

**YOUTH ADVOCACY CENTRE INC**

**Submission regarding**  
**THE AGE OF CRIMINAL RESPONSIBILITY**  
**for the**  
**Australian Council of Attorneys-General**

**FEBRUARY 2020**



*When a flower doesn't bloom –  
you fix the environment in which it grows, not the flower.*

Alexander Den Heijer

*News stories and young people have rarely made happy reading since the advent of print media ... mass media, from their inception, have been closely associated with mass anxiety about young people.*

Sheila Brown, *Understanding Youth and Crime: Listening to Youth?*  
(Oxford University Press, 2005),

*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*

United Nations Convention on the Rights of the Child, Article 3(1)

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## INTRODUCTION

The Brisbane-based Youth Advocacy Centre Inc (YAC) is a well-respected specialist community legal and social welfare agency for young people who are involved in, or at risk of involvement in, the youth justice and/or child protection systems (10-18 years old) and/or are homeless or at risk of homelessness (15-25 years old) – young people who are among the most marginalised and excluded by our community and often the most harshly judged.

YAC has operated a multidisciplinary model comprising lawyers and social welfare workers since its establishment in 1981. Young people who become entrenched in the criminal justice system have significant social, welfare and/or relationship problems. While it is important that they are well-represented by specialist lawyers, unless the underlying issues are addressed, it is likely the young people will be back in court before too long. This means having skilled social welfare staff to work with these young people and having these workers co-located with lawyers is an obvious solution. Not having to go to another agency and tell someone else their story again makes it more likely the young person will take up the opportunity of addressing their difficulties. Appropriate information sharing between these professionals, enabling a coordinated approach to managing the issues which are contributing to offending behaviour is more likely to lead to sustainable and positive outcomes

A small study by Legal Aid NSW, which analysed the 50 most frequent users of its legal aid services between July 2005 and June 2010, found that 80% of high users of its services were children and young people who were under 19 years of age and had complex needs because of their environment and a range of welfare issues. It concluded that *it can be difficult to meet the needs of these clients through the traditional legal service delivery model where legal and non-legal services are not joined up.*

YAC welcomes the opportunity to participate in an informed and evidence-based discussion in relation to youth justice policy, in particular as it relates to the issue of when children should be subjected to the criminal justice system. The issue of raising the age of criminal responsibility is a critical discussion as it relates to the wellbeing of our children and our society's ability to support their positive growth and development to a meaningful life.

In our view, the case for raising the age to 14 years is objectively and evidentially well-established, as we will indicate in this submission. The main issue for further investigation and discussion is how we should respond to children whose behaviour would otherwise be the subject of a criminal response.

### A. LEGAL MATTERS RELATED TO RAISING THE AGE OF CRIMINAL RESPONSIBILITY

If the purpose of the criminal law is to keep our community safe (noting that Australia would be considered very safe by world standards) then we need to understand what would lead to that outcome. We know, for example, that imprisoning people will only keep the community safe for the time they are in prison and that without other interventions, the likelihood of re-offending is high. Simply punishing people is unlikely of itself to lead to the desired outcome.

If the purpose is to hold people to account for the harm they have caused, there will need to be some recognition that there are varying degrees of culpability. The law acknowledges this in specific situations by providing particular defences which can be applied on a case by case basis: self-defence, mistake of fact, provocation and so on.

However, the criminal justice system still fails to take proper account of capacity and culpability: *the over-representation of people with a cognitive impairment as offenders in the criminal justice system has been discussed extensively in the literature and is reflected in available statistics<sup>1</sup>.*

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<sup>1</sup> Justice Issues Paper 10 March 2009, Law and Justice Foundation of New South Wales

Similarly, there needs to be greater recognition of the developing capacity of children and that this will vary on an individual basis and be affected by a range of childhood experiences when determining their accountability in a system which was primarily structured to deal with adults.

Many years ago, YAC hosted a worker from Germany who was researching the youth justice system in Australia. Her question to us was: “Why do you criminalise your children at such a young age?” A critical question in terms of youth justice policy. One of the arguments raised against the recent inclusion of 17 year olds in the youth justice system in Queensland was a concern about their mixing with 10 year olds in detention. This overlooks the rather obvious question: how is it that a 10 year old could and would be placed in detention in the first place? Indeed, why do we bring a 10 year old into the criminal justice system at all? The research indicates that the younger offending behaviour commences, the more likely it is the young person will become a recidivist. This would surely be a good indicator that there are one or more underlying issues which are putting the child at risk of this – these are discussed later. We need to address such issues if we want to meaningfully respond to the behaviour and stop this trajectory.

*...irrespective of the vexed question of capacity – there are strong grounds for raising the minimum age of criminal responsibility [in England and Wales] if the ‘goals’ of the youth justice system are taken to include: complying with the provisions of the international human rights standards that have been formally ratified by the [UK] government; modelling a system of justice that is broadly compatible with practice elsewhere [in Europe]; ensuring that criminal law coheres with civil law; minimizing social harm and obtaining the best outcomes for children in conflict with the law, the wider community and the general public, in accordance with the imperatives of crime prevention and community safety and; responding to society’s most disadvantaged, damaged and distressed children without undue recourse to criminalization.<sup>2</sup>*

### **1. Children and the criminal law**

With respect to children, their immaturity as developing human beings has been recognised to some extent as relevant to holding them responsible for their actions where this involves breaking the law.

This recognition is closely tied to increased appreciation from the nineteenth century of the concepts of childhood and, later, adolescence.

In keeping with the accepted societal norms of how children were regarded<sup>3</sup>, when the English came to Australia in the late eighteenth century, the law treated child offenders no differently to adult offenders. They went to the same courts and received the same sentences including hard labour and corporal and capital punishment. Children as young as nine were transported to Australia as convicts and 20% of the transported convicts were under 20 years<sup>4</sup>. Childhood was not recognised as a concept or a life stage.

The only concession under English law and therefore Australian colonial law, was the *doli incapax* rule. Children under the age of seven were deemed incapable of committing an offence. For children aged seven but not yet 14, there was a presumption that they were incapable of breaking the law but this was rebuttable by prosecution. In due course, the minimum age was raised to ten across Australia with *doli incapax* still to apply to those under 14. However, the implementation of *doli incapax* has always been problematic and currently varies in its precise wording and interpretation across Australian jurisdictions. We refer to the submission of Youth Law Australia in this regard.

In the 1880s legislation was enacted in some States to allow children charged with very serious offences to be tried summarily. In Queensland this was for all offences other than homicide. The establishment of

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<sup>2</sup> Goldson B, , “‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) Youth Justice

<sup>3</sup> The English Factory Act 1833 banned children from working in textile factories under the age of nine. From nine to thirteen they were limited to nine hours a day and 48 hours a week. This was seen as a significant step in protecting children!

<sup>4</sup> <https://libraries.tas.gov.au/convict-portal/pages/before-transportation.aspx>

a separate and specialist children's court first occurred in South Australia in 1890 and 1907 in Queensland:

*We have to endeavour to distinguish between a legal function and a fatherly correction. The offences of nearly all children do not call for legal punishment but for correction administered in a fatherly manner and it is a grave mistake when we confound one of these with the other.<sup>5</sup>*

Initially the aim was to: allow for minor offences by children to be dealt with speedily; remove the stigma children suffered when appearing in an adult court; eliminate the procedures which treated young offenders as criminals and "reclaim erring children."

In the early 1900s there was a paradigm shift from punishment to prevention and guidance. During this time until the 1960s there was a commitment to the welfare model with a focus on the individual child as influenced by the experiences and circumstances in their lives.

In 1990, the United Nations finalised the Convention on the Rights of the Child with basic legal rights for children. The *Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules') stress the importance of nations establishing a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed to meet the varying needs of juvenile offenders, while protecting their basic rights<sup>6</sup>.

However, there has been an increasing tendency in recent years to call for more punitive "law and order" responses to children. Extreme cases such as the killing of the toddler, James Bulger, in England set the background to this with media reports of the two ten year olds involved as "the face of evil". England and Wales actually removed *doli incapax* as a consequence. Such offences are not, of course, representative of child offenders or child offending and policy and law based on extremes is never good policy or good law.

The reality is also that across the world, including Australia, crime and youth crime has been decreasing for some length of time. There is certainly no "youth crime wave" enveloping Australia. There may be "hot spots" of offending or offenders, but knowing this, in fact, gives us an opportunity to investigate the causes and develop relevant localised and targeted responses.

The youth justice system in Queensland (and probably other jurisdictions in Australia) is only a slightly modified form of the adult criminal justice system. The only restriction on police is that there must generally be a person the child has some confidence in present at any interviews or searches. Whilst courts may be closed, they operate as any adult court in terms of process and personnel. The main difference is the length of sentences which reflects a child's experience and perception of time. However, for more serious offences, it is possible for a child to be sentenced to life imprisonment where the offence involves the commission of violence against a person and the court considers the offence to be a particularly heinous offence having regard to all the circumstances.

Ironically, research has indicated that countries with the lowest minimum age of criminal responsibility tend to have the highest rates of child imprisonment.

Raising the age of criminal responsibility could be seen as an opportunity to re-think the justice system as it applies to children, adolescents and young adults to better reflect their stage of development and maturity.

Importantly, CROC requires States Parties to set a minimum age "below which children shall be presumed not to have the capacity to infringe penal law" and the UN Committee on the Rights of the Child (the CROC Committee) has criticised Australia's low age of ten years. While CROC does not specify what age level is appropriate, and General Comment No. 10 (2007) concluded "that a minimum age of

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<sup>5</sup> A Queensland member of Parliament when the Children's Bill was debated on the introduction of the court.

<sup>6</sup> Richards K: *What makes juvenile offenders different from adult offenders?* Trends & Issues in Crime and Criminal Justice no. 409.

criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable". The more recent General Comment No 24 (2019) states:

*22. Documented evidence in the fields of child development and neuroscience 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. .... **States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.** Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention. (Our emphasis)*

## **2. Inconsistency of the law in relation to children**

While Queensland's Criminal Code provides for a child aged 10 to be subject to the criminal law, it also provides that:

- for a number of offences, the fact that the victim of the offence is under 12 years of age is a circumstance of "aggravation" thus attracting a higher maximum sentence
- it is an offence for a person who has care or charge of a child under 12 years to leave them unsupervised for an "unreasonable time"
- "indecent treatment of a child" relates to a person up to and including the age of 15
- "child exploitation material" relates to images of a person up to and including the age of 15
- it is an offence for a person who has care or charge of a child under 16 years to abandon the child or fail to provide them with adequate food, clothing, medical support
- a child under 18 years cannot get their ears pierced without parental permission

It is also interesting to note the classifications for films and computer games (regulated under Commonwealth Law) are:

- G - General (suitable for all)
- PG –Parental Guidance (potentially only "mild impact" but not recommended for viewing by people under the age of 15 without guidance from parents, teachers or guardians)
- M (not recommended for children under the age of 15).

These examples indicate a degree of confusion and ambivalence in the way our society views its children: do we treat them as people who are vulnerable and potentially at risk and in need of some form of protection or assistance – or do we treat them as criminals first and foremost?

## **3. Doli incapax in Queensland**

It could be argued that *doli incapax* goes some way to ameliorating the impact of the age of ten as the minimum age. Due to the construction of section 29 of the Queensland Criminal Code when the common law in relation to criminal offences was codified in Queensland, this quasi protection has proven to be ineffective: the bar is effectively so low as to provide almost no protection:

*In sum, while there may be infelicities of wording in some judgments, the Queensland Court of Appeal has consistently expressed a test that requires proof of a general capacity to understand that the specific act charged ought not to have been done (mutatis mutandis with respect to omissions). That test is clear from the wording of s.29(2) and differs from the common law. It does not require proof of any specific degree of wrongfulness. This may be a matter of some concern, permitting a lower bar to be set for children in the Code jurisdictions: all that need be*

*established, it seems, is that they have the capacity to distinguish right from wrong simpliciter in order to bear criminal responsibility*<sup>7</sup>.

In theory, if *doli incapax* worked effectively it should mean that a child under 14 generally cannot be prosecuted except for the most minor of matters: *doli incapax* actually enables the prosecution of children at a younger age of ten to thirteen years and its interpretation leads to prosecution for more serious offences than is appropriate with the knowledge we have in relation to children, their development and offending behaviours – this is discussed more in Part B of this submission.

#### **4. Inappropriate use of the criminal law**

The Charter of Youth Justice Principles in Queensland's *Youth Justice Act 1992* commendably reinforces compliance with the human rights aspects of children in the criminal justice system, but it does not fundamentally have an approach that is child centric. In particular, Principle 8 states:

A child who commits an offence should be—

- (a) held accountable and encouraged to accept responsibility for the offending behaviour; and
- (b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and
- (c) dealt with in a way that strengthens the child's family.

However, the police and the criminal law is not infrequently used as a behaviour management tool for unruly or troubled children – including by agencies which have the care of children in the child protection system. This generally relates to behavioural issues and results in property damage or assault of a worker. Children are placed in such accommodation because they cannot live in a family situation and it is to be expected that they have behavioural problems which staff should have the skills to manage and be able to work with the child to address. The problem is sufficiently serious that the Department of Child Safety, the Queensland Police Service and non-government partners in the out-of-home care system have entered into a Joint Protocol<sup>8</sup> aimed at reducing the criminalisation of young people as a response to those situations.

The following are examples of how the law is currently utilised against children in spite of their circumstances:

##### Example One

A 13-year old female in the care of Child Safety was charged with creating and distributing child exploitation material and indecent treatment of a minor. These charges all related to images she took of herself on her mobile and then forwarded to her boyfriend (who was of a similar age). With respect to the first charge, she was effectively the victim of her own act; and with respect to the second, there was no evidence that her boyfriend was unhappy with or distressed by receiving the images on his phone. The young female's phone was handed in to Police for investigation by those responsible for her care in an out of home care placement. The young person was charged and sent to court rather than having any meaningful intervention and support which is what a parent would likely have offered in similar circumstances had this child not been in care.

##### Example Two

In 2019 YAC lawyers represented a child who is in the statutory care of Child Safety. She was charged with 14 offences. All offending was alleged to have occurred in or adjacent to her residential setting or school, or as a result of consequential police intervention. All offending was alleged to have occurred prior to the young woman attaining the age of fourteen (14) years.

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<sup>7</sup> McKeon A. *Doli Incapax – an assessment of the current state of the law in Queensland July 2018* (prepared for YAC internal use)

<sup>8</sup>[https://www.qfcc.qld.gov.au/sites/default/files/joint\\_agency\\_protocol\\_to\\_reduce\\_preventable\\_police\\_calls\\_outs\\_to\\_residential\\_care\\_services.pdf](https://www.qfcc.qld.gov.au/sites/default/files/joint_agency_protocol_to_reduce_preventable_police_calls_outs_to_residential_care_services.pdf)



Medical reports indicated the child had “an IQ of 70, which lies in the borderline range of cognitive ability with speech and language process difficulties in the severe range”.

Representations were made to the Prosecution referring to evidence of the young woman’s alleged physical (including sexual) assault, intellectual and educational deficits, multiple diagnoses, a history of trauma and neglect and repeated observations of immaturity submitting that the presumption contained in Section 29 of the Criminal Code [*doli incapax*] could not be rebutted beyond reasonable doubt.

The Prosecution refused to withdraw the charges. Ultimately, as result of a finding that the young woman was temporarily unfit for trial, the Magistrate dismissed the charges without needing to determine the issue of *doli incapax*.

#### Example Three

In 2018 YAC represented a 13 year old who was with his family in a store whilst his mother obtained a manicure. His father removed money from an unattended cash register. During this time the boy looked around the shop, checking in on his mother. It was alleged that this young boy had assisted his father by keeping “a lookout”.

YAC lawyers submitted that a 13 year old would not understand that such behaviour should be avoided, as they themselves have not participated in any serious wrongdoing or had the capacity to understand that they could get in trouble for their father’s wrongdoing. This observation was supported by the fact that the boy returned to the shop to re-join his mother after the theft had taken place.

Submissions requesting the charges be withdrawn were rejected and the matter was listed for trial. It was only after YAC obtained evidence indicating that the young person suffered from an intellectual impairment that the police were prepared to withdraw the charge shortly before trial.

The issue in all of these cases is: what public interest is served in putting these children into the criminal justice system? If the child has “done the wrong thing”, is prosecution really the most appropriate and helpful way to address this?

### **B. OTHER KEY ISSUES IN RELATION TO RAISING THE AGE**

There is now an extensive body of research, literature, and data across a range of domains (justice, psychology, sociology, health, education) which relates to child and youth development and behaviour and its significance in terms of youth offending and youth offenders. In particular, the field of neuroscience has progressed significantly and has provided highly relevant insights into brain development in the young child and the adolescent. This body of literature paints a highly consistent picture of the impact of a child’s developmental needs and life experiences throughout the period of their development to a mature adult – now said to extend to the age of 25 years. Academics in Australia have contributed to this body of literature, bringing an Australian experience and perspective to the discussion – but overall finding consistency with the overseas experience. The data and evidence are clear and we have yet to find any evidence which disputes their findings and conclusions.

This evidence is readily available to the Attorneys-General, their departments and policy advisers and officers. We are quite sure that they are, in fact, already aware of this literature and what that clearly articulates – that the age of 10 is far too low when it comes to holding a person **criminally** responsible for their actions (which is to be differentiated from providing a consequence for that action). Children who enter the legal system and have ongoing contact are known to have life experiences which have contributed to the behaviours they exhibit – the earlier the child comes into the system, the greater should be the concern.

We would strongly suggest that the Attorneys-General have targeted consultations with respected Australian academics across the relevant disciplines<sup>9</sup>. Targeted consultation should also take place with those who daily experience the youth justice system: the lawyers who regularly represent children in the youth justice jurisdiction (particularly Legal Aid Commission and Community Legal Centre lawyers) and the judicial officers before whom these children appear and not least, those with lived experience of the youth justice system. The United Nations Convention on the Rights of the Child (CROC) mandates hearing the child's voice.

We note that raising the age of criminal responsibility is supported by organisations such as the Australian Medical Association and the Law Council of Australia<sup>10</sup>.

### **1. Neuroscience and brain development**

The neuro-scientific research indicates how critical the early years and then the period of adolescence are in a person's life and an understanding of this is fundamental<sup>11</sup>. In summary:

- The human brain is undeveloped at birth – human interactions grow brain connections.
- The developing brain is directly influenced by early environmental enrichment and social experiences (positive or negative) and the type of experiences an infant has is crucial.
- The brain of the young person (adolescent) is remodelling (growing new connections and pruning out others) from the 'child' brain and transforming into the 'adult brain' – a process that takes until at least 24 years of age in healthy development.
- Remodelling of the young person's brain should develop the functions for a successful adult life which would include learning self-regulation (such as in pausing before acting) and developing empathy and morality (a concern for others/the greater good) and not simply acting on automatic fight/flight responses which are part of the "reptilian" part of the human brain.
- The re-modelling process will only happen positively if the young person has had appropriate experiences in the early years and then in adolescence so the brain develops in a "healthy" way.<sup>12</sup>

Adolescents have developing cognitive capacities. In early adolescence, those parts of the brain that deal with reward processing are more easily aroused but those that deal with harm avoidance and self-regulation are still comparatively immature<sup>13</sup>. At age 16 the adolescent brain, and therefore judgement making and impulse control, is still evolving<sup>14</sup>.

There are those who argue that the modern education system and access to television and the internet means that children know more and mature earlier. The Australian Association of Child Welfare Agencies (AACWA) has commented that:

*While many children may have access to a greater amount of information (and even this assertion is questionable for highly disadvantaged groups) than in previous centuries when the laws were*

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<sup>9</sup> See for example: Professor Christopher Cunneen (UTS), Professor Kelly Richards (QUT), Professors Anna Stewart and Hennessey Hayes (Griffith University), Professor Tamara Walsh (UQ), Professor Pamela Snow (Latrobe) and Professor Elisabeth Hoehn (Qld Health)

<sup>10</sup><https://www.lawcouncil.asn.au/docs/7b6b5121-5220-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>

<sup>11</sup> YAC notes *Better Systems, Better Chances: A Review of Research and Practice for Prevention and Early Intervention*. Canberra: prepared for the Australian Research Alliance for Children and Youth (ARACY) by Fox, S., Southwell, A., Stafford, N., Goodhue, R., Jackson, D. and Smith, C. (2015) as an excellent resource on child and youth development and related issues.

<sup>12</sup> Based on a presentation by Professor Elisabeth Hoehn at the Balanced Youth Justice Forum, Brisbane, 29 May 2013

<sup>13</sup> Australian Institute of Family Studies 2011 Family Matters No 88

<sup>14</sup> Levin MA 2012 [NB: Mr Levin is Director Center for Effective Justice, Texas Public Policy Foundation, Senior Policy Advisor, Right on Crime]

*conceived, information does not necessarily imply a greater maturity or discernment when it comes to matters of right and wrong.[44]*

*In fact, despite compulsory education research shows that a significant number of offending children do not regularly attend school, because of truancy or school exclusion.[45] As such while school may generally contribute to educating children in what is socially acceptable behaviour it may fail to do so with regard to those children most at risk of committing crime. It should also be noted that not all children will have been born and brought up in Australia and so it may not be appropriate to expect that they have experienced a similar standard of education.[46]*

.....

*It cannot be denied that children today make much greater use of modern technology than in earlier years. However, this does not simply equate with a better ability to understand the wrongfulness of actions. The revolution in the electronic media has not only had a positive influence on the development and maturation of children. Computer games, Internet, television, etc, have led to a reduction in social contact and, as one German author claims, such media have led to a "gradual disappearance of reality".[49] Thus, instead of interacting with others, personally experiencing situations and learning how to behave in them, children learn now increasingly through watching television and playing computer games. As such the young may not fully appreciate the full effects of their actions and how others may be affected or react in real situations.*

*....children may well be "shocked and distressed to discover that real people do not get up and walk away as they do after lethal attacks in cartoon films".[50] Such thought processes have indeed been noted in the Bulger case where, "[o]utside the trial, one [of the accused boys] spoke of James Bulger as a character in a chocolate factory and imagined that, as in some Disney-esque scenario, he might be brought back to life."<sup>15</sup>*

The child brain is not the same as the adult brain and youth offending and youth offenders are different to adult offending and adult offenders<sup>16</sup>.

Where a child commits one of the most serious of offences such as rape or murder – that does not make the child an adult. We note that some jurisdictions outside Australia have a higher age of criminal responsibility but that if the offence is a very serious one, then the child can be prosecuted. This is quite counter-intuitive. If a younger child has committed a very serious offence then the alarm bells should be sounding even more loudly because what they are doing is not normal for a child of that age. This does not make the child “evil”. The seriousness of the offence is not a reason to be more punitive – but will be a reason for a significant investigation into the child’s circumstances.

## **2. The importance of parents and parenting**

Research has demonstrated a clear relationship between the health and wellbeing of young people and the environment they grow up in<sup>17</sup>. “Parents, play and home environments are critical to child development and health and wellbeing outcomes. Parenting is so influential that it can moderate the impact of social and economic disadvantage.”<sup>18</sup>

<sup>15</sup> Association of Child Welfare Agencies, Newsletter 2000.

<http://www.acwa.asn.au/acwa/publications/newsletter/2000/feb2000.html>

<sup>16</sup> Richards K (2011) What makes juvenile offenders different from adult offenders? Trends & Issues No 409, Australian Institute of Criminology

<sup>17</sup> Australian Institute of Health and Welfare 2011. Young Australians: their health and wellbeing 2011. Cat. no. PHE 140 Canberra: AIHW.

<sup>18</sup> Fox, S., Southwell, A., Stafford, N., Goodhue, R., Jackson, D. and Smith, C. (2015). Better Systems, Better Chances: A Review of Research and Practice for Prevention and Early Intervention. Canberra: Australian Research Alliance for Children and Youth (ARACY).

Contrary to popular beliefs around the diminishing role of parents in late adolescence/early adulthood, the role of parents continues to be important in an adolescent's life. There is evidence that the emotional and psychological support provided to children by parents in a warm and communicative manner plays a significant role in adolescence. Additionally, parental monitoring and limit setting have been linked to managing antisocial/offending behaviour, substance abuse and sexual risk taking in adolescence<sup>19</sup>.

The parental role is also important in the development of language skills, particularly in the early years. The extent of oral communication between child and parent and the quality of that conversation is important. The ability to communicate has been found to play a key role in social capabilities and underlines the overlap between child maltreatment and poor language development. Research indicates:

- a link between low socio economic status and oral language competence in the early years, particularly for boys
- a link between offending patterns/severity and oral language impairment
- poor language ability in the early years increases the risk of anti-social behaviour at 14 years of age.<sup>20</sup>

Parental health and disability can also have an impact on children and young people and their behaviour as this may contribute to poor parenting skills and emotional support and developmental delays. A young person living with a parent with mental health problems may also be at increased risk of social, psychological and physical health problems and may experience violence and abuse<sup>21</sup>.

A recent Queensland discussion paper noted:

*Key Point: Evidence shows that a youth justice response is not the reason that children and young people who offend for the first time do not return to the youth justice system. Instead it is family and community supports and the child and young person's natural and developing understanding and acceptance of their behaviour and personal responsibility that contributes to this change.*<sup>22</sup>

Parents' capability, capacity, parenting and parenting styles are therefore critical to the healthy development of a child from birth through adolescence to adulthood, giving the child the best opportunity to develop to their full potential. We know, however, that a large proportion of repeat young offenders and their families are known to Child Safety Services.

### **3. Child abuse and neglect and family and domestic violence**

The Australian Institute of Health and Welfare (AIHW) has linked data from child protection services and youth justice services in six Australian jurisdictions (not including NSW or the NT) to examine the experiences of children aged 10–17 who accessed both systems between July 2013 and June 2017<sup>23</sup>. The data showed that almost half (48%, or 3,700) young people under youth justice supervision also received child protection services. This was higher among those in youth detention (53%, or 2,400) than among those under community-based supervision (48%, or 3,400).

Young people who received child protection services were 9 times as likely as the general population of the same age to enter the youth justice system. Those in out of home care were 16 times as likely to do so. Of the young people who accessed both child protection and youth justice, more than 4 in 5 (82%, or 3,000) accessed child protection first.

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<sup>19</sup> Australian Institute of Family Studies 2011 Family Matters No 88

<sup>20</sup> Snow P, Powell M Youth (in)justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence Trends & Issues in Crime and Justice No. 435 April 2012

<sup>21</sup> Australian Institute of Health and Welfare 2011. Young Australians: their health and wellbeing 2011. Cat. no. PHE 140

<sup>22</sup> Queensland DJAG Youth Justice Reform Discussion Paper (2016)

<sup>23</sup> Australian Institute of Health and Welfare 2019. Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018. Data linkage series no. 25. Cat. no. CSI 27.

Young people who have been abused or neglected often exhibit reduced social skills, poor school performance, impaired language ability, and mental health issues<sup>24</sup>.

*Abuse has particular repercussions for the development of school skills such as language learning, cognitive processing and self-regulation. Interpersonal violence and community violence experienced in childhood are related to myriad psychosocial problems including, attachment problems, speech, language and social interactions, delays in emotion processing, and intellectual and behavior problems (Azar & Wolfe, 2006).*<sup>25</sup>

Neglect can have serious short-term and long-term effects for children in relation to their brain development, emotional and social development and potential for mental health problems and risky behaviours<sup>26</sup>.

Research has identified that family stressors such as financial difficulties; social isolation; domestic violence; mental health problems; disability; alcohol and substance abuse; and a lack of safe and affordable housing<sup>27</sup> put young people at risk of abuse and neglect.

With respect to family violence, AIHW found that 22% of children whose mothers reported abuse by their partner in the first year after giving birth had emotional and/or behavioural difficulties at age 4, and at 4 years after birth, around 24% of children had emotional and/or behavioural difficulties.<sup>28</sup>

*Children with a history of violence exposure follow certain developmental trajectories, often withdrawing socially or behaviourally regressing, which can cause problems with peer relationships, especially in demanding social settings, such as in school. At the level of the brain, children exposed to violence may exhibit neurological changes that lead to problems of cognition in memory, executive functioning (the ability to organize and synthesize information), self-regulation, language causing learning delays or disabilities<sup>29</sup>. Integrating research from a number of fields, we review the confluence between violence exposure, mental health problems, language learning, neurocognitive development and disabilities.*<sup>30</sup>

In 2017–18, the Specialist Homelessness Services assisted 121,000 clients due to family violence. Thirty four percent were aged under 18 with 22% aged 0–9 and 13%, or 15,200 aged 10–18.

Abused, neglected or traumatised adolescents who are ‘acting out’ are less likely to be viewed sympathetically by the community than younger children and are more likely to run away, become homeless, engage in illegal and survival activities which bring them to the attention of the police rather than child protection services. These young people have been described as moving from being ‘troubled’ to ‘troublesome’<sup>31</sup>. This may lead to interventions which criminalise rather than assist them.

In particular, it has been found that:

- placement in out of home care doubles the risk of post placement offending particularly if this occurs during adolescence and involves a group home
- multiple placements or placement instability together with changes of school, particularly if that involves exclusion, are linked to an increased risk of difficult behaviour and later offending

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<sup>24</sup> Australian Institute of Family Studies 2011 Family Matters No 89

<sup>25</sup> Perkins S, Graham-Bermann S, <https://www.sciencedirect.com/science/article/pii/S135917891100108X>

<sup>26</sup> Information taken from NSPCC (UK) website at:

[https://www.nspcc.org.uk/Inform/resourcesforprofessionals/neglect/effects\\_wda91912.html](https://www.nspcc.org.uk/Inform/resourcesforprofessionals/neglect/effects_wda91912.html)

<sup>27</sup> Ibid

<sup>28</sup> Australian Institute of Health and Welfare 2019. Family, domestic and sexual violence in Australia: continuing the national story 2019. Cat. no. FDV 3. Canberra: AIHW.

<sup>29</sup> Citing De Bellis, Hooper, Spratt, & Woolley, 2009; De Bellis, Hooper, Woolley, & Shenk, 2009; DePrince, Weinzierl, & Combs, 2009; El-Hage, Gaillard, Isingrini, & Belzung, 2006; Seckfort et al., 2008; Watts-English, Fortson, Gibler, Hooper, & DeBellis, 2006

<sup>30</sup> Perkins S, Graham-Bermann S, <https://www.sciencedirect.com/science/article/pii/S135917891100108X>

<sup>31</sup> Australian Institute of Family Studies 2011 Family Matters No 89

- for females, any placement, irrespective of instability, increased their risk of offending<sup>32</sup>.

In Queensland, as in some other jurisdictions, young people in care may be at greater risk of criminalisation as a result of the system which is supposed to provide them with protection: such as charges for wilful damage and assault in residential placement due to insufficient resources and staffing and staff without the experience or skills to work with troubled children.

It is useful to consider the prevalence of child abuse and neglect, and instances of family and domestic violence in light of their connection to offending by young people. The 2018 Report on Youth Justice by former Queensland Police Commissioner, Bob Atkinson, notes that 83% of children in the youth justice system were known to Child Safety Services in 2014. In 2016-17:

- 55,441 children were subject to one or more child concern report
- 20,076 children were subject to one or more notification
- 6,242 children were found to have experienced significant harm and/or be at risk of significant harm
- 26,706 Family and Domestic Violence Protection orders were made in Queensland
- 13,518 defendants were convicted of breaching a Protection order.

The Report also noted:

*It is estimated that over 90 per cent of children and young people in the youth justice system are survivors of complex and ongoing trauma. To respond accordingly, DJAG is moving towards adopting a trauma informed practice framework.<sup>33</sup>*

Children are, in fact, far more at risk from adults than adults are at risk of harm from children.

#### **4. Education**

*Evidence of an association between school suspension and a range of negative behavioural outcomes has grown during the past decade. As well as contributing to academic failure and dropout, school suspension is a key element of what is known as the 'school-to-prison' pipeline, which sees marginalised and excluded young people at an increased risk of juvenile and eventually, adult incarceration.<sup>34</sup>*

Education Queensland data indicate that, in 2018, 1188 **prep students** were suspended for 1-10 days, 9 for 11-20 days and 1 child was actually excluded. This should be a key signal early on that something is wrong and that there is a need to see what interventions for the family and/or child are needed.

The total suspensions and exclusions for Grades 1 to 5 inclusive was nearly 21,000. Similarly, these should be a red flag for investigation and action if necessary.

We note the provisions in Queensland's *Education (General Provisions) Act 2006* included in 2013 which enable a child to be suspended where charged with an offence or excluded if convicted (irrespective of whether the behaviour was during school hours or on school property or otherwise involved the school) undermine the work of those involved in youth justice. Courts, in recognition of the importance of school in providing stability and support for young people, regularly seek to impose bail conditions on young people to the effect that they attend school. Where the young person is subject to a school disciplinary absence (eg for the same behaviour which has led to the charge) the state education system is in effect actively working against those outcomes.

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<sup>32</sup> Ibid

<sup>33</sup> Queensland DJAG Youth Justice Reform Discussion Paper (2016)

<sup>34</sup> Hemphill SA, Broderick DJ, Heerde JA, Trends & Issues in crime and criminal justice, No 531 June 2017, Australian Institute of Criminology

## 5. Homelessness

There is also a proven link between homelessness and offending. As the Australian Institute of Family Studies has noted:

*Homeless young people typically come from disadvantaged and dysfunctional families, and maltreatment is often the impetus for a young person to leave home.*

*Homeless maltreated young people may have:*

- *run away from home to avoid the maltreatment (runaways)*
- *been asked to leave home (throwaways) or*
- *been placed in out-of-home care.*

*Disadvantages experienced by homeless youth are often exacerbated by mental health concerns. Children experiencing multiple types of maltreatment are more likely to develop PTSD and depression. Young people who leave home to escape traumatic situations (domestic violence and multiple victimisation) are likely to suffer from trauma-related mental health issues. Furthermore, homeless children are at greater risk of victimisation with an estimated 83% of homeless youth experiencing physical and/or sexual assault after leaving home,<sup>7</sup> increasing their risk of further mental health issues.*

*Homeless young people are at a higher risk of becoming involved in the criminal justice system than their housed counterparts.*

*Young homeless people are often unable to support themselves, ineligible for benefits, and unlikely to find employment. Consequently, they may engage in survival behaviours—begging, theft, drug dealing and prostitution—to earn income for food and shelter. Not only are some of these behaviours illegal, they are also more visible to police due to the lack of privacy experienced by homeless people.*

*Trauma adds to the risk of offending behaviour, contributing to the link between child maltreatment, homelessness and offending. Experiences of trauma—both prior to leaving home and a result of being homeless—lead to poor self-regulation and coping skills (exacerbated by substance abuse), placing the young person at high risk for serious illegal behaviour.<sup>35</sup>*

## 6. Aboriginal and/or Torres Strait Islander children

The 2018-19 Annual Report of the Childrens Court of Queensland notes the ongoing high level of overrepresentation of Aboriginal and/or Torres Strait Islander children. In 2018-19 these children accounted for 44% of all child defendants. That number is significantly higher in the younger group of juveniles - in 2018:

- 83% of children aged 10 were Aboriginal and/or Torres Strait Islander
- 73% aged 11
- 68% aged 12.

By the age of 17 Aboriginal and/or Torres Strait Islander children represented 29% of the cohort. Overall, Aboriginal and/or Torres Strait Islander young people are 9 times more likely than other young people to have had a charge finalised through a Queensland court.

In terms of detention centres, Aboriginal and/or Torres Strait Islander young people accounted for over 70% of young people in custody on any average day and were 28 times more likely to have been in youth detention than other young people in 2018-19. The Justice Report by the Queensland Government Statistician's Office for 2017-18 indicates that the average daily rate of 10-12 year olds in detention was

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<sup>35</sup> Child maltreatment, homelessness and youth offending, 4 October 2017 <https://aifs.gov.au/cfca/2017/10/04/child-maltreatment-homelessness-and-youth-offending> Footnotes in article can be found on the website

eight, all of whom were Aboriginal and/or Torres Strait Islander children and ten of thirteen 13 year olds were Indigenous.

This is an Australian-wide phenomenon. Cunneen notes that

*The concentration of Indigenous children is even greater when we look at those aged 12 years or younger. Nationally, some 76 per cent of children placed in detention and 74 per cent of children placed on community-based supervision in the 10-12 year old age bracket (inclusive) were Indigenous children during the period 2015-16 (AIHW 2019: Tables S78b and S40b).*

If the data in relation to Aboriginal and/or Torres Strait Islander children do not clearly illustrate that it is a range of social, economic and trauma related issues (which Indigenous peoples experience at their most extreme) which pull our children into the justice system, it is hard to know what else could possibly convince people. The fact that it is predominantly Aboriginal and/or Torres Strait Islander children in the younger age groups should be particularly troubling to policy and law makers (indeed, the whole Australian community) – and one which should inspire positive and swift action.

### C. IDENTIFYING ALTERNATIVE RESPONSES

What the previous section of this submission tells us is that, for children who have ongoing involvement with the youth justice system, particularly those children whose involvement begins almost as soon as they turn 10 years of age, a legal response is not useful in addressing the causes of crime, which are essentially social welfare issues. Thus the justice system is not well-equipped to address offending and prevent future offending because it cannot address the causes. Addressing the causes of offending needs the involvement of a range of disciplines:

*It must not fall to criminologists, psychologists, and legal representatives alone, to tackle issues of crime. Instead, a true interdisciplinary approach ought to include disciplines such as sociology; education; philosophy; economics; politics; history; and the arts. It must combine the work of academics and practitioners but also it must not ignore the voices of people interwoven within the criminal justice system, such as those convicted of a crime, victims of a crime and their social networks. Indeed, the development of an interdisciplinary and integrated rehabilitation theory that examines not only the causes of crime but explores strengths based approaches through the psychological, social, moral and judicial elements of reintegration, is needed. With an integrated and interdisciplinary rehabilitation theory, practitioners and researchers can begin to explore and test alternative approaches to rehabilitation, providing policy makers with evidenced based knowledge to guide policy<sup>36</sup>.*

#### 1. Justice reinvestment and investment in the early years

The key issue which needs to be addressed is what response(s) are required to address problem behaviours for the 10 – 13 year old age group instead of use of the youth justice system? As stated above, the answer should involve more than justice agencies.

*...the overriding theme of international conventions and guidelines is a two-pronged approach of decriminalisation and diversion<sup>37</sup>.*

In other words:

*the key to reducing [harm and] offending lies in minimal intervention and maximum diversion<sup>38</sup>*

<sup>36</sup> Kewley S Strength based approaches and protective factors from a criminological perspective, *Aggression and Violent Behavior* 32 (2017)

<sup>37</sup> John Gillen, 'The Age of Criminal Responsibility: "The Frontier between Care and Justice"' (2006) 12(2) *Child Care in Practice*

<sup>38</sup> Leslie Mcara and Susan Mcvie, 'Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) *European Journal of Criminology*



It is likely that a ten year old who appears in court has had issues as an eight or nine year old (and potentially younger) and they have not been addressed.

Clearly, early intervention and prevention are the best solutions: this is hardly a new concept and has been discussed in the literature for a long time – “prevention is better than cure”. However, equally clearly we are not doing this, or not doing it effectively. As noted previously, if a child is being suspended in prep, then that must be a red flag for problems at home, a family which is struggling or some challenge the child has such as ADD or ADHD. Focussing on providing the best start in life for the child and their future wellbeing will be protective factors for developing anti-social or offending behaviour. There is evidence that supporting families who are struggling; providing parents with support and parenting programs from the early years into adolescence; supporting the development of good oral language and social skills; and responding more appropriately to young people who are the victims of abuse and neglect would be the most cost-effective responses. Again, the literature on “what works” and best practice is well documented and available to governments and departments.

Due to the link between offending and other social problems, any measure that succeeds in reducing crime will probably have benefits that go far beyond this and therefore the cost effectiveness of this approach is magnified. *Early prevention that reduces offending would probably also reduce drinking, drunk driving, drug use, sexual promiscuity and family violence, and perhaps also school failure, unemployment and marital disharmony*<sup>39</sup>.

Taking up the concept of justice reinvestment, we need to review how we invest public monies to best effect. Instead of building more detention centres at the “end of the line”, there needs to be a properly resourced investment at the beginning, taking a whole of government approach with an integrated suite of programs at the local community level which support parents, families and children in a non-judgmental manner so that they do not feel failure or stigmatisation in seeking help. It can incorporate universal strategies<sup>40</sup> which support inclusion of families and their children in communities and assist in normalising parenting and other skills and experiences as well as workers in health, child care and education identifying those who would benefit from assistance when the children are still young – at birth and pre-natal even. It then requires the programs and services to be available and accessible by those families and children as required when they hit challenges.

To support this we would advocate for stand-alone Departments for Children and Families which would be responsible for ensuring that the services are delivered where needed. This should be quite separate to the current statutory child protection agencies, to avoid any perceived stigma in seeking help or taking up a referral from (for example, the child’s school) or concern (particularly for Aboriginal and/or Torres Strait Islander families) that this may lead to the removal of a child.

A focus on child wellbeing and the “best start in life” for all children is to be preferred to only taking a negative “risk” centred approach – which is not a child centric, strengths based approach, but rather about addressing the concerns of adults.

The Australian Research Alliance on Children and Youth (ARACY) has published an extensive document “Better systems, better chances”: a review of research and practice for prevention and early intervention (2015). This provides a wealth of information in relation to:

- Child development pathways and processes;
- The social and economic benefits of prevention and early intervention;
- Risk and protective factors for positive child development;

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<sup>39</sup> Farrington (1997) The Cambridge Study in Delinquent Development - a prospective longitudinal survey which commenced in 1961 of the development of offending and antisocial behaviour in 411 South London boys, mostly born in 1953.

<sup>40</sup> An example of this would be programs where mothers and their babies are visited in their homes for two years after the birth of the child

- Key pathways for intervention at key developmental stages (from antenatal through to adolescence); and
- System design elements that facilitate prevention and early intervention.

We note two Queensland based initiatives which would also help to inform what is needed and how it can be achieved - the *Pathways to Prevention* project which was led by Professor Ross Homel and the Logan Together project.

*Pathways to Prevention* operated in the third most disadvantaged SLA in Queensland between 2002 and 2011 (for 10 years) as a partnership between national community agency, seven primary schools (children aged 4-12), and Griffith University Pathways as a multi-component service delivered through schools and the community. It employed a mixture of professional staff and community workers from the First Nations, Pacific Islands and Vietnamese communities, and

*Within its universal focus, the Pathways model emphasises comprehensive and integrated practice that supports development in a holistic way. Its overriding goal is to create a pathway to wellbeing for all local children as they transit through successive life phases, from conception to youth.*

Projects with pre-schoolers and their families were a significant part of the Queensland *Pathways to Prevention* project<sup>41</sup>. It combined the Preschool Intervention Program (PIP) focused on children and delivered through state preschools with services for families (the Family Independence Program, or FIP). The preschool intervention was found to be effective in improving children's communication skills and reducing their difficult behaviour, over and above the effect of the regular preschool curriculum with better outcomes when the two programs were combined than when either was delivered on its own<sup>42</sup>.

A Jesuit Services report also notes the importance of family, school and community:

*Particular attention is given to the need for a wider focus on the environments in which children develop and this brings in factors such as family, school, community and society. Evidence gathered in the present project shows that children who come into the system at an earlier age are associated with higher rates of offending and longer criminal careers.*<sup>43</sup>

Logan Together is supported by Griffith University and “Dozens and dozens of organisations, big and small, are working to help Logan kids reach their potential”. Their Vision: *In 2025 Logan kids will be as healthy and full of potential as any other group of Queensland kids. If all of us can assist 5,000 more Logan kids to arrive at 8 years old in great shape, we will have achieved our goals and have aligned our actions according to the life stages – from before birth and through each age and stage of childhood. We know that child, family and community characteristics all influence how our children are now, and in future years.*<sup>44</sup>

Assisting and investing in communities to mobilise in the way which Logan is doing would arguably be a much better use of the taxpayer dollar than paying for a child to be in a detention centre (calculated to be cost approximately \$237,980 per year for one young person in 2010<sup>45</sup>).

There needs to be a greater understanding of behavioural issues such as ADD, ADHD, Autism, Asperger’s and recognition of FASD related behaviours and specialist responses, and for those with particularly

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<sup>41</sup>Key Centre for Ethics, Law, Justice and Governance at Griffith University (led by Professor Ross Homel) and Mission Australia <http://www.griffith.edu.au/criminology-law/key-centre-ethics-law-justice-governance/research/prevention-developmental-pathways/the-pathways-to-prevention-project>

<sup>42</sup> Homel R, Freiberg K, Branch S, Le H Preventing the onset of youth offending: The impact of the Pathways to Prevention Project on child behaviour and wellbeing Trends & Issues Paper No 481 May 2015 Australian Institute of Criminology

<sup>43</sup> Richmond Jesuit Social Services (2013) Thinking Outside: Alternatives to remand for children: Profiles of children in the youth justice system

<sup>44</sup> <https://logantgether.org.au/>

<sup>45</sup> Cohen, Mark., Alex, Piquero and Wesley Jennings. 2010. “Studying the Costs of Crime across Offender Trajectories.” Criminology and Public Policy. 9(2):279-305.

challenging behaviours, such as young sex offenders provided by the Griffith Youth Forensic Service. Children with behavioural issues are often at risk of suspension and exclusion because their behaviour is simply regarded as “naughty”.

## 2. *Alternative responses to court*

For the immediate future, we will be faced with 10-13 year olds whose behaviour may be a cause for concern. To be clear: where a child’s behaviour is having an impact on others that must, of course be addressed. However, this may mean reviewing the approach we take to “the problem”:

*[I] nstead of asking, ‘does this child have the capacity to be exposed to the youth justice system?’, one should rather ask ‘is it preferable to decriminalise the act and deal with the behaviour without prosecution, sentencing, and YJ intervention?’*

*This approach suggests that children under the MACR are immune from prosecution not because they are not responsible for an act, but because their position and status as a child means prosecution in a youth justice system is:*

- a. Not effective in achieving the goals of youth justice;*
- b. Not in the best interests of the child; and,*
- c. Unlikely to address the core issues underlying their offending behaviour<sup>46</sup>*

We would argue that the age of criminal responsibility be raised to at least 14. Setting any age is problematic because every child and their circumstances are different but this does align with the current law to some extent as previously discussed.

The Children’s Court jurisdiction would be 14-17 but the current processes, structure and personnel should be reviewed to make it a true specialist jurisdiction and not simply a ‘junior’ form of the adult court. The purpose of the Queensland *Youth Justice Act 1992* (YJA) as detailed in section 3 is very much one of procedure. We would also argue that a form of *doli incapax* apply to 14 and 15 year olds which properly addresses their level of culpability and would enable a referral to the process we advocate shortly in relation to 10-13 year olds where more appropriate due to capacity issues.

In line with the evidence we now have about child and youth development, we would further argue that there should be a “middle phase” where 18-25 year olds may be dealt with in the adult system but the responses are again more tailored in recognition that there is still potential to get young adults “on track”. In particular, there should be greater recognition of the overrepresentation of vulnerable and disadvantaged people in the criminal justice system and responses developed which reduce the risks for them of coming back in to the system.

A child whose life circumstances have played a significant role in their “offending” behaviour cannot be held solely responsible for their actions. Whilst they may be held accountable, that is, there is some consequence for their action, there also needs to be a group of people who take responsibility in supporting the child and their family to access the services and interventions which would address identified challenges.

The CROC Committee in General Comment 24 has noted:

*23. The Committee recognizes that although 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 deals with children above and below that age. The Committee will continue to scrutinize this in reviews of State party reports. **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.** (Our emphasis)*

<sup>46</sup> Goldson B, “‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) Youth Justice

For those aged 10-13 where there is concern in relation to a child's behaviour which would be considered criminal if they were older, we believe that consideration should be given to developing a new response altogether, but one which builds on experiences in the use of a "circle style" of intervention drawing on lessons from restorative justice processes in the justice system but other spaces such as schools<sup>47</sup>, family group conferencing, the Queensland Special Circumstances Court and the Queensland Family Responsibilities Commission (FRC) which operated in the discrete Indigenous communities for over 10 years, the Murri Court and similar. It would have a therapeutic jurisprudence focus. We believe that it would be helpful to speak with people such as David Glasgow, the former Queensland Family Responsibilities Commissioner and others who have been involved in managing the various other programs referred to.

At this point we cannot be definitive about what, for ease of discussion we will refer to as a 'Children's Circle', that should look like but our initial thoughts include:

- There would need to be a referral by police for consideration of the desirability of convening of a Children's Circle where a person aged 10-13 years was alleged to have engaged in behaviour that if engaged by older person may constitute a breach of the criminal law and it was at least the second time that the child had been identified to have engaged in this type of behaviour.
- Some form of preliminary hearing be held to determine whether the child had engaged in the behaviour and so prevent "net widening".
- Where it cannot be established that the child has engaged in the behaviour or it is decided that a Children's Circle is not required in the circumstances, but there are indications that the child or family need support, they should be supported in contacting services which may be of assistance outside the Children's Circle process.
- A Children's Circle would likely be an ongoing process, not a "one off" event: there would be an initial session to identify the issues for the child and the family and an agreement made about goals and actions for those in the room is to take in seeking to address the issues identified and the goals to be achieved to bring the Circle to an end.
- Whilst not a court proceeding, the Chair should be someone with authority, not simply a convenor.
- Subsequent sessions would be by way of "checking in" that the various tasks and responsibilities were being implemented and would be as many and as frequent as the person responsible for chairing the Circle felt was necessary to ensure that people were doing what was required and development of a transition plan for the end of the Circle process
- The Children's Circle would be flexible as to who was part of the process in order to ensure that the right people are in the room who can assist the child and the family: this could change from session to session depending on what was needed to be addressed at that time. Initially there might be more family members or significant adults and later, representatives of service providers who have been involved. The police should not be able to attend as of right.
- Persons affected by the behaviour could attend at an appropriate session to discuss the impact of the event on them and for the opportunity for the child to apologise to those persons and to see what was being done to avoid future problems.
- Information shared within a Children's Circle cannot be used for any other purpose (other than if a serious risk of imminent and serious harm to a person is identified).
- Participation in a Children's Circle cannot be disclosable in any future criminal proceedings when the child turns 14.

A particular issue to be considered would be how the process would be affected by the child being in the care of Child Safety and the needs of this cohort in terms of family and significant people in their lives.

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<sup>47</sup> See Braithwaite J Youth Development Circles Oxford Review of Education 27, no 2 (2001) for a good descriptor of a the latter

The Children's Circles could happen within a local "hub" where relevant services are co-located or within easy reach to facilitate support – or where services might be able to have a worker available at times when a Circle is happening. Some local neighbourhood centres might be ideal for this.

Whether we are looking at prevention and early intervention or alternative responses to children with behavioural issues, the most pressing need of all is to appropriately address the overrepresentation of Aboriginal and/or Torres Strait Islander children.

The only way that this can happen is to enable Aboriginal and/or Torres Strait Islander families, agencies and communities to lead the responses and what they would look like for their individual communities across the State or Territory.

Focus should also be given to "hot spots" of youth offending and youth offenders in prioritising putting responses in place.

## **D. THE REAL CHALLENGES TO RAISING THE AGE**

### ***1. The Court of Public Opinion***

All children are subject to the normal maturation processes, physically and mentally. We now know so much more than Victorian England which began to see that young children were not "mini-adults" and set a minimum age of seven. We now **know** that the ten year old brain is not significantly more mature than that of a seven year old and the use of the age of ten is therefore quite arbitrary and has no rationale, defensible basis. The fourteen year old brain also still has a lot to go through.

Less than one per cent of all 10-17 year olds in Queensland are prosecuted in court for offending behaviour in a given year, and the number continues to fall - so despite some media, there is no youth offending crisis which needs to be urgently addressed. For those who grow up with limited challenges in their lives, the maturation process will still put them at risk of inappropriate behaviours. Their offending, if any, will be short-lived and part of the "normal" growing up process. This group will tend to have people around them to get them "back on track" and they are generally still connected to key institutions such as school. They will just "grow up".

Our concern is for the small group who will continue to offend – those whose lives are the most challenging: those in the care and protection system, who regularly witness and experience family violence, with a parent in the adult justice system, who have substance abuse or mental health issues, are homeless, are Aboriginal and/or Torres Strait Islander children whose communities continue to carry the trauma of past interventions and injustices – and often a combination of many of these issues.

The most recent report on justice matters by the Queensland Government Statistician's Office notes that those aged 20–29 years consistently comprised the largest proportion of offenders in Queensland from 2008/9 to 2017/18 (about a third), followed by persons aged 30-39 years. The third group was those aged 10-19 year (noting that children's' courts are only 10-17 so this group includes adults) but since 2014/15 40-49 year olds have become the third most represented group, relegating 10-17 year olds fourth. A clear majority of offenders is therefore adult.

Despite knowing the drivers of why children get caught up in the youth justice system and the reality of the levels and types of offending, our response to children and young people with behavioural issues continues to be driven by misinformation or continuing narratives which do not reflect the truth of either the extent of, or the reasons for, offending behaviour. Regrettably, we live in an age where people do not accept thorough research or the facts as told to them by people who would know. As Queensland heads into an election in October, we have already seen the commencement of an aggressive focus on "law and order" - which always focusses on children, never on adult offending or behaviour – by certain sections of the media.

Despair of the younger generation and its behaviour has been around almost since humankind came into existence. There are references to it throughout history. For example:

*Young people today are unbearable, without moderation... Our world is reaching a critical stage. Children no longer listen to their parents. More and more children are committing crimes and if urgent steps are not taken, the end of the world as we know it, is fast approaching.*

Hesiod, Greek poet 8th Century BCE

In 1995 the Courier Mail ran an article: Delinquents “a war time worry” and stated that

*Images of the “predatory delinquent” have formed a historical dialect in Australia for most of the century.*

A study of Canadian print media coverage over the twentieth century, looking at 1937 articles, was undertaken in Canada to “assess the claims often found in contemporary print media accounts that youth crime is out of control are that youth today are worse than ever”<sup>48</sup>. It found that

*the sensationalised narrative of fear is dominant throughout the sample...The description of youth crime as “epidemic” or “crime wave” or other alarmist terms in 1931, 1943, 1955, 1959, 1963, 1967, 1971, 1975, 1983, 1991, 1995 and 1999 at the very least challenges the credibility of such accounts.*

and

*Although the theme of worsening youth crime was more prevalent in the last three decades of the sample, it was also present in the earlier years. This is consistent with the suggestion that each generation believes its own youth problem is worse than it has ever been (Bell, 2003; Bernard, 1992), a contention that loses all credibility when examined longitudinally.*

The notion that the legislation and system for youth justice is “a slap on the wrist” also appears to be a perennial one: in surveys carried out in Canada, one found that “the public believes that Act to be more lenient than it actually is” and another that 71% of respondents believed the Act needed to be toughened. In Queensland young people are being subjected to harsher consequences for their alleged behaviour than adults – in 2018-2019 84% of young people held in detention were on remand having not yet been convicted of the offence alleged whereas a snapshot on 30 June 2019, showed only 31% of adults were in prison without being on sentence. There have been recent attempts to ameliorate this situation by recent amendments to the Queensland *Bail Act 1980* which provide that the fact a child is homeless is not a sufficient basis to hold them in detention<sup>49</sup>.

It is also undoubtedly true that: media reporting and politicians’ statements often emphasise ‘a fear of children’s rights as challenging adult authority and, ultimately, adult power.’<sup>50</sup>

A review of the literature relating to young people, crime and public perceptions was undertaken by the National Foundation for Educational Research in the United Kingdom. It revealed that this is a relatively under-researched area but:

*From the few studies completed, it can be said that there is a tendency for the public to overestimate the scale of youth crime (however, this is also true for crime generally).*

The paper also noted that making the public aware of action which government may be taking to address antisocial behaviour and youth offending may actually instil fear or concern rather than provide reassurance and paint a negative picture of young people generally.

<sup>48</sup> Faucher C (2007) Bad boys and girls, yesterday and today: a century of print media perspectives on youthful offending (In partial fulfilment of the requirements for the degree of Doctor of Philosophy)

<sup>49</sup> *Youth Justice and Other Legislation Amendment Act 2019*

<sup>50</sup> Deena Haydon and Phil Scraton, ‘Condemn a Little More, Understand a Little Less: The Political Context and Rights Implications of the Domestic and European Rulings in the Venables - Thompson Case’ (2000) 27(3) *Journal of Law and Society*, 416, 448.

Research illustrates that news reporting about juvenile crime is often *highly selective, distorted and routinely exaggerated*<sup>51</sup>. An analysis of 2,456 news items sampled over six months found the media exhibited a *clear general hostility towards young people*<sup>52</sup>. Such news stories often seek to orientate *the reader to process the text in a predetermined direction*<sup>53</sup>, with the aim of blaming youth for *a range of social problems*<sup>54</sup>. Analysis of words and phrases in print media demonstrated that the media often deployed language to label and categorise youth as criminal and deviant.

The use by journalists of words and phrases such as ‘crisis’, epidemic’ and ‘urgent action’ to frame their reporting on young people incorporates emotive language which emphasises youth involvement and dehumanises them. This plays a ‘significant role in framing news items’ and consequently readers’ attitudes and provides the media with ‘a channel to appropriate a moral conscience for its readership’. In YAC’s experience, it is difficult for alternative viewpoints to be heard with reporters only interested in the sensational and thus the media discourse around youth crime is not balanced.

*This choice of vocabulary contributes to the development of the fear theme. Youth crime is presented as increasing in frequency, affecting more and more people (as offenders and as victims) and becoming more serious. Even those who have no direct or indirect experience with youth crime can easily arrive at the conclusion that “it could happen to them”.*<sup>55</sup>

A study conducted in Canada found that:

*Most (94%) of the stories about youth crime appearing in a sample of Toronto newspapers involved cases of violence. Youth court statistics, in contrast, showed that less than a quarter of youth court cases in Ontario involved violence....Clearly, over-reporting of youth violence will have an influence on public perceptions and concerns about the issue.*<sup>56</sup>

At the time of writing this submission, there was a recent ABC radio news report which stated that a 12 year old had been arrested in Cairns for threatening a shopkeeper with a 30cm knife. It was further reported that police stated that the child had been involved in 60 offences since last October and had been given bail 11 times. It is an unfortunate fact that due to the need to prevent identification of a child in the criminal justice system to prevent further criminalisation, balance cannot be given to the article because to do so would potentially identify the child within the community. Clearly, there are concerns in relation to why this child’s is behaving in this way. Twelve year olds who have a stable and happy home environment and are well connected to school and probably out-of-school activities are not involved in extensive and relatively serious offending behaviour. The public are never told this. The younger the child, the greater the concern must be for their welfare as well as the community.

The extent to which crime is newsworthy and pre-occupies the media can be seen in quite an extreme way in the Townsville Bulletin (a paper notorious for its focus on youth crime) of 20 October 2017. The front page headline at a time of heavy rain fall was:

**FAIR WEATHER FIENDS – Rainfall causes crime figures to take a dip.**

This was followed up with a full page on page 6:

**Wet weather welcome: CRIME RATE FALLING WITH HEAVY RAIN**

“It’s only natural that people don’t want to get wet, even criminals” (Snr Sgt Graeme Paine).

<sup>51</sup> Judith Bessant and Richard Hill (eds) *Youth, Crime and the Media: Media representation of and reaction to young people in relation to law and order* (National Clearinghouse for Youth Studies, 1997)

<sup>52</sup> Faith Gordon, *Children, Young People and the Press in a Transitioning Society* (Palgrave Socio-Legal Studies, 2018), 76.

<sup>53</sup> Karmen Erjavec, ‘Media Representation of the Discrimination Against the Roma in Eastern Europe: The Case of Slovenia’, (2001) 12 (6) *Discourse and Society*, 699, 708

<sup>54</sup> Faith Gordon, *Children, Young People and the Press in a Transitioning Society* (Palgrave Socio-Legal Studies, 2018), 76.

<sup>55</sup> Faucher C (2007) *Bad boys and girls, yesterday and today: a century of print media perspectives on youthful offending* (In partial fulfilment of the requirements for the degree of Doctor of Philosophy)

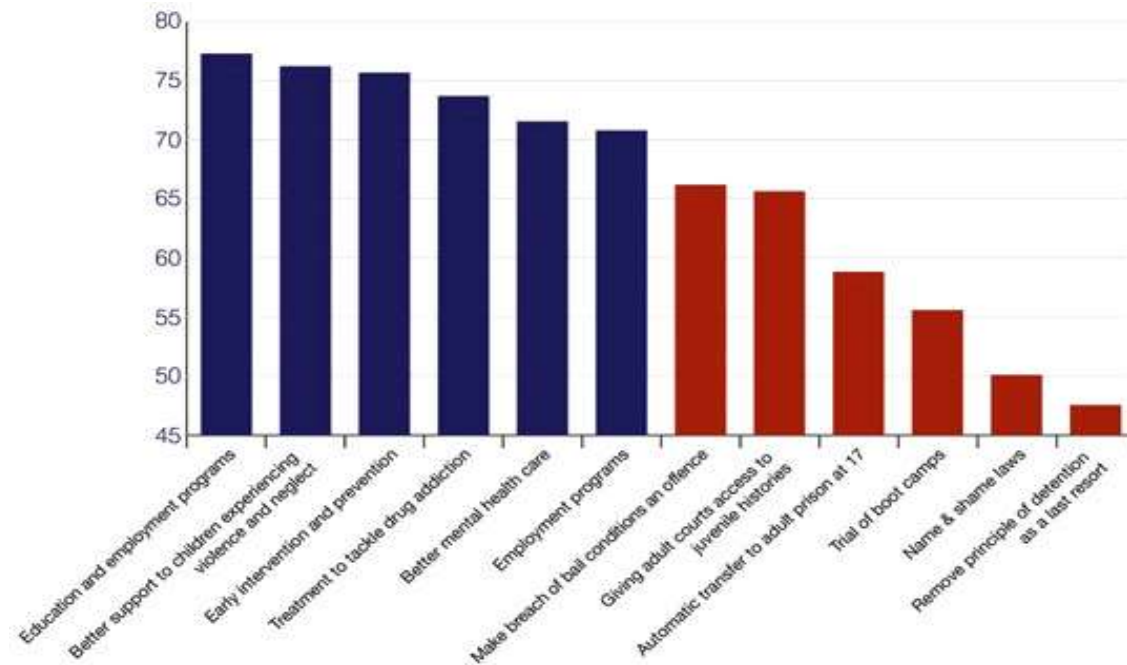
<sup>56</sup> Spratt J (1996) *Understanding public views of youth crime and the youth justice system*, *Canadian Journal of Criminology*, Vol 38, Issue 3, July 1996

Research in Sydney also found that police held more negative views of young people than other groups, such as seniors and teachers<sup>57</sup> and research evidence exists to support the view that the police and the media maintain a relationship that can be mutually beneficial. The public has an appetite for “crime news” and the media rely on the police for the information for this. In return, this also shapes the way the public views police and their role in juxtaposition to those alleged to have offended.

However, there is reason to believe that if people are given good and balanced information, then at least some may take less punitive stance. A 2016 paper on perceptions in New Zealand noted that:

*There is a growing body of literature that suggests that a large number of variables are implicated in the development of attitudes to offenders, both at the group and individual levels. Members of the public adopted a more lenient approach to offenders when they were given more contextual information about the crime and the offender ... Even in cases where there is pervasive support for more punitive approaches, the public still show an interest in addressing underlying social and individual circumstances that lead to offending and are targeted in offender rehabilitation ...*

Additionally, the Queensland Newman government undertook a public survey in 2013 to ascertain views on youth offending and responses they proposed. The outcomes indicated, contrary to the way the information was relayed afterwards, that the community was supportive of addressing the causes of crime and the proposed amendments (which were pursued in any event) did not receive majority support:



2013 Survey Monkey responses to Newman Government’s *Safer Streets Crime Action Plan – Youth Justice: Have Your Say* [indication of levels of support to various options: those in red were the responses proposed (and implemented) by the government.

The concept of Citizen Juries is one which could be useful in this context and has been trialled for a report for the Lowitja Institute, Australia’s national institute for Aboriginal and Torres Strait Islander health research. This study aimed to explore the opinions and views of members of the public towards how the community should address offenders in terms of incarceration and alternatives to incarceration through use of the Citizen Jury model.

*This study shows that, when given the opportunity to deliberate with others and critically engage in wider knowledge on offenders and responses to offending, jury members preferred non-punitive approaches. Overall, policy recommendations by jurors contained strategies to address*

<sup>57</sup> Natalie Bolzan, Kids are like that! Community attitudes to young people. Sydney, 2003 National Youth Affairs Research Scheme.



*the social determinants of health and offending in order to prevent people coming into contact with the criminal justice system in the first place and non-incarceration options for those who do*<sup>58</sup>.

This should provide some confidence in policy makers that if the public is properly informed and engaged around the question of youth offending, then there will be support for taking the action which the literature and evidence shows is likely to be most effective in addressing offending by children.

## **2. The politicisation of youth offending and youth offenders**

Closely connected to media portrayal and public opinion is the need for politicians to respond to it. It is entirely appropriate that the elected leaders in our community are listening to those who vote for them but democracy can only “work” if information on which policy and law is based is evidence based and supportable and that information is disseminated to everyone so that informed decisions can be made by the public as well as politicians.

Clearly, the community needs to be brought on board with any proposal to raise the age of criminal responsibility. That requires politicians to be “singing from the same hymn sheet” with a bi-partisan approach to youth justice and being prepared to actively distribute accurate data and reasoned information to the public.

There was a number of staff at last year’s Australasian Youth Justice Conference from New Zealand’s Ministry for Children (which is responsible for youth justice in that country) which highlighted what can be achieved with bi-partisan support. Acknowledging that this may be somewhat easier in a non-federalised country with one government, the New Zealand attendees commented more than once that the fact that at this point the major political parties in New Zealand are agreed on the approach which is being taken makes a huge difference to the ability to plan and put in place effective, evidence-based strategies.

Queensland will have a State election around October this year and already there are signs of a “law and order” bidding war commencing, with children in particular being the scapegoats, and the cynical attempt by others to use this as an opportunity for increased resources.

*In many respects, the intellectual argument for raising the minimum age of criminal responsibility [in England and Wales] has been won. Resistance, however, derives ultimately from political imperative rather than criminological rationality. ...The corrosive politicization of juvenile crime not only socially constructs child ‘offenders’ in ways that render them ‘undeserving’ but it also fatally obstructs the application of knowledge and evidence to the processes of legislative reform, policy formation and practice development. For as long as this remains the case, children in trouble will be denied justice and the public interest – with regard to crime prevention and community safety – will continue to be failed.*<sup>59</sup>

It is also possible that politicians may over-estimate the potential concern that the community as a whole might have over the raising of the age of criminal responsibility: we note that despite years of being told that successive Queensland governments that one of the main barriers to the inclusion of 17 year olds in the youth justice system was public opinion, when it actually occurred, there was no major backlash, indeed very little response to it in the media or elsewhere.

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<sup>58</sup> Simpson, P., Guthrie, J., Lovell, M., Walsh, C. & Butler, A. 2014, Views on Alternatives to Imprisonment: A Citizens Jury approach, The Lowitja Institute, Melbourne.

<sup>59</sup> Goldson B, “‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) Youth Justice

## IN CONCLUSION

From the discourse above, we draw the following points:

- Objectively, the argument in favour of raising the age of criminal responsibility is more than proven
- The age of criminal responsibility should be 14
- *Doli incapax* should be retained for 14 and 15 year olds with a uniform definition which would enable children to be referred into the process for 10-13 year olds where there is reduced capacity
- There should be a Department for Children and Families, separate to the statutory Child Protection agencies, in each State and Territory, to support delivery of prevention and early intervention strategies and services at the local level: referrals through health services, early childhood, education etc.
- “Hot spots” for youth offending and youth offenders should be prioritised in ensuring the necessary services are available
- As a priority, we must seek to address the overrepresentation of Aboriginal and/or Torres Strait Islander children, working with Aboriginal and/or Torres Strait Islander controlled organisations and communities in relation to address the over-representation of Indigenous children
- Investigate what alternative processes could be used for addressing the challenging behaviours of 10-13 year olds, building on processes which are already known and in use but adapted as necessary and with a therapeutic focus.
- Those with responsibility for policy and law should follow the evidence and ensure that accurate information is provided to the community more generally.

In conclusion:

*The minimum age of criminal responsibility (MACR)... is 10 years, which is well below the average minimum age of 14 years .... By raising the MACR we would immediately take a significant step forward towards developing a less destructive youth justice system based on the ethos of treating young people who offend as ‘children first’ and ‘offenders second’. Even greater numbers of young people who offend would be directed away from the criminal justice system towards universal children’s services where their complex social welfare needs could be met without resort to criminalisation (Goldson, 2013). The greatest impact would undoubtedly be seen in the use of youth custody because it is known from the research evidence that higher rates of diversion from formal processing by the courts are related to lower levels of youth imprisonment (Bateman, 2012). Ultimately a higher MACR would provide the opening and incentive for restorative justice to become the standard-bearer for progressive and innovative youth justice policies and practices for young people in conflict with the law<sup>60</sup>.*

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<sup>60</sup> Patricia Gray, Reader in Criminology and Criminal Justice, School of Law, Plymouth University, British Society of Criminology Newsletter, No. 76, Summer 2015 – referring to the UK but equally applicable to Australia