

Raise the Age:
Kids belong in community





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

Between 2018 and 2019, Australian Governments pushed almost 8,353 children aged 10, 11, 12 and 13 years through the criminal justice system, and 573 children under the age of 14 were in detention.¹ 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 reoffend as adults.²

Between 2018 and 2019 Indigenous children made up 64% of 10–13 year olds in prison.³ 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 therapeutic and cultural family support, schooling, mentoring, counselling, 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.⁴

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.⁵

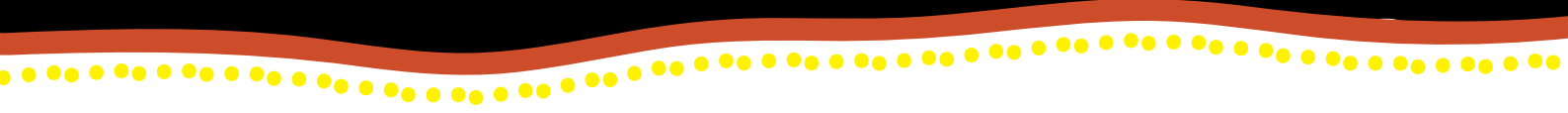
1. 2020, Australian Bureau of Statistics (ABS), Recorded Crime – Offenders, 2018-19, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra and 2020, Australian Institute of Health and Welfare (AIHW), Youth Justice in Australia 2018-19, 'Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2018–19', accessed 15 May 2020, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/data>
2. 2017, Queensland Family & Child Commission, The age of criminal responsibility in Queensland, p.30, accessed 1 February 2020, available at <https://www.qfcc.qld.gov.au/sites/default/files/Forpercent20professionals/policy/minimum-age-criminal-responsibility.pdf>.
3. 2020, AIHW, Youth Justice in Australia 2018-19, 'Table S80b: Young people in detention during the year by Indigenous status and age, states and territories, 2018–19', accessed 12 February 2020, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/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; 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 11 February 2020, available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.
5. 2017, Change the Record, Free to be kids: National Plan of Action, accessed 1 February 2020, available at <https://www.amnesty.org.au/wp-content/uploads/2017/11/amnesty-report-national-plan-of-action-november-2017.pdf>.



Recommendations

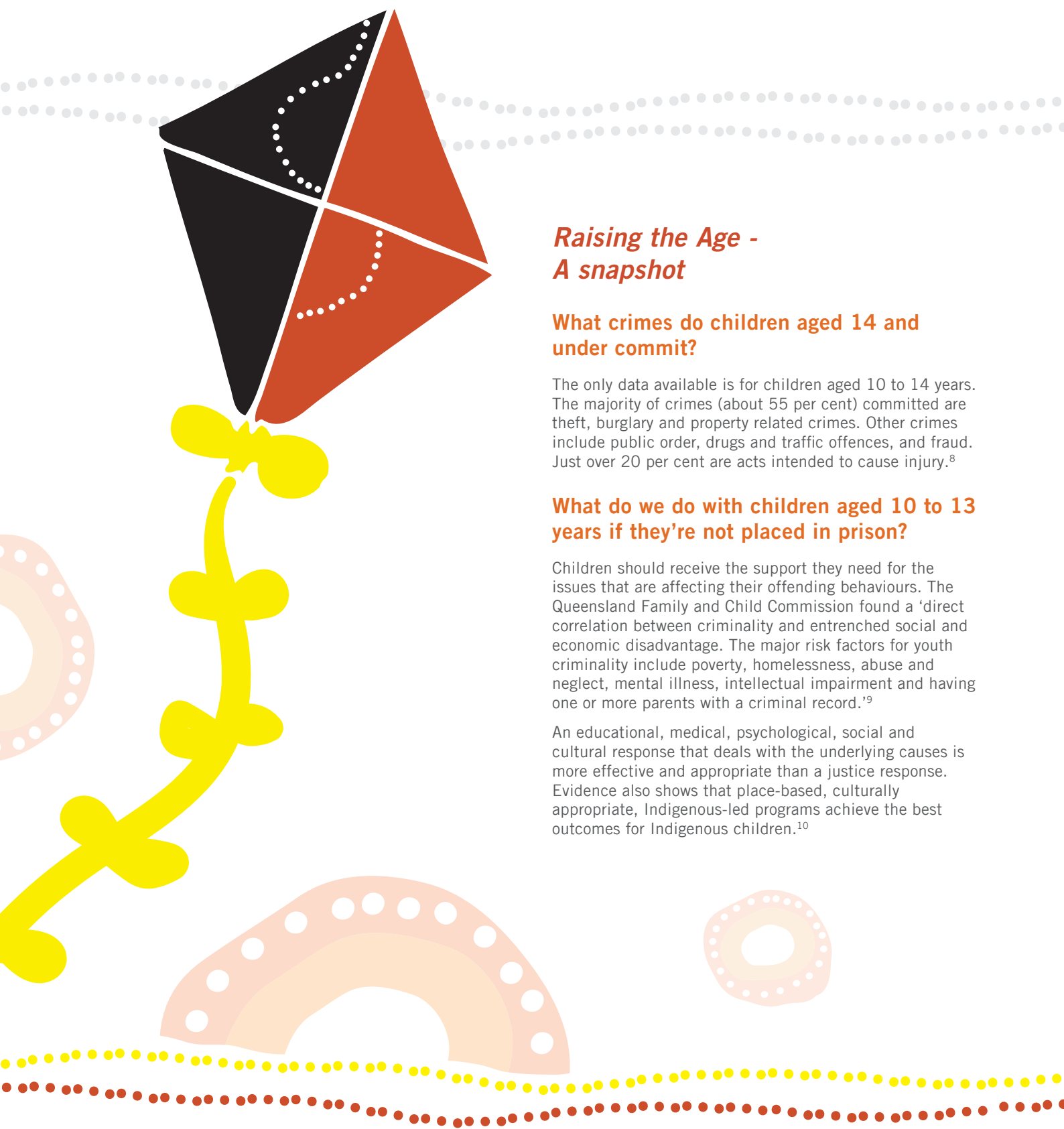
All Australian Governments must:

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. Australian Governments must also provide funding for health checks, including for ear disease, for children displaying risk factors. Australian Governments must also ensure at-risk children have access to therapeutic, age-appropriate health and prevention programs to address the issues faced by the child and prevent future contact with the justice system.⁶
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.⁷ This funding should be allocated to Indigenous-led organisations and programs in proportion to the over-representation of Indigenous kids in the justice system.
4. All Australian Governments, in conjunction with relevant agencies, should ensure appropriate data collection in relation to primary and secondary prevention that measures the effectiveness of the youth justice system and the accessibility and efficacy of interventions offered. This includes: data on timely access to diversionary services, the effectiveness of diversionary services, family engagement with youth justice services and mechanisms to enable disaggregation by jurisdiction, age, and priority population groups including Indigenous children.



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 1 February 2020, available at https://www.fasdhub.org.au/siteassets/pdfs/australian-guide-to-diagnosis-of-fasd_all-appendices.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/>.



Raising the Age - A snapshot

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.⁸

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 Queensland 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.'⁹

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.¹⁰

8. 2019, Australian Bureau of Statistics, Criminal Courts Australian 2017-2018, 'Table 3 DEFENDANTS FINALISED by Sex and age by principal offence and court level', accessed, 12 February 2020, available at <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02017-18?OpenDocument>.

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

10. 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; see also 2018, 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 1 February 2020, available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

11. *Ibid.*



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 of 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.

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.¹¹ 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:

- Sections 4M and 4N Crimes Act 1914 (Cth)
- Sections 25 and 26 Criminal Code 2002 (ACT)
- Section 5 Children (Criminal Proceedings) Act 1987 (NSW)
- Section 38 Criminal Code Act 1983 (NT)
- Section 29 Criminal Code Act 1899 (Qld)
- Section 5 Young Offenders Act 1993 (SA)
- Section 18 Sch 1 Criminal Code Act 1924 (Tas)
- Section 344 Children, Youth and Families Act 2005 (Vic)
- Section 29 Criminal Code Act Compilation Act 1913 (WA)

What does it cost?

There will be a small short-term 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.¹²

In 2017, PWC Indigenous Consulting (PIC), the Indigenous consulting branch of PWC, and Change the Record coalition undertook a study focused on the costs of Indigenous incarceration in Australia. 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 each year and savings of \$10.6 billion in 2040 and by \$153.6 billion in total present value terms.¹³



12. Ibid and 2017, PIC, Indigenous incarceration: Unlock the facts, p.24, accessed 1 February 2020, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf> and 2018 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 1 February 2020, available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/>

13. 2017, PIC, Indigenous incarceration: Unlock the facts, p.56, accessed 1 February 2020, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.



Human rights obligations

Children shouldn't 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,¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷

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'.¹⁸

Australia has been repeatedly criticised by the United Nations, including long-standing criticism from the UNCRC¹⁹ and 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.²⁰



14. 2016, Australian Human Rights Commission, National Children's Commissioner, Children's Rights Report 2016, p.187.

15. 2019, Child Rights International Network (CRIN), Minimum ages of criminal responsibility, accessed 12 February 2020, available at <https://home.crin.org/issues/deprivation-of-liberty/minimum-age-of-criminal-responsibility>.

16. 2019, Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, p. 9, accessed 1 February 2020, available at <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>.

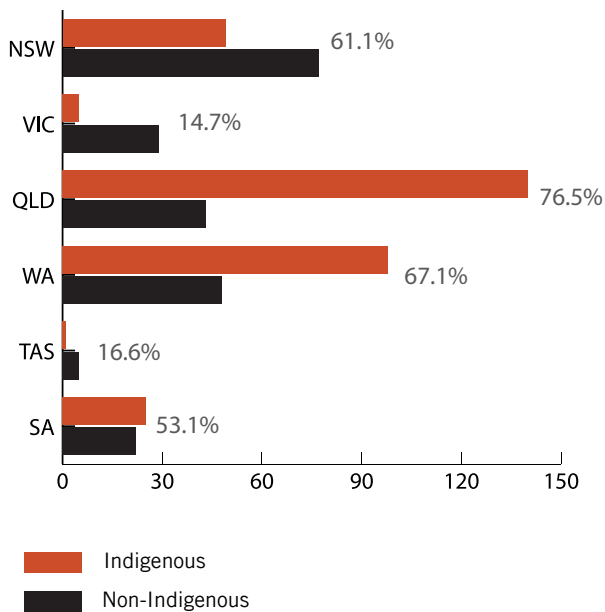
17. 2017, Amnesty International, Abuse of children in Don Dale and other prisons is a national shame, accessed 1 February 2020, available at <https://www.amnesty.org.au/abuse-children-don-dale-prisons-national-shame/>.

18. 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.

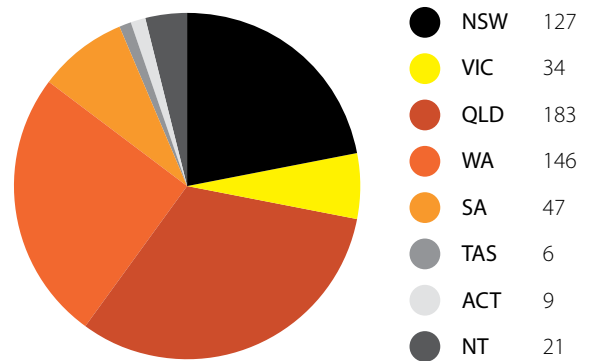
19. United Nations Committee on the Rights of the Child, Concluding observations (2019) CRC/C/AUS/CO/5-6, paragraph 47, accessed 12 February 2020, available at <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AUIndex.aspx> and United Nations Committee on the Rights of the Child, Sessions of the Committee, 1997: paragraphs 11 and 29, 2005: paragraph 73; 2012: paragraph 82(a).

20. 2017, United Nations Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, accessed, 1 February 2020, available at <https://www.refworld.org/docid/59cb9bd34.html>.

Per cent and number of Indigenous children and non-Indigenous children under the age of 14 in detention between 2018-2019*²¹



Number of children under 14 years in prison between 2018 –19 in Australia²²



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.

Indigenous people make up 6 per cent of the Australian population of children aged between 10 and 17 years. Yet they are 22 times more likely to be locked up than non-Indigenous children.²³

Indigenous children aged between 10-13 years make up 64% of the prison population in that young age group.

Indigenous children aged between 14 and 17 make up 58% of the children’s prison population.²⁴

*ACT and NT not provided



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.

21. 2020, AIHW, Youth Justice in Australia 2018-19, ‘Table S80b: Young people in detention during the year by Indigenous status and age, states and territories, 2018-19’, accessed 15 May 2020, available <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/data>.
 22. Ibid, ‘Table S74b: Young people in detention during the year by age, states and territories, 2018-19’, accessed 15 May 2020, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/data>.
 23. 23 Ibid, Chapter 9: Youth Justice in Context, p. 41, accessed 15 May 2020, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/data>.
 24. Ibid, Chapter 9: Youth Justice in Context, p. 20, accessed 15 May 2020, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/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.²⁵

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'.²⁶ 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.²⁷ In addition children aged 10–13 years are particularly vulnerable to peer pressure.

25. 2019, Australian Early Development Census, Brain Development in Children, accessed 1 February 2020, available at <https://www.aedc.gov.au/resources/detail/brain-development-in-children>.

26. 2017, Learning Potential- Australian Government, Learning and the teen brain, accessed 1 February 2020, available at <https://www.learningpotential.gov.au/learning-and-the-teen-brain>.

27. 2013, Lamb and Sim, 'Developmental Factors Affecting Children in Legal Contexts', Youth Justice, August.



Case study:

A 13 yr old in trouble for father's wrongdoing

In 2018 the Youth Advocacy Centre (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.²⁸

28. 2020, Youth Advocacy Centre, Submission in relation to: Council of Attorneys-General Age of Criminal Responsibility Working Group review, p.8, accessed May 22nd 2020, available at https://www.yac.net.au/wp-content/uploads/2020/03/YAC-Submission-re-MACR_Council-of-AGs-2020.pdf

Compounding effect of prison

'Toxic stress' or trauma can have a negative impact on brain development.²⁹ 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.³⁰

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 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'.³¹

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.'³²

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.³³ Children in the justice system have significantly higher rates of mental health disorders and neurocognitive disabilities than children outside the justice system.³⁴

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.³⁵ A NSW study found that 83 per cent of children in prison had a psychological disorder,³⁶ 68 per cent had experience of abuse and 59 per cent had a behaviour or attention disorder. 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.³⁷

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'.³⁸

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.

29. 2019, Australian Early Development Census, Brain Development in Children, accessed 1 February 2020, available at <https://www.aedc.gov.au/resources/detail/brain-development-in-children>.

30. Ibid.

31. 2013, Aboriginal and Torres Strait Islander Healing Foundation, Growing our children up strong and deadly: Healing children and young people, accessed 1 February 2020, available at <https://trove.nla.gov.au/version/193634560>.

32. 2019, Australian Early Development Census, Brain Development in Children, accessed 1 February 2020, available at <https://www.aedc.gov.au/resources/detail/brain-development-in-children>.

33. 2017, Cunneen, Arguments for raising the minimum age of criminal responsibility, Research Report, Comparative Youth Penalty Project, University of NSW, Sydney, pp.8-9.

34. 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 2019, Justice Health & Forensic Mental Health Network, Our Network 2019, NSW Government, p. 19, accessed 1 February 2020, available at <https://www.justicehealth.nsw.gov.au/publications/our-network-final.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, accessed 12 February 2020, available at <https://bmjopen.bmj.com/content/8/4/e019605corr1.full>.

35. Ibid, Kinner.

36. 2019, Justice Health & Forensic Mental Health Network, Our Network 2019, NSW Government, p. 19, accessed 1 February 2020, available at <https://www.justicehealth.nsw.gov.au/publications/our-network-final.pdf>

37. 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 February 2020, available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

38. 2013, Lamb and Sim, 'Developmental Factors Affecting Children in Legal Contexts', Youth Justice, August, p.139.



Case study:

Charlie's story

Charlie was a 13 year old Aboriginal boy who had travelled to NSW from Queensland with his mother. Charlie was mucking around with his friend in a shop. They were throwing a basketball to each other. Staff contacted police who charged Charlie with offensive behaviour and, when Charlie argued with them, resist arrest. Charlie was granted bail with a condition to not enter any shops and an overnight curfew unless he was with his mum. Charlie's mum frequently abandoned him so that he was left homeless and he was arrested for breaching his curfew and spent time in custody. Ultimately, his mum returned to Queensland and Charlie was left at risk of homelessness.³⁹

39. 2020, National Legal Aid, Council of Attorneys-General - Age of Criminal Responsibility Working Group review, p.16, accessed May 22nd 2020, available at https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/39267/NLA-sub-CAG-age-of-criminal-responsibility-28-02-20.pdf

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'.⁴⁰ It can result in a range of difficulties for children such as difficulties understanding cause and effect, learning from past experiences and decision making.⁴¹ 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 2004.⁴² The 2015 Lirilwan Project, a study of children from Fitzroy Valley in Western Australia found that 13 out of 108 Indigenous children had FASD.⁴³

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 70.⁴⁴

In NSW a study of children in eight prisons found that 45.8 per cent had borderline or lower intellectual functioning.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸ Students with FASD are often suspended or removed from schools due to their symptoms and many do not complete school.⁴⁹

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'.⁵⁰ 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.

40. 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 1 February 2020, www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/splafasd/report/fullreport.pdf.
41. 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, accessed 12 February 2020, available at <https://bmjopen.bmj.com/content/8/4/e019605corr1.full>.
42. 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.
43. 2015, Fitzpatrick. J, et al, 'Prevalence of fetal alcohol syndrome in a population-based sample of children living in remote Australia: the Lirilwan Project', *Journal of Paediatricians and Child Health*, vol.51, Iss.4, accessed 12 February 2020, available at <https://www.ncbi.nlm.nih.gov/pubmed/25594247>.
44. 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, accessed 12 February 2020, available at <https://bmjopen.bmj.com/content/8/4/e019605corr1.full>.
45. 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.
46. 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), accessed 1 February 2020, www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/splafasd/report/fullreport.pdf.
47. *Ibid*, p. 28 and 131.
48. *Ibid*, p.131.
49. *Ibid*.
50. *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.”⁵¹

51. 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 1 February 2020, www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/spla/fasd/report/fullreport.pdf.



Case study:

Tyler's story

Tyler is Aboriginal and diagnosed with FASD. He comes from a poor social economic background. He was arrested by police when he was 11 years old for stealing a kebab after he had not eaten for two days. He was referred to a youth justice conference. Tyler was placed on a STMP and frequently stopped and searched by police. He would regularly be arrested and charged for offensive language and resist arrest. When Tyler was 13 years and 10 months he was charged with being a lookout for a shoplifting. He was granted bail conditions which prevented him from entering any shop in his small town. The police sought to use the youth justice conference he received when he was 11 to rebut doli incapax.⁵²

52. 2020, National Legal Aid, Council of Attorneys-General - Age of Criminal Responsibility Working Group review, p.16, accessed May 22nd 2020, available at https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0009/39267/NLA-sub-CAG-age-of-criminal-responsibility-28-02-20.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.'⁵³ The ongoing effects of ear 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.⁵⁴

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.⁵⁵

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.⁵⁶ Furthermore, testing when in contact with the justice system should occur to ensure children are not being penalised for medical issues.



Recommendation two: brain development, mental capacity and health

All Australian Governments 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. Australian Governments must also provide funding for health checks, including for ear disease, for children displaying risk factors. Australian Governments must also ensure at-risk children have access to therapeutic, age-appropriate health and prevention programs to address the issues faced by the child and prevent future contact with the justice system.

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.

53. 2016, Royal Australian College of Surgeons and Australian Society of Otolaryngology Head and Neck Surgery, SUBMISSION: Implementation Plan Advisory group (IPAG) consultation 2017, p.2, accessed 12 February 2020, submission available at <https://www.surgeons.org/news/advocacy/2017-05-05-implementation-plan-advisory-group-ipag-consultation-2017-racs-submission>.

54. 2013, Burns. J and Thomson. N, 'Review of ear health and hearing among Indigenous Australians', Healthinonet . vol. 14, No.4, Accessed 1 February 2020, available at http://healthbulletin.org.au/wp-content/uploads/2013/10/ear_health_review_2013.pdf.

55. 2017, Australian Health Ministers' Advisory Council, Aboriginal and Torres Strait Islander Health Performance Framework 2017 Report, accessed 1 February 2020, available at <https://www.niaa.gov.au/resource-centre/indigenous-affairs/health-performance-framework-2017-report>.

56. 2016, Royal Australian College of Surgeons and Australian Society of Otolaryngology Head and Neck Surgery, SUBMISSION: Implementation Plan Advisory group (IPAG) consultation 2017, p.3, accessed 12 February 2020, submission available at <https://www.surgeons.org/news/advocacy/2017-05-05-implementation-plan-advisory-group-ipag-consultation-2017-racs-submission>.

***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.⁵⁷ In 2020, 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.⁵⁸

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'.⁵⁹

***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.⁶⁰ 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*.⁶¹

Worse still, the practice of holding children on remand before *doli incapax* assessments can be conducted actually prolongs a child's involvement with the criminal justice system:

'While on paper it looks like there's some level of safeguard there, there's a whole lot of kids that are being held on remand before those questions have even been answered. You can be charged as a 10 year old and may not ultimately be found guilty. ... So in those circumstances it doesn't even necessarily matter whether *doli incapax* applies because they might not have really got to those questions before someone's being held in remand... or being held in police watch houses, having been charged. So the damage has already been done.'⁶²

57. 2019, Fitz-Gibbon K and O'Brien, W., 'A Child's Capacity to Commit Crime: Examining the operation of *Doli Incapax* in Victoria (Australia)' International Journal for Crime, Justice and Social Democracy, p.19, accessed 12 February 2020, available at: <https://www.crimejusticejournal.com/article/view/1047/714> and 2006, Johnston M., 'Doli Incapax – the Criminal Responsibility of Children,' Children's Court of New South Wales, p.1.

58. 2005, Australian Institute of Criminology, The age of criminal responsibility, accessed 1 February 2020, available at <https://aic.gov.au/publications/cfi/cfi106>.

59. BP v R; SW v R [2006] NSWCCA 172 at [27-30]. and 2019, Fitz-Gibbon K and O'Brien, W., 'A Child's Capacity to Commit Crime: Examining the operation of *Doli Incapax* in Victoria (Australia)' International Journal for Crime, Justice and Social Democracy, p.19, accessed 12 February 2020, available at: <https://www.crimejusticejournal.com/article/view/1047/714> and 2014, Lennings, N.J., 'Assessing Serious Harm Under the *Doli Incapax*: A Case Study', Psychiatry, Psychology and Law, p.1, accessed 12 February 2020, available at https://www.researchgate.net/publication/271939617_Assessing_Serious_Harm_Under_the_Doctrine_of_Doli_Incapax_A_Case_Study.

60. 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.

61. 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.142.

62. 2019, Fitz-Gibbon K and O'Brien, W., 'A Child's Capacity to Commit Crime: Examining the operation of *Doli Incapax* in Victoria (Australia)' International Journal for Crime, Justice and Social Democracy, p.25, accessed 12 February 2020, available at: <https://www.crimejusticejournal.com/article/view/1047/714>.




Case study:

Kelly's story

Kelly has FASD. When she was 13, she had over \$500 in fines and a lengthy criminal history. She lived in a very impoverished community. She had no ability to pay her fines until Legal Aid NSW assisted with setting up a Work and Development Order. Kelly received her first caution shortly after her 10th birthday for a very minor offence of offensive language. She was placed on an NSW Police Suspect Targeted Management Plan (STMP) when she was 10 years old. Before she turned 11 years old, she was no longer able to receive cautions, having been given three cautions. She was either fined or sent to court. When Kelly was 13 she was before the court for various minor charges where doli incapax was in issue. Her matters were before the court for approximately 15 months, during which time she breached bail conditions, including a curfew condition, and was in and out of detention centres. Ultimately a psychologist report found that Kelly was not fit to be tried. Her matters were discharged under mental health legislation.⁶³

63. 2020, National Legal Aid, Council of Attorneys-General - Age of Criminal Responsibility Working Group review, p.14, accessed May 22nd 2020, available at https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/39267/NLA-sub-CAG-age-of-criminal-responsibility-28-02-20.pdf



This is particularly troubling in the light of mounting evidence that highlights the negative effects experienced by children on remand, including 'separation from family and community, disruption to education, the negative effects of associations with sentenced young offenders and the lack of therapeutic programs'.⁶⁴

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.⁶⁵ 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'.⁶⁶

If a child's legal defence team does decide to pursue on their own initiative *doli incapax*,⁶⁷ 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.⁶⁸ 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 UNCRC 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'.⁶⁹ This statement is particularly concerning when Indigenous children across Australia are 22 times more likely to be in prison than non-Indigenous children.⁷⁰

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'.⁷¹

The rates of children from these backgrounds and with remedial and developmental issues in detention would indicate that *doli incapax* is not functioning to protect children who cannot fulfil the legal test.



64. Ibid p. 26.

65. 2013, Lamb and Sim, 'Developmental Factors Affecting Children in Legal Contexts', Youth Justice, August, p.137.

66. Ibid.

67. However, exercising this option also comes with its own set of unique challenges. See 2019, Fitz-Gibbon K and O'Brien, W., 'A Child's Capacity to Commit Crime: Examining the operation of Doli Incapax in Victoria (Australia)' International Journal for Crime, Justice and Social Democracy, accessed 12 February 2020, available at: <https://www.crimejusticejournal.com/article/view/1047/714>.

68. 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.

69. 2019, UN Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, p. 10, accessed 1 February 2020, available at <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>.

70. 2020, AIHW, Youth Justice in Australia 2018-19, Chapter 9: youth justice in context, p. 41, accessed 15 May 2020, available at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/data>.

71. 2017, Queensland Family and Child Commission, The Age of Criminal Responsibility in Queensland, p. 16.



Case study:

Doli incapax isn't working

In 2019 the Youth Advocacy Centre 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. 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.

72. 2020, Youth Advocacy Centre, Submission in relation to: Council of Attorneys-General Age of Criminal Responsibility Working Group review, p.8, accessed May 22nd 2020, available at https://www.yac.net.au/wp-content/uploads/2020/03/YAC-Submission-re-MACR_Council-of-AGs-2020.pdf



Case study:

Simon's story

Simon was aged 16 years when he first met his VLA lawyer in 2019. Attached to his police brief was a history detailing an appearance from a regional town four years prior, when Simon was aged 13 years old. The lawyer's investigation of how this relatively minor offence came to appear on his history revealed that Simon's prior legal representatives had pleaded guilty without adequate exploration of whether Simon was *doli incapax* and whether *doli incapax* could be rebutted. The matter was heard before a magistrate who ordinarily did not sit in the Children's Court. Rather than a caution, Simon received two 9-month probation orders as well as a criminal history. Simon's previous legal representatives also failed to give him appeal advice so he was not aware that the sentence imposed was excessive and that he may have been able to avoid the matter appearing on his criminal history. Further investigation found that Youth Justice did not direct Simon to seek a second opinion. Simon's VLA lawyer filed an appeal against conviction out of time. The application for leave to appeal out of time was granted and on the prosecution's application, the charges were withdrawn based on *doli incapax*. For the 2019 offending, Simon was granted diversion with conditions to participate in Children's Court Youth Diversion Service. Simon now has no criminal history and has been successfully diverted away from the criminal justice system.⁷³

73. 2020, National Legal Aid, Council of Attorneys-General - Age of Criminal Responsibility Working Group review, p.29, accessed May 22nd 2020, available at https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0009/39267/NLA-sub-CAG-age-of-criminal-responsibility-28-02-20.pdf



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.⁷⁴

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.⁷⁵ 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.'⁷⁶

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.'⁷⁷ 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.⁷⁸

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.⁷⁹



74. 2017, Cunneen, Arguments for raising the minimum age of criminal responsibility, Research Report, Comparative Youth Penalty Project, University of NSW, Sydney, p.11.

75. 2017, Queensland Family and Child Commission, The Age of Criminal Responsibility in Queensland, p. 29.

76. Ibid p. 30.

77. 2017, Cunneen, Arguments for raising the minimum age of criminal responsibility, Research Report, Comparative Youth Penalty Project, University of NSW, Sydney, p.12.

78. 2018, New Zealand Department of Justice, 'Youth Crime Action Plan', Key initiatives, accessed 12 February 2020, 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 12 February 2020, 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>. See also the \$1.8 million in funding to support the Maranguka Justice Reinvestment project in NSW in 2019: Paul Fletcher MP, \$1.8 million for Maranguka Justice Reinvestment project in Bourke, media statement, 12 March 2019, accessed 12 February 2020, available at <https://www.paulfletcher.com.au/media-releases/joint-media-release-18-million-for-maranguka-justice-reinvestment-project-in-bourke>.

79. 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 February 2020, available at <http://www.bocsar.nsw.gov.au/Documents/BB/bb108.pdf>



Case study:

Jane's story

Jane's story Jane's life experience demonstrates the results of early involvement in the criminal justice system and its intergenerational impact. Her story illustrates how children who enter the criminal justice system at a young age can become entrenched in the criminal justice system and often continue their involvement into adulthood. This was particularly pronounced for Jane, who like many children, presented in the youth justice system with a history of childhood trauma and complex mental health needs. Jane's involvement with child protection services started when she was aged 2. Her childhood had been marred by a chronic history of physical abuse, emotional abuse, neglect and unstable accommodation. Her engagement with mental health services commenced at the age of 12. Between the ages of 13 and 17, Jane was subjected to numerous short admissions to out-of-home care placement, residential units, foster care placement and Secure Welfare Services. Jane was diagnosed with having an intellectual disability, Post-traumatic Stress Disorder, Reactive Attachment Disorder, Generalised Anxiety and Borderline Personality Disorder. Jane also had physical impairments which were compounded by self-harming behaviour, suicidal ideation and substance use. Jane's interaction with the criminal justice system started at aged 13, predominantly related to property damage in residential units, threats and assaults on staff. Ultimately however, this offending resulted in serving a custodial sentence. Jane is now 25 years old. She is no longer in custody but continues to struggle to maintain a stable life. She aspires to be a hairdresser, values her two young children and the time she spends with them, and attends her church on Saturdays to assist in their weekly barbeque. Her eldest child resides interstate with the paternal grandparents. This is difficult for Jane; she has contact with her eldest child only four times a year. Her second child was placed in out-of-home care from birth. Jane has been involved in custody proceedings involving her youngest son. In culmination with other related matters, this has caused Jane great distress and unpredictability in her life. These stressful life circumstances contributed to her most recent offending of assault upon a former disability case worker. Jane's story is regrettably not unique. Children known to the child protection system are disproportionately over-represented in the criminal justice system. They are referred to as 'crossover kids'. Regrettably, the disadvantages faced by crossover kids have the capacity to spill over to the next generation. Curtailing children's involvement in the criminal justice system, through raising the minimum age of criminal responsibility and properly resourcing alternative therapeutic services has the capacity to break the cycle of re-offending.

The savings

In 2017, PIC, used 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 2040.⁸¹

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.⁸²

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.⁸³

Self-determination is the key to success

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.⁸⁴

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.⁸⁵

81. 2017, PIC, Indigenous incarceration: Unlock the facts, p.7, accessed 1 February 2020, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

82. 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.

83. 2017, PIC, Indigenous incarceration: Unlock the facts, p.56, accessed 1 February 2020, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

84. 2017, Change the Record, Free to be kids: National Plan of Action, p.5, accessed 1 February 2020, available at <https://www.amnesty.org.au/wp-content/uploads/2017/11/amnesty-report-national-plan-of-action-november-2017.pdf>.

85. 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; 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 11 February 2020, available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.



Case study:

Maranguka Justice Reinvestment Project (‘care for others’)

The Maranguka Justice Reinvestment Project is a grass-roots justice reinvestment project and is the first major justice reinvestment project in Australia. The Project, which began in 2013, is designed to empower the Aboriginal community in Bourke, New South Wales and began with a ‘grass-roots coalition of concerned local Aboriginal residents who wanted to see positive change in their community.’

In partnership with JustReinvest NSW, the project aims to redirect resources that would usually be spent on prison back into the community, to address the underlying causes of imprisonment, and provide support to vulnerable children and families.⁸⁶

In 2018, KPMG undertook an impact assessment of the project over the 2017 calendar year and found a number of significant improvements:

- Family strength: 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of re-offending
- Youth development: 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories
- Adult empowerment: 14% reduction in bail breaches and a 42% reduction in days spent in custody.

As a result of these achievements, and achievements in other areas, KPMG estimated an economic impact of \$3.1 million in 2017 – and if just half of the results achieved in 2017 continued, an additional impact of \$7 million.⁸⁷

86. 2020, Australian Indigenous HealthInfoNet, Maranguka Justice Reinvestment Project , accessed 12 February 2020, available at <https://healthinonet.edu.au/key-resources/programs-and-projects/2586/?title=Maranguka%20Justice%20Reinvestment%20Project%20>.

87. 2018, KPMG, Maranguka Justice Reinvestment Project Impact Assessment, p. 6, accessed 12 February 2020, available at <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

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.



Recommendation three: setting children up to thrive

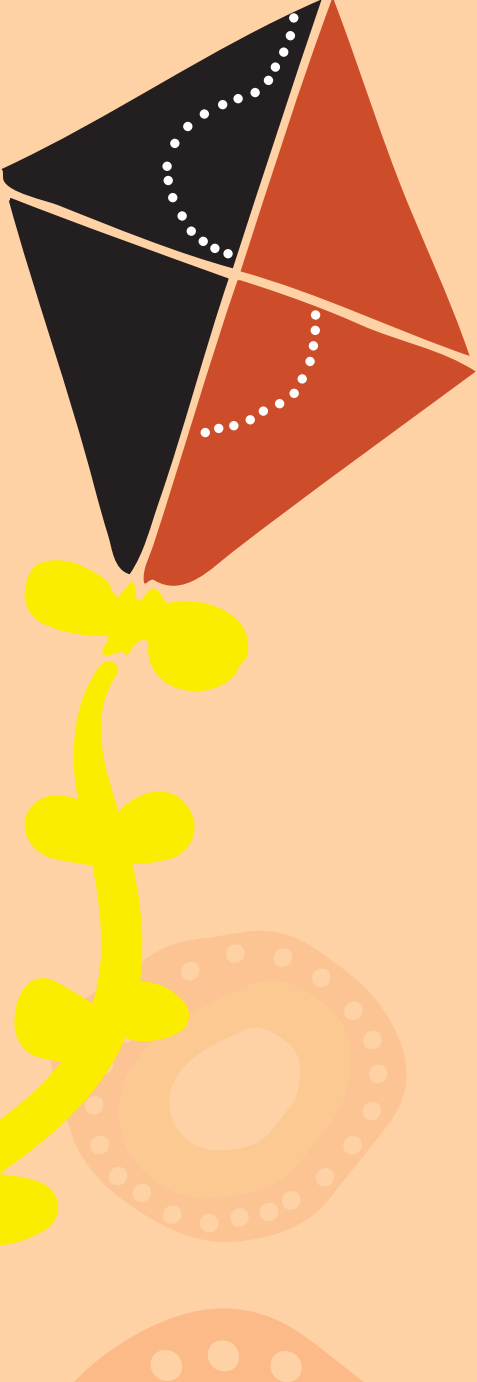
All Australian Governments must increase the allocation of funding to Indigenous community-led and controlled organisations, within existing budgets, to support culturally appropriate, place-based Indigenous designed and led preventative programs to address the needs of children under 14 years at risk of entering the justice system.⁸⁸ This funding should be allocated to Indigenous-led organisations and programs in proportion to the over-representation of Indigenous kids in the justice system.



Recommendation four: address the data gaps

All Australian Governments, in conjunction with relevant agencies, should ensure appropriate data collection in relation to primary and secondary prevention that measures the effectiveness of the youth justice system and the accessibility and efficacy of interventions offered. This includes data on timely access to diversionary services, the effectiveness of diversionary services, family engagement with youth justice services and mechanisms to enable disaggregation by jurisdiction, age, and priority population groups including Indigenous children.

88. Ibid.



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.⁸⁹ 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’.⁹⁰ 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.⁹¹

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

89. 2017, Royal Commission and Board of Inquiry into the Protection and Detention

90. 2019, UN Committee on the Rights of the Child, General comment No. 24 (2019) on children’s rights in the child justice system, CRC/C/GC/24, p. 9, accessed 1 February 2020, available at <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>.

91. 2017, Change the Record, Free to be kids: National Plan of Action, p.5, accessed 1 February 2020, 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 12 February 2020, 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 12 February 2020, 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 12 February 2020 available at <http://jss.org.au/wp-content/uploads/2017/11/RAISE-THE-AGE-open-letter.pdf>.

It's time to raise the age

Putting children in prison harms children. It compounds existing issues children face or creates new social, emotional and developmental problems. Rather than focusing on justice-led solutions, which removes vulnerable children from their family and community, it's time to focus on Indigenous-led solutions and community programs, which focus on supporting families and have better outcomes for children and their communities.⁹²

The abuse and mistreatment of children in Don Dale and other prisons in every state and territory in Australia⁹³ makes it clear that we are placing our most vulnerable children⁹⁴ in harm's way and are failing to provide necessary evidence-based interventions.⁹⁵ Prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services is the only way forward. For Indigenous children, the planning, design and implementation of those responses must be community-led.⁹⁶

Australia has fallen behind - the international community has a median age of criminality of 14 years old,⁹⁷ and the United Nations Committee on the Rights of the Child (UNCRC) has recommended a minimum age of criminal responsibility of 14 years or older.⁹⁸ 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.⁹⁹

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.

It's time - let's raise the age and give our children the future they deserve.

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94. 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 2019, Justice Health & Forensic Mental Health Network, Our Network 2019, NSW Government, p. 19, accessed 1 February 2020, available at <https://www.justicehealth.nsw.gov.au/publications/our-network-final.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, accessed 12 February 2020, available at <https://bmjopen.bmj.com/content/8/4/e019605corr1.full>.
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96. 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; 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 11 February 2020, available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.
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Amnesty International Australia

ABN 640 0280 6233

supporter@amnesty.org.au

1300 300 920

Locked Bag 23 Broadway NSW 2007 Australia

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