits that 'children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions'.[201] The Working Group also notes that other research from the United States has observed that:

> *unlike logical-reasoning abilities, which appear to be more or less fully developed by age 15, psychosocial capacities that improve decision making and moderate risk taking—such as*

[197] Royal Australasian College of Physicians, Submission 19, February 2020, p.3.
[198] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 25.
[199] Justice Policy Institute, *The Dangers of Detention: the impact of incarcerating youth in detention and other secure facilities*, 2006, p. 3.
[200] ibid, pp. 4-7.
[201] Human Rights Law Centre, Submission 21, 28 February 2020, p. 5.

> *impulse control, emotion regulation, delay of gratification, and resistance to peer influence—continue to mature well into young adulthood. Accordingly, psychosocial immaturity in these respects during adolescence may undermine what otherwise might be competent decision making*.[202]

The intended deterrent effect of detention for children is therefore not supported by scientific research and may, in fact, result in more criminal behaviour. The Australian Institute of Criminology (**AIC**) recently considered the question of why juvenile offenders are different to adult offenders. The AIC concluded that the brain development of children, specifically the influence of their socio-emotional network often leads to bad decision-making, susceptibility to peer pressure and increased risk-taking:

> *In contrast with the widely held belief that adolescents feel 'invincible', recent research indicates that young people do understand, and indeed sometimes overestimate, risks to themselves … Adolescents engage in risker behaviour than adults … <u>despite</u> understanding the risks involved … it appears that adolescents not only consider risks <u>cognitively</u> (by weighing up the potential risks and rewards of a particular act), but <u>socially</u> and/or <u>emotionally</u>*.[203] [emphasis added]

The Working Group observes that placing children in detention does not acknowledge that the rate at which cognitive and logic processes develop in children's brains, specifically for adolescents, does not allow them to fully comprehend the purpose of the detention or its intended effect. Children's immature psychosocial immaturity can undermine their decision-making abilities and, as a consequence, the deterrent effect of being held in detention.

Finding 4: Detention may not be an effective deterrent for a child because of their immature brain development and cognitive functions and lack of capacity to understand the consequences of their actions.

The effects of trauma

The developing brains of children are much more vulnerable to trauma than adult brains, and the younger the child is, the more vulnerable they are.[204] Trauma can include:

- physical or sexual abuse
- neglect or lack of affection
- parental mental illness
- family violence
- poverty
- lack of adequate housing.[205]

All of these elements of toxic stress that may contribute to trauma are also risk factors for offending. Trauma can disrupt the architecture of the developing brain which, in turn, can lead to lifelong problems in learning, behaviour, and physical and mental health.[206]

A strong body of evidence demonstrates a link between child maltreatment and youth offending and finds that:

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[202] Steinberg L, 'Risk Taking in Adolescence: new perspectives brain and behavioural science, *Current Directions in Psychological Science*, vol. 16:2, April 2007, p. 56.
[203] Richards K, Australian Institute of Criminology, *What makes juvenile offenders different from adult offenders?*, 18 February 2011, p. 4, available from: https://aic.gov.au/publications/tandi/tandi409, viewed on 20 April 2020.
[204] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, p.134.
[205] Australian Early Development Census, *Brain Development in children*, 2015, <https://www.aedc.gov.au/resources/detail/brain-development-in-children, viewed on 7 April 2020.
[206] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, p. 134.

> *children and young people with a history of abuse or neglect are at increased risk of engaging in offending behaviours than those without a history of maltreatment*.[207]

Other research has found that approximately 80 per cent of young people in juvenile justice settings in Australia have experienced multiple traumatic stressors.[208]

There is a clear over-representation of children who have been engaged with the child protection/out-of-home care systems in the youth justice system. In particular, the younger a child is at first sentence, the more likely they are to be known to child protection and therefore likely to have experienced trauma.[209] Indigenous young people are also significantly more likely to be in out-of-home care than non-Indigenous young people.[210]

Involvement of a child in the child protection system can be considered a proxy indicator for trauma, as most children in the child protection system have experienced some form of physical or mental health trauma, and many have experienced high levels of adverse childhood experiences.[211]

The Australian Childcare and Adolescent Trauma, Loss and Grief Network notes that:

> *Trauma can have the most significant impact on children when they are exposed to it in the first three years of life. During this time there is a huge amount of brain growth and activity, particularly in the areas that control learning and emotional self-regulation. Exposure to abuse, neglect and domestic violence during this period of time can have a great impact on the child's ability to develop emotionally and cognitively. It is also during this time that the child needs supportive and protective relationships with adults in order to learn how to control their own emotions, learn about social norms, develop empathy and learn how to interact with others*.[212]

The experience of significant trauma during this time can derail a child's development if they cannot access proper supports or treatment.[213] Young people who have experienced significant trauma as a child often have difficulties in:

- controlling their emotions
- relating to others, or forming supportive relationships with others
- showing empathy towards others
- concentration
- learning and education.[214]

Finding 5: Complex or cumulative trauma in early childhood can disrupt brain development and the effects may manifest as risk factors for future contact with the justice system. Most children in the youth justice system have experienced childhood trauma.

[207] Australian Institute of Family Studies, *The intersection between the child protection and youth justice systems*, July 2018, https://aifs.gov.au/cfca/publications/intersection-between-child-protection-and-youth-justice-systems/youth-justice, viewed on 7 April 2020.
[208] Royal Australasian College of Physicians, *The Health and Wellbeing of Incarcerated Adolescents*, 2011, Sydney, https://www.racp.edu.au/docs/default-source/advocacy-library/the-health-and-wellbeing-on-incarcerated-adolescents.pdf, viewed on 7 April 2020.
[209] Victoria, Sentencing Advisory Council, *Crossover kids: Vulnerable children in the youth justice system – Report 1: Vulnerable children in the Youth Justice System*, June 2019.
[210] Australian Institute of Health and Welfare, *Child Protection Australia 2017-18*, 8 March 2019.
[211] Royal Australian College of Physicians, Submission 19, February 2020, p. 8.
[212] Australian Child and Adolescent Trauma, Loss and Grief Network, *Trauma, young people and juvenile Justice,* <https://www.ics.act.gov.au/__data/assets/pdf_file/0020/1323524/Trauma-and-juvenile-justice-in-Australia.pdf>
[213] Ibid.
[214] Ibid.

The negative effects of detention

There is a significant body of evidence which shows that any potential punishment and deterrent value that detention may have is vastly outweighed by the negative life-long outcomes it creates, especially for the youngest and most vulnerable cohorts.[215]

Criminalising and stigmatising childhood behaviour may promote escalation of that behaviour and further harm. A disproportionate number of child offenders have faced significant prior disadvantage and adversity, and better outcomes may flow from attending to those underlying issues.

Children aged 10 to 13 years old (inclusive) in the youth justice system are physically and neurodevelopmentally vulnerable.[216] Detaining young people has been shown to increase a child's risk of depression, suicide and self-harm[217], lead to poor emotional development, result in poor education outcomes and further fracture family relationships.[218] It also provides for association with older children who may have more serious offending histories. This report notes that, in this way, detention can contribute to a cycle of disadvantage.

Additionally, removing a child from his or her home and from any positive influences, and placing them in a prison environment can be a highly traumatic experience which may damage brain development and can have a compounding effect on children who are already at risk.[219] This can be a particular issue for children from rural and remote areas, including those awaiting trial, who are geographically cut off from family or support networks, and placed in a culturally foreign environment.

Finding 6: Children and young people who engage with the criminal justice system have comparatively higher rates of childhood neglect and trauma (including physical, psychological and sexual abuse), familial instability and substance abuse, and experience in the child protection and out-of-home care systems, as well as lower levels of education. Placing a child in detention can disrupt normal brain development and compound pre-existing trauma. Detention creates life-long negative outcomes.

7.1.2 Physical development

The RACP submitted that the physical vulnerabilities of a 10 year old are such that it is inappropriate that they can be arrested, held in police cells and/or incarcerated. From a physical vulnerability perspective, RACP suggests that a minimum age for detention of 14 years is much more appropriate.[220]

RACP submits that children who are 10 years old are physically very different to 14 year old children: puberty, and the accompanying growth spurt, generally occurs between the ages of 10 and 14 years, although there is significant variation. A normal 10 year old child will weigh

[215] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 419.
[216] Royal Australian College of Physicians, Submission 19, February 2020.
[217] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2A, p. 361.
[218] Baldry E and Cunneen C, 'Locking up kids damages their mental health and leads to more disadvantage. Is this what we want?', UNSW Newsroom, 21 June 2019, https://newsroom.unsw.edu.au/news/social-affairs/locking-kids-damages-their-mental-health-and-leads-more-disadvantage-what-we, viewed on 6 April 2020.
[219] Royal Australian & New Zealand College of Psychiatrists, Qld Branch, Submission to the Queensland Department of Child Safety, Youth and Women Youth Justice Strategy, 21 September 2018, p. 6, https://www.ranzcp.org/files/resources/submissions/ranzcp-qld-submission-on-youth-justice-strategy-se.aspx, viewed on 9 April 2020.
[220] ibid.

as little as 20-30 kilograms, and a normal 10 year old's height can range from as short as 122 centimetres for girls or 125 centimetres for boys.[221]

7.2 The over-representation of disadvantage

Children in youth detention in Australia have a very different profile compared to children who are not in custody. Some of the common characteristics of young people in detention are that they:

- are male
- performed poorly in school, were truant and/or left school at a young age
- come from a low socio-economic area
- come from a family under severe financial, health, housing and other forms of stress
- have a mental health disorder and/or cognitive, hearing, neuro- or other disability
- have experienced violence and abuse
- are in out-of-home care
- are Indigenous.[222]

Children with the above characteristics are amongst the most vulnerable children in our society: they may have not had adequate access to housing, safety, health, and may not attend school. They are also more likely to have experienced trauma. This cohort of children therefore has complex needs which the justice system may not be equipped to properly address.

The Victorian Sentencing Advisory Council refers to 'crossover kids': a term used to describe children with involvement in both the criminal justice system and the child protection system.[223] Crossover kids who entered the youth justice system in Victoria early (first sentenced or diverted aged 10-13 years) were more likely than older crossover kids (16 years or over at first sentencing/diversion) to:

- have also entered the child protection system earlier, with a median age of two years at first child protection report compared with a median age of eight years for older crossover kids
- be Aboriginal or Torres Strait Islander children: 24 per cent of younger crossover kids compared with older crossover kids
- be the subject of at least one child protection report alleging physical harm: 83 per cent for the 10-13 year old group compared with 59 per cent for older crossover kids
- have experienced out-of-home care: 61 per cent compared with 28 per cent, respectively
- have experienced more out-of-home care placements, with a median of nine placements compared with four placements for older crossover kids.[224]

The younger crossover kids are the most likely to be known to child protection and are 'a particularly vulnerable, traumatised, high-needs and high-risk group'.[225]

[221] Royal Australasian College of Physicians, Submission 19, February 2020.
[222] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 3B, Chapter 35 and Baldry E & Cunneen C, 'Locking up kids damages their mental health and leads to more disadvantage. Is this what we want?', UNSW Newsroom, 21 June 2019, https://newsroom.unsw.edu.au/news/social-affairs/locking-kids-damages-their-mental-health-and-leads-more-disadvantage-what-we, viewed on 6 April 2020.
[223] Victoria, Sentencing Advisory Council, *'Crossover kids': Vulnerable children in the youth justice system – Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria*, April 2020.
[224] ibid, p. 74.
[225] ibid, p. 36.

While the problems associated with these vulnerable children would not be solved through raising the minimum age of criminal responsibility, raising the age would provide a catalyst for considering how these children should be responded to in the community without entrenching them at an early age in the criminal justice system.[226]

7.2.1 Mental health

Young people within youth justice systems have significantly higher rates of mental health disorders and cognitive disabilities when compared with general youth populations.[227] They are also likely to experience co-morbidity: co-occurring mental health disorders and/or cognitive disability, usually with a drug or alcohol disorder.[228]

The prevalence of mental health disorders is higher for Indigenous young people in custody when compared with non-Indigenous young people in custody, particularly the incidence of having two or more disorders concurrently.[229]

Risk factors for the development of mental health problems among young offenders may include:

- parental incarceration or death
- a history of abuse and neglect
- being in out-of-home care, social isolation
- family history of alcohol
- other drug and mental health problems.[230]

7.2.2 Speech, language and hearing impairments

Research suggests that the cognitive functioning of young people in detention is worse than for those in the general community, particularly for receptive verbal skills, which are the ability to understand what a person is saying.[231] Speech, language and communication problems are significantly higher among those involved in the youth justice system than in the general population.[232]

Hearing loss during a child's developmental years can lead to poor social and emotional outcomes, including 'delayed language development, poor auditory perception and communication, and interpersonal problems'.[233] This often results in an inability for the child to engage with school, leading to issues such as increased absenteeism, illiteracy, difficulties

[226] Cunneen C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penality Project, University of New South Wales, <http://cypp.unsw.edu.au/node/146
[227] Western Australia, Commissioner for Children and Young People, *Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia*, 29 April 2011, p. 78.
[228] Cunneen C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penality Project, University of New South Wales, p. 9, http://cypp.unsw.edu.au/node/146.
[229] New South Wales, Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report*, November 2017, p. 68, https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF, viewed on 9 April 2020.
[230] Australian Institute of Health and Welfare, *National data on the health of justice-involved young people: a feasibility study 2016-17,* 14 June 2018, pp. 4-5.
[231] ibid, p. 5.
[232] ibid, p. 5.
[233] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, p. 139.

gaining employment and other negative outcomes.[234] Hearing loss affects Indigenous children at a much higher rate than non-Indigenous children.[235]

There is a high prevalence of communication impairments in youth justice populations. A 2016 international study found that between 50-70 per cent of boys in detention have significant difficulties with language function.[236] The presence and severity of these disorders also appears to directly relate to offending severity, and in particular, violent offending.[237]

7.2.3 Cognitive and neuro-disability

Little is known about the disability status of young people under youth justice supervision, with the few studies that have been done pointing to disability being an area of significant concern for this population.[238]

A 2015 report from the NSW Government found that one in six young people in custody in NSW obtained an IQ score below 70, putting them in the extremely low range and indicating potential cognitive disability.[239] This rate (16.6 per cent) is much higher than the rate expected in the general community (2.2 per cent) and is also much higher for Aboriginal children compared to non-Aboriginal children in custody (24 per cent compared to 8 per cent).[240]

Young people with cognitive disability are particularly susceptible to contact with the justice system.[241] This is because 'they may experience trouble with memory, attention, impulse control, communication, difficulties withstanding peer pressure, controlling frustration and anger, and may display inappropriate sexual behaviour'.[242]

Childhood neurodisability incorporates a wide range of conditions, including:

- learning disabilities
- specific learning difficulties
- communication disorders
- attention deficit hyperactivity disorder
- autistic spectrum disorders
- acquired or traumatic brain injury
- epilepsy
- foetal alcohol spectrum disorders.[243]

[234] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, p. 139.
[235] ibid, p. 139.
[236] Scotland, Centre for Youth & Criminal Justice, *A guide to youth justice in Scotland: policy, practice and legislation*, June 2016, p. 204, https://cycj.org.uk/wp-content/uploads/2016/06/A-guide-to-Youth-Justice-in-Scotland.pdf, viewed on 9 April 2020.
[237] ibid, p. 204.
[238] Australian Institute of Health and Welfare, *National data on the health of justice-involved young people: a feasibility study 2016-17,* 14 June 2018, p. 5.
[239] New South Wales, Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report*, November 2017, p. 81, https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF, viewed on 9 April 2020.
[240] ibid.
[241] Cunneen C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penality Project, University of New South Wales, http://cypp.unsw.edu.au/node/146, p. 10.
[242] Ibid.
[243] United Kingdom, Office of the Children's Commissioner, *Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend*, October 2012.

Young people in custody may have significantly higher rates of neurodevelopmental disorders than young people in the general population.[244]

Neurodisability is related to a number of factors that have a direct bearing on the likelihood of offending behaviour. Those factors include hyperactivity and impulsivity, cognitive and language impairment, alienation and poor emotional regulation.[245] Additionally, there is evidence of a secondary association of neurodisability with other risk factors including poor educational attendance and attainment, illicit drug use and peer delinquency.[246]

The Telethon Kids Institute's Banksia Hill Project is the first study in Australia to assess and diagnose young people in a youth custodial setting. This study revealed that almost every young person being held in the Banksia Hill Detention Centre in Western Australia had some form of significant neurodevelopmental impairment: around 90 per cent.[247]

Foetal Alcohol Spectrum Disorder

Foetal Alcohol Spectrum Disorder (**FASD**) is a diagnostic term for severe neurodevelopmental impairments caused by alcohol exposure before birth. FASD affects the ability to think, learn, focus attention and control behaviour and emotions.[248] People with FASD may also be impulsive and often have low self-esteem and mental health problems.[249] In addition, young people with FASD often have an inability to understand causal relationships or remember that there are consequences for their actions.[250] These impairments may also lead to problems at school, socially unacceptable behaviour, alcohol and other drug use, and early interactions with the justice system.[251]

Indigenous children are more likely to suffer from FASD. Prevalence estimates for FASD in Australia are based primarily on State and Territory-based studies and range from 0.06 to 0.68 per 1,000 live births.[252] The known birth prevalence of FASD for Indigenous children is higher: 2.76 per 1,000 live births in Western Australia and 4.7 per 1,000 live births in the Northern Territory.[253] However, estimates for remote Indigenous communities are as high as 120 per 1,000, which is similar to high-risk populations internationally.[254]

A 2016 Australian study suggested that a large proportion (60 per cent) of young people with FASD become involved with the criminal justice system and they are 19 times more likely to

[244] Cunneen C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penality Project, University of New South Wales, http://cypp.unsw.edu.au/node/146, p. 10.
[245] ibid, p. 23.
[246] ibid, p. 23.
[247] Telethon Kids Institute, *Banksia Hill Project a game changer for young people in detention*, July 2018, <https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/july/banksia-hill-project-a-game-changer-for-young/>. Bower C, Watkins RE, Mutch RC et al. (2018), 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia', *BMJ Open*.
[248] Telethon Kids Institute, *Fetal Alcohol Spectrum Disorder (FASD),* https://www.telethonkids.org.au/our-research/research-topics/fetal-alcohol-spectrum-disorder-fasd/, viewed on 7 April 2020.
[249] ibid.
[250] Passmore HM, Giglia R, Watkins RE et al, (2016), 'Study protocol for screening and diagnosis of fetal alcohol spectrum disorders (FASD) among young people sentenced to detention in Western Australia,' *BMJ Open,* 6:e012184, doi:10.1136/bmjopen-2016-012184.
[251] Telethon Kids Institute, *Fetal Alcohol Spectrum Disorder (FASD),* https://www.telethonkids.org.au/our-research/research-topics/fetal-alcohol-spectrum-disorder-fasd/, viewed on 7 April 2020.
[252] Australian Institute of Health and Welfare, *National data on the health of justice-involved young people – a feasibility study 2016-17,* 14 June 2018, p. 6.
[253] Telethon Kids Institute, *Working Together,* Chapter 20, 'Addressing fetal alcohol spectrum disorder in Aboriginal communities', p. 359 https://www.telethonkids.org.au/globalassets/media/documents/aboriginal-health/working-together-second-edition/wt-part-5-chapt-20-final.pdf.
[254] Australian Institute of Health and Welfare, *National data on the health of justice-involved young people – a feasibility study 2016-17,* 14 June 2018, p. 6.

be detained compared with those without FASD.[255] However, the prevalence of FASD in Australia is difficult to determine, in particular due to a lack of routine assessment and screening of both mothers and children.[256]

The Telethon Kids Institute's Banksia Hill Project diagnosed more than one in three of the children who participated in the study with FASD.[257] This was much higher than any previous estimate of prevalence rates.

RACP has commented that these findings highlight that many, if not most, incarcerated children with a chronological age of 10 years are likely to have a functional age younger than 10 years. Judging criminal responsibility on the basis of a chronological age is therefore inappropriate for children who may have a much lower developmental age due to a number of medical and developmental conditions.[258]This view also appears to be supported by the Inspector of Custodial Services in Western Australia.[259]

7.2.4 Out-of-home care

Research shows that children and young people who have been abused or neglected are at greater risk of engaging in criminal activity, and of entering the youth justice system.

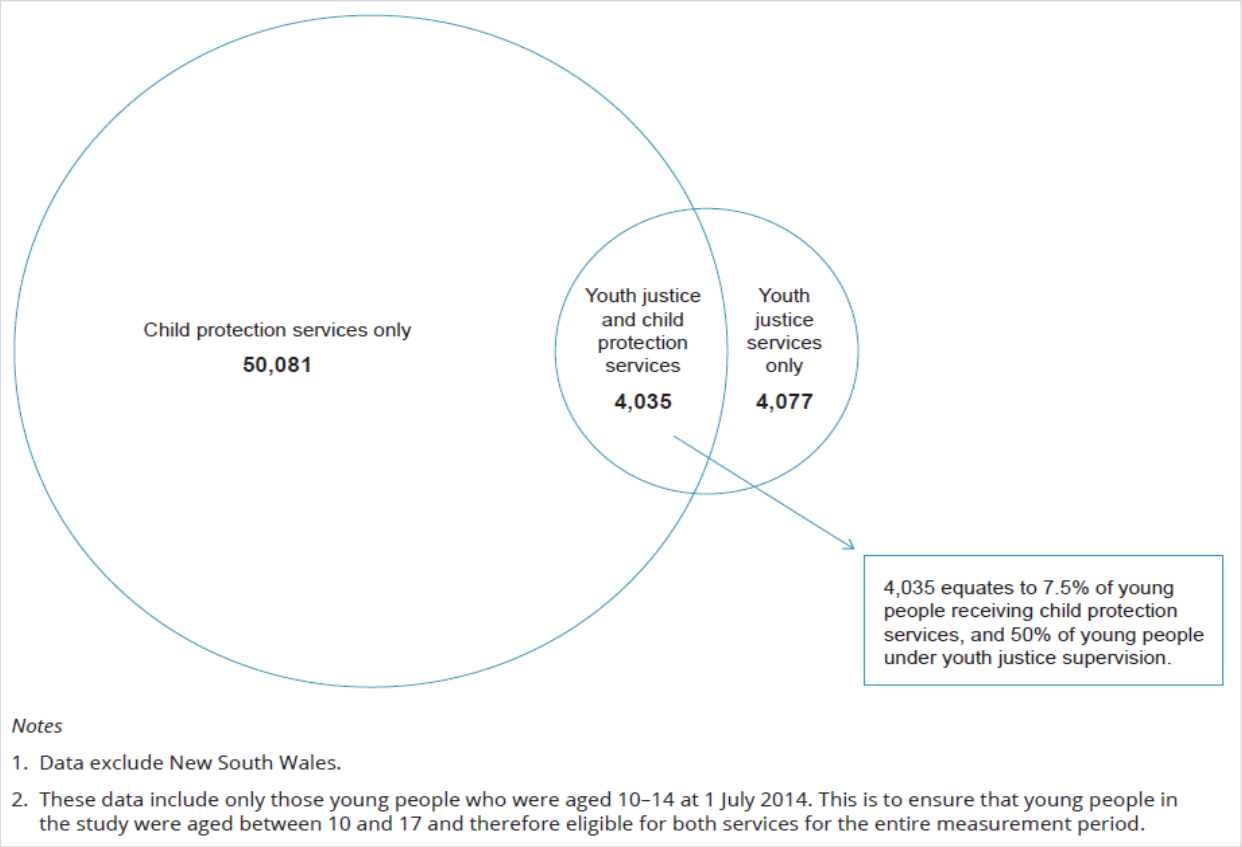
A 2019 report from the AIHW links data from the child protection and youth justice systems for children aged 10-17 years and observes that:

- Of the young people who had received both child protection services and youth justice supervision, 81 per cent had received child protection services as their first contact.
- Young people who had received child protection services were nine times as likely as the general population to have also been under youth justice supervision.
- Around half of those under youth justice supervision had also received child protection services.
- Young Indigenous Australians were 17 times more likely than their non-Indigenous counterparts to have received both child protection services and youth justice supervision.
- Those who were younger at their first youth justice supervision were significantly more likely to have also received child protection services, compared with those who were older at their first youth justice supervision: 63 per cent compared to 17 per cent.[260]

AIHW represents the overlap between child protection services and youth justice graphically: see **Figure 1**.

[255] Passmore HM, Giglia R, Watkins RE et al, (2016), 'Study protocol for screening and diagnosis of fetal alcohol spectrum disorders (FASD) among young people sentenced to detention in Western Australia,' *BMJ Open,* 6:e012184, doi:10.1136/bmjopen-2016-012184.
[256] Australian Government, Department of Health, *National Fetal Alcohol Spectrum Disorder Strategic Action Plan 2018-2028*, p.10. https://www.health.gov.au/sites/default/files/national-fasd-strategic-action-plan-2018-2028.pdf
[257] Telethon Kids Institute, *Banksia Hill Project a game changer for young people in detention*', https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/july/banksia-hill-project-a-game-changer-for-young/
[258] Royal Australasian College of Physicians, Submission 19, February 2020.
[259] Inspector of Custodial Services, Submission 3, 10 February 2020, pp. 3-4.
[260] Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018*, 15 October 2019, pp. iv-v, <https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2014-18/contents/table-of-contents, viewed on 7 April 2020.

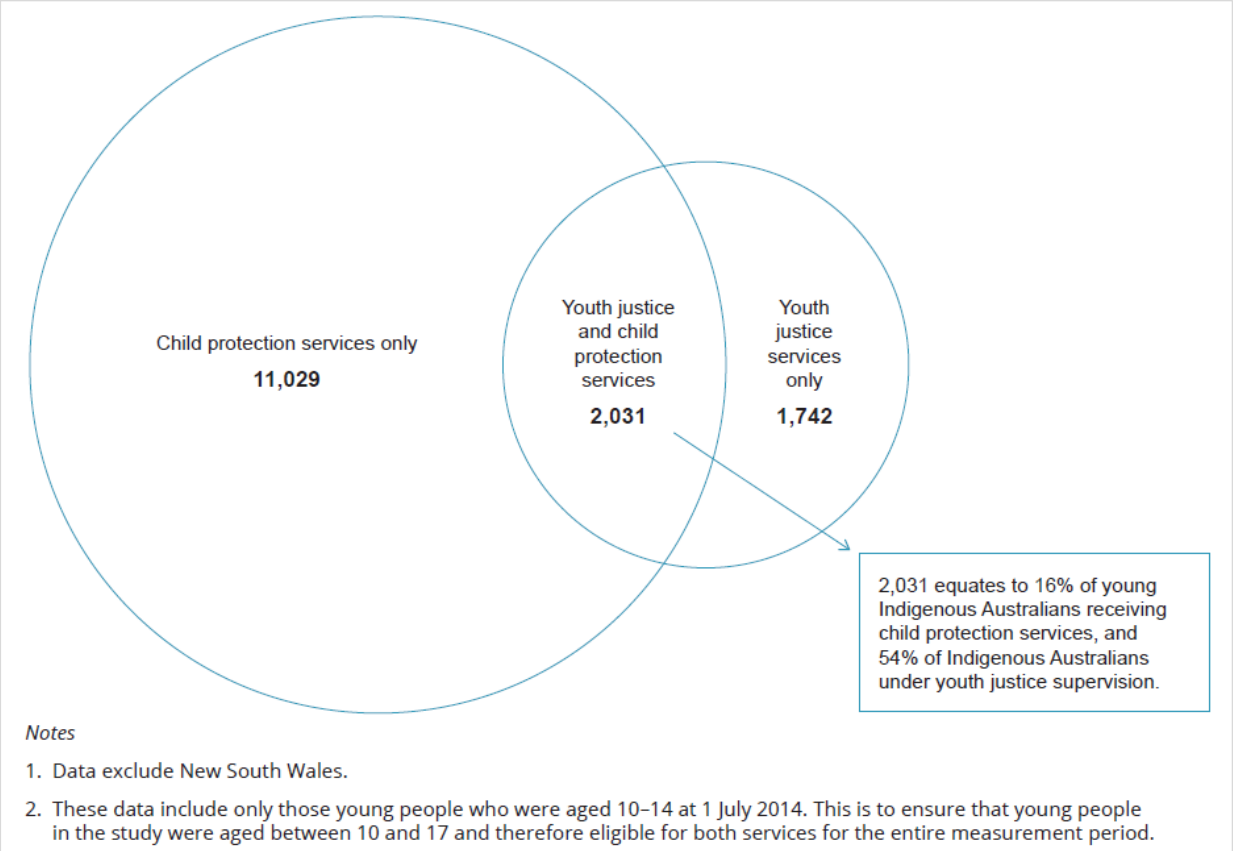
Figure 1. Young people who had received child protection services had been under youth justice supervision, or both, 1 July 2014-30 June 2018[261]



By comparison, the proportion of young people who are exposed to both child protection services and the youth justice system is significantly higher for Indigenous young people: see **Figure 2**.

[261] Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018*, 15 October 2019, p. 7, <https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2014-18/contents/table-of-contents, viewed on 7 April 2020.

Figure 2. Indigenous young people who had received child protection services, had been under youth justice supervision, or both, 1 July 2014-30 June 2018[262]



7.2.5 Socio-economic status

Young people from lower socioeconomic areas are more likely to be under supervision. More than one in three young people under supervision on an average day in 2017-18 were from the lowest socioeconomic areas, compared with five per cent from the highest socioeconomic areas.[263]

This means that young people from the lowest socioeconomic areas were about six times as likely to be under supervision as those from the highest socioeconomic areas.[264] This was similar in both community-based supervision and detention. Additionally, Indigenous young people were more likely than their non-Indigenous counterparts to have lived in the lowest socioeconomic areas before entering supervision.[265]

7.2.6 Indigenous children

Most Aboriginal and Torres Strait Islander children and young people grow up in loving, supportive environments strong in their culture and identity. However, due to the ongoing effects of colonisation, racism, discrimination, and the trauma of forced family separation and removals, some Aboriginal and Torres Strait Islander children experience compounding levels of disadvantage not experienced by their non-Indigenous peers.[266]

[262] Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018*, 15 October 2019, p. 8, <https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2014-18/contents/table-of-contents, viewed on 7 April 2020.
[263] ibid, p. 12.
[264] ibid.
[265] ibid, p. 12. https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2014-18/contents/table-of-contents
[266] National Aboriginal and Torres Strait Islander Legal Services, Submission 84, 28 February 2020, p. 11.

Because of these entrenched and systemic disadvantages, some Aboriginal and Torres Strait Islander children can be trapped in cycles of intergenerational trauma, poverty, injustice and illness at key times of their neurological development.[267] This further compounds and entrenches their disadvantage.[268]

As can be seen from the statistics in the preceding sections, Indigenous children continue to face significant disadvantage across a range of areas including health and education, discrimination, exposure to family violence and over-representation in child protection and youth justice systems. A larger proportion of Indigenous children than non-Indigenous children in detention have mental health disorders, a larger proportion of Indigenous young people than non-Indigenous children in custody in have cognitive functioning in the low range indicating cognitive disability, and a larger proportion have FASD.[269]

Australian Census figures confirm that Indigenous children are twice as likely to be developmentally vulnerable as non-Indigenous children across one or more and two or more domains:

- physical health and wellbeing
- social competence
- emotional maturity
- language and cognitive skills (school-based)
- communication skills and general knowledge.[270]

Available research shows that Indigenous children are less likely to receive the benefit of a diversionary option when in contact with the criminal justice system. They are also more likely to be arrested rather than receive a court attendance notice, have bail refused and to have their matter determined in court compared to non-Indigenous youth.[271]

A 2011 report by the Standing Committee on Aboriginal and Torres Strait Islander Affairs found that 'contact with the criminal justice system represents a symptom of the broader social and economic disadvantage faced by many Indigenous people in Australia'.[272]

The three key risk factors for Indigenous offending that overlap with some of the risk factors for youth offending are:

- low parenting capacity, particularly child abuse and neglect
- poor school performance/early school leaving
- drug and alcohol abuse.[273]

[267] National Aboriginal and Torres Strait Islander Legal Services, Submission 84, 28 February 2020, p. 11.
[268] ibid.
[269] Professor Chris Cunneen, Submission 33, 26 February 2020.
[270] Department of Education and Training, Australian Early Development Census, 2016, *Australian Early Development Census National Report 2015: A snapshot of early childhood development in Australia*, p. 8.
[271] Cunneen C, White R and Richards K, (2015) *Juvenile Justice. Youth and Crime in Australia*, Oxford University Press, pp. 154-159.
[272] Commonwealth, House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System,* June 2011, p. 7, https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf, viewed on 7 April 2020.
[273] Weatherburn D, *Arresting Incarceration: Pathways out of Indigenous Imprisonment,* 2014, pp. 74-87.

A vicarious effect of the high rates of Indigenous incarceration is that it is common for Indigenous children and young people to have direct knowledge and experience of imprisonment through family members, friends or neighbours:

> *imprisonment ceases to be the fate of a few criminal individuals … becoming instead a 'fact of life' or even, on some occasions, a 'rite of passage*.[274]

This report notes that children of prisoners often experience social stigma and isolation and display a wide range of emotional, social and behavioural problems.[275] Children and young people with a parent in prison can experience a range of interrelated issues, including homelessness, mental health issues, family conflict and divorce, neglect, isolation and poverty.[276] Their lives are characterised by experiences of instability, the loss of important relationships, social exclusion, trauma, a lack of both formal and informal supports, low educational achievement and challenging transitions into adulthood.[277] Imprisoning a parent increases the likelihood of their children becoming incarcerated by up to six times.[278]

Finding 7: Children, particularly Indigenous children, in the youth justice system are more likely to come from disadvantaged backgrounds, have experienced trauma, or have a disability or neurodevelopmental impairment and consequently have complex needs.

7.3 Implications of disadvantage

In 2017, Queensland's Family and Child Commission heard evidence that there is:

> *overwhelming evidence providing a direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment and having one or more parents with a criminal record.*[279]

This suggests that an educational, medical, psychological, social and cultural response that deals with the underlying causes of criminal behaviour may be more effective and appropriate than a justice response. Young children with problematic behaviour and their families need appropriate healthcare and protection. Involvement in the youth justice system is not an appropriate response to problematic behaviour as it further damages and disadvantages already traumatised and vulnerable children.[280]

After considering international juvenile justice programs, the NSW report: *A Review of Effective Practice in Juvenile Justice* concluded that:

> *Traditional penal or 'get tough' approaches are ineffective due to the stigmatising effect of labelling young offenders, reinforcement of offenders' criminal behaviour resulting from the collective detention, lack of pro-social influences and failure to address the underlying behaviour behind the offending behaviour. Not only do these methods tend to be ineffective in reducing recidivism among young people, but they are also amongst the most costly means of dealing with juvenile crime due*

[274] Hudson S, *Panacea to prison? Justice reinvestment in Indigenous communities*. Centre for Independent Studies, 31 January 2013, p. 9, https://www.cis.org.au/publications/policy-monographs/panacea-to-prison-justice-reinvestment-in-indigenous-communities/, viewed on 7 April 2020.
[275] Woodward R, (2003), *Families of prisoners: Literature review on issues and difficulties*, Occasional Paper Number 10, Australian Government Department of Family and Community Services, Canberra.
[276] Institute of Child Protection Studies, *Research to Practice: Children with Parents in Prison* (December 2013) <http://earlytraumagrief.anu.edu.au/files/Practice_Series_4_Dec2013_ChildrenofPrisoners.pdf>
[277] ibid.
[278] Woodward R, (2003), *Families of prisoners: Literature review on issues and difficulties*, Occasional Paper Number 10, Australian Government Department of Family and Community Services, Canberra.
[279] Queensland, Family and Child Commission, *The Age of Criminal Responsibility in Queensland*, January 2017, p.16.
[280] Royal Australian College of Physicians, Submission 19, February 2020, p. 3.

> *to high immediate costs and ongoing long-term costs to the juvenile justice system due to continued contact with the criminal justice system*.[281]

Consistent with the above findings, RACP has suggested that more appropriate approaches include:

- better support through community-based and acute paediatric and general mental health services
- support to schools to maintain children in the education system
- support for parents struggling with mental health and drug and alcohol issues
- working with Aboriginal and Torres Strait Islander communities to develop culturally appropriate solutions within the community
- expansion of child protection services to support vulnerable children and their families, including specially trained services for Indigenous clients and communities.[282]

The Telethon Kids Institute has recommended that there be training for all frontline education, child protection, community service and justice professionals regarding neurodevelopment, to ensure there is appropriate awareness, recognition, and response as early as possible for young people with neurodevelopmental impairments.[283]

Evidence also shows that place-based, culturally appropriate, Indigenous-led programs achieve the best outcomes for Indigenous children.[284]

Finding 8: An educational, medical, psychological, social and cultural response that deals with the underlying causes of child and youth offending, rather than a purely justice-based approach, can lead to better outcomes for children.

This report recognises that prosecution of children who allegedly commit a criminal offence whilst aged under 14 years is subject to the legal presumption of *doli incapax*. In principle, this allows the court to undertake an individualised assessment of a child's developmental capacity. However, it is clear that a significant proportion of children in detention suffer from some form of cognitive impairment or disability, and therefore have not been found to be *doli incapax*.

[281] New South Wales, *Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice*, prepared by Noetic Solutions Pty Ltd, January 2010, p. iv, http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf, viewed on 7 April 2020.
[282] Royal Australian College of Physicians, Submission 19, February 2020.
[283] Telethon Kids Institute, Submission 75, February 2020.
[284] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Vol. 1, Chapter 7.

8 Youth justice data

The following chapter provides age-related data regarding the numbers of children and young people who are in contact with the justice system, who are under supervision either in the community or in detention, rates of re-offending, and the principal types of offences committed.

This chapter also considers the representation of Indigenous and non-Indigenous children and young people in the justice system.

This report has also examined the costs of the youth justice system and how taking a justice reinvestment approach in raising the age of criminal responsibility may create long-term savings for the community.

8.1 Young people in contact with the justice system

In 2018-19, there were 49,180 young offenders aged 10 to 17 years proceeded against by police[285] in Australia, of which 8,353 were aged 10-13 years and 1,566 were aged 10-11 years.[286]

There is no recently available national data on the number of young people who appear before children's courts which breaks down the age grouping of under 14 year olds.[287] Australian Bureau of Statistics (**ABS**) data from 2011-2012 indicates that 2,695 finalised defendants aged 10 to 13 appeared in Australian children's courts.[288]

8.2 Young people under supervision

Unless otherwise referenced, the following data has been taken from the AIHW.[289]

The data set includes all young people who were supervised by State and Territory youth justice agencies.[290] The upper age limit for treatment as a young person is 17 years at the time an offence was allegedly committed in all States and Territories. However, it is possible for young people aged 18 and older to be under youth justice supervision, for example where the offence was committed when the young person was aged 17 years or under, the continuation of supervision once they reached 18 years of age, or the young person's vulnerability or immaturity.[291]

A total of 5,694 young people aged 10 years and over were under youth justice supervision on an average day in 2018-19 and 10,820 young people were supervised at some time during

[285] 'Proceeded against' includes both court and non-court action, for example caution, conference or counselling, however the data outlining the type of proceeding is not broken down by age.
[286] Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders 2018-19*, 'Youth offenders' Table 21: Sex and principal offence by age, 2018-19, available from: https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02018-19?OpenDocument. Viewed on 7 April 2020.
[287] Professor Chris Cunneen, Submission 33, 26 February 2020.
[288] Australian Bureau of Statistics (2013) *4513.0 Criminal Courts Australia 2011-12*, Canberra: Children's Court Supplementary Data Cube, Table 7.
[289] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020. Please note that totals may not sum due to rounding, and because some young people were under community-based supervision and in detention on the same day. Figures may not distinguish where one person has been counted more than once during the year (for example, re-entering or moving between remand and detention).
[290] Note that, as the Commonwealth does not manage youth detention centres, there are no statistics provided in this regard. However, the Commonwealth does prosecute young people under its laws, most commonly in relation to telecommunication and drug offences.
[291] In addition, in Victoria, some young people aged 18-20 years may be sentenced to detention in a youth facility (known as the 'dual track' system).

the year.[292] Most young people under supervision on an average day in 2018-19 were male: 80 per cent.[293]

Table 3a: Young people under supervision on average day by age, 2018-19[294]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10	—	—	—	1	2	—	—	—	3
11	2	1	16	6	2	—	—	—	27
12	9	2	43	28	7	3	2	3	97
13	49	18	117	64	14	12	3	10	287
14	150	75	227	113	28	16	8	20	636
15	278	138	346	152	47	33	16	30	1,040
16	399	204	460	174	47	39	19	50	1,391
17	399	229	466	187	60	29	18	45	1,433
10–17	*1,284*	*667*	*1,675*	*725*	*207*	*131*	*66*	*158*	*4,914*
18+	79	286	263	48	41	24	10	29	780
Total	**1,363**	**953**	**1,939**	**773**	**248**	**155**	**76**	**187**	**5,694**

Table 3b: Young people under supervision during the year by age, 2018-19[295]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10	—	—	3	7	4	—	—	—	14
11	10	2	28	23	6	1	—	—	70
12	35	9	76	68	19	5	5	6	223
13	135	44	227	159	38	17	7	24	651
14	319	127	375	237	65	23	20	32	1,198
15	521	239	542	334	110	57	38	59	1,900
16	707	357	707	374	105	60	36	76	2,422
17	853	383	763	406	142	53	42	85	2,727
10–17	*2,580*	*1,161*	*2,721*	*1,608*	*489*	*216*	*148*	*282*	*9,205*
18+	241	602	443	114	86	39	26	64	1,615
Total	**2,821**	**1,763**	**3,164**	**1,722**	**575**	**255**	**174**	**346**	**10,820**

8.2.1 Analysis of AIHW data

Most young people under supervision are 14 years of age and above

During 2018-19, there were 10,820 young people under supervision. Only 8.8 per cent of these children fell within the 10-13 year old age cohort.

On an average day, only 7.2 per cent of young people under supervision were aged 10-13 years. About 13 per cent of young people under supervision were aged 18 years and over, having committed offences as minors.

Only 60 children aged 10-13 years were in detention on an average day in Australia in 2018-19. Of these, only six children were sentenced. In 2018-19, a total of 34 children aged 10-13 years were in sentenced detention. Of these, 30 were Indigenous children.

[292] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table 2.1 and Table S1.
[293] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S2a.
[294] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S1a.
[295] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S1b.

Most young people were supervised in the community

More than 4 in 5 young people (84 per cent or 4,767) under supervision on an average day were supervised in the community. Almost one in five (17 per cent or 956) were in detention; some were supervised in both the community and detention on the same day.

Although relatively few young people were in detention on an average day, almost half (45 per cent, 4,872) of all young people who were supervised during 2018-19 had been in detention at some time during the year.

During the year, almost four in five (79 per cent) young people under supervision on an average day were aged 14-17 years. Seven per cent of children under supervision were aged 10-13 years. This included 764 children aged 10-13 years in community-based supervision compared to 573 children in detention.

Table 4: Young people under community-based supervision during the year by age, 2018-19[296]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10	—	—	—	—	—	—	—	—	—
11	2	1	27	18	4	—	—	—	52
12	15	5	73	60	12	5	5	5	180
13	78	37	206	140	29	17	7	18	532
14	249	122	359	206	55	23	19	30	1,063
15	426	223	511	309	91	52	34	51	1,697
16	601	340	685	344	88	59	34	70	2,221
17	709	362	736	363	107	49	38	83	2,447
10–17	2,080	1,090	2,598	1,443	390	205	137	257	8,200
18+	153	569	454	118	73	40	24	64	1,495
Total	**2,233**	**1,659**	**3,052**	**1,561**	**463**	**245**	**161**	**321**	**9,695**

Table 5: Young people in detention during the year by age, 2018-19[297]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10	—	—	2	5	3	—	—	—	10
11	9	1	13	12	4	1	—	—	40
12	27	5	50	41	13	2	5	4	147
13	91	28	118	88	27	3	4	17	376
14	189	64	164	130	38	11	12	21	629
15	294	115	237	161	58	13	23	37	938
16	390	162	268	186	63	18	17	45	1,149
17	429	185	259	192	74	13	22	48	1,222
10–17	1,429	560	1,111	815	280	61	83	172	4,511
18+	117	180	16	20	23	1	3	1	361
Total	**1,546**	**740**	**1,127**	**835**	**303**	**62**	**86**	**173**	**4,872**

The majority of young people in detention were unsentenced

Young people may be referred to unsentenced detention either by police or by a court (remand). Overall, about 3 in 5 young people in detention on an average day (63 per cent) were unsentenced, awaiting the outcome of their legal matter or sentencing.

[296] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S36b.
[297] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S74b.

Across Australia in 2018-19, there were 54 children in unsentenced detention on an average day who were aged 10-13 years. By comparison, only six children aged 10-13 years were in sentenced detention on an average day: 1.6 per cent of the total. During 2018-19, there were a total of 567 children under 14 years in unsentenced detention and only 34 in sentenced detention: 2.8 per cent of the total sentenced amount.

Table 6a: Young people in unsentenced detention on an average day by age, 2018-19[298]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10-13	8	1	23	14	3	—	2	2	54
14-17	128	84	196	63	21	8	4	25	529
18+	15	5	2	—	1	—	—	—	23
Total	**151**	**90**	**220**	**78**	**26**	**9**	**5**	**27**	**605**

Table 6b: Young people in unsentenced detention during the year by age, 2018-19[299]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10-13	127	34	183	143	46	6	9	19	567
14-17	1,225	506	915	619	231	53	71	141	3,761
18+	73	26	16	3	14	—	1	1	134
Total	**1,425**	**566**	**1,114**	**765**	**291**	**59**	**81**	**161**	**4,462**

Table 7a: Young people in sentenced detention on an average day by age, 2018-19[300]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10-13	2	—	1	2	—	—	—	1	6
14-17	88	37	37	54	14	4	1	18	252
18+	31	62	1	5	11	—	1	—	110
Total	**120**	**99**	**39**	**61**	**25**	**4**	**2**	**19**	**368**

Table 7b: Young people in sentenced detention during the year by age, 2018-19[301]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10-13	6	—	8	13	2	—	—	5	34
14-17	309	124	179	174	45	17	5	56	909
18+	79	161	6	18	15	2	2	—	283
Total	**394**	**285**	**193**	**205**	**62**	**19**	**7**	**61**	**1,226**

Most young people enter supervision at 14 years and above

Among all young people who were supervised during 2018-19:

- almost three quarters (71 per cent) had first entered supervision when aged 14-17 years
- about one quarter (25 per cent) had entered supervision when aged 10-13 years
- the remaining four per cent had first entered youth justice supervision when they were aged 18 years or over.

As highlighted by the AIHW, Western Australia had the highest proportion of young people who first entered supervision when aged 10-13 years: 38 per cent of the Australian total.

[298] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S114a.
[299] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S114b.
[300] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S121a.
[301] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, 2020, Table S121b.

The most common age for first entry to youth justice supervision for Indigenous youth was 14 years compared with 15 years for non-Indigenous youth.

Young people in remote areas were more likely to be under supervision
Although most young people under supervision had come from cities and regional areas, those from geographically remote areas had the highest rates of supervision.

On an average day in 2018-19, young people aged 10-17 years from remote areas were six times as likely to be under supervision as those from major cities. Those from very remote areas were nine times as likely. This reflects the higher proportions of Indigenous Australians living in these areas.

Principal offence committed
According to ABS data, in 2018-19 the most common principal offences among young people aged 10-13 years were:

- acts intended to cause injury (24 per cent; 96 per cent of these were for assault)
- theft (20 per cent)
- unlawful entry with intent (15.5 per cent).

In the higher age groups, illicit drug offences become the second most common principal offence, overtaking theft.[302]

Younger offenders also rarely commit the most serious offences. In 2017-18, there were no instances of homicide and related offences committed by offenders aged under 14 years and sexual assault (and related offences) made up only 3.6 per cent of all crimes committed in the 10-13 year old age bracket.[303]

The Working Group notes that, while more detailed information may be separately available for criminal court cases in jurisdictional children's courts, this information may not be age-sensitive and may not be directly comparable with the AIHW data.

Finding 9: 10 to 13 year olds make up only seven per cent of children under supervision in Australia and almost never commit the most serious offences. During 2018-19, there were 567 children aged under 14 years in unsentenced detention and 34 in sentenced detention.

8.3 Indigenous over-representation

Chapter 7 refers to the significant over-representation of Indigenous young people across many areas of social disadvantage. This is also reflected in the rates of youth justice supervision. Indigenous young people aged 10-17 years are 22 times as likely as non-Indigenous young people to be in detention and 15 times as likely to be under community supervision.[304]

Although only about six per cent of young people aged 10-17 years in Australia are Aboriginal or Torres Strait Islander, half of the young people aged 10-17 under supervision on an average

[302] Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders 2018-19*, 'Youth offenders' Table 21: Sex and principal offence by age, 2018-19, available from: https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02018-19?OpenDocument. Viewed on 7 April 2020.
[303] ibid.
[304] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19,* 2020, p. 9.

day in 2017-18 were Indigenous.[305] In addition, Indigenous young people enter youth justice supervision at an average younger age than non-Indigenous young people.

During the 2018-19 year, there were (notionally) 573 children aged 10-13 years placed in detention in Australia. Of these, 64 per cent (or 369) were Indigenous children.[306] During the same period, there were 772 under 14 year olds under community-based supervision. Of these, 64.5 per cent (or 498) were Indigenous children.

The over-representation of Indigenous children is even greater for those aged 12 years or younger. Nationally, 65 per cent of children placed in detention and 73 per cent of children on community-based supervision in the 10-12 year old age bracket, respectively, were Indigenous.[307]

Over the five years to 2018-19, the level of Indigenous over-representation has stabilised. This was due to a fall in rates of Indigenous young people and a levelling out of rates for non-Indigenous young people under supervision. According to 2018-19 data, Indigenous young people continue to be 16 times as likely as their non-Indigenous counterparts to be under supervision, a rate which has not changed over the past three years.[308]

Finding 10: Indigenous children and young people are vastly over-represented in the youth justice system.

8.4 Rates of re-offending

Many studies show that the justice system is criminogenic, and that the younger a child is when first engaging with the youth justice system, the more likely it is that they will go on to reoffend and become entrenched in the system: see Table 1.[309]

Early contact with the justice system is one of the key predictors of future juvenile offending.[310] Children who are first subject to supervision between the ages of 10-14 years are significantly more likely to experience all types of supervision, particularly sentenced supervision in their later teens when compared with children who are first supervised at 15-17 years.[311]

However, the NT Royal Commission heard evidence that the vast majority of children who are diverted from the formal criminal justice system do not go on to reoffend. Northern Territory Police data for 2015-16 indicated that this was the case for 85 per cent of children and young people who participated in a diversion program.[312] This may be indicative of first contact with police tending to be for less serious behaviours and offences.

[305] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19,* 2020, p. 9.
[306] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19,* 2020, Table S80b.
[307] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19,* 2020, Tables S78b and S40b.
[308] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19,* 2020, p. 35.
[309] See for example Cain M, 'Recidivism of Juvenile Offenders in New South Wales', Department of Juvenile Justice, 1996 and Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2017–18*. 2019, p. 5.
[310] Cunneen C (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penality Project, University of New South Wales, <http://cypp.unsw.edu.au/node/146. See also O'Brien W and Fitz-Gibbon K, 2017, 'The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform', *Youth justice*, Vol. 17, No. 2, pp. 134-152. <http://dro.deakin.edu.au/eserv/DU:30092014/obrien-minimumage-post-2017.pdf>.
[311] Australian Institute of Health and Welfare, *Young People Aged 10–14 in the Youth Justice System*: *2011–2012*, 25 July 2013, https://www.aihw.gov.au/getmedia/3782934c-9bfa-4367-acb4-f92def5a8ebe/15758.pdf.aspx?inline=true; and Cunneen C, Goldson B, Russell S, *Juvenile Justice, Young People and Human Rights in Australia*, [2016] CICrimJust 23.
[312] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 2B, p. 259. It is noted that this high rate may reflect that children who were diverted by police were diverted based on their low likelihood of reoffending.

The following data and analysis is taken from the AIHW report on *Young people returning to sentenced youth justice supervision 2017-18*.[313]

Most young people do not return to sentenced supervision
Of young people aged 10-17 years who were under sentenced youth justice supervision at any time from 2000-01 to 2017-18, 59 per cent served only one sentence and did not return to sentenced youth justice supervision and 41 per cent returned to supervised sentence before turning 18.

Young Indigenous Australians under youth justice supervision were 1.6 times as likely as their non-Indigenous counterparts to return to sentenced supervision before the age of 18: 55 per cent and 34 per cent, respectively.

Young people released from sentenced detention are more likely to return to sentenced supervision
Of young people aged 10-16 years released from sentenced supervision in 2016-17:

- 3,120 were released from sentenced community-based supervision, with 759 (24 per cent) returning to sentenced supervision within six months and 1,476 (47 per cent) returning within 12 months.
- 670 were released from sentenced detention, with 393 (59 per cent) returning to sentenced supervision within six months and 535 (80 per cent) returning within 12 months.

AIHW data also reveals that a high proportion of young people who were first supervised at age 10-14 years remain involved in the youth justice system at older ages.

> *Young people who were first supervised when aged 10–14 were more likely than those first supervised at older ages to experience all types of supervision when 15–17—particularly the most serious type of supervision, sentenced detention (33% compared with 8%). They also spent more time in total under supervision at older ages. About half (51%) of those who entered supervision aged 10–14 (and later returned) spent 18 months or more in total under supervision when 15–17, compared with only 15% of those first supervised at 15–17*.

Most (85 per cent) young people in the cohort born in 1993-94 who were supervised at age 10-14 years returned to (or continued) supervision when they were aged 15 to 17 years.[314]

The younger a person was at the start of their first supervised sentence, the more likely they were to return to sentenced supervision[315]
For those whose first supervised sentence was community-based, 90 per cent of those who were aged 10-12 years at the start of this sentence returned to sentenced supervision. The proportion declined for each successive group, to:

[313] Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2017–18*, 2019. This report measures the number of young people who were released from a supervised sentence and subsequently returned; that is, young people who received an additional supervised sentence after the end of their initial sentence. While a return to sentenced supervision is likely due to reoffending, it is not a measure of reoffending or recidivism, as not all offences will lead to a supervised sentence.
[314] 'Supervision' in the youth justice system for the purposes of this research is defined as meaning two types of supervision: detention and community-based supervision: Australian Institute of Health and Welfare, *Young People Aged 10–14 in the Youth Justice System*: *2011–2012*, 25 July 2013, p. vi.
[315] It is important to note that younger age groups have more time to return to youth justice supervision, while older age groups may turn 18 before returning to the justice system and therefore would not be captured in this analysis.

- 79 per cent of those aged 13 years
- 67 per cent of those aged 14 years
- 49 per cent of those aged 15 years
- 25 per cent of those aged 16 years
- 4 per cent of those aged 17 years.

The pattern was similar for those whose first supervised sentence was detention, though higher than for those whose first sentence was community-based. In the 10-12 year age group, 94 per cent of young people returned to sentenced supervision, compared to 75 per cent of those aged 15 years and 18 per cent of those aged 17 years.

Young people with shorter initial sentences were *more* likely to return to sentenced supervision than those who served longer initial sentences

For young people whose first supervised sentence was community-based, almost half (49 per cent) of those whose sentence lasted less than three months returned to sentenced supervision, compared with 33 per cent of those whose initial sentence was longer than nine months.

This difference was more pronounced for detention, with nearly two thirds (65 per cent) of young people returning to sentenced supervision if their initial sentence was less than three months, compared with 22 per cent of those whose initial sentence was longer than nine months.

The relationship between sentence length and returning to sentenced supervision may be due to the access to, and completion of, services designed to prevent young people returning to sentenced supervision. For example, young people serving shorter sentences may be less likely to complete rehabilitative programs compared with those serving longer sentences.

Finding 11: Early contact with the justice system is a key predictor of recidivism: 85 per cent of young people who were supervised between the ages of 10 and 14 years returned to, or continued under, supervision when they were aged 15 to 17 years.

8.5 Cost of the youth justice system

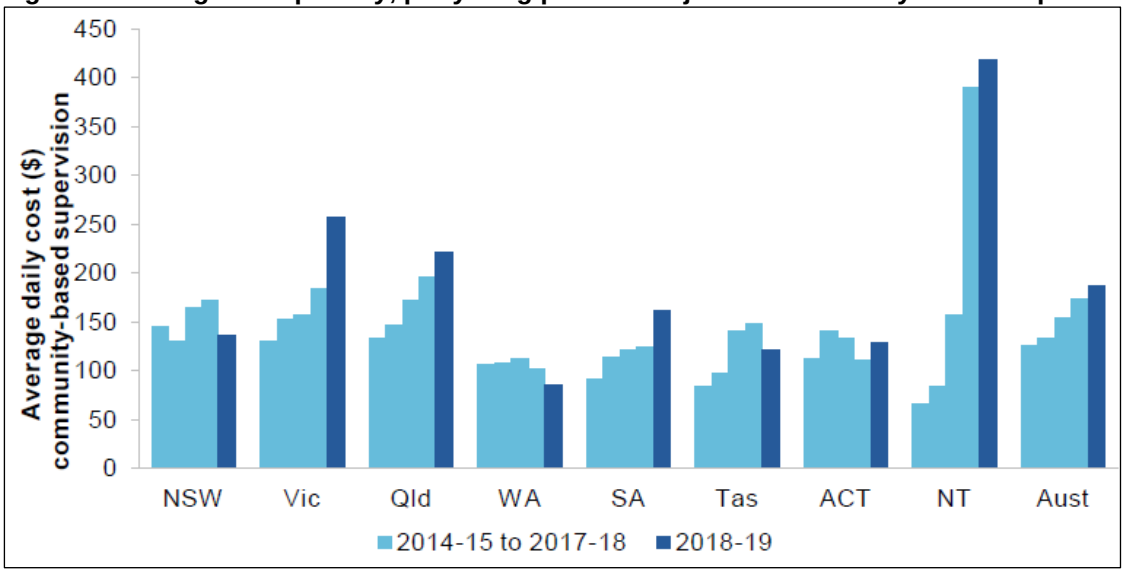
Australia spends $2.7 billion annually on youth crime including police and court costs.[316]

Productivity Commission data reveals that total recurrent expenditure on detention-based supervision, community-based supervision and group conferencing was $916.6 million across Australia in 2018-19. Detention-based supervision accounted for the majority of this expenditure: 58.9 per cent or $539.6 million.[317]

In 2018-19, the average cost per day for a young person subject to community-based supervision in Australia was $187: see **Figure 3**.[318]

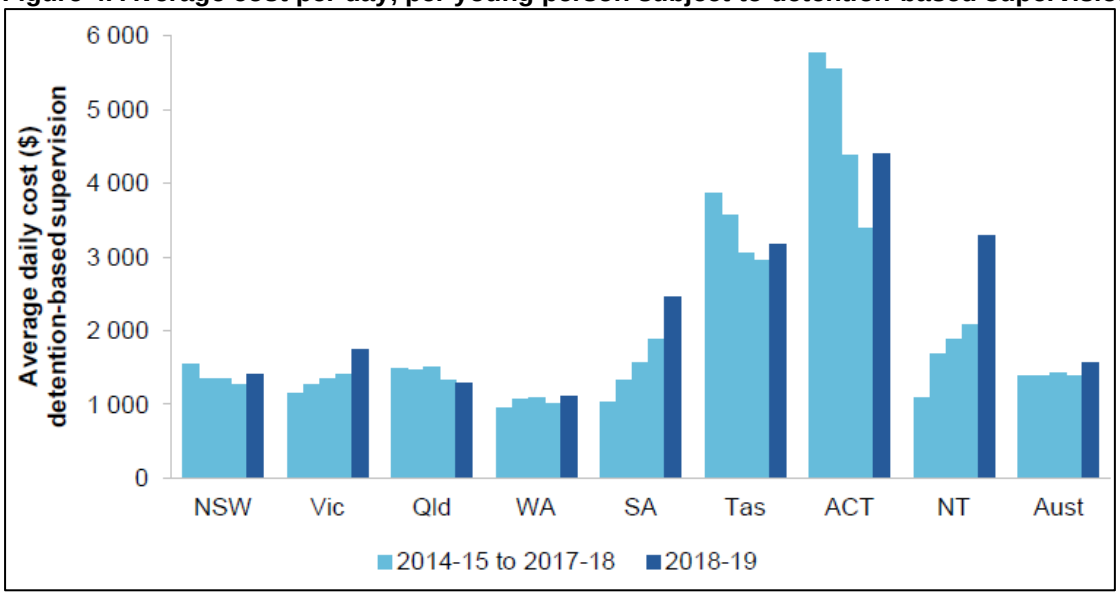
[316] Teager W, Fox S and Stafford N, *How Australia can invest early and return more: A new look at the $15b cost and opportunity*. Early Intervention Foundation, The Front Project and CoLab at the Telethon Kids Institute, 2019.
[317] Productivity Commission, *Report on Government Services 2020*, Chapter 17, p. 17.6.
[318] ibid, Figure 17.9, p. 17.24.

Figure 3. Average cost per day, per young person subject to community-based supervision



However, the average cost per day per young person subject to detention-based supervision was $1579, eight times the cost of community-based detention: see **Figure 4**.[319] The Working Group notes that this data does not distinguish remand costs from the costs of sentence detention.

Figure 4. Average cost per day, per young person subject to detention-based supervision



Total recurrent expenditure on detention based supervision, community based supervision and group conferencing was $842.4 million. Detention-based supervision accounted for the majority of this expenditure (60.4 per cent, or $509.1 million).[320] Nationally, recurrent expenditure on youth justice services per young person in the population aged 10-17 years was $357.[321]

[319] Productivity Commission, *Report on Government Services 2020*, Figure 17.10, p. 17.26.
[320] Teager W, Fox S and Stafford N, *How Australia can invest early and return more: A new look at the $15b cost and opportunity*. Early Intervention Foundation, The Front Project and CoLab at the Telethon Kids Institute, 2019.
[321] ibid.

The median duration of a sentence of detention in Australia in 2017-18 was 72 days.[322] Multiplied by the (notional) 601 children aged 10-13 years who were in detention during that period, the cost to the Australian economy of detaining these children was around $63 million.

It is not within the scope of this report to conduct economic modelling for jurisdictions regarding investments to better treat the causal factors associated with children engaging in criminal behaviours and to divert children from the criminal justice system.

However, taking into account the significant costs associated with prosecutions and youth detention, the Working Group notes that there may be a net benefit for jurisdictions in:

- developing and implementing policies and programs that are better targeted to preventing children from engaging in behaviours that may lead to them entering the criminal justice system
- developing and implementing diversion policies and programs that are better targeted to rehabilitation of children who engage in criminal behaviour
- monitoring the effectiveness of policies and programs to keep pace with research and societal developments.

A justice reinvestment approach to criminal justice reform involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration.[323] Justice reinvestment measures may be utilised at all points of a person's interaction with law enforcement and criminal justice: to prevent people from coming into contact with the criminal justice system, as well as through diversion and providing support for people on parole and post-release.[324]

A justice reinvestment approach may deliver savings and contribute to closing the gap in incarceration rates. For example, modelling by PwC Australia for Change the Record Coalition suggests that if Indigenous children and young people who offend are provided with cognitive behavioural therapy or multi-systemic therapy, and holistic case management and support is provided to all people who had offended, it would reduce recidivism rates and the cost of Indigenous incarceration by an estimated $10.6 billion by 2040.[325]

However, it is not self-evident whether there would be significant savings if the age of criminal responsibility is raised in Australia, particularly due to the relatively small numbers of young people under the age of 14 years in detention or under supervision. The Working Group notes, nonetheless, that there is a strong argument that any savings are better reinvested in early intervention, taking into account:

- the potential reduction of young people in remand
- police resources needed to charge and prosecute and court services required
- the benefits to the economy of changing a person's trajectory from entrenchment in the justice system to productive employment.

8.6 International data comparison

The Working Group notes the following, limited information that is available that allows meaningful comparisons of international juvenile justice data.

[322] Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18*, 2019, p. 24.
[323] Tucker S, and Cadora E, 'Justice Reinvestment' (Ideas for an Open Society 3(3), Open Society Institute, 2003, 2.
[324] Schwartz M, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous over-Representation' (2010) 14(1) *Australian Indigenous Law Review* 2, 2.
[325] PwC Australia, *Indigenous Incarceration: Unlock the facts*, May 2017, p. 56.

Rates of detention

On an average day in 2017-18, the rate of young people in youth detention in Australia (four per 10,000 young people) was:

- higher than in England and Wales (two per 10,000)
- lower than in Canada (five per 10,000)
- lower than in the United States of America (14 per 10,000).[326]

Recidivism rates

Recidivism studies in the United States of America show consistently that 50-70 per cent of young people released from juvenile correctional facilities are re-arrested within two to three years.[327]

[326] PwC Australia, *Indigenous Incarceration: Unlock the facts*, May 2017, p. 42.
[327] Mulvey E, *Highlights from pathways to desistance: a longitudinal study of serious adolescent offenders*, Office of Juvenile Justice and Delinquency Prevention, www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf.

9 Should the age of criminal responsibility be raised in Australia?

This report has identified a number of risks and benefits associated with raising the minimum age of criminal responsibility in Australia.

9.1 Possible risks associated with raising the age

9.1.1 Community perceptions

Some sections of the community, including victims of crime, may oppose raising the minimum age of criminal responsibility and/or detention.

A perception that it would endanger community safety

Some community members may be of the view that removing the ability to prosecute children aged 10 to 13 years (inclusive), particularly where their behaviour would otherwise have constituted a serious offence, would endanger community safety. The Office of the Director of Public Prosecutions in Western Australia further submits that 'the protection of the community must be a significant consideration' when discussing a minimum age of detention for children.[328]

An appropriate framework to deal with children who pose a serious risk to the community or themselves may help to address this perception along with awareness raising about the negative impact that criminalising children has on community safety. An education and publicity strategy to accompany such a framework would likely be beneficial to assuage community concerns.

The younger a child is exposed to the criminal justice system, the less likely they are to complete their education and find employment: see Chapter 7. This in turn increases their risk of becoming entrenched in the criminal justice system, including into adulthood. This concern is compounded in youth detention facilities where normal childhood development is interrupted, and children are exposed to trauma and negative peer influence.

On the other hand, early intervention approaches which address the underlying causes of offending behaviour make the community safer in the long run. The Working Group notes that early intervention may be more likely to change children's pathways and reduce the likelihood of recidivism – including as they become adults.

Criminal behaviour should be punished and deterred

This report acknowledges that young people do engage in behaviour that constitutes criminal conduct and, in some cases, very serious criminal conduct. There may be community perceptions that those who commit such acts, irrespective of their age, should be duly punished, and that criminal sanction provides a necessary deterrent from engaging in that behaviour.

If a child under the minimum age is not prosecuted, this may be perceived by some in the community as the child or young person 'getting away with' their conduct, or acting with impunity. Raising the minimum age of criminal responsibility may also be perceived as removing the deterrent effect of criminal sanction, including by some young people.

[328] Office of the Director of Public Prosecutions for Western Australia, Submission 7, 24 February 2020, p. 3.

The Working Group is of the view that such perceptions could be mitigated by the young person being diverted into alternate appropriate programs for behaviour management, and being required to acknowledge and take steps to redress the consequences of their actions.

They could also be mitigated by ensuring that an appropriate framework is in place for the management and rehabilitation of the young person, with reference to existing data to demonstrate that serious violent offences committed by young people are extremely rare, and evidence that a rehabilitative and early intervention approach is more effective in reducing crime than a punitive one.

The Working Group does not expect that raising the age of criminal responsibility would lead to an increase in criminal behaviour by children under the age threshold. Due to the way the brain develops during adolescence, children often engage in increased risk-taking without a full appreciation of the consequences, despite having some understanding of the outcome (see further, discussion around Finding 5). This suggests that there may be little weight to be given to the value of deterrence.

Use of children to commit criminal acts on behalf of others

If the age of criminal responsibility is raised, it is possible that older young people or adults will be encouraged to coerce or bribe younger children to commit criminal acts on their behalf, since those children would face no threat of criminal sanction.

It is important to note that this possibility already exists with respect to children under the age of 10 years and, potentially aged 10-14 years, noting the application of *doli incapax*.

The Working Group understands that all jurisdictions have provisions which criminalise incitement, and would cover such scenarios.

9.1.2 Loss of connection to services

This report notes that, if the minimum age of criminal responsibility is raised, young people under that age would need to be referred to and managed by a specified government agency as they would no longer be eligible for justice-based services.[329] The specified agency or agencies should be responsible for delivering comprehensive and culturally appropriate intervention and programs for these young people.

Appropriate intervention services must be provided for those young people who will not be considered offenders, but who continue to cause harm and impact the community. The Western Australia Police Force has submitted that:

> *Community sentiment for these offenders is negative despite their young age with the WA Police Force providing an overt and visible response. The agency responding* [to] *and managing this cohort, should criminal responsibility be raised, will need to manage community expectations to maintain community confidence in government services*.[330]

The Mental Health Commission also notes that if the age of criminal responsibility were raised to 14 years, children aged 10-13 years who are part of Links, the juvenile component of its Mental Health Court Diversion Program, would no longer receive services.[331]

[329] Such as the Western Australian Department of Communities: Western Australia Police Force, Submission 2, 10 February 2020, p. 3.
[330] Western Australia Police Force, Submission 2, 10 February 2020; p. 5.
[331] Mental Health Commission Western Australia, Submission 5, p. 3.

Programs would need to be developed in conjunction with police and other service providers to address causal factors influencing child behaviour and immediately reduce the risk of continued behaviour that will impact the community. This has implications for funding, particularly for the primary agencies absorbing referrals.[332]

Under Western Australia's current system, where children are younger than 10 years of age and are not considered criminally responsible, police may return the child to the custody of a parent or guardian or, where concerned for the child's welfare, may make a referral to a community services departmental officer.

This report therefore observes that if the minimum age of criminal responsibility is raised above 10 years of age, a framework will need to be implemented so that children who fall under the new threshold are still referred to appropriate authorities, diversionary programs and services. These children should be given equal priority to those in the justice system. This will promote community safety and ensure that the public has peace of mind that children engaged in potentially criminal activities are diverted from the criminal justice system.

The Working Group recognises that delivery of this approach would require cross-agency coordination across jurisdictions to ensure the delivery of wrap-around services and programs in the best interests of the child.

[332] Western Australia Police Force, Submission 2, 10 February 2020, p. 3.

10 Conclusions and recommendations for reform

In all Australian jurisdictions, the minimum age of criminal responsibility is currently 10 years, but is subject to the legal presumption of *doli incapax* (and statutory equivalents) for children between 10 and 14 years of age. The Working Group acknowledges that it is the prerogative of each jurisdiction to decide whether and how to raise the minimum age of criminal responsibility within that jurisdiction. The Working Group has not reached a consensus on whether the minimum age of criminal responsibility should be raised, but the majority of the Working Group presents its preferred option for reform for CAG's consideration.

The Northern Territory, in response to the NT Royal Commission, has already committed to raising the age of criminal responsibility from 10 to 12 years by 2021.

In making its recommendations, the Working Group has taken into account its assessment of legal and policy considerations and the key policy objectives for this review (see paragraph 10.2).

The Working Group is mindful that this report is the culmination of research and evidence-gathering through a justice policy lens. The Working Group has not been able to reach agreement amongst its members on a preferred option for reform to recommend to CAG.

The Working Group notes that the recommendations for reform in this report do not represent the end of this process, nor is this report the final step in increasing the age of criminal responsibility in Australia. The question of whether to raise the age of criminal responsibility in Australia is far broader than a purely legal or justice policy issue and requires a holistic, multi-agency response.

Ultimately these remain whole-of-government considerations for CAG to investigate further.

10.1 Recommended reforms and potential alternatives

Based on the findings in this report, the Working Group recommends the following:

1. A primary recommendation (Recommendation 1) to increase the minimum age of criminal responsibility to 14 years without exceptions.
2. A number of alternative recommendations (summarised in Table 9).

Evidence in support of the primary recommendation is presented at paragraph 10.1.1 onwards.

Recommendation 1: Based on the findings of this report, but subject to Recommendation 2, the Commonwealth, State and Territory governments should raise the minimum age of criminal responsibility to 14 years of age without exception.

Alternative options for reform include raising the minimum age of criminal responsibility to 14 with exceptions for serious crimes, or raising the minimum age of criminal responsibility to 12 and the minimum age of detention to 14 (with exceptions for serious offences). These options are further outlined in Table 9 of this report.

Recommendation 2: Prior to implementing a change to the minimum age, the following matters should be considered by each jurisdiction:

Recommendation 2.1: A gap analysis be undertaken with regard to the current prevention, early intervention and diversionary frameworks in the context of a potential change to the minimum age of criminal responsibility.
Recommendation 2.2: Broad consultation be commenced, including with government agencies and community members who were not part of the Report's consultation.
Recommendation 2.3: Current family and community responses/programs be strengthened, ensuring that programs are evidence-based, culturally safe, trauma informed and, where appropriate, community-led.
Recommendation 2.4: 'Places of safety' be established or ensured. Each government review, develop and expand safe accommodation for children that is culturally appropriate and takes into account the need for connection with family and community.
Recommendation 2.5: The police or other authorities be given the power to refer a child and/or caregivers to appropriate agencies, diversionary programs and services where the authorities become aware that the child is under the age of criminal responsibility and is displaying risks or needs in their behaviour. This recommendation relates to circumstances where, if the child had been over the age of criminal responsibility, they would have been reasonably suspected to have committed a criminal offence.
Recommendation 2.6: Consideration be given as to whether there should be a minimum age of detention for children above the minimum age of criminal responsibility, such as 16 years of age, with exceptions for serious offences.

Recommendation 3:If there is a decision to keep the minimum age of criminal responsibility below 14 years, the presumption of *doli incapax* ought to be retained from that minimum age to 14 years.

The presumption should be standardised in legislation across jurisdictions, with a specification that the onus of proof rests with the prosecution.

The assessment as to whether a child is *doli incapax* should occur at the earliest possible opportunity.

The recommended reforms above are summarised in **Table 8**. The Working Group also considered two further options: 'Alternative A' and 'Alternative B' (see **Table 9**). These two options were discussed but not preferred (see further, paragraphs 10.3.1 and 10.3.2).

10.1.1 Recommended reform: Raise the minimum age of criminal responsibility to 14 years without exception

There is very strong support from legal, medical, and human rights organisations to raise the minimum age of criminal responsibility to 14 years of age.

The Working Group is of the view that an appropriate minimum age of criminal responsibility is 14 years, for the following reasons:

- Medical and scientific evidence clearly establishes that children under the age of 14 years are unlikely to be capable of understanding the consequences of their actions and do not have the maturity required for criminal responsibility.
- A minimum age of criminal responsibility of 14 years is in line with UN Committee recommendations and the average international age.
- The concentration of Indigenous children under supervision is increased in the 10-13 year old age bracket. Removing these children from the justice system will therefore be an important step towards addressing the over-representation of Indigenous children in the criminal justice system.

- There is only a very small number of 10-13 year olds who are sentenced to detention each year, but comparatively high numbers on remand.
- Children aged 10-13 years almost never commit the most serious crimes.

Raising the minimum age of criminal responsibility to 14 years would, of course, require strong coordination by relevant government agencies to ensure that at-risk children below the minimum age of criminal responsibility are provided with effective services and programs to assist them and prevent offending into the future. Consideration would also need to be given to how children under the minimum age who engage in serious violent conduct are referred to appropriate services in order to prevent further offending and promote community safety.

This report observes that it is unlikely that raising the age of criminal responsibility to 14 years would require significantly more resources than raising it to 12 years.

Further complementary option: raise the minimum age of detention to 16 years

This report notes that the UN Committee and several stakeholders support implementing restrictions on placing children aged under 16 years of age in detention. There is a significant body of evidence which shows that any potential punishment and deterrent value that detention may have is vastly outweighed by the negative life-long outcomes it creates.

There could be an exception to the higher age of detention for children who posed a serious risk to the community, with a requirement that the President of the Children's Court approves the sentence.

Table 8: Recommendations for reform of the minimum age of criminal responsibility (MACR)

	MACR	Exceptions to the MACR	*Doli incapax*	Age of detention	Policy objectives
Recommended reforms	14	None	N/A	16	*Meets all key policy objectives, other than policy objective 5 (in line with previous NT Government commitment).* *In line with UN support for a MACR of 14 years based on medical and scientific evidence on child development.* *Risks regarding loss of service delivery and community safety to be managed through delivery of appropriate preventative and diversion frameworks.*
	Recommended reforms: 1. Raise the MACR to 14 years. 2. Where police or other authorities become aware of a child under the minimum age of criminal responsibility displaying risks or needs in their behaviour, they are given the power to refer the child and/or caregivers to appropriate agencies, diversionary programs and services. This would be subject to the condition that if the child had been over the age of criminal responsibility they would have been reasonably suspected to have committed a criminal offence. 3. If those children pose a serious risk to themselves or the community, police and authorised persons have the power to take the child to an appropriate place of safety (not being a place of detention) and caregivers and relevant agencies are notified. **Implementation and supports:** • Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led. • Maintenance of data of all behaviour by children aged 10 to 13 years (inclusive) that would otherwise be considered criminal. • Ensure or establish appropriate ‘places of safety’. • Review the operation and effectiveness of the revised MACR of 14 years within three years of commencement.				

10.2 Raising the age: legal and policy considerations

This report has identified and considered a number of legal and policy issues arising in relation to raising the age (which were also posed to stakeholders), including:

- the appropriate programs and services required for at-risk children who fall under the minimum age of criminal responsibility
- whether there should be exceptions for serious offences
- whether there should be a separate higher minimum age of detention
- whether *doli incapax* should be retained for children under 14 years.

10.2.1 Pre-conditions for raising the age: programs and services

The Working Group stresses that a pre-condition to raising the minimum age of criminal responsibility is ensuring availability of the accompanying programs and services needed to address what would otherwise be criminal behaviour in children who fall under a raised age of criminal responsibility.

Specifically, raising the age will require governments to ensure that:

- effective and appropriate programs and services are available
- mechanisms are in place to ensure that the right children are referred to those programs and services at the right time
- support is provided to children and families or caregivers to properly engage with those programs and services.

This will require a whole-of-government approach to mapping existing programs and services to identify gaps and any barriers to uptake and participation. A new framework for referral of children under the minimum age of criminal responsibility who are engaging in what would otherwise be criminal behaviour to appropriate authorities, diversionary programs and services will also be required.

This report notes that many countries around the world have a minimum age of criminal responsibility of 14 years of age or higher. Accordingly, Australian jurisdictions should be able to draw on the approaches and experiences in those countries in developing a best practice framework for dealing with children under the minimum age of criminal responsibility.

Stakeholder submissions have also been of considerable assistance in identifying what a new framework might look like. For example, Jesuit Social Services notes it has produced a paper – *Raising the Age of Criminal Responsibility: There is a better way*[333] – which advocates for holding children to account for their actions while addressing the underlying causes of those actions.[334] It also involves creating a society in which children are less likely to offend in the first place. The paper offers a guide to the principles, policies and programs that can underpin responses when the age of legal responsibility is raised.

The Australian Red Cross has suggested that any approach should:

- be whole of government
- ensure training and support for first responders, including trauma-informed and culturally-grounded development training
- ensure that adequate youth diversion programs and services are available

[333] Jesuit Social Services, *Raising the Age of Criminal Responsibility: There is a better* way, 27 November 2019, https://jss.org.au/raising-the-age-of-criminal-responsibility-there-is-a-better-way/, viewed on 7 April 2020.
[334] Jesuit Social Services, Submission 13, 26 February 2020.

- engage young people and families
- take a long-term and holistic approach
- be tailored for local environments
- be community led or have input from young people
- include proactive screening for developmental/mental health issues.[335]

Legal Aid Western Australia suggests that best practice would require government to commit to increased justice reinvestment to expand funding for culturally appropriate community resources such as:

- more affordable and accessible community housing
- alternative primary school education engagement strategies
- early neurodevelopmental screening for all children identified as being 'at risk' or having behavioural issues in early childhood education
- early trauma interventions for children identified as being exposed to neglect, domestic violence and abuse.[336]

Legal Aid Western Australia also notes that there is currently a dearth of 'targeted community, accommodation and mental health resources to assist very young children aged between 10 and 14 who are currently in the justice system'.[337] The current fall-back position for children under 14 years who do not have safe family support or accommodation in the community is 'remand detention'. Government would therefore need to resource and increase the number of safe accommodation options for children aged under 14 years who are at risk.

Many stakeholders noted that in Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be led by the community. Aboriginal Community Controlled Organisations should be resourced to provide culturally safe services focused on health, family support, education, disability, cultural connection and healing.[338]

This report also notes that existing restorative justice and diversion processes in each jurisdiction can be extended and adapted for children under the minimum age of criminal responsibility.

The Working Group acknowledges that increasing the minimum age of criminal responsibility may require a significant initial outlay of resources for implementation, notwithstanding the long-term savings expected from taking a justice reinvestment approach.

It is not within the scope of this report to conduct economic modelling for jurisdictions. The Commonwealth, States and Territories should estimate the financial impact of the changes to the functions and services of their relevant agencies, should they choose to adopt or consider the recommendations in this report.

10.2.2 Exceptions for serious offences

One method of addressing perceptions around community safety and punishment is to create exceptions to the minimum age of criminal responsibility so that children between the ages of 10 and 13 years can be prosecuted for serious offences, such as those involving loss of life.

Whilst uncommon, there is international precedent for this approach, which was taken in New Zealand and Ireland. New Zealand legislation provides that criminal proceedings should only

[335] Australian Red Cross, Submission 8, February 2020 pp. 5-7.
[336] Legal Aid Western Australia, Submission 12, 24 February 2020, p. 44.
[337] ibid, p. 12.
[338] Aboriginal Legal Service (NSW/ACT), Submission 90, 3 March 2020, p. 30.

be instigated against a young person as a last resort and where it is in the public interest to do so.[339]

This report notes that such an exception would only be used very rarely. This is because children under 14 years generally do not commit serious offences. They commit 'nuisance offences' such as stealing, trespass and criminal damage, which are often opportunistic and arise out of boredom or disadvantage (such as stealing food). When children under 14 years commit crimes against the person they are generally 'in care' offences against paid carers, or offences committed with older offenders.[340] The Working Group also notes that on the rare instances when children do engage in serious criminal behaviour, it receives a disproportionate amount of exposure.

The danger with varying the age of criminal responsibility for different offences is the assumption that children who commit more serious offences have a more advanced sense of moral wrong than children who commit less serious offences. Legal Aid Western Australia notes that serious offences can also vary significantly in factual seriousness. Robberies can involve a threat of violence or a high level of actual violence. Sexual offences can involve under age 'consensual' sex or predatory forced sexual contact.[341]

As noted earlier in this report, the UN Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence, stating:

> *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*.[342]

Therefore, Australia could expect ongoing criticism from the UN Committee should it adopt exceptions to the minimum age of criminal responsibility. In addition, almost all stakeholders opposed creating exceptions for serious offences.

10.2.3 Minimum age of detention

This report notes that imposing a minimum age eligibility for detention reflects practices in other international jurisdictions. In countries such as Scotland and a number of European countries, where children over the age of criminal responsibility are protected from certain sentencing options until they reach higher age thresholds, there is instead heavy investment in pre-court diversion alternatives.[343] The UN Committee also recommends that children under 16 years of age not be placed in detention. The NT Government has previously committed to increasing the minimum age of detention to 14 years alongside raising the age of criminal responsibility to 12 years.

Given the negative outcomes detention can create, there is strong evidence in support of restricting the ages of children who may be admitted to detention, in conjunction with raising the age of criminal responsibility, and focussing intervention in response to their offending

[339] *Oranga Tamariki Act 1989* (NZ), s. 272.
[340] Legal Aid Western Australia, Submission 12, 24 February 2020, p 14.
[341] Legal Aid Western Australia, Submission 12, 24 February 2020, p 14.
[342] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, paragraph 25.
[343] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol 2B, p. 418.

wholly around their family life and social network in the community.[344] The Working Group also notes the submission from knowmore that youth detention centres are a high-risk setting for child sexual abuse.[345]

However, instituting a separate minimum age of detention does not ameliorate or justify an unacceptably low minimum age of criminal responsibility. This is because contact with the justice system (and not just detention itself) also worsens outcomes for these children. Whilst a child may not be eligible for detention, they will still be required to participate in the formal justice system, including the potential of a trial. This report reiterates that contact with the justice system is a key predictor of future recidivism.[346]

Stakeholders have tended not to support a separate minimum age of detention. Some, however, have suggested that the minimum age of criminal responsibility should be raised to 14 years, with a minimum age of detention of 16 or 18 years.

10.2.4 Retention of doli incapax

The UN Committee has urged States Parties to set one appropriate minimum age rather than employing two age limits between which a rebuttable presumption applies. The UN Committee has stated that having two age limits is confusing and can lead to discriminatory practices.[347]

As outlined earlier in this report, the immature brain development of 10 to 13 year old children means that they may not have sufficient understanding or control of their actions to be held criminally responsible. Most children in the youth justice system have significant additional neurodevelopmental delays. The children who typically come into contact with the justice system are often affected by one of more of the following risk factors:

- severe socio-economic disadvantage
- neglect, complex trauma
- mental or cognitive impairments affecting their decision-making capacity and emotional control.

Many stakeholders have argued that the minimum age of criminal responsibility should therefore be raised to a more appropriate age level of 14 years, rendering the rebuttable presumption of *doli incapax* redundant.

However, many stakeholders have noted that if the age of criminal responsibility is raised to an age under 14 years, *doli incapax* should be retained. Others have suggested that, in conjunction with raising the minimum age of criminal responsibility to 14 years, the upper age limit of *doli incapax* should be increased to 16, 17 or 18 years.

Criticisms of doli incapax

Stakeholders have submitted to the Working Group that the presumption of *doli incapax* in its current form is ineffective, as:

- there is inconsistency inherent in judicial and prosecutorial discretion

[344] Northern Territory, Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol 2B, p. 418.
[345] knowmore, Submission 80, 28 February 2020, p. 4.
[346] See paragraph 8.4.
[347] United Nations, Committee on the Rights of the Child, *General Comment No. 24 (2019) Children's Rights in the Child Justice System*, 18 September 2019, paragraph 26.

- children can still be arrested and remanded in custody before charges are dismissed or dropped months later, as the presumption of doli incapax is subject to rebuttal during prosecution
- children to whom doli incapax applies may accept a caution in order to avoid court, but this may still end up on their records
- in practice, the onus may fall on the defence to provide the expert evidence to establish incapability
- children coming before the justice system are amongst the most vulnerable in society, often coming from backgrounds of severe disadvantage, neglect, and may suffer from complex trauma, mental or cognitive impairment, such as FASD
- it does not reflect recent medical and scientific evidence regarding childhood brain development and does not adequately take into account individual vulnerabilities affecting the capacity of children to make informed decisions.[348]

This report acknowledges that there are some inherent difficulties regarding the operability of *doli incapax*.

Firstly, even if a child is eventually found to be *doli incapax* by the court and the matter dismissed, the child has still been involved with the justice system potentially for months beforehand, exposing them to the risks of early contact, as discussed earlier in this report. They may be detained on remand before a determination of whether they are suitable participants in the system at all, and children may still perceive this as a punishment, regardless of the eventual outcome.[349] As discussed in Chapter 8, almost all detention of children occurs prior to a finding of guilt.

Doli incapax therefore does not protect children from contact with the court system. This report notes that the court system disadvantages children in the following ways:

- it takes away the role of the family to guide and discipline
- there is a financial cost to the family and/or state
- it is not effective rehabilitation
- complex welfare issues are not immediately addressed
- it creates a negative label for the child and may create a peer group of other offenders
- it can provide positive attention for a child who either receives no attention or negative attention within their family
- Indigenous children and children from non-English speaking backgrounds are particularly vulnerable.[350]

In addition, the Working Group notes that despite what is known about the under-developed capacity of children for consequential thinking, children are subject to largely the same bail laws as adults.[351] The most disadvantaged children are the ones the most likely to breach bail conditions or be refused bail.[352]

[348] For example, National Legal Aid, Submission 67, 28 February 2020 and Aboriginal Legal Service (NSW/ACT) Limited, Submission 90, 3 March 2020.
[349] Caitlin Akthar, Submission 82, February 2020 p 27.
[350] Youth Legal Service Inc, Submission 24, February 2020.
[351] Caitlin Akthar, Submission 82, February 2020, p. 13.
[352] Caitlin Akthar, Submission 82, February 2020.

Secondly, the presumption of *doli incapax* is formulated slightly differently between jurisdictions. Some jurisdictions rely on the common law, and others rely on their own statutory provisions: see Chapter 4.

Thirdly, there has been ongoing criticism in Australia that the presumption, however formulated, operates in a way that is prejudicial to defendants, inconsistent and procedurally unfair.

A starting point for assessing a child's understanding may be their age and the alleged type of act, and a common form of evidence may include the child's interview with the police. The closer a child is to 14 years and the more obviously wrong the act, the less strong the evidence may need to be to rebut the presumption.[353] Prosecutors may be allowed significant evidentiary concessions in the form of admissions by the accused during police interviews, including in relation to earlier acts of misconduct. The prosecution may also introduce evidence of surrounding circumstances from which consciousness of wrongdoing may be inferred: for example, attempts to run from police or to hide the facts.[354] A related consideration is that children, especially those from Indigenous backgrounds, may be particularly vulnerable when giving evidence to police and in a court setting and may admit guilt regardless of available defences.[355]

Youth Legal Service has noted that, in practice, the prosecution rarely needs to rebut the presumption of *doli incapax*. When the child is first arrested, police ask the child if they knew what they were doing was 'wrong' and if the child says 'yes', they are taken to have capacity.[356] However, most children will answer 'yes' in these circumstances, regardless of their actual state of mind at the time of the offence.

Children may also face proceedings well after the alleged offence occurred, which may mean that the maturity with which they present in court does not reflect their maturity at the time of the offence. In addition, physical maturation is not necessarily indicative of intellectual and emotional development.[357]

While displacing the presumption to a requisite standard should involve consideration of matters including the child's background and psychological history, many argue that expert testimony is rarely tendered when considering *doli incapax.*[358] In fact, despite the High Court affirming that the onus of proof resides with the prosecution, various legal practitioners and commentators have noted that, in practice, the onus is more commonly placed on the defence who bear the unofficial burden of providing expert reports at their cost to prove that the defendant is *doli incapax*.[359]

[353] Crofts T, 'Doli Incapax: Why children deserve its protection', *Murdoch University Electronic Journal of Law*, Vol.10, No.3 (2003), paragraphs 7-8.
[354] Bradley L, 'The age of criminal responsibility revisited', [2003] *Deakin Law Review* 4, http://classic.austlii.edu.au/au/journals/DeakinLawRw/2003/4.html, viewed on 8 April 2020.
[355] Bradley L, 'The age of criminal responsibility revisited', [2003] *Deakin Law Review* 4, http://classic.austlii.edu.au/au/journals/DeakinLawRw/2003/4.html, viewed on 8 April 2020. Note also the related concepts of gratuitous concurrence and the Anunga Rules in relation to Indigenous people in police custody.
[356] Youth Legal Service Inc, Submission 24, February 2020.
[357] Bradley L, 'The age of criminal responsibility revisited', [2003] *Deakin Law Review* 4, http://classic.austlii.edu.au/au/journals/DeakinLawRw/2003/4.html, viewed on 8 April 2020.
[358] See for example Bradley L, 'The age of criminal responsibility revisited', [2003] *Deakin Law Review* 4, http://classic.austlii.edu.au/au/journals/DeakinLawRw/2003/4.html, viewed on 8 April 2020.
[359] For example see discussion in: Fitz-Gibbon K and 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*, 8(1): 18-33.

This report also acknowledges that, on the other hand, the presumption has been subjected to criticism by some courts and legislators in Australia and the United Kingdom to the effect that children under 14 years should *not* be presumed incapable of crime.

In 1988, the United Kingdom enacted the *Crime and Disorder Act 1988* (UK), which abolished the rebuttable presumption of *doli incapax* while leaving the minimum age of criminal responsibility at 10 years. It was frequently argued during parliamentary debates that the presumption of *doli incapax* was an archaic rule, which took root at a time when the criminal law was more draconian and children were sentenced to death for crimes less than murder. It was argued that as the law was no longer as harsh, there was no longer need to retain the presumption.[360]

Effectiveness of doli incapax

The Working Group notes that there is a lack of empirical research on the effectiveness of the *doli incapax* presumption. There is limited information available in the form of court statistics, such as the number of cases where the presumption was raised and successfully rebutted to demonstrate whether or not *doli incapax* is working effectively overall.[361]

However, recent research in Victoria found that 'inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers a legal safeguard for very young children in conflict with the law'.[362] In practice, *doli incapax* is not engaged as a matter of course for all children aged 10-13 years.[363]

As referred to earlier in this report, recent research by the Telethon Kids Institute shows that nine out of ten young people at Banksia Hill detention centre in Western Australia had at least one form of severe neurodevelopmental impairment. More than one in three had FASD, but only few had previously been diagnosed. This raises serious doubts about the utility of *doli incapax*. It also suggests that young people who do not have capacity to fully understand their criminal behaviour, and potentially have a functional age well below their chronological age, are being successfully prosecuted.[364]

10.2.5 Findings about doli incapax

This report observes that there is a lack of evidence as to the effectiveness of the presumption as currently formulated and applied. *Doli incapax* is also subject to extensive stakeholder and UN Committee criticism. However, as Crofts has argued, criticisms of *doli incapax* may not convince of a need for change to the presumption, rather they persuade of a need to take the presumption seriously. He adds that unless governments are willing to increase the minimum age of criminal responsibility to either 14 or 16 years, there is a continued need for the conditional age period with a rebuttable presumption of *doli incapax* to provide a safeguard for children facing criminal prosecution.[365]

This report agrees with this proposition: the minimum age of criminal responsibility alone is not sufficient if that minimum is set below 14 years of age. Despite operational limitations

[360] Urbas G, *The age of criminal responsibility* (2000). Trends & issues in crime and criminal justice no. 181. Canberra, Australian Institute of Criminology, pp.4-5. Crofts T, 'Doli incapax: Why Children Deserve its Protection', *Murdoch University Electronic Journal of Law*, Volume 10, No. 3 (September 2003), [9-35].
[361] Fitz-Gibbon K and 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*, 8(1): 18-33.
[362] O'Brien W and Fitz-Gibbon K (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, 17(2): 134-152, at 135.
[363] O'Brien W and Fitz-Gibbon K (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, 17(2), 142.
[364] Inspector of Custodial Services Western Australia, Submission 3, 11 February 2020, p. 3.
[365] Crofts T, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 (1) Current Issues in Criminal Justice 123, http://www.austlii.edu.au/au/journals/CICrimJust/2015/15.html, viewed on 7 April 2020.

which may arise, there is at least recognition by virtue of the existence of the presumption that children under 14 years of age generally do not possess criminal capability. In principle, its existence also provides for the court to take an individualised approach, recognising that not all children develop emotional or mental capacities at a constant or steady rate.
The assessment as to whether a child is *doli incapax* must also occur at the earliest possible opportunity to avoid prolonged contact with the court system, and ideally *before* a child is placed on remand.

Finding 12: *Doli incapax* does not operate as intended to consistently to protect children aged 10 to 14 years who did not know that their behaviour was 'seriously wrong.'

Even in cases where *doli incapax* operates to prove that a child was incapable of criminal responsibility, the late stage at which the presumption is triggered still results in a child being subjected to the criminal justice system, including a criminal trial.

The Working Group again notes its recommendation in relation to a standardised approach to *doli incapax* at Recommendation 3.

10.3 Raising the age: alternative reform considered

10.3.1 Alternative A: Raise the minimum age of criminal responsibility to 14 years, with exceptions for serious offences

This report notes that, if the minimum age of criminal responsibility is immediately raised to 14 years, exceptions could be made for the prosecution of younger children for serious offences.

Although uncommon, there is international precedent including in a range of common law countries for a higher minimum age of criminal responsibility with exceptions for serious crimes.

New Zealand has a minimum age of criminal responsibility, subject to *doli incapax*, of 14 years for most crimes. However, there are exceptions for children aged 10 years and older for the offences of murder or manslaughter, and children between 12 and 13 years can be prosecuted for serious crimes that have penalties of 14 years imprisonment or more.

Similarly, Ireland has a minimum age of criminal responsibility of 12 years with exceptions for children aged 10-11 years regarding the offences of murder, manslaughter, rape or aggravated sexual assault.

The UN is unsupportive of incorporating exceptions for serious offences and this is not recommended by the Working Group as its preferred option. However, it may be a path that is more acceptable to the community.

Given the very small numbers of children aged under 14 years who commit serious offences, the Working Group expects that incorporating this exception would not significantly reduce the positive outcomes expected from raising the age to 14 years.

An exception for serious offences would provide that:

- The current minimum age of criminal responsibility of 10 years of age is maintained in the rarer instances that younger children commit serious crimes.
- While up to jurisdictional discretion, this could include serious and violent crimes against a person (for example murder, manslaughter, rape, serious sexual assault) and for offences that present a serious risk to community safety (for example, terrorism related offences).

- This would ensure that serious crimes will continue to be a matter for the youth justice system.
    - The presumption of *doli incapax* would continue to apply for children aged under 14 years of age who are prosecuted for serious offences.
    - The courts will continue to consider the severity of the crime in administering sentencing options where an offender is convicted.

Further complementary option: raise the minimum age of detention to 16 years

The UN Committee and several stakeholders support implementing restrictions on placing children aged under 16 years in detention. Again, there could be an exception to the higher age of detention for children who posed a serious risk to the community, with a requirement that the President of the Children's Court approves the sentence.

10.3.2 Alternative B: Raise the minimum age of criminal responsibility to 12 years and minimum age of detention to 14 years

This option is in line with the Northern Territory Government's commitment to lifting the minimum age of criminal responsibility to 12 years of age, and implementing restrictions on placing children younger than 14 years in detention with possible exceptions for crimes that present serious risks for community safety.

There are some arguments in support of raising the minimum age of criminal responsibility to 12 years of age.

Firstly, there are generally much lower numbers of 10 and 11 year olds than 12 and 13 year olds in the justice system. Ten and 11 year olds made up around nine per cent of the 10-13 year olds under youth justice supervision during the 2017-18 year, and less than one per cent of the total number of young people under supervision. These are also the children who are most likely to go on to reoffend.

In addition, the over-representation of Indigenous children is more significant for those aged 10 and 11 years. Nationally, some 80 per cent of children placed in detention and on community-based supervision in the 10-11 year old age bracket (inclusive) were Indigenous children.

However, adopting this alternative would be expected to attract ongoing criticism from the UN Committee and stakeholders, as it is not in line with international standards or medical and scientific evidence regarding child development.

There may be also be a general perception in the community that children in primary school are less independent and able to exercise moral judgement than those in high school, and therefore an age of 12 years may be more acceptable. However, this is not supported by any evidence. Instead, the evidence demonstrates that brain development continues well into adolescence, and that many adolescents (particularly males) experience greater peer pressure, lack impulse control and demonstrate risk-taking behaviours.

Lastly, this report observes that it is unlikely that raising the age of criminal responsibility to 12 years would require significantly less resources than raising it to 14 years, given the low numbers of 10-13 year olds in the justice system overall. The Working Group therefore does not see any immediate financial benefits to raising the age to 12 years only.

For these reasons, this alternative is not preferred in this report. However, if it were adopted, the Working Group suggests that the following additional supports also be adopted.

Retain doli incapax

Notwithstanding the possible limitations of *doli incapax*, this report considers that it should be retained if the minimum age of criminal responsibility is set below 14 years of age. Subject to the reforms outlined in Recommendation 3 of this report, the presumption of *doli incapax* would provide an extra safeguard by allowing the courts to undertake an individualised assessment of a child's capacity.

Raise the minimum age of detention to 14 years

This report supports the idea that if the minimum age of criminal responsibility is raised to only 12 years, a new minimum age of detention be set at 14 years. There is a significant body of evidence which shows that any potential punishment and deterrent value that detention may have is vastly outweighed by the negative life-long outcomes it creates, especially for the youngest and most vulnerable cohorts. This would also be in line with the NT Government's commitments.

There could be an exception to the higher age of detention for children who pose a serious risk to the community, with a requirement that the President of the Children's Court approves the sentence. The Working Group anticipates this would be rarely used given that younger children almost never commit the most serious offences.

Staged approach

The Working Group suggests that if this option is preferred by the Commonwealth Government and by State and Territory governments, it be considered the first step of a staged approach to raising the age of criminal responsibility to an age that better reflects child development and international standards (that is, 14 years of age or higher).

Table 9: Alternative options for raising the minimum age of criminal responsibility (MACR)

	MACR	Exceptions to the MACR	*Doli incapax*	Age of detention	Policy objectives
Alternative A	14	Certain specified serious offences for children aged 10-14 or 12-14	Retain for specified serious offences	10 or 12 – serious offences only	*Meets key policy objectives 2 and 4, partially meets policy objectives 1 and 3.* *Similarities with New Zealand's approach and may manage perceptions regarding community safety.* *But, not in line with medical science regarding child development.* *UN prefers an absolute MACR without exceptions. Expect ongoing UN criticism.*
	Alternative A recommendations: 1. Raise the MACR to 14 years, with exceptions for serious offences. 2. For specified serious offences, implement an appropriate lower age threshold for the MACR. 3. Standardise the operation of the *doli incapax* presumption across jurisdictions so as to ensure that the onus is on the prosecution and it is fit for purpose. 4. Where police or other authorities become aware of a child under the minimum age of criminal responsibility displaying risks or needs in their behaviour, they are given the power to refer the child and/or caregivers to appropriate agencies, diversionary programs and services. This would be subject to the condition that if the child had been over the age of criminal responsibility they would have been reasonably suspected to have committed a criminal offence. 5. If those children pose a serious risk to themselves or the community, police and authorised persons have the power to take the child to an appropriate place of safety (not being a place of detention) and caregivers and relevant agencies are notified. **Implementation and supports:** • Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led. • Maintenance of data of all behaviour by children under the age of criminal responsibility that would otherwise be considered criminal. • Ensure or establish appropriate 'places of safety'. • Review the operation and effectiveness of the revised MACR of 14 years within 5 years of commencement to consider the incidence of serious offending by children aged 10-13 and whether any other changes are required.				

	MACR	Exceptions to the MACR	*Doli incapax*	Age of detention	Policy objectives
Alternative B	12	None	Retain for children aged 12 to 14	14 (with exceptions for defined serious offences)	*Meets policy objective 5 and partially meets other objectives.* *In line with NT Royal Commission recommendations. May be more acceptable to the community.* *Not in line with medical science regarding child development.* *UN prefers an absolute MACR without exceptions. Expect ongoing stakeholder and UN criticism.*

Alternative B recommendations:

1. Raise the MACR to 12 years.
2. Establish a minimum age of 14 years for custodial sentences with exceptions for specified serious offences.
3. Standardise the operation of the *doli incapax* presumption across jurisdictions so as to ensure that the onus is on the prosecution and it is fit for purpose.
4. Where police or other authorities become aware of a child under the minimum age of criminal responsibility displaying risks or needs in their behaviour, they are given the power to refer the child and/or caregivers to appropriate agencies, diversionary programs and services. This would be subject to the condition that if the child had been over the age of criminal responsibility they would have been reasonably suspected to have committed a criminal offence.
5. If those children pose a serious risk to themselves or the community, police and authorised persons have the power to take the child to an appropriate place of safety (not being a place of detention) and caregivers and relevant agencies are notified.

Implementation and supports:

- Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led.
- Maintenance of data of all behaviour by children under the age of criminal responsibility that would otherwise be considered criminal.
- Ensure or establish appropriate ‘places of safety’.
- Review of the operation and effectiveness of the revised MACR of 12 years within 5 years of commencement, and consider the effects of not sentencing children under 14 to detention except for serious offences. Consider further increasing the MACR to 14 years of age.

10.3.3 Other options considered, but discounted

This report has also considered two other options for reform as part of this review (see **Table 10**), but has concluded that the other options should be discounted as they do not meet the required key policy objectives.

Table 10: Other options considered by the Working Group, but not preferred

	MACR	Exceptions to MACR	*Doli incapax*	Age of detention	Policy objectives
Not preferred 1	12	None	Retain for children 12-14 years	12	*Does not fully meet any key policy objectives.* *Not fully in line with recent UN comments and medical science regarding child development.* *Not fully in line with NT Government commitments in response to NT Royal Commission. Jurisdictions would differ from NT (from 2021).* *Would not fully address best interests of the child, and may be weighted more towards managing perceptions of community safety.*
	Associated reforms: 1. Raise the MACR to 12 years. 2. Standardise the operation of the *doli incapax* presumption across jurisdictions so as to ensure that the onus is on the prosecution and it is fit for purpose. 3. Where police or other authorities become aware of a child under the minimum age of criminal responsibility displaying risks or needs in their behaviour, they are given the power to refer the child and/or caregivers to appropriate agencies, diversionary programs and services. This would be subject to the condition that if the child had been over the age of criminal responsibility they would have been reasonably suspected to have committed a criminal offence. 4. If those children pose a serious risk to themselves or the community, police and authorised persons have the power to take the child to an appropriate place of safety (not being a place of detention) and caregivers and relevant agencies are notified. **Implementation and supports:** • Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led. • Maintenance of data of all behaviour by children under the age of criminal responsibility that would otherwise be considered criminal. • Ensure or establish appropriate 'places of safety'. • Review of the operation and effectiveness of the revised MACR of 12 within 5 years of commencement, with a view to a further increasing the MACR to 14 years of age if the data reflects no significant increase in what would otherwise be considered criminal behaviour for children aged 10 and 11 years.				

	MACR	Exceptions to MACR	*Doli incapax*	Age of detention	Policy objectives
Not preferred 2	10	None	Retain for children 10-14 years	14 (with exceptions for defined serious offences)	*Does not meet any key policy objectives.* *Not in line with recent UN comments and medical science regarding child development.* *Would expect considerable UN and civil society criticism.* *Limited alignment with NT Government commitments but consistent with all other jurisdictions for the time being. Jurisdictions would differ from NT (from 2021).* *Would not fully address best interests of the child, and weighted more towards managing perceptions of community safety.* *Children may still end up being held on remand.*
	Associated reforms: 1. Maintain the MACR of 10 years. 2. Establish a minimum age of 14 years for custodial sentences with exceptions for specified serious offences. 3. Standardise the operation of the *doli incapax* presumption across jurisdictions so as to ensure that the onus is on the prosecution and it is fit for purpose. **Implementation and supports:** • Strengthening, expansion and development of targeted prevention, early intervention, and diversionary frameworks, ensuring they are evidence based, culturally-safe, trauma-responsive and where appropriate, community-led. • Require maintenance of data of police and court diversion for children aged 10 to 14 years. • Review of the operation and effectiveness of the higher minimum age of detention within 5 years of commencement, with a view to moving to increase the MACR.				

Appendix 1 Criminal Age Working Group Representatives

Western Australia	Department of Justice (Chair)
Commonwealth	Attorney-General's Department
ACT Government	Justice and Community Safety Directorate
New South Wales	Department of Communities & Justice
Northern Territory	Department of the Attorney-General and Justice
Queensland	Department of Justice and Attorney-General
South Australia	Attorney-General's Department
Tasmania	Department of Justice
Victoria	Department of Justice and Community Safety

Appendix 2 Review of Age of Criminal Responsibility: Questions for Stakeholder Consultation

An invitation by the Working Group for public submissions was published on the Department of Justice (WA) website on 16 December 2019 at:
https://www.department.justice.wa.gov.au/R/review-criminal-age.aspx

The web-page was updated on 13 January 2020 to reflect that the closing date for submissions was extended by two weeks to 28 February 2020.

Written responses were invited on all or any of the following matters:

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.
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.
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.
4. Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (for example, to 12) should a higher minimum age of detention be introduced (for example, to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.
5. What programs and frameworks (for example, 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.
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.
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.
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?
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?
10. Are there issues specific to states or territories (for example, 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.
11. Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

Appendix 3 List of public submissions received

Number	Submitter
1	Alex Atwell
2	Lino Paggi
3	Australian Medical Association
4	National Health Leadership Forum
5	Australian Lawyers Alliance
6	Philip Armit
7	ACT Director of Public Prosecutions
8	Red Cross
9	Civil Liberties Australia
10	Western Australia Police Union
11	Petition from Carnarvon residents
12	Legal Aid Western Australia
13	Jesuit Social Services
14	Australian Human Rights Commission
15	Youth Affairs Network Qld
16	Commissioner for Aboriginal Children and Young People, SA
17	Australians for Native Title and Reconciliation (Qld) Inc.
18	Youth Law
19	Royal Australasian College of Physicians
20	Youth Co
21	Human Rights Law Centre, Vic
22	Aboriginal Justice Caucus
23	The Shopfront Youth Legal Centre
24	Youth Legal Service
25	Save the Children
26	Youth Network of Tasmania
27	Joint Council of Social Service Network
28	Qld Human Rights Commission
29	Justice Health Unit, University of Melbourne and Centre for Adolescent Health, Murdoch Children's Research Centre
30	Berry Street
31	Robert Rutkowski
32	Australian and New Zealand Children's Commissioners and Guardians
33	Professor Chris Cunneen

34	ACT Human Rights Commission
35	Aboriginal Legal Service of Western Australia
36	Commissioner for Children and Young People Victoria
37	In My Blood It Runs
38	Commissioner for Children and Young People WA
39	Australian Lawyers for Human Rights
40	Federation of Community Legal Centres
41	Royal Australian and New Zealand College of Psychiatrists
42	North Australian Aboriginal Justice Agency
43	Whitelion
44	Australian Youth Affairs Coalition
45	Youth Law Australia
46	Anderson and Ross
47	Victorian Council of Social Service
48	Youth Advocacy Centre
49	Victorian Aboriginal Child Care Agency
50	ACT Council of Social Service Inc.
51	Youth Justice Coalition
52	Thomas Crofts
53	Amnesty International
54	Kath McFarlane
55	Koori Youth Council
56	Children's Court Vic
57	Sisters Inside
58	Office of the Public Guardian Qld
59	Centre for Excellence in Child and Family Welfare
60	Centre for Innovative Justice
61	Community Legal Centres Tasmania
62	Danila Dilba Health Service
63	Law Council of Australia
64	Law Institute of Victoria
65	Public Health Association Australia
66	Hub Community Legal
67	National Legal Aid
68	Life Without Barriers
69	PeakCare Qld

70	Aboriginal Peak Organisations Northern Territory
71	Supreme Court of Victoria
72	Community Legal Centres Australia
73	Youth Affairs Council of Western Australia
74	Professor Stubbs
75	Telethon Kids Institute
76	Victorian Aboriginal Legal Service
77	NT Council of Social Service
78	YFS Legal
79	Aboriginal Medical Services Alliance NT
80	knowmore
81	Public Interest Advocacy Centre
82	Caitlin Akthar
83	Social Reinvestment WA
84	National Aboriginal and Torres Strait Islander Legal Services
85	yourtown
86	Queensland Family and Child Commission
87	Queensland Youth Housing Coalition Inc.
88	NSW Office of the Children's Guardian and NSW Advocate for Children and Young People
89	Just Reinvest NSW
90	Aboriginal Legal Service NSW/ACT
91	NSW Bar Association
92	Commissioner for Children and Young People SA
93	Legal Aid NSW

Appendix 4 Summary of government submissions received

Agency		Question 1 **Should the age be raised, and to what age?**	**Key arguments for answer to question 1**	Question 2 **Should there be exceptions?**	Question 3 **Should *doli incapax* be retained for under 14?**	Question 4 **Should there be a separate minimum age of detention?**	Questions 5, 6, 7 and 8 **What programs and strategies should be in place?**	Question 9 **Are new offences required for inciting children under the MACR to commit offences?**	Questions 10 and 11 **State/Territory specific issues; other issues**
WA	WA Police	Yes - 12	In-principle support for raising the MACR from 10 years. If the MACR is raised, WA Police will require a transition mechanism to refer children who fall below the minimum age to an appropriate government agency to provide a response that will manage community expectations and reduce harm. To simply raise the MACR with the attendant legislative amendment would be irresponsible and fraught with risk and community harm.	-	Supports that there is greater jurisdictional conformity regarding the application of *doli incapax* including legislative requirement for the onus of proof to be borne by the prosecution.	No - Under the principles of youth justice in WA, detention of a young person is only authorised as a last resort. The full range of options of sentencing should still be available.	Currently, if Police have concerns for welfare of a child aged under 10 years, they refer to the Department of Communities, or the child is returned to care of a parent or guardian. An increase in the MACR must be supplemented by comprehensive and appropriately funded intervention and support being available to young people under the minimum age, as they would no longer be managed within a law enforcement and justice capability. These young people would need to be referred to and managed by a specified government agency (most likely Communities) with that agency to provide appropriate intervention and diversion programs. Significant additional resources and funding would be required for the responsible agency to deliver these services, including to *regional and remote* communities. Programs would need to be developed in conjunction with WA Police and other service providers to address causal factors and immediately reduce risks of continued behaviour for the community. However, such programs are voluntary. Consideration could be given to bringing the parent/guardian to account (not via justice system) for the child's behaviour with education, awareness and parenting skills delivered to improve guidance and development of the child. Police seek to divert young people from the criminal justice system where possible. Diversion has been shown to be cost-effective and may reduce further offending. Police manage a number of community services for young people and their families, **but cannot compel** young people to engage with voluntary services.	-	For children between 10 and 12 years, between 1 July 2018 and 30 June 2019: WA Police issued: • 870 verbal cautions. • Over 900 written cautions. • Almost 600 referrals to a juvenile justice team for non-schedule offences. • This totals almost 2,400 diversions for this age-group. • Just over 1,400 matters were referred to the Children's Court of which 20 per cent were scheduled offences.
	Office of the Inspector of Custodial Services	Yes – in line with international standards	Evidence shows that exposure to the criminal justice system causes harm to children, limiting their chances of becoming responsible adults. Therefore, it is in the 'best interest of the	No	-	-	Community safety is an important consideration, but can often be achieved by intervention rather than detention. Detention does not prevent future crime, but increases the likelihood of reoffending.		The majority of young people (78 per cent) entering Banksia Hill under the age of 14 in the last five years, returned there.

Agency		Question 1 **Should the age be raised, and to what age?**	**Key arguments for answer to question 1**	Question 2 **Should there be exceptions?**	Question 3 **Should *doli incapax* be retained for under 14?**	Question 4 **Should there be a separate minimum age of detention?**	Questions 5, 6, 7 and 8 **What programs and strategies should be in place?**	Question 9 **Are new offences required for inciting children under the MACR to commit offences?**	Questions 10 and 11 **State/Territory specific issues; other issues**
			child and the community' that we at least meet international standards. The United Nations Committee on the Rights of the Child (UN CRC) (2019) cites the large volume of documented evidence in the fields of child development and neuroscience that supports a MACR of at least 14 years. The UN recommends one standardised age below which children cannot be held criminally responsible, *without exception* (such as for serious offences). "Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development". OICS also submits that the presumption of *doli incapax* may not work effectively in practice. The UN has commented that although there is some support for the idea of individualised assessment of criminal responsibility, this leaves much discretion to the court and results in discriminatory practices. Also, children with developmental delays or neurodevelopmental disorders or disabilities (e.g. autism spectrum, FASD or acquired brain injuries) should not be in the youth justice system at all. "If not automatically excluded, such children should be individually assessed." OIC submits that consideration is given to how improvements can be made to better understand the developmental stage of young people.				However, there needs to be some form of intervention where young people are involved in criminal behaviour even if they are not to be held criminally responsible.		Reception and discharge data (TOMS)[366] shows that one in five (20 per cent) young people in Banksia Hill in the last five years has been under 14. This includes 71 individuals aged 10 or 11. Often it appears that young people are placed in Banksia Hill because *a responsible adult cannot be found and alternatives are not readily available*. In the last five years, 62 per cent of young people received into Banksia Hill were detained for 2 days or less. Recent research by the Telethon Kids Institute shows that nine out of ten young people at Banksia Hill had at least one form of severe neurodevelopmental impairment (Bower, 2018). More than one in three had FASD, but only two young people had been previously diagnosed. OICS concludes from this, that it is highly likely that young people who do not have the capacity to fully understand their criminal behaviour, are being sent to Banksia Hill.
	Court and Tribunal Services	-	If the MACR is raised to 12 or 14 years, or the age depends on the nature of the offence committed then – *significant resources* would be needed to deal with the young people who are thereby not brought before the court, but who are committing antisocial acts and are aged between 10 and 14 years.	-	-	-	Supports must be provided to young people aged 10 to 14 years who are behaving in an antisocial or dangerous manner regardless of whether their conduct is met with a criminal sanction or not. It may be that the issues addressed in the principles and objectives of the *Young Offenders Act 1994* (WA) could be addressed by the Department of Communities or other departments to ensure that young people aged 10 to 14 years who are behaving in an antisocial	-	-

[366] TOMS is a confidential data-base and numbers should not be publicly disclosed unless authorised.

Agency		Question 1 **Should the age be raised, and to what age?**	**Key arguments for answer to question 1**	Question 2 **Should there be exceptions?**	Question 3 **Should *doli incapax* be retained for under 14?**	Question 4 **Should there be a separate minimum age of detention?**	Questions 5, 6, 7 and 8 **What programs and strategies should be in place?**	Question 9 **Are new offences required for inciting children under the MACR to commit offences?**	Questions 10 and 11 **State/Territory specific issues; other issues**
							way are given the best opportunity to cease the offending conduct and to work towards rehabilitation through supports in the community.		
	Mental Health Commission	Yes – in line with international standards	-	-	-	-	If the MACR were raised to 14 years, there will be a cohort of children aged below 14 years who would no longer be identified by, or receive mental health services through some of the diversionary programs available under the justice system. These programs can be effective in assisting children to change their behaviour. This is particularly so, if the child has no prior engagement with mental health services. As a result, it will be important for relevant agencies to collaborate to ensure these children have access to similar services that operate outside of the criminal justice system. As well, it will be important to ensure that any new services are culturally secure for Aboriginal children. In order to progress this work, it will be necessary, in the first instance, to identify the key points in the system where the children could be identified, assessed and provided, where appropriate, with ongoing services. Key agencies including the MHC, Justice, Communities and the WA Police will need to work collaboratively to carry out this work to ensure that these children do not miss out on the support services they currently access. It will also be very important to ensure that any new services are culturally secure, given the over representation of Aboriginal children in the criminal justice system. MHC currently provides services for a number of diversion programs for children: • Provides capacity to service children referred for Alcohol and Other Drug treatment who are participants of the Children's Court Drug Court.	-	Links program data confirms that there are a significant number of children aged 10 to 13 years who currently receive services through this diversion program.[367] During July 2016 to Dec 2019, there were a total of 1473 referrals[368] to Links • Of these, 181 were aged 10-13 years (12.3 per cent). • Of those referred for the first time, 114 were aged 10-13 (12.1 per cent). • Of those 114 children, 54 children had previously had contact with mental health services. Of that 10 children were currently managed by a mental health service. Recent data may indicate that there is increasing demand by children entering the youth justice system requiring mental health services. • During June 2018 to June 2019, there were 388 referrals to Links. • Of these, 62 were aged 10-13 years (16 per cent). • 273 children were referred for the first time, with 42 aged 10-13 years (15.4 per cent). • Of those 42 children, 24 had a history of receiving mental health services (57.1 per cent) and 4 children were currently managed by a mental health service (9.5 per cent).

[367] Please note that the data is approved for release to the Department of Justice for internal planning purposes only, and must not be disseminated beyond those purposes.
[368] This is not a count of individuals - some young people are referred multiple times.

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							• Therapeutic treatments for children aged 14-17 years diverted by Police under the cannabis intervention requirement scheme. • Young Persons Opportunity Program which is a voluntary drug treatment program for young people (12 to 17 years-of-age inclusive) with *low level offending* who are in contact with a juvenile justice team and who have emerging or significant illicit drug related problems. • The Youth Supervised Treatment Intervention Regime (YSTIR) is a voluntary program to assist young people (10 to 17 years-of-age inclusive) who attend the Perth Children's Court Drug Court and have *moderate level offending*. Participants who plead guilty to an offence, and who would normally receive a fine or community based order, may be referred to the program. • The Mental Health Court Diversion Program is a partnership between the MHC and Justice, which offers a tailored response to offenders appearing in courts experiencing mental health problems or illness. Links is the juvenile component of the Program, and is a voluntary mental health assessment and support service for young people who appear in the Perth Children's Court.		
	Department of Education	-	If the MACR were to be raised, a focus on preventative strategies for the children who have been identified as being at high-risk of anti-social behaviour would be required.	-	-	-	The preventative strategies would need to designed and delivered collaboratively with agencies such as WA Police, Communities, Justice, Health and Education. The DOE recognises the critical importance of promoting students' resilience and wellbeing through building healthy, respectful and positive relationships in safe and supportive environments. This is a protective factor for students who may have a propensity for engaging in ant-social or potentially criminal behaviour.	-	-

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							DOE has in place a number of programs to enhance social and emotional competencies including self-control, emotional awareness, and interpersonal and problem solving skills. Students with disability who exhibit behaviours that might breach the criminal code can be referred to relevant services (e.g. for sexually inappropriate behaviours). Family Support Networks are a partnership between the community sector and the Department of Communities to provide a common entry point to services and deliver earlier and targeted support to families with complex problems. The DOE does not provide psychological therapy services for students, but are provided by interagency partners. Such services would need to continue to be made available to young people who fall below an increased MACR and would previously had access to such services through the justice system. Other initiatives such as Target 120 (which works with high-risk and recidivist youth) may assist families with accessing support services, build parenting skills and help young people to better engage in education.		
	Department of Communities	Yes –14 years	Communities supports an increase in MACR in line with UN recommendations and other recent inquiries undertaken by the NT Government. Submission also refers to the inconsistency and lack of alignment in the weight given to a young person's ability to make sound decisions between the juvenile justice system and the health system in Australia.	A mechanism should be put in place to avoid the criminalisation of children and young people for certain types of offences.	If MACR is raised to 14, *doli incapax* should be retained but raised to 16 years at least.	Should be same age as MACR. Discretion for ages 12-13 being charged as a 14 year old if appropriate.	Social reinvestment strategies work to improve opportunities, health and education in at-risk communities. Programs and services should be placed-based, trauma-informed, culturally safe, accessible, integrated and co-designed with young people and their communities. Key agencies must work together to build on existing initiatives, address current gaps and identify opportunities to tackle emerging issues.	To the extent that they do not already exist, new offences should be considered.	Given the very high proportion of Aboriginal young people in detention, Communities supports any move towards reducing this overrepresentation.
	Office of the Director of Public Prosecutions	No	The MACR should be maintained at the age of 10 years. The current system whereby there is a range of ages between which the prosecution is required to prove criminal responsibility is appropriate. However support is given for any initiative which reduces the incarceration of young people.	-	-	-	-	-	-

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			If there is to be reform, consideration could instead be given to changing the test to be applied for establishing criminal responsibility rather than a blanket increase in the MACR. Alternatively consideration could be given to the range of consequences available on a finding of criminal responsibility. Children aged 10 to 14 years are rarely charged with minor offences unless they are regularly committing them, and are generally subject to diversionary measures. Accordingly, only the most serious offences, or the most serious repeat offenders, end up in the court process.						
	Department of the Premier and Cabinet - Aboriginal Policy and Coordination Unit	-	-	-	-	-	To ensure the Government's progress in reducing the number of young people in detention in general, and more specifically to assess how the laws on the age of criminal responsibility are working, it will be necessary to use data additional to the AIHW data set to build a more detailed picture. Mapping the locality of usual residence will assist in assessing the adequacy of existing government programs, identifying gaps in service delivery, and considering whether changes are required in the delivery of these programs.	-	Australian Institute of Health and Welfare (AIHW) data for 2017-18 shows that indigenous young people are over-represented in the youth justice system (including for children under 14 years) and the (Telethon Kids Institute) Banksia Hill Study shows a high proportion of detainees suffer some form of neuro-developmental impairment. The data suggests that the WA Government needs to direct effort toward improving outcomes for Indigenous youth. The WA Government is working towards delivering Our Priorities. Under the goal of achieving A Safer Community are two priorities of reducing youth reoffending and to reduce illicit drug use. A third priority of reducing the over-representation of Aboriginal people in custody will. The WA Government is also working towards national Closing the Gap targets. The Department of the Premier and Cabinet is also leading the development of an Aboriginal Empowerment Strategy. The implementation of the strategy and accountability measures for Government Agencies will be a critical point of coordination to overcome structural issues that continue to enable a disproportionate number of

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									Aboriginal people to be represented in the justice system.
	Commissioner for Victims of Crime	Yes	The A/Commissioner supports, in principle, an increase in the age of criminal responsibility. An increase would be consistent with prevailing research into child offending, including that related to brain development in children and the complex socioeconomic factors that can lead to child offending. Increasing the age of criminal responsibility would also bring the State in line with many international jurisdictions.	-	-	-	-	-	-
SA	Department for Human Services	General support, no age specified		N/A	Support retention of *doli incapax*	N/A	Government will need to consider strategies that focus on diversion, education, restorative approaches and referral to age appropriate therapeutic support services. This may include, for example, intensive family and individual supports and alternative accommodation options in a less restrictive environment.		In South Australia, anecdotal evidence indicates that increasingly children enter the youth justice system in circumstances that suggest there is unmet need around their care and protection in their community. There is an opportunity to intervene early with young people with complex needs, and provide community supports which address risk factors, before children become entrenched in the justice system.
	Department for Child Protection	Supportive, age 14	Would have benefit of reducing the criminalisation of children who are in care. Children in care have often experienced significant trauma which can present as complex and risk-taking behaviour. Increasing the age could provide a greater opportunity to move towards a supportive and restorative practice approach. There is also strong scientific literature regarding cognitive, emotional and moral development, which also supports the age being raised. The pre-frontal cortex, responsible for decision-making, is last area of brain to develop, and is not fully developed until the age of 25. Children of 10 cannot be expected to have a fully developed brain	Type of offence should not have an impact on the age, otherwise it negates the scientific and developmental evidence on brain development	Can provide a benefit for those children whose development is adversely impacted by environmental and hereditary factors, could be beneficial to retain	If age is raised to 14, that should also be the minimum age of detention.	Important to consider the factors that correlate strongly with young offending. Children in care and children with significant developmental trauma are overrepresented in the youth justice system, and therefore multi-agency, integrated and effective programs that focus on these groups are likely to see positive outcomes. Programs that protect children from trauma would also likely reduce offending and should not be overlooked (e.g. positive parenting and connections for children, rather than solely offending behaviour) Programs should aim to address underlying causes of offending behaviour and not just the behaviour itself	Requires further exploration but could be a helpful mechanism to protect children	An increase in the age of criminal responsibility may see an increase in demand for diversionary and preventative programs. Early intervention strategies need to be developed along with skilled service provisions who can identify children and families at risk and offer the support and safety planning required to address these concerns to prevent pathway into the care system or future exposure to the youth justice system
	South Australia Police	Not supportive	May result in adverse outcomes for young people aged 10 to 14, their families, and communities. By virtue of jurisdiction of the court, young people gain benefit of departmental supervision. Will undermine public confidence, victims will be aggrieved. It	N/A	The presumption provides a sufficient and well-established protection for	SAPOL recommends preservation of the principle that the power to detain is commensurate	In Whyalla, a Young Offender Prevention Program was being delivered by Mission Australia, funded by AGD. Delivered strong results in terms of no reports of repeated offending by participants, improved school attendance, greater community and cultural engagement, and	SAPOL support the need for new criminal offences to close the loophole whereby an adult intentionally	SAPOL recommends that many arguments which suggest that ACR should be lifted, in particular to the age of 14, because a youth under that age does not know what they are doing is wrong, represent an overreaction to such an complex issue, with a 'one

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			potentially sends the wrong message to young people that they are not accountable for their conduct, and is likely to result in a substantial increase in anti-social conduct		young people, but could be applied more effectively in practice. (too many statements required, should only be used for offences where *mens rea* is necessary)	with the criminal activity or frequency of same and at the discretion of the decision maker faced with this task. Should be the same as the ACR	stronger family connections. Should be supported to work with young people above, or below, the MACR. Best practice for protecting community would be that children who commit anti-social or criminal behaviours are held to account for that behaviour, but that may fall outside a criminal justice setting	avoids criminal responsibility by using a youth. Offences related to adults using children either under ACR or *doli incapax*.	size fits all' approach. Age cannot be arbitrarily lifted, disregarding the fact that every child is different. Detention is used as a last resort - "if the outcome (imprisonment) is used to justify a reason to lift the ACR, then the actual solution is to change the outcome, not the ACR."
	Director of Public Prosecutions	No view	"Whether the minimum age of criminal responsibility should be raised and the field of operation of the presumption of *doli incapax* correspondingly contracted is quintessentially a policy question about which the ODPP has no view" The age should be set taking into account the underlying complexity and acquisition of autonomy. Frontal lobe maturity is found not to occur until a child is approximately 14 years old.	N/A	N/A	N/A	Any amendment raising the age will exclude some children who possess capacity to understand the serious wrongness of their conduct from any form of intervention or punishment within the criminal justice system.	N/A	The impact of raising the age is likely to be minimal on the ODPP - vast majority of youth prosecutions conducted by SAPOL.
	Commissioner for Victims' Rights	Supportive, age 12 preferred	Any policies and practices must take into account the wide variance in seriousness of offending and focus not only on the care and protection of the juvenile but on victim recognition, public safety, and prevention of further victimisation.	Offences such as murder, manslaughter, sexual assault and cause death may need a different approach that remains at a lower age. Emphasis on rehabilitation, but accountability for more serious crimes	Yes - raising age of criminal responsibility to 12 or 14 without *doli incapax* is a risk for those children above that age who have not matured and cannot form the necessary intent to commit the crime. Around the age of puberty children develop at vastly different and inconsistent rates	Detention of young offenders should be used as a last resort - did not specify a minimum age for this	Victims of violent offences must be entitled to compensation Must be a practical consideration of what will happen for children who are below the age of criminal responsibility that are found by police - who will take care of them, referral into program, management of behaviour, flexibility for truly horrific crimes, system to track how a child is progressing	It is recognised that some older offenders recruit younger children into criminal activity, and there should be some recognition and penalty for the older recruiters.	Victims are concerned that any changes would be made prior to any implementation of a practical system that works to protect the community and assist the young person

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	Guardian for Children and Young People	Supportive, age 14	"I endorse the information contained in the joint submission on the Minimum Age for Criminal Responsibility made by the Law Council and the Australian Medical Association" In line with Australian and New Zealand Children's Commissioners and Guardians November 2019 communique and the Law Council of Australia and Australian Medical Association joint submission The current age disproportionately affects Aboriginal children, those with disabilities, and those in care. Detention does not act as an effective deterrent or serve a rehabilitative function	See submission of Law Council and Australian Medical Association	See submission of Law Council and Australian Medical Association	See submission of Law Council and Australian Medical Association	Government will need to consider strategies that focus on diversion, education, restorative approaches and referral to age appropriate therapeutic support services. This may include, for example, intensive family and individual supports and alternative accommodation options in a less restrictive environment.	See submission of Law Council and Australian Medical Association	In SA, anecdotal evidence indicates that increasingly children enter the youth justice system in circumstances that suggest there is unmet need around their care and protection in their community. Opportunity to intervene early before becoming entrenched in justice system.
	Chief Justice and Judge of the Youth Court	Supportive, age 14	In line with United Nations Committee on the Rights of the Child	No	Raising age to 14 means it will have no application - causes confusion amongst prosecutors and legal practitioners	No - apply age to all offences rather than have a separate minimum age of detention	There must be an agreement in place to identify which government agency will take responsibility for addressing the behaviour of this group of children and young people. The fact the cohort would no longer be charged with an offence and will not be entering the youth justice system will not mean their anti-social and at risk behaviours will cease. Currently mandate to supervise children and young people is undertaken by Youth Justice, with services and programs delivered by not for profit organisations. Any programs or services directed at Aboriginal children and young people must be culturally appropriate and delivered by Aboriginal people (Chief Justice added that this should be accompanied by resourcing) Particular focus on drug use required	N/A	Support is conditional upon agreement to identify which government agency will take responsibility
	Commissioner for Children and Young People	Supportive, age 14	10 year olds may know what is "good" and "bad", but are unable to distinguish between what is "bad" and what is "criminal". According to neurobiology, a young person is "unable to make any rational choice, let alone a rational choice to commit a criminal act" It is more cost effective to keep a child out of the justice system, both economically and socially	N/A	N/A	Detention should only be used as a last resort, for older children and more serious offences.	Any legislative change must be accompanied by a campaign to inform the community that there are alternatives to criminalising children, which result in a safer society with better economic outcomes. The primary response by government should be to prevent children from committing criminal acts in the first place, appropriately treat children who display behaviours that constitute an offence through a public health approach. Secondary response to divert children who have committed offences out of the system. Tertiary response should be	N/A	Often children are not property diagnosed when they enter the justice system (with neuro-disability), it is concerning that these children are not being treated in a therapeutic way for their disorders.

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							therapeutic and designed so that children are rehabilitated and can easily reintegrate back into society		
	Commissioner for Aboriginal Children and Young People	Supportive, age 14	2 in 5 (39%) of Aboriginal children under supervision in 2017-18 were first supervised when aged 10-13, compared with about 1 in 7 (15%) non-Indigenous young people. Raising the age to 14 would be an appropriate step in addressing the issue of inappropriate child behaviours with a public health response and not criminalise children who are scientifically incapable of regulating their behaviour. There is a significant number of Aboriginal in detention who suffer from foetal alcohol syndrome - fare worse in terms of general health in detention compared to general community. The younger a child has contact with the youth justice system, the more likely it is for the child to have ongoing contact with the criminal justice system	N/A	No - not all Aboriginal children are afforded the defence nor is there sufficient understanding on behalf of both the prosecution and the defence as to who is tasked with proving whether a child knew or didn't know that their actions were intently criminal. Raising MACR to 14 would remove ambiguity, ensure all children are treated the same	N/A	There must be a transition within the justice system to respond with a rehabilitative focus, rather than a punitive measure. Need a whole of government co-designed strategy, that allows the Aboriginal communities and their ACCOs (Aboriginal Community Controlled Organisations) to deliver programs that address the root causes of offending and emphasis on building stronger and safer communities.	N/A	CACYP will undertake to establish a working group to develop proposal options regarding diversion of Aboriginal children away from the youth justice system and to ensure culturally informed therapeutic approaches to addressing 'at-risk' juvenile problem behaviour amongst Aboriginal children and young people.
ACT	ACT Policing	Supports national consistency		No	No	ACT Policing does not support the intent of a minimum age of detention as it shifts the focus away from the age of criminal responsibility towards appropriate age of custodial sentencing.	Appropriate diversionary options for children under the designated age		Different ages of criminal responsibility between Australian jurisdictions is a particular concern for the ACT given the proximity and interaction ACT residents have with NSW and vice versa.
	Community Services Directorate								
Cth	National Indigenous Australians Agency	Supports an increase		Yes, for serious crimes	Recommends commissioning further		Recommends legislative reform be accompanied by additional research, supports, and investment in prevention and early intervention programs and		

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					research regarding the effectiveness of the rebuttable presumption of *doli incapax* in practice before the presumption is removed or any reform to the presumption is made.		services, to reduce the incarceration rate of Aboriginal and Torres Strait Islander young people.		
	Australian Federal Police	No view	The AFP sees significant merit in maintaining national consistency and aligning with international benchmarks.				For operational purposes, the AFP notes that the legislation must provide for forensic procedures to be carried out on those under the MACR, where they are a volunteer whose parents consent to the procedure.	The AFP holds concerns that children under the MACR are at risk of being manipulated or utilised by adults to further criminal enterprises and activities.	

Appendix 5 Summary of prevention and diversion programs in Australia

Diversion from the criminal justice system

Australian Capital Territory

Diversionary programs in the Australian Capital Territory (ACT) are coordinated by Child and Youth Protection Services (CYPS) within the Community Services Directorate (CSD), which has statutory responsibility to support children, young people and families requiring a care or justice response.

Programs available include the After Hours Crisis and Bail Service, which assists ACT Policing to avoid detention for young people overnight by assisting with bail decisions (similar service provided by CYPS during hours).

Police diversion programs and services

ACT Policing diversion activities are governed by the youth justice principles established under section 94 of the *Children and Young People Act 2008* (ACT), and include the following options:

- Diversion of children and young people to alcohol or drug treatments instead of charging them if the person has committed an offence against the *Liquor Act 2010* (ACT) or a minor drug possession offence.
- If a young person has been apprehended for an offence and does not deny their involvement, police may issue a caution.
- ACT Policing is required to refer 100 per cent of eligible young offenders to the ACT Government Restorative Justice Unit.
- The Alcohol and Other Drugs Diversion program is a partnership between ACT Policing and ACT Health to divert young people from the youth justice system through assessment and education. The Youth Alcohol Diversion program provides diversion to education for young people under 18 years who are intoxicated, or in possession of, or consuming, alcohol in a public place.

Police Community Youth Club (PCYC)

PCYC is the key service provider in the ACT that works with children and young people aged 12 to 18 years with programs specifically targeted at diversion. PCYC also provides a range of programs and case management for children and young people who may not meet the threshold of statutory involvement.

Restorative Justice Scheme

The Restorative Justice Scheme, run by the ACT Government Restorative Justice Unit (within the Justice and Community Safety Directorate) provides the opportunity for eligible and suitable offenders, victims, and other affected parties to take responsibility and help 'put things right'. Children and young people are mostly referred to the Restorative Justice Scheme by ACT Policing and the ACT Children's Court.

Court diversion processes

The ACT Children's Court is currently finalising a practice direction which would see children and young people diverted away from the criminal justice system. The practice direction incorporates procedures designed to have the young person and his or her family engage in rehabilitation pathways with relevant agencies, in particular drug and alcohol programs, education and physical and mental health.

Where a young person can demonstrate adherence to a rehabilitation pathway, it is anticipated that at the end of that time they will receive a certificate recognising the accomplishment, and the charges laid before them and now before the court will be dismissed as if they never existed.

The Court Alcohol and Drug Assessment Service is a scheme in the ACT to engage clients during proceedings at various stages, and refer to support services to negotiate and develop appropriate and achievable treatment plans.

Support for children within youth justice system

Education programs

The Education Directorate Flexible Education Program manages the Murrumbidgee Education and Training Centre (METC) which is located at Bimberi Youth Justice Centre (Bimberi) and provides a range of programs for youth in detention from age 10 to 21 years. METC also provides students with the option to participate in the Respectful Relationships Program (RRP). The RRP provides a framework for feedback designed to assist young people to demonstrate respect for themselves, others and the environment. Students transitioning from METC can access support from the Off Campus Flexible Learning Program upon their release. Program staff support young people and their transitions back to education or employment.

Health services

Psychiatric and psychological treatment and intervention are provided upon remand at Bimberi. The Alcohol and Drug Services, Police Court Drug Diversion Service provides support for young people 12 years of age and older, for alcohol and other drug screening, assessment, information and education. These children can be referred to the Youth Counselling Service or other allied health services.

Community services and programs

The ACT Government Community Services Directorate works with young people in detention or on community-based court orders through CYPS case management and Bimberi. The foundation of the case management program for children and young people in youth justice is assessment of the needs and criminogenic risk of a young person.
Community programs available for young people in detention or community corrections include:

- Police Community Youth Club (PCYC);
- Youth Alcohol Diversion program;
- CatholicCare Youth and Wellbeing;
- Anglicare's 'The Junction Health Service';
- Winnunga Nimmityjah Aboriginal Health Service;
- ACT Council of Social Services (ACTCOSS) Gulanga Program;
- Multicultural Youth Services;
- Youth Transition from Care program;
- Youth Emergency Accommodation Network, 'Our Place'; and
- Family Group Conferencing for Aboriginal and Torres Strait Islander families.

Bail and court support services

The After Hours Bail and Support Service aims to keep young people out of custody by providing alternative community-based options to being remanded in Bimberi and assisting young people on justice orders to comply with the conditions of their orders.

The Court Alcohol and Drug Assessment Service is a scheme in the ACT to engage clients during proceedings at various stages and refer to support services to negotiate and develop appropriate and achievable treatment plans.

Supported accommodation

Bimberi Residential Services (Narrabundah House Indigenous Supported Residential Facility) provides supported accommodation services to young Indigenous men, aged between 15 and 18 years. Narrabundah House is a community-based accommodation program that provides Indigenous males subject to community-based justice orders with supported accommodation in a safe, structured and inclusive environment. Narrabundah House utilises a resident-focused, mutually respectful and goal-orientated approach to meet the needs of residents. The program aims to develop the young person's independent living skills, connections to culture and engagement with services, while consolidating participation with employment, education and training engagement.

CSD also provides a 'Youth Transition from Care' program that supports young people in out of home care and involved with youth justice, who are at risk of an unsuccessful transition to independence. CSD also provides youth housing and homelessness housing services including the Youth Emergency Accommodation Network, 'Our Place', and other youth housing programs. These services support young people through early intervention, crisis accommodation and longer-term supported accommodation to enable young people to transition to independent housing, employment and education. They also provide outreach, conflict resolution, education, employment assistance, mentoring, life skills and tenancy support to youth aged 15 to 25 years (including young people who are transitioning from the youth justice system, care and protection or homelessness services).

New South Wales

Diversion options for young offenders in New South Wales (NSW) include legislative measures as such as those established by the *Young Offenders Act 1997* (NSW), as well as early intervention programs provided across government, including by the Department of Communities and Justice, the Department of Education and NSW Health.

Youth justice diversion programs aim to identify and address criminogenic risk factors and behaviours as well as support services for education, mental health and family dysfunction, which can all be factors strongly influencing criminal behaviour. All diversion programs have a common objective of identifying and addressing the underlying causes that contribute to criminal behaviour, to put in place an intervention strategy before offending occurs or escalates.

The NSW Police Force (NSWPF) is usually the first point of contact with the criminal justice system for young people who have offended or engaged in anti-social behaviour. The *Young Offenders Act 1997* (NSW) provides options for NSWPF to give a warning, caution or refer a young person to a Youth Justice Conference as an alternative to court proceedings. Policing options are then supported by services and programs to address the underlying causes of criminal behaviour.

In 2016-17, the NSWPF issued 31,941 infringement notices, made 558 referrals to Youth Justice Conferences and issued 9,878 warnings and 6449 cautions under the *Young Offenders Act 1997*. The total number of diversions far exceeds the number of young people who proceeded to court (10,513). An even smaller number dealt with by the court received an order that required management by Youth Justice NSW, with only around 1500 young people a year being supervised by Youth Justice NSW.

Intervention and diversion programs are available at several points in the life-path of a young person in contact with the criminal justice system. These can occur as:

- early intervention: child protection services, education providers or other service providers identify children who may be vulnerable or require additional support, so that steps can be taken to address their needs and help them stay out of the criminal justice system;
- pre-court diversion: NSWPF or courts use the Young Offender's Act 1997 to guide interventions;
- pre-sentence diversion: bail support, case work for young people in the community or on remand; and
- post-conviction: interventions to reduce reoffending.

Youth diversionary programs can include some or all of the following elements:

- needs assessment or criteria to determine eligibility (using verified instruments);
- provision of or referral to health, education, disability, accommodation and other services;
- restitution to victims of the offence;
- completion of community service hours;
- mandated avoidance of situations/locations that may lead to committing another offence for a specified period;
- family intervention;
- evaluation and review; and
- interventions that address criminogenic needs.

Youth on Track is a voluntary early intervention scheme for 10 to 17 year olds, which identifies young people at risk of long-term involvement in the criminal justice system. It covers 13 police districts in NSW. The Youth on Track scheme has a multi-agency approach, with the involvement of the Department of Education, the Department Communities and Justice and NSW Health, in addition to non-government organisations (NGOs). Youth on Track provides police and school staff with an opportunity to refer young people identified to be at medium to high risk of reoffending to an alternate support program. Youth on Track operates alongside and after formal contact with the criminal justice system.

The Youth Koori Court (YKC) is a dedicated part of the Children's Court for Aboriginal and Torres Strait Islander young people who have been charged with a criminal offence and who are willing to participate. The YKC has the same powers as the Children's Court and involves the Aboriginal community in the court process.

Northern Territory

On 20 March 2019, the Minister for Territory Families introduced the Youth Justice and Related Legislation Amendment Bill and the Care and Protection of Children Amendment Bill to the Legislative Assembly and referred both those Bills to the Social and Economic Scrutiny Committees for report. The report was released on 16 July 2019. The Bill contains the following important amendments:

- new limits to reduce the length of time young people are held in police custody;
- improved access to legal assistance and support for young people held in custody;

- conditions that favour bail for young people and decriminalise the breach of bail conditions as an offence;
- removing barriers to diversion;
- improved understanding of young people's rights in detention;
- protecting the right to privacy for court proceedings; and
- ensuring consistency in commencing legal proceedings.

Amendments introduced in the Care and Protection of Children Amendment Bill 2019 include:

- mandating early assessment, intervention and support;
- strengthening the principle of family connection;
- improving care planning;
- improving court orders;
- enhancing the legal process; and
- formalising the transition to independence.

The NT Government has committed an investment of $229.6 million over the next five years to improve outcomes for Northern Territory's vulnerable children and families. This investment is the largest made in youth justice and child protection in the history of the Northern Territory and will fund the long-term changes needed to better support children and families.

The NT Government's implementation plan, *Safe, Thriving and Connected: Generational Change for Children and Families* includes delivering on the intent and direction of the Royal Commission recommendations by the year 2021. This includes implementing restrictions on placing children younger than 14 in youth detention and measures to accommodate an increase in the age of criminal responsibility to 12 years old. The NT Government remains committed to this plan.

The NT Government has further committed a total of $9.4 million of recurrent funding for Youth Diversion programs. This includes $5.5 million for the Back on Track Program, $3.2 million for Community Youth Diversion Programs and $1.2 million for Strategic Youth Justice Grants. The Strategic Youth Justice Grants will provide the opportunity for Territory Families to address identified gaps and needs as they arise and allow for innovation in the community youth program space.

NT Government is committed to providing greater access to diversion for young people in the Northern Territory. The Youth Services Directorate, Territory Families is developing a regionalised approach to future Community Youth Diversion Programs, which recognises Aboriginal self-determination and cultural authority, supports the implementation of Local Decision Making and the Aboriginal Justice Agreement and encourages locally controlled service provision.

The Community Youth Diversion Grants Program will provide ongoing funding for case management services, programs and activities for young people subject to formal youth diversion (as defined in the Youth Justice Act) and to vulnerable young people aged eight years and above who are at risk of future contact with the formal Youth Justice System.

The Back on Track program will provide a holistic program response for young people aged 8-17 years and will divert young people away from the youth justice system and provide alternatives to detention. The key aim of the program is to get young people back on track, while taking responsibility for their actions and understanding the consequences of their offending behaviour.

The Back on Track Program will be delivered in the Greater Darwin, Alice Springs, Tennant Creek, Nhulunbuy and Katherine regions to two groups of children and young people including 14-17 year olds and 8-13 year olds. This program is a sentencing option available to courts. It will provide the courts with another option to direct young people (10-17 years) as an alternative to detention. Police, government agencies and non-government agencies will also be able to refer young people, including those under the age of criminal responsibility (aged eight or nine years) to the program. Existing options such as bail support services, community work orders, good behaviour orders, suspended sentences and alternative detention orders will remain.

These programs, alongside the other Youth Services Directorate funded initiatives (such as supported bail accommodation services, Intensive Youth Support Services and Restorative Justice Conferencing), will provide a coordinated system of intervention strategies aimed at supporting young people who have come into contact with the youth justice system.

The Specialist Assessment and Treatment Services at Territory Families currently deliver mental health screeners and risk of recidivism assessments. If there is a mental health issue they can follow up with referrals to NGOs. They currently deliver criminogenic and other needs programs, such as: Step Up (family violence), Love bites (healthy relationships) and Mooditji (life skill focussed). Once they become fully established, they will be delivering comprehensive and holistic assessments (psychology, occupational therapy, speech) and further programs – both within Detention Centres and bail support accommodation in both Alice Springs and Darwin.

Queensland

In Queensland, there are a number of alternatives to children being charged with a criminal offence. These include:

- For all but 'serious offences' (generally, those that attract a maximum penalty of 14 years imprisonment for an adult), police must consider whether it would be more appropriate to use one of these options before starting a proceeding:
    - Take no action.
    - Issue a police caution.
    - Refer to a restorative justice conference service run by Youth Justice, which involves the young person meeting with the victim of the crime, learning about the harm that has been caused and developing an agreement with the victim on how to repair that harm.
    - Refer to a graffiti removal program, which holds young people who commit graffiti offences accountable for their behaviour by doing unpaid graffiti removal work in the community.
    - Refer to a police drug diversion, a legislated diversion program that allows police to offer an eligible person the opportunity to participate in a drug diversion assessment program, as an alternative to prosecution.

Where legal proceedings are instigated, courts have the power to:

- dismiss charges if the police should have taken no action, administered a caution or made a referral to a restorative justice conference, and may instead administer a caution, direct a police officer to administer a caution, or make a restorative justice referral; or
- make a referral to a restorative justice conference.

The following initiatives are not strictly alternatives to criminalising behaviour, but facilitate responses and consequences that are less criminal in nature:

- Supervised community accommodation as an alternative to remand in custody allowing older children on remand to live in supervised bail houses in the community instead of detention centres.
- Bail support services delivered by non-government organisations to assist children and young people successfully complete bail requirements.

The Queensland Government has developed a Youth Justice Strategy 2019-2023, in consultation with relevant stakeholders. A number of measures are in place as part of the Youth Justice Strategy, including:

- Restorative justice processes to reduce the over-representation of Aboriginal and Torres Strait Islander children in the justice system by diverting children from court to restorative justice conferences.
- The Transition 2 Success program (T2S): a vocational training and therapeutic service model delivered in a community setting to young people aged 15-17 years who are involved in the youth justice system or are assessed as being at-risk of entering. The model enhances service delivery through local partnerships between Youth Justice, Education Queensland (such as local secondary schools and Senior Guidance Officers), registered training organisations, not-for-profit agencies, community groups and local businesses. The purpose of T2S is to reduce risk factors for offending associated with disengagement from education, training and employment as well as the associated behaviours needed to access and maintain those opportunities. Graduates are linked directly to employers and/or education services to transition to long term opportunities.
- The Youth Justice First Nations Action Board was developed to help Youth Justice develop culturally appropriate ways to reduce over-representation of Aboriginal and Torres Strait Islander people in the youth justice system.
- The Changing habits and reaching targets (CHART) intervention program aims to change behaviour to help reduce the risk of young offenders re-offending.
- Graffiti removal programs are a way young graffiti vandals are made accountable for their behaviour by doing unpaid graffiti removal work in the community.
- Police drug diversion is a legislated diversion program that allows police to offer an eligible person with the opportunity to participate in a drug diversion assessment program, as an alternative to prosecution.
- Local solutions to youth crime such as the ‘Townsville Stronger Communities – Community Youth Response’ which incorporates a number of consensus-focused, place-based solutions to address youth crime developed through independent consultation with the local community).
- Supervised community accommodation as an alternative to remand in custody allowing teens on remand to live in supervised bail houses in the community instead of detention centres.
- Expanded bail support to assist children and young people to successfully complete bail requirements.

South Australia

There are three pieces of youth justice specific legislation in South Australia: the *Young Offenders Act 1993* (Young Offenders Act), the *Youth Court Act 1993* (YC Act) and the *Youth Justice Administration Act 2016* (YJA Act). Administratively, Youth Justice sits within the Department of Human Services.

The Young Offenders Act and the YJA Act are intended to be complementary to each other and read together in order to ascertain the full picture of how young people must be treated and dealt with following criminal offending. The Young Offenders Act sets out how both minor criminal offences and more serious criminal offences are dealt with.

Minor offences

For minor offences, South Australia Police has a wide range of options to utilise, including informal cautions, formal cautions, undertakings to pay compensation for damage or to the victim, undertakings to complete community service up to 75 hours, or an undertaking to apologise to the victim or to those who suffered loss as a result of the offending.

Serious offences

Other offences can be dealt with in a family conference between the offender, their guardians or relatives and the victim of the offender and their guardians (if a minor victim), as well as any other appropriate people. Family conferences can determine the outcome for the young person in a similar manner to above, including with community service up to 300 hours, undertakings for compensation/restitution, apologies, or a formal caution.

Youth Training Centre Programs

If a young person is remanded or sentenced to a period in detention at the Adelaide Youth Training Centre (AYTC), the YJA Act sets out how the AYTC is to be run and administered. There are a number of rehabilitative programs run in the AYTC to assist residents in their rehabilitation and education, including specific programs for Aboriginal and Torres Strait Islander young people in areas of offending behaviour, cultural, health and development, family and social, and community engagement.

The departmental Aboriginal Cultural Inclusion Strategy seeks to ensure that Youth Justice delivers culturally competent services and develop strong partnerships with Aboriginal communities and service providers, to support Aboriginal children and young people in the justice system to positively transition back into their community. The Youth Justice Aboriginal Advisory Committee aims to bring the voice of the Aboriginal community and key partner agencies into decision making processes within Youth Justice.

Tasmania

The *Youth Justice Act 1997* (Tas) provides diversionary procedures, which can be utilised where the youth admits to having committed the offence and include:

- Informal Cautions – where the police officer is of the opinion that the matter does not warrant formal action.
- Formal Cautions – this may require the youth to enter into certain undertakings including the payment of compensation, restitution of offence-affected property, perform community service of up to 35 hours, an apology to the victim, or any other undertaking that may be appropriate in the circumstances. Formal cautions are generally administered by the police, however can also be administered by an Aboriginal Elder or community representative in limited circumstances.
- Community Conference – facilitated by Children and Youth Services (Communities Tasmania) on referral from the police. A community conference may impose one or more of the following sanctions:
    - administer a caution against further offending;
    - require the youth to enter into an undertaking to pay compensation for injury suffered by the victim or any other person by reason of the commission of the offence;

- require the youth to enter into an undertaking to pay compensation for loss or destruction of, or damage to, offence-affected property;
- require the youth to enter into an undertaking to make restitution of offence-affected property;
- if the youth is 13 or more years old, require the youth to enter into an undertaking to perform a specified period, not exceeding 70 hours, of community service;
- with the agreement of the victim of the offence, require the youth to enter into an undertaking to apologise to the victim;
- require the youth to enter into an undertaking to do anything else that may be appropriate in the circumstances of the case.

Of those children who are not deemed suitable for one of these diversionary processes and are placed under supervision, whether on a community based order or detention, the majority are aged above 12 to 13 years.

Victoria

Victoria's early intervention activity takes two key forms: the Youth Support Service/Aboriginal Youth Support Service (YSS/AYSS) and the Children's Court Youth Diversion (CCYD) Service. In addition, Victoria provides a pre-sentence (post-finding of guilt) restorative process through the Youth Justice Group Conferencing (YJGC) program.

Victoria is currently developing a new Youth Justice Strategy, as well as a new Youth Justice Act so will continue to review strategies for diversion and other non-custodial mechanisms.

Koori Youth Justice Program

Culturally responsive service that provides:

- diversionary strategies;
- working with statutory clients; and
- enhancing linkages to community.

Partnership with mainstream and Koori specific service providers, Aboriginal co-operatives, communities and families. Community based Koori Youth Justice workers provide a diversionary and rehabilitation service for young Aboriginal people on statutory Youth Justice orders, or who are at risk of entering/re-entering the Youth Justice and criminal justice systems.

Koori Support Workers in custodial centres provide support to young Aboriginal people in custody, working with them to maintain or re-establish their connection with family and community, and to develop culturally appropriate programs.

Central After Hours and Bail Placement Service

The Central After Hours and Bail Placement Service is a State-wide after hours service available to young people who commit an offence when aged from 10 to 17 years. The service may be utilised voluntarily by a young person being considered for remand by police or where bail accommodation may be required.

The service provides a single point of contact for police in matters where police and/or a bail justice is considering remand of a young person outside business hours. During business hours, police may contact the regional youth justice unit.

Youth Justice Court Advice Service

Court and bail advice is provided to enhance the capacity of children's courts and bail justices to undertake informed decision-making, and to ensure that young people are dealt with in a manner that is consistent with the key principles of diversion and minimum intervention that underpin the *Children, Youth and Families Act 2005* (Vic).

Cautions

Victoria Police caution a large number of young people every year. The young person must admit their guilt and there must be sufficient evidence to prove the offence. Cautions are unconditional and are most often given to first time offenders.

Ropes Program

The Ropes Program (Ropes) is a diversionary program available for those young people who may have previously received caution/s but who have no prior appearances before the Children's Court. The program is a joint project between Victoria Police, the Children's Court and youth workers and requires young offenders to complete a program with police informants.

The police informant recommends a young person for Ropes. It is generally available for lower level offending. The court determines whether the matter will be referred for the young person to complete the program. Ropes consists of young people who have been referred together with members of the police, preferably the relevant police informant. Ropes includes a physical component (low and high ropes) and seeks to improve relations between young people and police, to embrace challenge, team work and trust and to emphasise choices and consequences of poor choices.

The benefit for the young person is that, provided they complete Ropes, their charge/s will be struck out and their clear criminal record will be maintained.

Youth Support Service/Aboriginal Youth Support Service

The YSS/AYSS is a voluntary, community-based, early-intervention (pre-charge) service for young people aged 10 to 17 years. Young people are mostly referred to the service as a result of a police caution, however there is also a small number of Children's Court, school or parental referrals to the service. Just over 1,100 young people access the service each year.

The YSS/AYSS intervenes before criminal involvement escalates to divert young people away from potential or actual involvement in crime and into service organisations that work with them to provide the practical support they need to desist from criminal activity. This support includes connecting young people to counselling and programs that can help to divert them from antisocial activity, and linking them to education, training or employment, housing services, and positive family, social and cultural connections. Ten community service organisations deliver YSS/AYSS in metropolitan Melbourne and Geelong, Ballarat, Bendigo, Shepparton, Mildura and the La Trobe Valley.

Children's Court Youth Diversion Service

Diversion is a key objective of the Youth Justice Service in Victoria. Division 3A of the *Children, Youth and Families Act 2005* (Vic) provides for the Children's Court Youth Diversion Service (CCYD), which is a pre-plea youth diversion program operating in all Children's Court locations in Victoria.

CCYD targets young people early in their contact with the criminal justice system. It provides these young people with the opportunity to:

- accept responsibility for their behaviour;
- understand the harm caused by their actions;

- complete a diversion plan involving activities intended to reduce the likelihood of further offending;
- have the charge/s discharged on successful completion of the diversion plan; and
- avoid the stigma associated with a criminal record and its impact on future life opportunities.

CCYD complements other options available to divert children and young people from further progression into, and involvement with, the criminal justice system, including:

- pre-court options, such as police cautions and police referrals to programs and support services;
- pre-plea options, such as bail supervision and Ropes; and
- post-plea options, such as deferral of sentence and Youth Justice Group Conferencing.

Youth Justice Group Conferencing

Youth Justice Group Conferencing, based on restorative justice principles, applies to young people appearing before the Criminal Division of the Children's Court who have:

- been found guilty of offences that do not include homicide, manslaughter and sex offences;
- committed offences that warrant a sentence supervised by Youth Justice;
- committed offences no longer than twelve months prior to the finding of guilt, or, in exceptional circumstances, at the discretion of the Court.

The *Children Youth and Families Act 2005* (Vic) states the purpose of a group conference is to facilitate a meeting between the child and other persons, such as significant others, the victim or victim's representative, if possible to:

- increase the young person's understanding of the impact of their offending on the victim and the community;
- reduce the likelihood of the young person re-offending;
- negotiate an outcome plan, agreed to by the young person, that sets out what they will do to make amends for the harm caused and what they will do to prevent further offending.

Further aims include:

- diverting the young person from a more intensive sentence and further progression into the criminal justice system;
- increasing victim satisfaction with the criminal justice process; and
- improving the young person's connection to family/significant others and the community.

If a young person participates in the conference and agrees to an outcome plan that sets out what they will do to make amends for the harm caused, the court is required to impose a lesser sentence.

Western Australia

The *Young Offenders Act 1994* (WA) (YOA) sets out the alternatives to initiating court proceedings when a young person commits non-serious offences. WA Police may divert young people from the courts by:

- administering a caution (informal or formal);

- referring the person to a juvenile justice team; or
- for some specific offences, referring the person to an appropriate program such as cannabis intervention requirements.

Juvenile justice teams aim to prevent recidivism by:

- avoiding young offenders' exposure to negative influences;
- providing a forum in which families can positively influence young offenders;
- providing a response that is proportionate to the seriousness of the offending and can be delivered within a timeframe appropriate for young people; and
- enhancing the young person's understanding of their offending behaviour and its consequences.

This diversion option is only available where the young person accepts responsibility. In respect of juvenile justice referrals, all parties must consent to the referral and agree to the proposed outcomes.

Schedules 1 and 2 of the YOA prescribe those serious offences for which court diversion is not available, and if convicted may lead to detention. This relates to serious and indictable offences under *The Criminal Code* (WA) and other relevant legislation (for example: offences of murder, manslaughter, assault, robbery, criminal damage, driving without a driver's licence, intent to supply prohibited drugs).

The main agencies with statutory responsibility for early diversion are WA Police and the Department of Justice. Other agencies, such as the Department of Communities and Department of Education also have a significant role in helping young people at risk.

WA Police

The WA Police Force endeavours to minimise young offenders being held in police custody, and seeks to divert young offenders from the criminal justice system where possible. The YOA requires police to consider a caution, refer the young offender to a juvenile justice team, charge the young offender without taking the young offender into custody, or to apprehend, charge and, subject to the *Bail Act 1982* (WA), detain the young offender in custody, or release the young offender to be considered by a juvenile justice team.

Legislation and case law may affect police minimising custody of a young offender in the following ways:

- The YOA requires that a responsible adult is notified before police ask questions about the relevant offence, or any other offence. There may be delays whilst police seek to identify a responsible adult and make the necessary notifications.
- An independent person must be present during an interview with a young offender, with exceptions for urgency, risk of escape of an accomplice, destruction or other interference with an investigation or where the confession is made prior to being able to provide an independent person. The decision to accept confessional material in the absence of an independent person is determined by a court. There may be delays of identifying, locating and conveying an independent person to assist the young offender.
- The YOA provides that a police officer, before commencing proceedings against a young person for an offence, must first consider whether in all the circumstances it would be more appropriate to take no action or administer a caution to the young person.

- The YOA provides that cautioning is preferred unless the previous number of offences committed by the young offender make it inappropriate to do so, or the current offence is a serious offence which is statute barred from dealing by way of caution. A determination is made by the individual officer based on the circumstances and where circumstances arise in which a member of the Police Force could charge a young person with the commission of an offence, the member of the Police Force may, having regard to the circumstances, caution the person instead of laying a charge.
- Schedules 1 and 2 of the YOA provide for a range of offences that cannot be dealt with by caution or juvenile justice team, and must be heard by a court.

Where a caution is the outcome, there is no further statutory requirement on the young offender or police. There is no legislation available for police to require a young offender to engage with a community service, and any such engagement is voluntary.

Dedicated WA Police Force Youth Crime Intervention Officers are located State-wide to engage and refer young offenders and youth at risk of entering the criminal justice system to community based programs to reduce their offending behaviour. Any Youth Crime Intervention Officer contact, support and engagement with young people is not solely reliant on offending behaviour, but additional effort is directed toward this cohort. Siblings and other children are engaged and offered access to support services where they are available and where relevant to the particular needs of the young person.

The WA Police Force manages a number of grant agreements for community services that support young people and families including Whitelion, the Federation of WA Police and Community Youth Centres (PCYC) and other not-for-profit support services. The various community groups work closely with the WA Police Force in delivering programs to young people that seek to develop their skills, keep them active and engaged in their community, and reduce the risk of their re-offending.

Referral of children under the age of criminal responsibility
Children younger than 10 years are not considered criminally responsible in WA and where concerns are held by police regarding their welfare, a referral may be made to the Department of Communities, Child Protection and Family Support (CPFS) or the child is returned to custody of a parent or guardian. The CPFS referral process is available for all children and young people whose wellbeing is of concern, with the ability to share relevant information provided by the *Children and Community Services Act 2004* (WA).

Juvenile Justice Teams

The YOA provides a statutory framework for referral of a matter to a juvenile justice team. This may only occur if the young offender accepts responsibility for the act or omission constituting the offence, and agrees to have the matter dealt with by a juvenile justice team rather than by a court.

A juvenile justice team dealing with a young person for an offence may determine the way in which it considers the matter should be disposed of and invite the young person to comply with terms to be specified by the team (but cannot make an order for restitution or compensation subsection). The team may refer a matter back to the person who referred the matter including if it not satisfied the young person complies with specified terms.

Drug treatment programs

The Young Persons Opportunity Program is a voluntary drug treatment program for young people 12-17 years of age with low level offending who are in contact with a juvenile justice team and who have emerging or significant illicit drug related problems. As part of the program, the young person and their family will be able to talk to a Diversion Officer, who is a trained

drug and alcohol counsellor. The Diversion Officer will provide information and ongoing support as well as access to other support services.

The Youth Supervised Treatment Intervention Regime is a program to assist young people 10-17 years of age with drug use problems who attend Perth Children's Court drug court for moderate level crimes. Participants who plead guilty to an offence, and who would normally receive a fine or community based order, are suitable for the program. A referral for assessment can be requested by a magistrate, lawyer, police prosecutor, the offender or by someone else in the court room. However, referral to YSTIR is at the magistrate's discretion.

If referred to the program, the offender's case will be remanded for approximately three months so they can access treatment for their drug use. Throughout treatment, participants are required to see a drug and alcohol counsellor regularly and undergo urinalysis and other court requirements. Participants are also required to attend court and see the referring magistrate at regular intervals. Following treatment, the offender will return to court for sentencing.

Young people aged 14-17 years deemed eligible by WA Police may also be diverted to treatment via the Cannabis Intervention Requirement scheme.

Whole of Government initiatives

Addressing youth offending is a complex multi-faceted challenge that requires sustained collaboration and commitment from a range of agencies to improve outcomes for young people.

The *Our Priorities: Sharing Prosperity* program aims to address complex, long standing public policy challenges, including through evidence based interventions with a sustained and collaborative approach across the public sector. Part of this program is *A Safer Community,* which has the following targets:

- Reduce youth reoffending: By 2022-23, have no more than 50 per cent of young offenders return to detention within two years of release.
- Reduce illicit drug use: By 2022, reduce the proportion of the Western Australian population who have taken an illicit drug in the last 12 months by 15 per cent from 2016 levels.

The current activities being undertaken in pursuance of this target are:

- Regional Youth Justice Strategy for the Kimberley and Pilbara.
- Target 120.
- Metropolitan and Regional Youth Justice Services work with young people on community orders to reduce reoffending.
- Department of Education Youth Transition Coordinators work with young people exiting detention to find them suitable education or training placements.

The Department of Justice collaborates with other agencies and works in partnership with Aboriginal communities to improve the outcomes for young people, and particularly Aboriginal people, who are in danger of, or already have, come into contact with the criminal justice system.

Kimberley Juvenile Justice Strategy

The Kimberley Juvenile Justice Strategy aims to improve youth justice outcomes in the Kimberley region, in partnership with community organisations and government agencies. The strategy involves community partners to co-design community-based youth residential programs as an alternative to detention along with other services aimed at diversion.

Target 120 Program Social Investment Data Resource

Target 120 aims to support up to 300 at-risk young people and their families across WA, led by the Department of Communities. Target 120 operates in the Perth metropolitan area and in Kalgoorlie and Kununurra.

For each young person and their family who are part of the program, a dedicated service worker will work in partnership with multiple agencies, including police, health, education, child protection and justice, and non-government service providers. Some examples of personalised services that have been provided to-date include mentoring, housing, on-country tours and extra-curricular activities like football or basketball being offered as rewards for going to school.

Diversion programs for young offenders

The Department of Justice, Corrective Services Division provides services and interventions to young offenders. Services to youth in the community are provided via the Youth Justice Services (YJS) branch and services for young people in custody are provided via Banksia Hill Detention Centre (BHDC).

Additionally, the Department of Corrective Services contracts the non-government and community services sector to deliver YJS Programs state-wide and in BHDC. The service providers provide programs and activities that address the following five program areas:

- rehabilitation;
- emotional wellbeing;
- education, training and employment;
- life skills, health and development; and
- bail services, which includes the Aboriginal Legal Service of Western Australia co-designed Youth Engagement Program metropolitan area.

Early prevention of contact with the criminal justice system

Australian Capital Territory

Blueprint for Youth Justice in the ACT 2012-22

The ACT Government's strategic direction for youth justice is set out in the *Blueprint for Youth Justice in the ACT 2012-22* (Blueprint). The Blueprint has a focus on early intervention, prevention and diversion with custody used as a measure of last resort. The Blueprint was released in August 2012 and developed by the Youth Justice Implementation Taskforce in consultation with youth justice stakeholders and the broader community. The Blueprint is supported by a three year action plan containing 45 actions to be implemented through a whole-of-government, whole-of-community approach.

Education policy, services and programs

The ACT Government Education Directorate has a range of universal, selected and targeted strategies to meet the continuum of student needs through all stages of schooling that support the prevention of criminal behaviour. These include:

- the Safe and Supportive Schools Policy, which provides guidance to schools on promoting safe, respectful and supportive school environments;
- the Positive Behaviour for Learning (PBL) framework, which is being rolled out across all ACT public schools. PBL is an evidence-based, whole school approach for creating safe, supportive school environments. The PBL framework creates a continuum of interventions to achieve positive academic, social and behavioural outcomes for all students;
- the Australian Curriculum, Civic and Citizenship, which is taught in all ACT schools from Years 3-8. Content taught is age-appropriate and focuses on why there are rules and laws set in a society, consequences of rules not being followed, how the political, legal and criminal justice system works, shared values of Australian citizenship and the rights and responsibilities of all citizens;
- Continuum of Educational Support, which is implemented in all ACT public high schools and provides a framework and intentional approach to teaching and learning specifically for young adolescents, with an emphasis on effective transitions, adolescent-centred learning, quality teaching, parental engagement and social and emotional wellbeing;
- the Education Directorate Flexible Education: Off Campus Program, which provides intensive support to students who are disengaged from traditional learning environments. The program has 10 students from Years 7-10, some of whom are current youth offenders or at risk of becoming involved with the youth justice system. All students receive intensive support from school staff to navigate the justice system as required.

Community services and programs

The ACT Government Community Services Directorate funds community programs and services focused on early intervention supports and services for children and young people through the Child, Youth and Family Services Program (CYFSP). This includes:

- programs for both physical and mental health support, such as CatholicCare Youth and Wellbeing, Anglicare's 'The Junction Health Service' and Winnunga Nimmityjah Aboriginal Health Service;
- for Aboriginal and Torres Strait Islander children, young people and families, CYFSP funds the ACTCOSS Gulanga Program to increase the accessibility and effectiveness of housing and homelessness support and services; and

- for Culturally and Linguistically Diverse (CaLD) young people, CYFSP funds Multicultural Youth Services to develop and improve the cultural competency of services working with CaLD young people, by promoting access and engagement with mainstream services through supporting community service workers.

CYFSP also funds an integrated service model with a series of intentional interventions that work to promote safety, permanency and well-being of children, youth and their families. CYFSP-funded services provide intensive intervention support to work in partnership with CYPS to transition children, young people and their families out of tertiary (statutory) services.

Health programs and services

The ACT Health Directorate funds a range of community services that are targeted at youth, which address health behaviours and determinants that can contribute to criminal behaviour. This includes:

- the CatholicCare 'Supporting young people Through Early intervention and Prevention Strategies (STEPS)' program, which is a voluntary mental health residential program that is available for young people aged 13-17 experiencing moderate to severe symptoms of mental illness and require support to avoid hospitalisation. STEPS also offers access to Alcohol and Other Drug interventions where required;
- Menslink, which provides counselling support for 10 to 12 year old boys. This funding compliments funding from CSD that provides counselling support for 12 to 25 year olds. Some of the challenges that this counselling program tackles is anger management issues, family relationships and managing addictions; and
- the Ted Noffs Foundation, which is funded to provide alcohol and other drug treatment and services for young people, including outreach to children in detention and at risk of engagement with the criminal justice system.

Canberra Health Services, through the Child at Risk Health Unit Therapy Team, also provides a range of voluntary interventions to children who have experienced child abuse.

New South Wales

Agencies across the NSW Government, including the Department of Communities and Justice, the Department of Education and NSW Health, screen young people to identify risk and assess their needs to provide effective, individualised referrals to programs and services, and interact with diversion programs.

Early intervention and diversion programs usually begin long before a young person has come to the attention of NSWPF. Schools, child protection services, welfare and health services identify vulnerabilities and behaviours that could lead children to criminal offending and formal contact with NSWPF. Effective and targeted earlier intervention and diversion can greatly reduce the likelihood of a child or young person experiencing disengagement from school, poor physical and mental health, welfare dependency, substance misuse, criminal offending and ongoing involvement with the criminal justice system. The clear majority of contact between young people and the NSWPF is positive and takes the form of informal socialising in the community at sporting functions, school lectures and presentations delivered by School Liaison Police or at PCYC.

The Targeted Earlier Intervention Program (TEIP) reform is a major NSW Government initiative led by the Department of Communities and Justice that aims to deliver a cohesive, flexible, client-centred service early intervention system, to benefit more than 130,000 children, families and communities across NSW. TEIP reform targets vulnerable children, young people, families and their communities at the point where they can have the most impact - early in life and early in need. Within this broad target group, there are three priority groups: 0-3 year-olds, young parents, and Aboriginal clients. TEIP consolidates six existing

early intervention programs into a single cohesive service system ensuring evidence based service design and delivery.

The Department of Education has various policies and practices in place to manage students experiencing difficulty in learning or behaviour. Specialist behaviour education settings provide additional support for students with severely disruptive behaviour.

- Behaviour schools provide a range of specialist programs for students with severely disruptive behaviours in Years 5 to 10 with the aim of returning the students to regular schools or supporting their transition to other education or employment opportunities. There are 35 behaviour schools across NSW.
- Tutorial centres and programs provide an age appropriate short-term intervention for students in Years 5 to 10 with severely disruptive behaviours, who require intensive and significant levels of intervention that cannot be provided within a mainstream or support class setting. There are 40 tutorial centres and programs across NSW.
- Suspension centres provide an intervention for students who are on long suspension from school and have been identified by their school as likely to benefit from a structured program to assist their successful return to schooling as soon as possible. There are 22 suspension centres across NSW.

NSW Health delivers targeted services that respond to the immediate and long-term needs of children and young people at risk of significant harm, as well as specialist services, that provide therapeutic interventions to address the effects of violence, abuse and neglect. With specific regard to services that could divert young people from the criminal justice system, Child Protection Counselling Services and Family Referral Services offer support to this group of vulnerable young people.

The Sexual Assault Service and NSW Health Children's Counselling Services respond to children under 10 years old with problematic or harmful sexual behaviours and their family/caregivers. NSW Health provides a specialised, early intervention, community-based service called New Street Services, to address harmful sexual behaviours displayed by 10-17 year olds who, for a range of reasons, have not been criminally prosecuted. NSW Health also provides funds for a range of support services available in the general community that young people can access by either self-referral or referral by case workers from other agencies. The most important service types for young people at risk are drug and alcohol services, mental health, domestic violence services, sexual assault and child abuse treatment services.

Northern Territory

Refer to page 107.

Queensland

Queensland's Youth Justice Strategy emphasises the importance of intervening early and keeping children out of court as two of its four pillars. The Strategy notes that responsibility for achieving gains in these pillars rests across the whole of government, beginning with early years of life and childhood development, continuing through health, education, family support, youth support and community development activities.

The Queensland Government has also published *Our Future State: Advancing Queensland's Priorities*, which outlines the government's objectives for the community. The Keep Communities Safe priority area includes a focus on reducing rates of youth offending, supported by a target of a five per cent reduction of young offenders who have another charged offence within 12 months of an initial finalisation of a proven offence for the period from 2015-16 to 2020-21.

For vulnerable families and for young people at risk of offending or showing early offending or problem behaviours, the following prevention and diversion programs are available:

- Youth Support Services – for any children and young people aged 8-21 years experiencing vulnerability, these services help them positively connect with family, community, education, employment and housing and to achieve healthy and violence free lives.
- Triple P – a universally available program to better equip parents to deal with behaviour of their children. This includes the Teen Triple P program for parents of adolescents. The Triple P system includes a number of multi-session programs some of which are appropriate for parents of young people involved in offending.
- Targeted, Secondary and Intensive Family Support services – to help families with children aged up to 18 years at risk of entering the child protection system to improve the safety and wellbeing of their home. Options include culturally specific Aboriginal and Torres Strait Islander Family Wellbeing services.
- Behaviour management approaches in schools including restorative practices.
- Young Black and Proud - a cultural program run over 12 weeks with a focus on prevention.
- Integrated complex case panels that provide holistic and seamless case planning for young people who are subject to supervised orders can also serve as a diversionary option for siblings or other family members.
- The Youth and Family Support Service in Brisbane provides interventions for young people aged 10-17 who are at risk of offending or re-offending and their families before the point of court orders, which may mitigate issues and build protective factors. Youth justice staff provide outreach, case management and after-hours support.

Queensland's youth justice system offers a range of programs for young people in the justice system to address offending and prevent further criminal behaviour. The Youth Justice First Nations Action Board was established to help youth justice services develop culturally appropriate ways to reduce over-representation of Aboriginal and Torres Strait Islander people across the youth justice system.

The following programs are available for children and young people in the justice system, to keep them out of custody and reduce re-offending:

- Responding to young offenders through community based programs are delivered to young offenders by funded, non-government organisations. There are no programs specifically for younger children:
    - Bail support and legal advocacy – individualised support to young people, aged 10-17 years who are at a very high risk of being remanded into custody, to help them comply with their bail conditions and address offending behaviour
    - Specialist Counselling – Specialist services for young people aged 10-17 years who are found guilty of sexual offences.
    - Supervised Community Accommodation – accommodation and intensive wrap around support for young people aged 14-17 years with a focus on addressing underlying cause of offending. Accommodation of 10-13 year olds is considered on a case by case basis.
    - Young Offenders Support Services - Culturally safe, trauma-informed intensive service to help young offenders aged 10-17 years be accountable for their behaviour and encourage their reintegration into the community.
    - Community Youth Response and Diversion – a multi-faceted place-based approach that may be made up of after-hours diversion services, mentoring, bridging education and family-focused intensive case management for young people aged 10-15 years old at high risk of reoffending.

- Youth and Family Workers in Aboriginal and Torres Strait Islander Family Wellbeing Services – new positions to equip these services to work more effectively with families whose children are involved in offending and at risk of detention.
- YouthChoices – a social benefit bond to address youth reoffending through an intensive, multi-systemic therapy approach delivered with families in their home.

- Programs during Community Supervision – delivered by Youth Justice. There are no programs specifically for younger children. Two key areas where services are needed to target this age cohort are alternative education programs with primary school age curricula and parenting or family focussed programs.

In Queensland, Department of Youth Justice staff endeavour to ensure that young people on Youth Justice orders, regardless of age, are matched to an appropriate level of supervision and service based on their assessed risk of reoffending and the seriousness of their offending behaviour.

Queensland Department of Youth Justice delivers the following programs and services, however some may not be appropriate to younger children:

- Restorative Justice - available to young people aged 10-17 years as a diversion or sentence option. Restorative Justice processes are coordinated and facilitated by Department of Youth Justice. Restorative Justice has been externally evaluated to demonstrate an effectiveness in reducing recidivism.
- Aggression Replacement Training: to help young offenders to deal with their anger or aggression using training and practical examples.
- Alternative learning environments - two operate that specifically target children in the youth justice system who are disengaged from education: Burragah Bridge Program in Townsville and Toowoomba Alternate Learning Earning Support.
- Integrated Case Management (ICM) – providing intensive levels of support and casework to young people and their families.
- Transition to Success – a holistic program to build skills and reconnect young people aged 14-17 years with education, training and employment

In addition, Queensland Department of Youth Justice delivers the following programs and services:

- Changing Habits and Reaching Targets (CHART) – a cognitive behavioural program for young offenders.
- Locally developed integrated complex case panels - provide holistic and seamless case planning for young people who are subject to supervised orders.
- Black Chicks Talking - mentoring program for justice-involved young Aboriginal and Torres Strait Islander women.
- Other programs – include Betterman, Drumbeat, Emotional Regulation Impulse Control, Girls… Moving On, Learning Experiences with Adventure Programs, Men's Project, Positive Behaviour Support, Reaching and Identifying Strengths to Empower, Regional Psychologists in Youth Justice Service Centres, Under the Hood, Victims of Youth Crime Engagement Strategy and Youth Justice Education and Training.
- Programs delivered in Detention: There are no programs designed specifically for younger children. When delivering programs to younger children, staff take into account how a program is delivered, how information is best received by the young person particularly if they are aged under 14 years and likely to be at a different developmental

stage. Operational policies advise detention staff that age, experience, maturity, developmental and cognitive levels should be considered at key decision points such as room sharing, managing behaviour, rewards and incentives, planning structured day activities and how programs are delivered.

Some relevant programs and services delivered in detention centres are:

- Education – younger children are separated from older children where possible in the detention school. However, the number of young people aged under 14 years is low. Girls of all age are taught in the same class, and younger boys are sometimes included in this class.
- Basic Key Skills Builder – a foundational education program transferrable between detention and community.
- Adventures on the Inside - delivered in Brisbane Youth Detention Centre only - outdoor experiences that provide opportunities to master difficult tasks, improve decision-making and behaviour.
- Screening for health and developmental problems – for example Speech Pathologists provide assessment of communication and a multidisciplinary team support completion of assessment reports for diagnosis of FASD. They are able to provide strategies to support communication and assist with linking with external services (such as NDIS).

Immediate responses for children below the age of criminal responsibility

In Queensland, there is no legislative basis for police to take any form of action against a child under the age of criminal responsibility. In terms of the Queensland Police Service (QPS) response to these children, actions are guided by Section 5.3.18 of the Operational Procedures Manual (OPM):

> *5.3.18 Children under the age of criminal responsibility*
>
> *POLICY Where a child who is under the age of criminal responsibility commits an offence, that child may be officially counselled. Counselling has no legal standing, but may assist in diverting a child from future involvement with the criminal justice system.*
>
> *PROCEDURE Official counselling is to be conducted only by an officer authorised to administer cautions. Officers are not to compel children or their parents or guardians to take part in official counselling. An officer who decides to officially counsel a child should adopt substantially the same process as that used for cautions, making such allowances as are necessary to:*
>
> *(i) emphasise the guidance aspect of counselling; and*
> *(ii) accommodate the levels of understanding of a younger child.*

While the OPM refers to 'Official Counselling', it is more commonly referred to as 'Behavioural Counselling'. While there is no specific training in relation to the delivery of behavioural counselling, the OPM requires behavioural counselling to be conducted by an officer who is trained or authorised to deliver youth justice cautions, noting the process for behavioural counselling is substantially the same as that for administering a caution.

QPS data shows that an average of 512 children under 10 years of age come to police attention in relation to criminal acts, per year. Of those, an average of 395 children receive behavioural counselling per year, noting officers cannot compel a person to take part in this process.

Training

Police officers are provided with a range of training relating to dealing with vulnerable members of the community, including young people as victims and as offenders. Intersections exist between training specific to young people and training relating to mental health, domestic and family violence, substance use, all of which identify impacts on families and the

community. Child Protection and Investigation Unit (CPIU) officers receive further specialist training in relation to child harm and youth justice.

Cautioning training provides officers with specific skills in relation to responding to young offenders. Training is available to all police officers to ensure all police have the requisite skills to respond to youth offenders.

Referral

The QPS OPM includes a chapter on special needs which includes specific guidance on police referral to support services. Further guidance for police is provided on the QPS intranet.

The cautioning training package includes a component on referral of children to address underlying causes of offending behaviour, noting the benefit of understanding this group of children and making the most of an early opportunity to address the underlying causes (familial and environmental) of their offending behaviour.

The QPS can make referrals by consent to support services through the police referrals process, however the success of this process is dependent on the availability of appropriate support services.

Child Harm

In those matters where police identify serious concerns about the wellbeing of the child, action will be taken in accordance with the QPS Child Harm Referral Policy (referenced in Chapter 7 of the OPM). This action can include referral without consent to a Family and Child Connect service, report to Child Safety, joint investigation with Child Safety, or immediate removal of the child through a Temporary Assessment Order (usually in consultation with Child Safety).

Wherever possible, QPS returns a child found engaging in what would, if they were older, be criminal behaviour to their home. Child Safety would gather information from QPS and other sources to inform the response in an individual case.

Child Safety may undertake an investigation and assessment to determine whether a child is in need of protection. A child in need of protection is a child who: has suffered, is suffering, or is at unacceptable risk of suffering significant harm, and does not have a parent able and willing to protect the child from the harm. As part of the investigation and assessment, Child Safety will:

- determine if the child is safe;
- investigate allegations of significant harm and significant risk of harm;
- undertake a holistic assessment of the child and family within their usual home environment;
- determine if the child is in need of protection; and
- decide whether there are supports that Child Safety or other agencies can provide to the child and family.

If a child is in need of protection and ongoing intervention is required, Child Safety or the QPS may take action considered necessary under legislation to meet the child's protection and care needs. As soon as practicable after moving the child, a QPS officer must take reasonable steps to tell at least one of the child's parents or a family member of the child's whereabouts. The child may be cared for at the place under the arrangements until the child's parents or family members resume or assume the child's care.

What services are children put in touch with?

Conditional Bail Programs (CBP) provide ongoing support for at risk young people to increase their ability to remain in the community while awaiting sentencing by the courts. CBP focus on addressing young people's educational or vocational needs, mental health issues, family intervention and accommodation, and work in partnership with bail support and other community programs.

Intensive support is provided to Aboriginal and Torres Strait families who have children at risk of entering, or already in contact with, the youth justice system. Case workers are employed by 15 existing Aboriginal and Torres Strait Islander Family Wellbeing Services in ten locations across Queensland from where large numbers of young people are remanded in custody. Intensive and culturally appropriate assistance is provided to families struggling with their children's behaviour, including advice to families on ways to manage child behaviour and connecting them with more specialised services when appropriate. Services assist families develop their own family plans which address risk factors and re-engage young people with positive support within their kin network, schools and communities.

The Navigate Your Health (NYH) pilot initiative for children in out of home care in Brisbane is being extended to young people in the youth justice system to improve their health and address underlying problems contributing to offending, including poor mental health, and undiagnosed disabilities and impairments. Health and Nurse Navigators provide health and developmental assessments and connect young people with relevant health and support services. NYH will be offered in three locations.

The Queensland Youth Partnership Initiative targets young people engaging in anti-social behaviour in busy shopping centres. It aims to prevent nuisance behaviour and crime and divert young people to constructive and sustainable activities. The program includes alternative activities for young people designed with young people, training for security staff, and connecting young people to retail and employment opportunities. Involving a partnership between Westfield, the National Retail Association and government, it currently operates in two shopping centres with expansion to four other shopping centres planned.

Specialised Multi-Agency Response Teams (SMART) in eight locations across Queensland support the Childrens Court to assess young people's needs and factors that may contribute to their offending. Young people in court who are identified as having needs related to education, mental health or substance use can be referred by Magistrates to SMART for assessment and advice. SMART comprise Department of Education staff, a mental health worker, drug and alcohol worker, speech and language therapist and case worker, each of whom will be able to refer young people to appropriate support services. SMART will then provide advice to the court on the best integrated approach to preventing the young person from further offending.

In Townsville, an after-hours diversion service provides police with an alternative to remanding children in watch houses, a cultural mentoring program, alternative education, and intensive case management for families and young people. Young offenders in Townsville also have access to bail support services and restorative justice approaches to help young people turn their negative trajectory around and reduce offending and reoffending. Similar services are being established in Brisbane, Ipswich and Cairns.

Project Booyah is a police-run leadership and mentor program that uses adventure-based learning, decision making/problem solving exercises, resilience training and family inclusion to help young people aged 15-16 years make better life choices.

Framing the Future (FTF) is a mentoring program delivered by the QPS in partnership with PCYC in eight locations across Queensland. FTF is a safety net for young Project Booyah

graduates, providing mentoring and support for a period of six months to connect them with education, training and prosocial activity and reduce future offending.

Dedicated Police Liaison Officer teams exist in six locations across Queensland to support young people to comply with bail conditions. This support acknowledges the trauma, lack of structure and supervision in the lives of many young people in the youth justice system. Where extra assistance is needed, young people can also be connected with specialist organisations outside the police service.

Programs in youth detention/other for younger children

The *Structured Day and Program Delivery Policy* for youth detention centres in Queensland states that daily activities should reflect the normal daily activities of young people in the wider community, including attending educational and vocational programs during school hours and participation in housekeeping and maintenance duties at a level commensurate with young people's age, experience, physical ability, cognitive development, and maturity level.

Aside from school curriculum requirements, programs are not differentiated for young people aged 14 and under. Younger children access the same range of therapeutic programs in youth detention centres as older children. However, for younger children, staff take into account how a program needs to be delivered so information is best received by the young person, who is likely to be at a different developmental stage to the majority of youth in detention.

South Australia

Connected Youth Justice

The Department of Human Services along with key partner agencies is co-designing a four-year plan to provide vulnerable young people with connected supports, programs and services. A strong focus is being placed on support for young people to avoid and limit contact with the justice system and to address the over-representation of Aboriginal young people in the justice system.

The plan aims to strengthen connections with communities and supports through development of the '*Young People Connected. Communities Protected.'* Blueprint and a range of delivery plans (currently in development) to detail the range of tangible actions to implement the Blueprint aims. The approach to co-designing a new plan has thus far included research, innovation, and cross-agency consultation and connections.

Blue Light

Blue Light SA Inc and South Australia Police (SAPOL) have enjoyed a successful partnership over the past 35 years, which has had a positive impact on many young people, including those from disadvantaged backgrounds, those at risk and those from CaLD backgrounds.

The Blue Light program has had many achievements in relation to the development and delivery of youth based crime prevention programs and initiatives supported by the 25 Blue Light Branches and these initiatives include the establishment of the two campsites at Errappa (Iron Knob) and Noorla-Yo-Long (Millicent), together with regular discos, other events and camp programs across the State.

The SAPOL Blue Light program was built on the foundation of its beginnings by providing the traditional Blue Light disco. Blue Light discos continue to be the core Blue Light event delivered by the branches, however they have expanded to also include movie/disco events for a younger audience (5 to 12 year olds).

Other SAPOL Blue Light activities include the following:

- Camps for: leadership, at-risk youth, young offenders, multicultural, high achievers
- Living Skills program

- Pool parties, discos, skate, bowling, inflatable, bounce events
- Police Link program (Women & Children Services at Flinders Medical Centre)
- Mobile Activity Centre Trailers (based at Christies Beach, Elizabeth and Port Augusta)
- APY Lands Blue Light Kids Club
- Outdoor adventure activities.

ThinkUKnow
In 2014, SAPOL formalised a partnership with the Australian Federal Police with the signing of a Memorandum of Understanding to manage delivery of the ThinkUKnow (TUK) cyber safety program throughout schools in South Australia.

TUK is an evidence-based cyber safety program that provides presentations to parents, carers, teachers and students. It provides information on the technologies young people use, the challenges they may face, and importantly, how they can be overcome. The presentations cover topics such as social media reputation management, cyberbullying, sexting, online grooming, online gaming, inappropriate content, privacy management, identity theft, how to protect devices, and how to report matters when things go wrong.

School Based Programs
Through the State Community Engagement Section, SAPOL has also developed a suite of school-based programs in consultation with the Department of Education for delivery across all schools for students through to Year 12. School-based packages have been developed that address topics such as: Bullying and Violence, Cyber Laws, Keeping Safe, Role of the Police, Juvenile Justice System, Theft Offences, Graffiti, Domestic Violence and the Law, Sexual Offences Awareness Program (SOAP) and Drugs and the Risks and Alcohol and the Risks.

Tasmania

No specific information provided.

Victoria

Victoria's Youth Justice Community Support Service (YJCSS) provides intensive support to two Youth Justice (YJ) client groups:

- young people who need a high or intensive level of intervention and who are on community-based court orders, including those on bail or deferred sentences (pre-sentence) and young people leaving custody on remissions or parole who require post-release support
- young people aged 17 years and over who are released from YJ centres on parole orders and who are homeless or at risk of homelessness and have the potential to live independently.

The Transitional Housing Management-Youth Justice Housing Pathways Initiative (THM-YJHPI) is an important complementary component of YJCSS. It provides housing properties and housing outreach for eligible young people.

YJCSS and the THM-YJHPI complement the statutory case management undertaken by YJ staff in metropolitan and regional offices across Victoria and in custodial settings and is delivered by eight community service organisations contracted to deliver the service. Three other organisations are funded from the YJCSS budget to deliver employment services to young people under YJ supervision.

Based on young people's assessed risks and needs, those who engage with YJCSS are referred to employment, education, training, health and mental health, drug and alcohol, or

housing services in an effort to address the areas that may affect, or have contributed to, their offending behaviour.

Through these referrals and intensive intervention, the service aims to:

- reduce the severity, frequency and rates of re-offending, and minimise young people's progression into the criminal justice system;
- provide a service for young people in their local community and enable their transition from Youth Justice centres or supervision into that community;
- prepare young people for adulthood by developing their independence, resilience and prosocial connections to family and community; and
- develop young people's capacity for meaningful education and economic participation.

YJCSS includes after-hours outreach support which provides access to structured programs and pro-social activities at high risk times (evenings and weekends), and is intended to improve compliance with ordered conditions. YJCSS can also continue to support young people after their statutory Youth Justice Orders have expired. This continued support is based on the young person's ongoing needs and is intended to reduce the risk of further offending.

Victoria is also developing a Reintegration Framework to guide young people's transition from custody to community. This Framework will articulate reintegration principles and key domains that need to be the focus of equipping young people to make this transition successfully. The Framework will inform work with young people from the point they are received into custody until their release.

Victoria is currently developing a new Youth Justice Strategy, as well as a new Youth Justice Act so will continue to review strategies for diversion and other non-custodial mechanisms.

Western Australia

Early Years Initiative

The Early Years Initiative (Initiative) is a commitment to work differently with communities to improve the development, health and learning of children from conception to four years and create lasting change. It will bring together community leaders, government, researchers, business and philanthropic organisations to achieve better outcomes for Western Australian children and families.

The Initiative will see the State Government join with Minderoo Foundation and Telethon Kids Institute (through CoLab) to work with four Western Australian partner communities. The Initiative will empower and support communities to assess the needs of children and families and identify what works best to help their children to thrive, based on evidence and research.

West Pilbara Plan

The West Pilbara Plan is the State Government working with Aboriginal elders, community members and service providers in and around Roebourne to address intergenerational disadvantage and child sexual abuse.

The West Pilbara Plan started in February 2018 and has six priority areas: more support for children, carers and families, safer children, tackling alcohol and drugs, greater engagement in school and work, healing the community and redesigning government funded services. There are 32 projects across the six priority areas, each being led by a government agency working with community and non-government stakeholders.

WA Youth Strategy

In 2017-18, the Department of Communities began developing an action plan to improve outcomes for at-risk young people in WA. The action plan will focus on young people at

extreme risk with multiple and complex needs, including young people with repeated contact with the child protection and youth justice systems, at-risk Aboriginal young people and their families, young people leaving care, young parents and homeless young people.

A Youth Strategy for Western Australia is being developed following consultation with young people, youth service providers and government agencies. Input from these groups will aid the development of a coordinated and targeted strategy designed to improve the delivery of programs and services to support young people in WA. The strategy will be released in 2020.

Commissioner for Children and Young People

On 8 May 2019, the Commissioner for Children and Young People's report, *Improving the Odds for WA's Children and Young People* (Report) made five recommendations on improving the wellbeing of WA's most vulnerable children. The Report argued that, despite investment in services and programs for children over many years, the WA Government had failed to address disadvantage and improve outcomes for children, particularly Aboriginal children.

The Report recommended that a State-wide Child Wellbeing Strategy should be established, with a priority on targeted, early intervention for vulnerable children and their families. Another key recommendation was to develop and implement a Child Impact Assessment Tool, to assess the impact of new policy and legislation on the interests of children