

## The sky is the limit:

Keeping young children out of prison by raising the age of criminal responsibility

**AMNESTY**  
INTERNATIONAL



## Across Australia children as young as 10 are arrested, held in police cells, hauled before the courts and locked up behind bars.

Between 2016 and 2017, Australian Governments pushed almost 9,000 children aged 10, 11, 12 and 13 years through the criminal justice system, and locked up 566 of these children.<sup>1</sup> This is despite overwhelming evidence of the harm prison does to children – from health experts, social workers, Indigenous leaders, legal experts and human rights organisations.

Applying criminal penalties to young children increases the likelihood they will get into trouble later in life, with children arrested before the age of 14 three times more likely than children arrested after 14 years to re-offend as adults.<sup>2</sup>

Between 2016 and 2017 Indigenous children made up 69 per cent of 10–13 year olds in prison.<sup>3</sup> Raising the age of criminal responsibility is an important step to reducing the over-representation of Indigenous children in the Australian prison system.

Children should be in their communities, at swimming lessons or climbing trees with cousins where they can learn and grow up healthy and strong. Prison does not achieve the outcomes children need to be the best they can be. Forcing children through the criminal justice system separates them from the support and services available in their communities, including family support, schooling, mentoring, counseling, cultural support and healthcare.

Instead of putting young children behind bars, governments must fund Indigenous-led solutions and community programs, which focus on supporting families and have better outcomes for both children and their communities.<sup>4</sup>

**This paper should not be read in isolation to the many issues that young people, particularly Indigenous young people, face in the justice system. Please also read the Change the Record Coalition's report, *Free to be kids: National Plan of Action*.<sup>5</sup>**

1. 2017, Australian Bureau of Statistics (ABS), *Recorded Crime - Offenders, 2016-17*, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra and 2018, Australian Institute of Health and Welfare (AIHW), *Youth Justice in Australia 2016-17*, 'Table S78b: Young people in detention during the year by age, states and territories, 2016-17', accessed 6 August 2018, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/data>.

2. 2017, Queensland Family & Child Commission, *The age of criminal responsibility in Queensland*, p.30, accessed 6 August 2018, available at <https://www.qfcc.qld.gov.au/sites/default/files/Forpercent20professionals/policy/minimum-age-criminal-responsibility.pdf>.

3. 2018, Australian Institute of Health and Welfare (AIHW), *Youth Justice in Australia 2016-17*, 'Table S80b: Young people in detention during the year by age, states and territories, 2016-17', accessed 2 August 2018, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/data>.

4. See Royal Commission into the Protection and Detention of Children in the Northern Territory, Chapter 7 - Community Engagement, and Recommendations 7.1, 7.2, 7.3 and see also 2017, Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, Chapters 7: Community based sentences especially culturally appropriate community based sentencing options p.262, Chapter 10: Access to justice especially Other specialist courts, lists and diversion programs, p.333-336., Chapter 11: Aboriginal and Torres Strait Islander Women, especially diversion, p.368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1 accessed 24 August, available at [https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf).

5. 2017, Change the Record, *Free to be kids: National Plan of Action*, accessed 6 August 2018, available at <https://www.amnesty.org.au/wp-content/uploads/2017/11/amnesty-report-national-plan-of-action-november-2017.pdf>.



## Recommendations

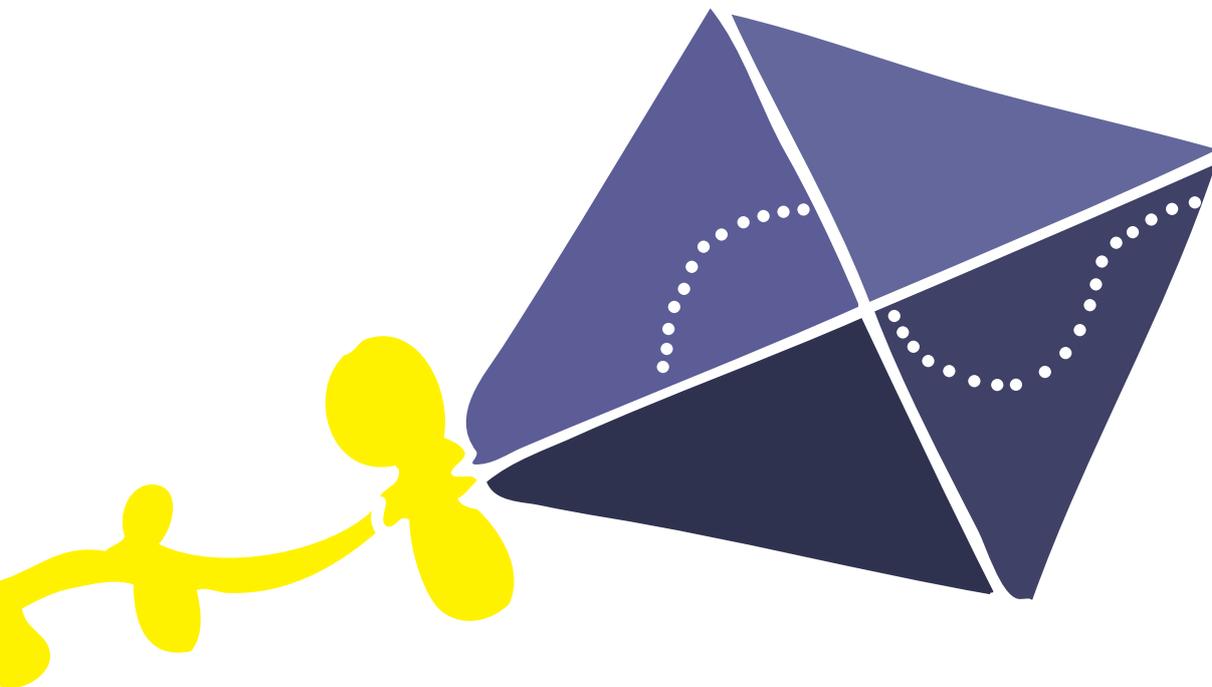
### All Australian Governments must:

1. Immediately raise the age of criminal responsibility to at least 14 years old, with no limitations for children under this age, and transition all children out of prison within a year.
2. Provide funding for psychologists to train and undertake neurocognitive testing for children who display risk factors for future offending when in contact with police, doctors or schools. Ensure that adequate funding is also available for testing and treatment of other health factors which contribute to interaction with the justice system, like ear disease, and that therapeutic, age-appropriate health services to address the issues faced by the child are provided.<sup>6</sup>
3. Increase the allocation of funding to Indigenous community-led and controlled organisations, within existing budgets, to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of children under 14 years at risk of entering the justice system.<sup>7</sup> This funding should be allocated to Indigenous-led organisations and programs in proportion to the over-representation of Indigenous kids in the justice system.



6. Recommend testing of the 10 neurodevelopmental domains: brain structure/neurology, motor skills, cognition, language, academic achievement, memory, attention, executive function (impulse control hyperactivity), affect regulation (mood), adaptive behaviour (social skills or social communication). 2016, Bower C, Elliott EJ on behalf of the Steering Group, *Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD)*, Report to the Australian Government Department of Health, p.5, accessed 6 August 2018, available at <http://www.apsu.org.au/assets/Uploads/20160505-rep-australian-guide-to-diagnosis-of-fasd.pdf>, Risk factors include: repeat offending, acting with or for a peer group, appear to be acting impulsively, have been subject to abuse, school failure or disengagement, other family members who have had contact with the justice system or substance abuse.

7. 2018, Amnesty International, 2018, *From the Ground Up*, available at <https://www.amnesty.org.au/campaigns/indigenous-justice/>.



## Human rights obligations

Children should not be in prison. Childhood should be spent in communities, at Saturday sports, with brothers and sisters and on family picnics. Yet across Australia, children as young as 10 are arrested by police, locked up in police cells, hauled before courts and sent to youth prisons – often in prisons far away from their community.

This is in stark contrast with the international community, which has a median age of criminality of 14 years old.<sup>8</sup> Most European countries set their ages of criminal responsibility at between 14 and 16 years and China, Russia, Kazakhstan, Japan, Sierra Leone and Azerbaijan have 14 years as the age.<sup>9</sup> The United Nations Committee on the Rights of the Child (UNCRC) has said that countries should be working towards a minimum age of criminal responsibility of 14 years or older.<sup>10</sup>

**Abuse and mistreatment of children has been uncovered in children's prisons in every state and territory in Australia. Still governments are allowing young children aged between 10 and 13 years to be placed in these harmful environments.<sup>11</sup>**

The international framework of standards relating to children in contact with the justice system is 'informed by an evidence base on the neurobiological impacts of early childhood trauma and knowledge from developmental psychology about both the corrosive and four protective factors for child wellbeing'.<sup>12</sup>

Australia has been repeatedly criticised by the United Nations, including long-standing criticism from the UNCRC,<sup>13</sup> and most recently by the Committee on the Elimination of Racial Discrimination, for failing to reform the current minimum age of criminal responsibility. When the Special Rapporteur on the Rights of Indigenous Peoples visited Australia in 2017 she said that the routine detention of 10 and 11 year-old children was the most distressing aspect of her visit.<sup>14</sup>

8. 2016, Australian Human Rights Commission, National Children's Commissioner, *Children's Rights Report 2016*, p.187.

9. 2018, Child Rights International Network (CRIN), *Minimum ages of criminal responsibility around the world*, accessed 14 August, available at <https://www.crin.org/en/home/ages>.

10. 2007, Committee on the Rights of the Child, *General comment No. 10 (2007) Children's rights in juvenile justice*, CRC/C/GC/10, p.11, accessed 2 August 2018, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

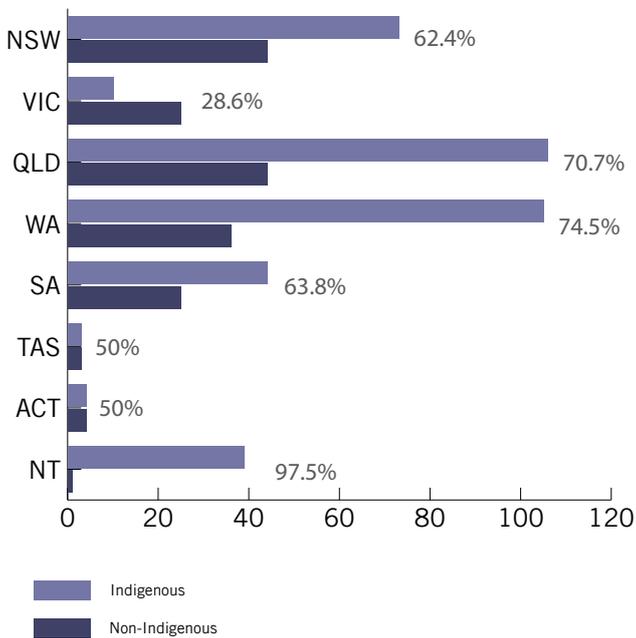
11. 2017, Amnesty International, Abuse of children in Don Dale and other prisons is a national shame, viewed 12 August 2018, available at <https://www.amnesty.org.au/abuse-children-don-dale-prisons-national-shame/>.

12. 2017, O'Brien, W. and Fitz-Gibbon, K, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, Vol.17, No.2, pp.135.

13. United Nations Committee on the Rights of the Child, Sessions of the Committee, 1997: paragraphs 11 and 29, 2005: paragraph 73; 2012: paragraph 82(a).

14. 2017, United Nations Human Rights Council, Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, accessed, 2 August 2018, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/234/24/PDF/G1723424.pdf?OpenElement>.

Per cent and number of Indigenous and non-Indigenous children under 14 years in detention between 2016–2017 in Australia.<sup>15</sup>

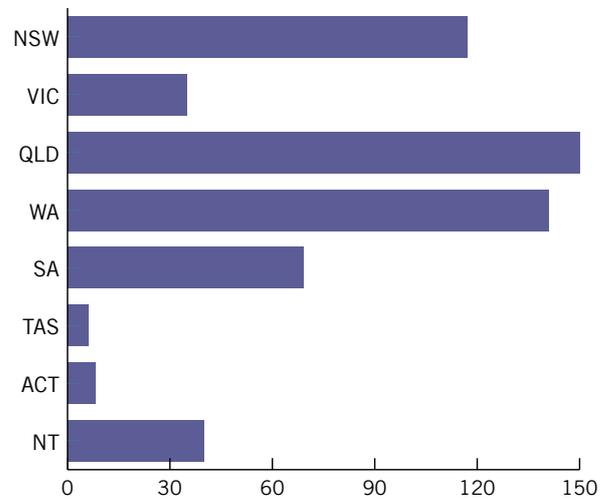


\* Percentage show indicates those of Indigenous background only

Indigenous children make up 69 per cent of the children in prison aged 10-13 years.

Indigenous children make up 50 per cent of the children in prison aged 14-17 years.

Number of children under 14 years in prison between 2016–17 in Australia.<sup>16</sup>



The number of children under 14 who are incarcerated is relatively small. With political will it is possible to find alternatives for these children that excludes being sent to prison.



## Recommendation one: human rights obligations

All Australian Governments must immediately raise the age of criminal responsibility to *at least* 14 years old, with no limitations for children under this age, and transition all children out of prison within a year.

15. 2018, AIHW, Youth Justice in Australia 2016-17, 'Table S80b: Young people in detention during the year by age, states and territories, 2016-17', accessed 2 August 2018, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/data>.

16. 2018, AIHW, Youth Justice in Australia 2016-17, 'Table S74b: Young people in detention during the year by age, states and territories, 2016-17', accessed 2 August 2018, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/data>.

## Brain development, mental capacity and health

### Children do not yet understand consequences

During adolescence, brain development focuses on the neurological pathways that are used most often. The neurological pathways least used are 'pruned'. The process of 'pruning' shows that the experiences children have, and the environments they grow up in, significantly affects the development of their brain.<sup>17</sup>

During this period of brain development 'adolescents will often make decisions using the amygdala – the part of the brain connected to impulses, emotions and aggression'.<sup>18</sup> This is why they might act on impulse or emotion and are unable to appreciate the likely consequences or impact. The four developmental factors that most often affect children in contact with the justice system are memory, communication skills, social orientation and suggestibility.<sup>19</sup> In addition children aged 10–13 years are particularly vulnerable to peer pressure.

### Compounding effect of prison

'Toxic stress' or trauma and can have a negative impact on brain development.<sup>20</sup> Examples of toxic stress include: exposure to violence or abuse; neglect, lack of affection, parental mental illness, poverty, removal from family, and placement in a prison environment.<sup>21</sup>

Indigenous children are more likely to experience trauma than their non-Indigenous peers because of the cumulative effect of historical and intergenerational trauma, which can all be traced back to colonisation. For young people this trauma can manifest as 'high rates of drug and alcohol addiction, violence directed at themselves and others, criminal behaviour and interaction in the justice system, gang membership, homelessness and leaving school early'.<sup>22</sup>

**The Australian Early Development Census advises that 'ongoing stress factors that are not buffered by caring and positive relationships disrupt brain architecture leading to a lower threshold of activation of the stress management system, which in turn can lead to lifelong problems in learning, behaviour, and both physical and mental health. It is in situations where ongoing stress is likely, intervening as early as possible is critical to achieving the best possible outcomes for the child.'**<sup>23</sup>

Australian research suggests that trauma, mental health and cognitive disability factors, when not addressed early in life, compound and interlock to create complex support needs in the justice system.<sup>24</sup> Children in the justice system have significantly higher rates of mental health disorders and neurocognitive disabilities than children outside the justice system.<sup>25</sup>

A 2014 Victorian study of children in prisons found that 39 per cent had symptoms of depression, 17 per cent had a positive psychosis screening and 22 per cent had engaged in self-harm in the past 6 months.<sup>26</sup> A NSW study found that 83 per cent of children in prison had a psychological disorder, 60 per cent had experience of abuse and 70 per cent had a behavior or attention disorder.<sup>27</sup> The 2016–2017 Northern Territory Royal Commission found that the conditions children were placed in, including those meant to manage at-risk behaviours, exacerbated the distress of children in prison rather than preventing serious harm.<sup>28</sup>

A United Kingdom study into developmental factors affecting children in the justice system found that children between 10 and 15 years who offend should be treated with an educational or welfare system that recognises their development capacities and 'emphasizes the opportunity for maturation and rehabilitation, rather than within a criminal justice system that places a heavy emphasis on punishment'.<sup>29</sup>

Prison is not an environment where children can flourish and grow up strong and healthy. Instead it's a place which compounds existing issues children face or creates new mental health, social, emotional and wellbeing problems.

17. 2015, Australian Early Development Census, *Brain Development in Children*, accessed 1 August 2018, available at <https://www.aedc.gov.au/resources/detail/brain-development-in-children>.

18. 2017, Learning Potential- Australian Government, *Learning and the teen brain*, accessed 1 August 2018, available at <https://www.learningpotential.gov.au/learning-and-the-teen-brain>.

19. 2013, Lamb and Sim, 'Developmental Factors Affecting Children in Legal Contexts', *Youth Justice*, August.

20. 2015, Australian Early Development Census, *Brain Development in Children*, accessed 1 August 2018, available at <https://www.aedc.gov.au/resources/detail/brain-development-in-children>.

21. Ibid.

22. 2013, Healing Foundation, *Growing our children up strong and deadly: Healing children and young people*, accessed 16 August 2018, available at <https://www.health.act.gov.au/sites/default/files/Growing%20our%20children%20strong%20and%20deadly%20-%20healing%20for%20children%20and%20young%20people.pdf>.

23. 2015, Australian Early Development Census, *Brain Development in Children*, accessed 1 August 2018, available at <https://www.aedc.gov.au/resources/detail/brain-development-in-children>.

24. 2017, Cunneen, *Arguments for raising the minimum age of criminal responsibility*, Research Report, Comparative Youth Penalty Project, University of NSW, Sydney, pp.8-9.

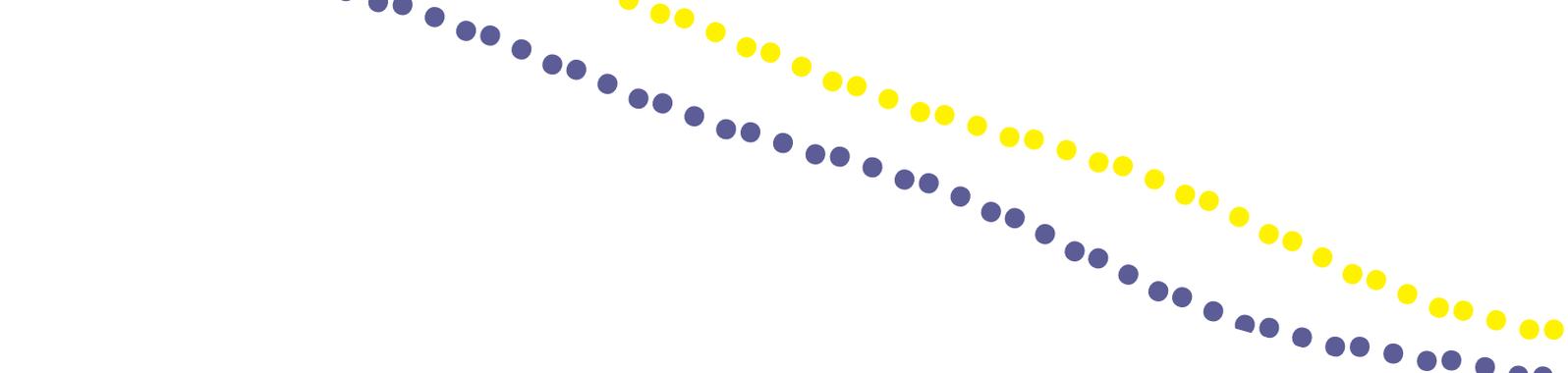
25. See: 2014, Kinner. S. A et al, 'Complex health needs in the youth justice system: a survey of community-based and custodial offenders', *J Adolescent Health*, vol. 54, pp.521-6 and 2016, Justice Health & Forensic Mental Health Network, *15-16 Year in Review*, NSW Government, accessed 2 August 2018, available at <http://www.justicehealth.nsw.gov.au/publications/201516YearinReview.pdf> and 2017, Bower et al, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia, *BMJ Open*, p.6, available at <https://bmjopen.bmj.com/content/8/2/e019605>.

26. Ibid, Kinner.

27. 2016, Justice Health & Forensic Mental Health Network, *15-16 Year in Review*, NSW Government, accessed 2 August 2018, available at <http://www.justicehealth.nsw.gov.au/publications/201516YearinReview.pdf>.

28. 2017, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, pp 9-10, accessed 1 August 2018, available at <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

29. 2013, Lamb and Sim, 'Developmental Factors Affecting Children in Legal Contexts', *Youth Justice*, August, p.139.



## FASD and severe neurodevelopmental impairment

There is a significant body of evidence which demonstrates that children who have brain injuries, developmental impairments, mental health issues and psychological issues – which as stated above is a very significant number of children in prisons – are being punished, rather than protected, by the justice system.

Fetal Alcohol Spectrum Disorder (FASD) relates to a ‘spectrum of disabilities including physical, cognitive, intellectual, learning, behavioural, social and executive functioning abnormalities and problems with communication, motor skills, attention and memory’.<sup>30</sup> It can result in a range of difficulties for children such as difficulties understanding cause and effect, learning from past experiences and decision making.<sup>31</sup> Studies show that there is higher birth prevalence and incidence rates of FASD in Indigenous communities, with Indigenous children making up 65 per cent of those diagnosed with FASD between 2001 and 2004.<sup>32</sup> The 2015 Lillilwan Project, a study of children from Fitzroy Valley in Western Australia found that 13 out of 108 Indigenous children had FASD.<sup>33</sup>

A recent study of the Banksia Hill Detention Centre in Western Australia found one in three children in prison had FASD and one in nine had some form of neurodevelopmental disorder. Symptoms of the severe neurodevelopmental impairments included attention, executive functioning and/or language, cognition and memory, and 25 per cent were assessed to have an IQ score of less than 70.<sup>34</sup>

In New South Wales a study of children in eight prisons found that 45.8 per cent had borderline or lower intellectual functioning.<sup>35</sup> Similar studies are needed in other jurisdictions to allow the sector to fully understand the prevalence of FASD and other neurological impairments, and the effect that they have on young people in contact with the justice system.

## FASD at school

Children who have FASD and neurodevelopmental impairments can have secondary conditions as they grow up, particularly affecting integration with society.<sup>36</sup> The 2012 House of Representatives Inquiry into FASD found that children with FASD often struggle at school with their symptoms manifesting in the classroom as issues with social skills, speech, hearing or vision problems, behavioural issues and hyperactivity.<sup>37</sup> Children who display these behaviours but who are not diagnosed with FASD or other neurodevelopmental impairments are often viewed as troublesome, uncontrollable, obstructive and defiant.<sup>38</sup> Students with FASD are often suspended or removed from schools due to their symptoms and many do not complete school.<sup>39</sup>

The criticism and punishment experienced by people with FASD can lead to the development of secondary issues including ‘mental health problems, trouble with the law, unemployment and homelessness, alcohol and drug problems and a heightened vulnerability to physical, sexual (victim and/or offender), financial, social and emotional abuse. Isolation and loneliness can lead to a range of other behaviours such as unsafe relationships, including relationships with violent and unsafe partners.<sup>40</sup> These types of personal problems can be characterised as risk factors that could contribute to children with FASD having contact with the justice system.

Mechanisms designed to divert children away from prison aren’t working. Children with FASD not only fall through the cracks, they’re placed on a fast-speed highway straight to the justice system. It is critical that children are tested when displaying these symptoms. Children who have their FASD-related symptoms managed are less likely to have contact with the justice system. They can have their symptoms addressed to change their offending behaviour and lessen the likelihood of reoffending.



30. 2012, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (FASD: The Hidden Harm)*, p viii, accessed 2 January 2015, [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=/spla/fasd/report/fullreport.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/spla/fasd/report/fullreport.pdf).

31. 2017, Bower et al, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia, *BMJ Open*, p.1, available at <https://bmjopen.bmj.com/content/8/2/e019605>.

32. 2008, Elliott EJ, Payne J, Morris A, et al, ‘Fetal alcohol syndrome: a prospective national surveillance study’. *Archives of Disease in Childhood* vol. 93, Iss, 9, pp.732-737.

33. 2015, Fitzpatrick, J, et al, ‘Prevalence of fetal alcohol syndrome in a population-based sample of children living in remote Australia: the Lillilwan Project’, *Journal of Paediatrics and Child Health*, vol.51, Iss.4, accessed 14 August 2018, available at <https://www.ncbi.nlm.nih.gov/pubmed/25594247>.

34. 2017, Bower et al, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia, *BMJ Open*, p.6-8, available at <https://bmjopen.bmj.com/content/8/2/e019605>.

35. 2014, Haysom, L et al, ‘Intellectual disability in young people in custody in NSW - prevalence and makers’, *Journal of Intellectual Disability Research*, vol. 58, pp1004-14.

36. F2012, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (FASD: The Hidden Harm)*, p.28, accessed 2 January 2015, [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=/spla/fasd/report/fullreport.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/spla/fasd/report/fullreport.pdf).

37. *Ibid*, p. 28 and 131.

38. *Ibid*, p.131.

39. *Ibid*, p.131

40. *Ibid*, p.31.

# Case study:

## 12-year-old boy living with FASD

Child protection charity Barnardos presented a child's story of living with FASD to the Commonwealth FASD Inquiry in 2012. The child had been expelled from school for violent behaviour:

“He struggles with the self-knowledge that he is not normal, even though he desperately wants to be normal. He is actually at an age of awareness at the moment. He does not have one friend in the whole world, because he lacks social skills and he has bad behaviour. He struggles with self-loathing for the relationships that he is constantly breaking, but he cannot stop the cycle of breaking them. He has started to self-harm, and he verbalises that he thinks he is a waste of oxygen. He has trouble with fine motor control, memory, retaining information and sequencing, and if you give him any more than two instructions at one time then he cannot follow them. He is very intelligent in some ways, but he is lacking in many areas – for instance, social skills, aggression and impulse control.”<sup>41</sup>

41. T Harth, Foster Carer, Barnardos, Committee Hansard, Sydney, 13 April 2012, in 2012, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (FASD: The Hidden Harm)*, p.31, accessed 6 August 2018, [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=/spla/fasd/report/fullreport.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/spla/fasd/report/fullreport.pdf).

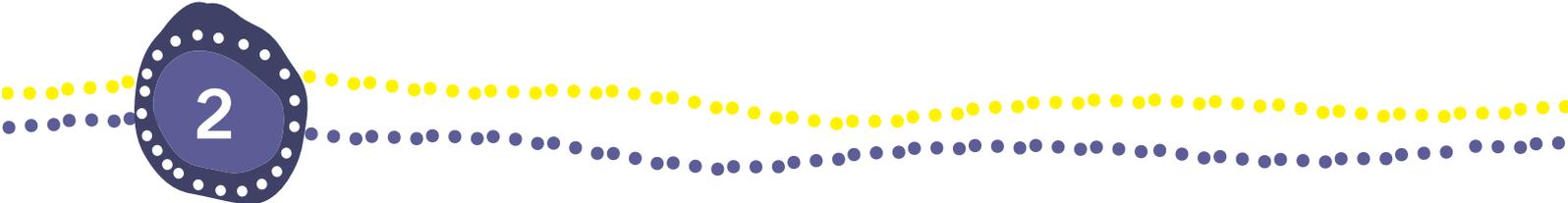
## Ear disease

Acute otitis media (AOM), glue ear (common middle ear infection), or runny ear (CSOM) can cause long term hearing loss if not treated and 'lead to delayed language development, poor auditory perception and interpersonal problems in young children.'<sup>42</sup> The ongoing effects of ears problems are seen in behavioural problems, educational underperformance, school dropout and illiteracy, which often leads to underemployment and involvement in criminal activity and the justice system.<sup>43</sup>

Aboriginal and Torres Strait Islander children have ear diseases at 2.9 times the rate of the non-Indigenous population, and are much more likely to have contact with the justice system than their non-Indigenous peers.<sup>44</sup>

Measures such as school screening, general practitioner hearing checks, auditory screening, specialist treatment, and education for families and schools in prevention and treatment, could reduce the crippling effect of chronic ear disease on the rate children come into contact with the justice system.<sup>45</sup> Furthermore, testing when in contact with the justice system should occur to ensure children are not being penalised for medical issues.

Full parental / guardian consent must be obtained before any testing is administered, privacy laws adhered to, and results provided to the child's defence lawyers and legal guardians. Governments should ensure that this testing is funded and available for children identified to be at risk in the justice system.



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## Recommendation two: brain development, mental capacity and health

All Australian Governments must provide funding for psychologists to train and undertake neurocognitive testing for children who display risk factors for future offending when in contact with police, doctors or schools. Ensure that adequate funding is also available for testing and treatment of other health factors which contribute to interaction with the justice system, like ear disease, and that therapeutic, age-appropriate health services to address the issues faced by the child are provided.

42. 2016, Royal Australian College of Surgeons and Australian Society of Otolaryngology Head and Neck Surgery, *SUBMISSION: Implemnataion Plan Advisory group (IPAG) consultation 2017*, p.2, accessed 6 August 2018, submission available at [https://www.surgeons.org/media/25342091/2017-05-05\\_submission\\_racs\\_asohns\\_ipag-consultation\\_final.pdf](https://www.surgeons.org/media/25342091/2017-05-05_submission_racs_asohns_ipag-consultation_final.pdf).

43. 2013, Burns, J and Thomson, N, 'Review of ear health and hearing among Indigenous Australians', *Healthinfontet* . vol. 14, No.4, Accessed 6 August, available at [http://healthbulletin.org.au/wp-content/uploads/2013/10/ear\\_health\\_review\\_2013.pdf](http://healthbulletin.org.au/wp-content/uploads/2013/10/ear_health_review_2013.pdf).

44. 2017, Prime Minister and Cabinet, Aboriginal and Torres Strait Islander Health Performance Framework 2017 Report, accessed 16 August 2018, available at <https://www.pmc.gov.au/sites/default/files/publications/indigenous/hpf-2017/tier1/115.html>.

45. 2016, Royal Australian College of Surgeons and Australian Society of Otolaryngology Head and Neck Surgery, *SUBMISSION: Implemnataion Plan Advisory group (IPAG) consultation 2017*, p.3, accessed 6 August 2018, submission available at [https://www.surgeons.org/media/25342091/2017-05-05\\_submission\\_racs\\_asohns\\_ipag-consultation\\_final.pdf](https://www.surgeons.org/media/25342091/2017-05-05_submission_racs_asohns_ipag-consultation_final.pdf).

## ***Doli incapax*: no longer protecting children under 14**

*Doli incapax* is a latin term meaning 'incapable of wrong'. *Doli incapax* describes the inability of children under the minimum age of criminal responsibility to form criminal intent.<sup>46</sup> In 2018, the minimum age was just 10 years in all Australian jurisdictions.

In addition to the statutory minimum age of criminal responsibility, *doli incapax* is enshrined in the Criminal Codes of each Australian jurisdiction and applies to children aged between 10 years and 14 years.<sup>47</sup>

In practice this should mean that children between 10 and 14 are presumed incapable of committing a crime because they lack the necessary criminal intent. To rebut this, the prosecution must prove beyond reasonable doubt that the child was aware their actions were 'criminal' or 'seriously wrong' as opposed to 'naughty' or 'mischievous'.<sup>48</sup>

### ***Doli incapax* is not protecting children**

Research has been conducted in Victoria which has found that the threshold of rebutting *doli incapax* has been lowered.<sup>49</sup> Legal stakeholders who shared examples from their professional practice say the automatic principle of *doli incapax* for children under 14 no longer applies:

**Instead, for a child to be deemed *doli incapax* the onus now falls on the defence to actively pursue an assessment that determines this child lacked capacity to know that their actions were seriously wrong. In practice this can mean that children are denied the protection of being *doli incapax*.**<sup>50</sup>

As stated previously, the stage at which a child's brain has developed, including delays from FASD and other neurodevelopmental disorders, affects their behaviour which in turn affects their engagement with the justice system.<sup>51</sup> Children are much more likely to confess than adults and to confess falsely, and 'suspects who have provided confessions are treated differently at every subsequent stage of the criminal justice process'.<sup>52</sup>

If a child's legal defence team does decide to pursue of their own initiative *doli incapax*, then they often bear the cost of expensive psychological assessments. This of course places significant financial burden on Aboriginal and Torres Strait Islander Legal Services, Legal Aid and community legal services.<sup>53</sup> The availability of assessments and practitioners which are specialised in conditions such as Fetal Alcohol Spectrum Disorder (FASD) is limited to most capital cities and is almost impossible to access in regional and remote areas.

The UNCRRC has noted that 'the system of two minimum ages is often not only confusing, but leaves much to the discretion of the court / judge and may result in discriminatory practices'.<sup>54</sup> This statement is particularly concerning when Indigenous children across Australia are 24 times more likely to be in prison than non-Indigenous children.<sup>55</sup>

Queensland's Family and Child Commission has found that '...there is overwhelming evidence proving a direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment and having one or more parents with a criminal record. The research also shows that young offenders are more likely Aboriginal or Torres Strait Islander.<sup>56</sup> The rates of children from these backgrounds and with medial and developmental issues in detention would indicate that *doli incapax* is not functioning to protect children who cannot fulfil the legal test.

46. 2006, Johnston M., 'Doli Incapax – the Criminal Responsibility of Children,' *Children's Court of New South Wales*, p.1.

47. 2005, Australian Institute of Criminology, *The age of criminal responsibility*, accessed 1 August 2018, available at <https://aic.gov.au/publications/cfi/cfi106>.

48. BP v R; SW v R [2006] NSWCCA 172 at [27-30]. and 2014, Lennings. N.J., 'Assessing Serious Harm Under the Doli Incapax: A Case Study', *Psychiatry, Psychology and Law*, p.1, accessed 6 August 2018, available at [https://www.researchgate.net/publication/271939617\\_Assessing\\_Serious\\_Harm\\_Under\\_the\\_Doctrine\\_of\\_Doli\\_Incapax\\_A\\_Case\\_Study](https://www.researchgate.net/publication/271939617_Assessing_Serious_Harm_Under_the_Doctrine_of_Doli_Incapax_A_Case_Study).

49. 1998, Bartholomew. T, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in Supreme Court of Victoria, Australia', *Psychiatry, Psychology and Law*, Vol. 5, No.1, pp.95-105.

50. 2017, O'Brien, W. and Fitz-Gibbon, K, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, Vol.17, No.2, p.140.

51. 2013, Lamb and Sim, 'Developmental Factors Affecting Children in Legal Contexts', *Youth Justice*, August, p.137.

52. Ibid.

53. 2017, O'Brien, W. and Fitz-Gibbon, K, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, Vol.17, No.2, p.140.

54. 2007, Committee on the Rights of the Child, General comment No. 10 (2007) *Children's rights in juvenile justice*, CRC/C/GC/10, pp.10-11, accessed 2 August 2018, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

55. 2017, AIHW, *Youth detention population in Australia 2017*, Bulletin 143 accessed 7 August 2018, available at <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2017/contents/summary>.

56. 2017, Queensland Family and Child Commission, *The Age of Criminal Responsibility in Queensland*, p. 16.

## Setting children up to thrive: preventing re-offending

The level of ongoing contact with the juvenile justice system varies according to a range of factors, with younger children having higher levels of re-contact with the justice system than older children.<sup>57</sup>

### Prisons and re-offending

The Queensland Family and Child Commission found that prison does not deter re-offending. Locking up 10 to 14 year-olds makes them less likely to finish school, tertiary education and training and secure a job.<sup>58</sup> A child in prison revealed that detention 'taught me to be a better criminal. I went in stealing cars and came out knowing how to cook meth and murder people.'<sup>59</sup>

The small number of children who commit a large proportion of crimes are often those who appear in courts at an early age, and 'for this reason, it is recognised that criminal justice systems themselves can be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending.'<sup>60</sup> This has been recognised in New Zealand and Western Australia, where governments have invested significant funding in prevention programs specifically to support the families of children who offend at the highest rates.<sup>61</sup>

In 2015 the NSW Bureau of Crime Statistics and Research found that children have a higher rate of re-offending than adult offenders. Almost 80 per cent of children who committed crimes were re-convicted within 10 years, compared with 56 per cent of adult offenders.<sup>62</sup>

### The savings

In 2017 PiC, the Indigenous consulting branch of professional services firm PwC, and Change the Record coalition undertook a study focused on the costs of Indigenous incarceration in Australia, using the current rates of re-offending to forecast the number of Indigenous people likely to return to prison and the associated cost. In 2016 it cost \$7.9 billion per annum to imprison Indigenous people with costs projected to grow to \$9.7 billion by 2020 and \$19.8 billion per annum by 2040. Closing the gap on Indigenous incarceration could save \$18.9 billion in 2040.<sup>63</sup>

A range of studies indicate that a reduction in crime rates among children and young people translates to a reduction in adult crime. A meta-analysis of initiatives targeting young people who had offended found that recidivism can be significantly reduced by up to 91 per cent.<sup>64</sup>

The PiC report mapped the projected reduction in re-offending and cost, if custodial sentences for Indigenous children who offend were replaced by cognitive behavioural therapy or multisystemic therapy, holistic case management and support. This approach indicated a reduction in the recidivism rates over four years of between 4 to 15 percentage points in each year and savings of \$10.6 billion in 2040 and by \$153.6 billion in total present value terms.<sup>65</sup>

### Supporting Indigenous-led solutions that work

There is a significant body of evidence, most recently from the Royal Commission into the Protection and Detention of Children in the Northern Territory and the Australian Law Reform Commission, which indicates that for Indigenous people including children, early intervention and diversion programs run by Indigenous-led organisations and leaders work best. Report after report has recommended that these programs use a trauma informed therapeutic approach, that they be locally run place-based programs run and controlled by Indigenous people.<sup>66</sup>

Raising the age of criminal responsibility to 14 years and supporting young children with therapeutic and culturally-appropriate support will reduce the likelihood of their entry into the justice system, decrease recidivism rates and set them up to succeed.

57. 2017, Cunneen, *Arguments for raising the minimum age of criminal responsibility*, Research Report, Comparative Youth Penalty Project, University of NSW, Sydney, p.11.

58. 2017, Queensland Family and Child Commission, *The Age of Criminal Responsibility in Queensland*, p. 29.

59. Ibid, p. 30.

60. 2017, Cunneen, *Arguments for raising the minimum age of criminal responsibility*, Research Report, Comparative Youth Penalty Project, University of NSW, Sydney, p.12.

61. 2018, New Zealand Department of Justice, 'Youth Crime Action Plan', *Key initiatives*, accessed 6 August 2018, available at <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/cross-government/youth-crime-action-plan/> and 2018, WA Government, \$20.5 million to target and reduce offending by young people, media statement, 20 May 2018, accessed 6 August 2018, available at <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/05/20-point-5-million-dollars-to-target-and-reduce-offending-by-young-people.aspx>.

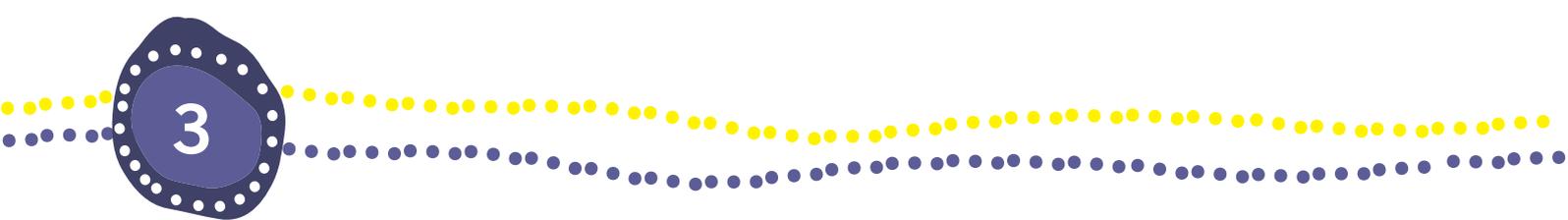
62. 2015, Agnew-Pauley, W and Holmes, J, 'Re-offending in NSW', *Crime and Justice Statistics: Bureau Brief*, NSW Bureau of Crime and Statistics Research, p.1, accessed 1 August 2018, available at <http://www.bocsar.nsw.gov.au/Documents/BB/bb108.pdf>.

63. 2017, PiC, *Indigenous incarceration: Unlock the facts*, p.7, accessed 1 August 2018, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

64. 2007, Allard, T, Oglivie J, and Stewart, A, 'The efficacy of strategies to reduce juvenile offending', *Justice Modelling @ Griffith*, p.iii, accessed 6 August 2018, available at [https://www.researchgate.net/publication/238732479\\_The\\_Efficacy\\_of\\_Strategies\\_to\\_Reduce\\_Juvenile\\_Offending](https://www.researchgate.net/publication/238732479_The_Efficacy_of_Strategies_to_Reduce_Juvenile_Offending).

65. 2017, PiC, *Indigenous incarceration: Unlock the facts*, p.56, accessed 1 August 2018, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

66. See Royal Commission into the Protection and Detention of Children in the Northern Territory, Chapter 7 - Community Engagement, and Recommendations 7.1, 7.2, 7.3 and see also 2017, Australian Law Reform Commission, *Pathways to Justice-Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, *Chapters 7: Community based sentences especially culturally appropriate community based sentencing options p.262, Chapter 10: Access to justice especially Other specialist courts, lists and diversion programs, p.333-336., Chapter 11: Aboriginal and Torres Strait Islander Women, especially diversion, p.368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1 accessed 24 August, available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\_report\_133\_amended1.pdf*.



## 3

### Recommendation three: setting children up to thrive

All Australian Governments must increase the allocation of funding to Indigenous community-led and controlled organisations, within existing budgets, to support culturally appropriate, place-based Indigenous designed and led preventative programs to address the needs of children under 14 years at risk of entering the justice system.<sup>67</sup> This funding should be allocated to Indigenous-led organisations and programs in proportion to the over-representation of Indigenous kids in the justice system.

### A chorus of calls: sector-wide support to raise the age to at least 14

The NTRC recommended raising the age to 12 years with a qualification for serious and violent crimes.<sup>68</sup> In 2007 the UN Committee on the Rights of the Child stated concern about any system which 'permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence'.<sup>69</sup> More than 70 – the vast majority – of medical, legal and human rights experts and peak bodies are calling for governments to raise the age of criminal responsibility to a single age point of at least 14 years without reservations.<sup>70</sup>

#### Organisations include:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission
- ANTaR
- Amnesty International
- Australian Council of Social Service
- Australian Indigenous Doctors' Association
- Federation of Community Legal Centres (Vic)
- First Peoples Disability Network
- Human Rights Law Centre
- National Aboriginal Community Controlled Health Organisations
- National Aboriginal and Torres Strait Islander Legal Services
- National Aboriginal and Torres Strait Islander Women's Alliance
- National Association of Community Legal Centres
- National Congress of Australia's First Peoples
- National Family Violence Prevention Legal Services Forum
- Oxfam Australia
- Royal Australian College of Physicians
- SNAICC – National Voice for our Children
- Sisters Inside
- The Lowitja Institute
- UNICEF
- Victorian Commissioner for Aboriginal Children and Young People, Justin Mohamed



67. Ibid.

68. 2017, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, recommendation 27.1, page 46, available at <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

69. 2007, UN Committee on the Rights of the Child, General Comment No.10, pp10-11, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

70. 2017, *Change the Record, Free to be kids: National Plan of Action*, p.5, accessed 6 August 2018, available at <https://www.amnesty.org.au/wp-content/uploads/2017/11/amnesty-report-national-plan-of-action-november-2017.pdf> and 2011, *Doctors, lawyers, Experts unite in call to raise age of criminal responsibility*, media statement, accessed 6 August 2018, available at <https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility> and 2018, Amnesty International Australia, *National Roundtable Says Australia lags Behind the Rest of the World Locking up 10 Years Olds*, media statement, accessed 6 August 2018, available at <https://www.amnesty.org.au/national-roundtable-says-australia-lags-behind-world-in-locking-up-10-year-olds/>, 2017, Jesuit Social Services, *Raise the age open letter*, accessed 6 August 2018, available at <http://jss.org.au/wp-content/uploads/2017/11/RAISE-THE-AGE-open-letter.pdf>.



## Questions and answers

### What crimes do children aged 14 and under commit?

The only data available is for children aged 10 to 14 years. The majority of crimes (about 55 per cent) committed are theft, burglary and property related crimes. Other crimes include public order, drugs and traffic offences, and fraud. Just over 20 per cent are acts intended to cause injury.<sup>71</sup>

### What do we do with children aged 10 to 13 years if they're not placed in prison?

Children should receive the support they need for the issues that are affecting their offending behaviours. The QLD Family and Child Commission found a 'direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment and having one or more parents with a criminal record.'<sup>72</sup>

An educational, medical, psychological, social and cultural response that deals with the underlying causes is more effective and appropriate than a justice response. Evidence also shows that place-based, culturally appropriate, Indigenous-led programs achieve the best outcomes for Indigenous children.<sup>73</sup>

### What happens to serious offenders?

If a child aged between 10 and 13 years has committed a serious violent offence, something has gone very wrong in their life. It is the responsibility for government to provide that child with the services needed to address the underlying causes of their behaviour and to set their childhood in a better direction. Services may need to address experiences of physical, emotional or mental abuse, trauma (including intergenerational trauma), cognitive impairment, family or drug and alcohol issues.



71. 2018, Australian Bureau of Statistics, *Criminal Courts Australian 2016-2017*, 'Table 5 DEFENDANTS FINALISED by Sex and age by principal offence and court level', accessed, 1 August 2018, available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02016-17?OpenDocument>.

72. Queensland Family and Child Commission, 2017, 'The Age of Criminal Responsibility in Queensland.' p.16.

73. See Royal Commission into the Protection and Detention of Children in the Northern Territory, Chapter 7 - Community Engagement, and Recommendations 7.1, 7.2, 7.3 and see also 2017, Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, Chapters 7: *Community based sentences especially culturally appropriate community based sentencing options p.262*, Chapter 10: *Access to justice especially Other specialist courts, lists and diversion programs, p.333-336.*, Chapter 11: *Aboriginal and Torres Strait Islander Women, especially diversion, p.368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1 accessed 24 August, available at [https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf).*



## When the age of criminal responsibility is raised, what happens to children aged 10–13 years who are currently in prison?

Children aged 10–13 years who are currently in prison will form the first tranche of participants in prevention and diversion programs designed to divert them away from the justice system. The government must create a transition plan to shift these children out of detention and place them into programs designed to address their underlying issues and keep them out of the justice system in the future.<sup>74</sup> The transition should take no longer than one year, and due to the longstanding impacts imprisonment has on children detailed in this paper, it is recommended that the transition of children with FASD and other mental impairments or vulnerabilities be prioritised.

## What law needs changing?

Governments need to make amendments to existing legislation in order to raise the age of criminal responsibility to at least 14 years:

- Commonwealth: Crimes Act 1914 section 4M and 4N
- QLD: Criminal Code Act 1899 section 5
- ACT : Criminal Code 2002 section 25 and 26
- TAS: Criminal Code Act 1924 section 18
- WA: Criminal Code Act Compilation Act 1913 section 29
- NSW: Children (Criminal Proceedings) Act 1987 section 5
- NT: Criminal Code Act 1983 section 38
- VIC: Children, Youth and Families Act 2005 section 344
- SA: Young Offenders Act 1993s section 5



74. Ibid.



## What does it cost?

There will be a small cost related to the physical transition of children out of prisons. Governments will also need to devise a long term funding strategy for the appropriate programs and services that are needed to address the underlying issues children are facing.<sup>75</sup>

The PiC report mapped the projected reduction in re-offending and cost for Indigenous children who offend where custodial sentences were replaced by cognitive behavioural therapy or multisystemic therapy, and holistic case management and support. This approach indicated a reduction in the recidivism rates over four years of between 4–15 percentage points in each year and savings of \$10.6 billion in 2040 and by \$153.6 billion in total present value terms.<sup>76</sup>

## What does the Indigenous community want?

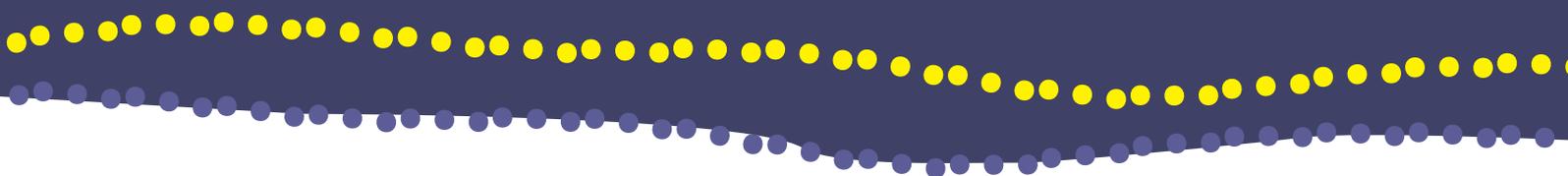
The **Change the Record Coalition** has nine Indigenous organisations as members, including expert peak bodies that work in the legal space such as the National Aboriginal and Torres Strait Islander Legal Services and National Family Violence Prevention Legal Services Forum. In 2017 the coalition released a National Action Plan on youth justice, '**Free To Be Kids**', which calls on all governments in Australia to raise the age of criminal responsibility to at least 14 years old, in line with international standards, and to fund Indigenous-led solutions for children.<sup>77</sup>



75. Ibid and 2017, PiC, *Indigenous incarceration: Unlock the facts*, p.24, accessed 1 August 2018, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf> and 2017 Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Chapter 4: Justice Reinvestment, ALRC Report 133, accessed 24 August available at [https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf).

76. 2017, PiC, *Indigenous incarceration: Unlock the facts*, p.56, accessed 1 August 2018, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

77. 2017, Change the Record, *Free to be kids: National Plan of Action*, p.5, accessed 6 August 2018, available at <https://www.amnesty.org.au/wp-content/uploads/2017/11/amnesty-report-national-plan-of-action-november-2017.pdf>.



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