

ARGUMENTS FOR RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Professor Chris Cunneen

Email: christopher.cunneen@uts.edu.au

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1. Introduction

The age of criminal responsibility is the primary legal barrier to criminalisation and thus entry into the criminal justice system. This paper¹ provides arguments for raising the minimum age of criminal responsibility (MACR). Nationally the minimum age is 10 years old. Some Australian states set the MACR at 10 years in the mid-to late 1970s (Queensland (1976), NSW (1977) and South Australia (1979)). However, only since the early 2000s has there been a uniform approach to the MACR in all Australian jurisdictions (Cunneen et al 2015: 250). The paper provides a number of reasons for raising the age: international comparisons; the protection of children's rights; the limited ability of the common law doctrine of *doli incapax* to protect young children; child developmental arguments and issues of mental illness and cognitive impairment; the over-representation of children in out-of-home-care (OOHC) among young children in the juvenile justice system, criminological arguments relating to the failure of an approach that relies on criminalisation and imprisonment; and the views of juvenile justice practitioners.

In addition, this paper argues that a low MACR adversely affects Indigenous children who comprise the majority of children under the age of 14 years who come before youth courts in Australia and are sentenced to either youth detention or a community-based sanction. The paper does not prioritise the reasons for raising the age – there are numerous perspectives and multiple reasons. Children's rights lawyers, critical disability advocates, child protection advocates, medical professionals, juvenile justice practitioners, criminologists and Indigenous organisations might all validly prioritise the reasons differently. The point is there are manifold and sound reasons for changing the current minimum age.

There has been widespread calls by a range of organisations and individuals to raise the minimum age:

- various non-government organisations including members of the Child Rights Taskforce² (2011: 31-32; 2018: 68), Jesuit Social Services (2015), the Human Rights Law Centre, and Amnesty International (2015, 2018);
- professional bodies including the Royal Australian College of Physicians and the Australian Medical Association (2019), the Law Council of Australia (2019), various other state and territory law societies, criminal lawyers' associations and other legal bodies (including legal aid commissions)³;
- State, Territory and Federal Children's Commissioners; and other organisations (Mitchell 2016; Zillman 2017; Royal Commission into Child

¹ This paper draws on research from the Comparative Youth Penalty Project (CYPP) (www.cypp.unsw.edu.au), including qualitative interviews with criminal justice professionals, and data analysis. The CYPP was an ARC funded project (DP130100184) housed at the University of New South Wales. Chief investigators on the project were Professors Chris Cunneen (UTS), Eileen Baldry (UNSW), David Brown (UNSW) and Barry Goldson (University of Liverpool), and Ms Melanie Schwartz (UNSW). Ms Sophie Russell was the research associate for the project. I particularly acknowledge that I have drawn on the work of Eileen Baldry and Sophie Russell on mental health disorders and cognitive disability among young people in this paper.

² Including, among others, the National Children's and Youth Law Centre, UNICEF, the Federation of Community Legal Centres.

³ See Legal Aid NSW (2019: 5-6) for a summary of organisations.

Protection and Youth Detention Systems of the Northern Territory (2017: vol 2b, 418).

- academics (eg Crofts 2015, O'Brien and Fitz-Gibbon 2017);

The majority of the organisations identified above recommend raising the minimum age to at least 14 years. A more minimalist position was put by the Royal Commission into the Protection and Detention of Children in the Northern Territory [RCPDCNT] (2017: vol 2b, 418) which recommended increasing the minimum age of criminal responsibility to 12 years, retaining the protection of *doli incapax* for 12-14 year olds, and limiting the circumstances that youth under the age of 14 years can be sentenced to detention (Recommendation 27.1).⁴ Recently the President of the NSW Children's Court, Judge Peter Johnstone, also recommended to a NSW Legislative Assembly Inquiry that the minimum age of criminal responsibility be raised to 12 years, and the minimum age for the use of control orders (juvenile detention) be raised to 14 years.⁵ The Inquiry recommended that the NSW Government conduct a review of whether the minimum age should be raised (Committee on Law and Safety 2018: ix). In Queensland a Government commissioned report on youth justice recommended that the Government support in principle raising the minimum age of criminal responsibility (Recommendation 68) (Atkinson 2018: 13). The recommendations from the NT Royal Commission and the NSW and Queensland inquiries, along with a proactive lobbying campaign by organisations like Amnesty International, the Law Council of Australia and the Human Rights Law Centre have opened the way for renewed public discussion of the issue.

In a sign that there may be some change forthcoming to one of the most significant abuses of children's rights in Australia, the Council of Attorneys-General agreed in late 2018 to examine whether to raise the age of criminal responsibility from 10 years of age.⁶ In October 2019, the *Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019* was introduced into Federal Parliament. The Private Members Bill would increase the minimum age of criminal responsibility for Commonwealth offences to 14 years, and will put pressure on Parliament to debate the issue.

My argument in this paper is that setting the minimum age of criminal responsibility at anything less than 14 years old is unlikely to achieve the desired result of minimizing the adverse consequences of criminalising children. Often lost among the discussions around the MACR is an acknowledgement of the children who become caught up in the criminal justice system. Our research for the Comparative Youth Penalty Project shows that the needs of young people in juvenile justice are multiple and complex: they have come from communities of entrenched socio-economic disadvantage; and have fragmented experiences of education which are marked by periods of exclusion and expulsion, and result in poor educational outcomes. They

⁴ The exceptions include a serious and violent crime against the person, where there is a serious risk to the community and the sentence is approved by the President of Children's Court (Royal Commission into Child Protection and Youth Detention Systems of the Northern Territory 2017: vol 2b, ch 27, 419-420).

⁵ Evidence 30 April 2018.

<https://www.parliament.nsw.gov.au/ladocs/transcripts/2056/Corrected%20Transcript%20-%2030%20April%202018.pdf>.

⁶ Council of Attorneys-General, Communique, 23 November 2018.

<https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>, 4.

have precarious living arrangements including homelessness and/or placements in Out of Home Care (OOHC). They have experienced drug and alcohol related addiction; struggle with unresolved trauma; and have one or more disabilities (Baldry, Briggs, et al. 2017).

This paper does not address in detail what should replace criminalisation as the most appropriate response for children aged 10 to 14 years who would have otherwise been dealt with through the criminal law. Developing the most appropriate forms of social policy and practice in this area should be the subject of wide consultation – to avoid the mistakes of previous ‘welfare’ based interventions and the widely acknowledged limitations of current child protection approaches. However, it should be noted that we already have in place responses to children below the age of 10 who engage in behaviour which could, if they were older, be regarded as criminal. Organisations like the Law Council of Australia have noted that we need greater emphasis on support services, early intervention, prevention, justice reinvestment and community-led diversion programs.

There has been substantial documentation of good practice in various diversionary programs available for children – see for example the Royal Commission into the Protection and Detention of Children in the Northern Territory (RCPDCNT 2017) and the NSW parliamentary inquiry into the Adequacy of Youth Diversionary Programs in New South Wales (Committee on Law and Safety 2018). Legal Aid NSW (2019: 23) has also noted that the most effective programs involve multi-disciplinary and multi-agency approaches and ‘help children and families to work together to address the underlying risk factors that lead to inappropriate behaviour’. Legal Aid NSW have identified various programs that fit within this paradigm (2019: 22-27). In addition, the Northern Territory government has introduced a suite of early intervention and targeted programs which in part focus on children aged 8-13 years.⁷ There has also been discussion on principles and documentation for diversionary programs for Aboriginal and Torres Strait Islander young people (Cunneen, et al forthcoming). It also worth noting that we already have in place a system of secure care for children in the child protection system.⁸ Secure care is also used internationally.

We also have the substantial experience of European jurisdictions to draw on, where in general there is a higher minimum age of criminal responsibility⁹. These jurisdictions respond to behaviour that we would see as criminal through a range of educational and social support mechanisms.

2. International Comparisons

At 10 years, the MACR in Australia is inconsistent with prevailing practice in Europe. Indeed, the average minimum age of criminal responsibility in the European Union is 14 years (Goldson 2013) where ‘it can be shown that there are no negative consequences to be seen in terms of crime rates’ (Dünkel, 1996: 38). Similarly, in some 86 countries surveyed worldwide the median age was 14 years and, despite

⁷ See Back on Track, <https://www.youthjustice.nt.gov.au/initiatives/back-track-alternative-sentencing-and-youth-diversion-program>

⁸ The nature of secure welfare services varies between states and territories in terms of criteria, the maximum length of stay and eligible age group (generally 10 or 12 up to age 17 years). See Mclean (2016).

⁹ Average MACR 14 years, see below.

variation, ‘there has been a trend for countries around the world to raise their ages of criminal responsibility’ (Hazel 2008: 31-2). The United Nations Committee on the Rights of the Child notes in General Comment 24 that over 50 States parties have raised the minimum age following ratification of the Convention on the Rights of the Child, and ‘the most common minimum age of criminal responsibility internationally is 14’ (UNCRC 2019: [21]).

The situation in Australia is clearly anomalous with global norms.

Table 1 The Minimum Age of Criminal Responsibility: Some International Comparisons

Country	Age	Country	Age
Austria	14	Spain	14
Belgium	18*	Canada	12
Germany	14	Norway	15
Portugal	16	France	13
Sweden	15	Denmark	15
Australia	10	Ireland	12*
England/Wales/NI	10	Hungary	14*

*Some offence-based exceptions to the minimum age (eg homicide). Sources: Muncie (2004: 251); Child Rights International Network (2017).

International comparisons by themselves do not provide an argument for increasing the minimum age in Australia. However, they do clearly demonstrate the feasibility of raising the age, and doing so without adverse effects on crime rates. Indeed, many of the countries identified above also have low incarceration rates for older juveniles who are subject to criminal law, for example Germany and Norway (see Jesuit Social Services 2017), suggesting the absence of a younger cohort of children who would otherwise have become entrenched in the system through re-offending and the accumulation of a prior offending history, and less punitive approaches to juvenile justice generally (RCPDCNT 2017: vol 2B, Chapter 6).

2.1 Less Optimal Responses

There are various hybrid responses which some jurisdictions have employed.¹⁰ ‘Hybrid’ approaches have been criticized by the UNCRC as an unsatisfactory substitute for raising the minimum age of criminal responsibility to at least 14 years.

In **Switzerland** has a legislative restriction on the use of child detention. The minimum age of criminal responsibility is 10 years of age, but the youth court can only impose ‘educational measures’ on 10-14 year old children. Juvenile prison sentences are restricted to those aged 15 and above (Zimring et al 2017: 21-24).

Hungary, Ireland and **New Zealand** have a minimum age higher than 10 years but there are exceptions. In **Hungary** the minimum age is 14, but from the age of 12 for homicide, voluntary manslaughter, battery, and robbery, provided that the child had the capacity to understand the nature and consequences of his or her act. In **Ireland** the minimum age is 12, but children aged 10 and above can be held criminally liable

¹⁰ See also RCPDCNT (2017: vol 2B, Chapter 26 and 417-19) for further examples and discussion.

for murder, manslaughter, rape or aggravated sexual assault. The presumption of *doli incapax* to 14 years old has been retained (Child Rights International Network <https://www.crin.org/en/home/ages/europe>; Crofts 2015:126). In **New Zealand** the age of criminal responsibility is 14 years old for most offences. However, for murder or manslaughter it is 10 years, and for certain other serious offences it is 12 to 13 years.¹¹ The **Canadian** response has been to increase protections for 10-11 year old children, but reduce the protections for those aged 12-13 years. Canada raised the MACR to 12 years, but it removed the presumption of *doli incapax* for those aged 12 and 13.

3. Human Rights Arguments

The United Nations (UN) has established a framework of norms for responding to children in conflict with the law, including through the Convention on the Rights of the Child (CRC). O'Brien and Fitz-Gibbon (2017: 135) note that these have been 'informed by an evidence base on the neurobiological impacts of early childhood trauma and knowledge from developmental psychology about both the corrosive and protective factors for child wellbeing'. Specifically, in relation to the minimum age at which a child can be held legally responsible for their actions, Article 40(3)(i) of the UNCRC requires the implementation of a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'

Although the Convention does not specify an appropriate age, 12 years had previously been recommended by the UN Committee on the Rights of the Child (UNCRC) as the absolute minimum age for states to implement (UNCRC 2007: [32]; see also Beijing Rules article 4(1)). The UNCRC argued at the time that a higher minimum age of criminal responsibility of 14 or 16 years contributes to 'a juvenile justice system which, in accordance with article 40(3)(b) of the CRC, deals with children in conflict with the law without resorting to judicial proceedings' (UNCRC 2007: [33]).

As a result of developments in neuroscience and developmental studies, the UNCRC has been more forthright in stating that the **minimum age should be at least 14 years**. General Comment 24 recommends that:

States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age (UNCRC 2019: [22]).

In addition, the UN Global Study on Children Deprived of Their Liberty has recommended that child justice systems increase the minimum age to at least 14 years (Nowak 2019: 669).

¹¹ Oranga Tamariki Act 1989, s272

The UNCRC has maintained a longstanding criticism of the low age of criminal responsibility in Australia (UNCRC 1997: [11, 29]; UNCRC 2005: [73]; UNCRC 2012: [82(a)]; UNCRC 2019: [47(a), 48 (a)]). The most recent UNCRC Concluding Observations ‘regrets the lack of implementation of its previous recommendations and remains seriously concerned about the very low age of criminal responsibility’ (UNCRC 2019: [47(a)]). The reports urges Australia to bring its child justice system fully into line with the CRC and to ‘raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14’ (UNCRC 2019: [48 (a)]).

Australia submitted its joint fifth and sixth periodic report to the UNCRC in January 2019 (Australian Government 2019) after a lapse of ten years since its previous fourth periodic report (Australian Government 2009). The 2019 report noted

The minimum age of criminal responsibility in Australia is 10 years old. In all Australian jurisdictions there is a rebuttable presumption that a child aged between 10 and 14 years of age is not criminally responsible (called *doli incapax*). A child of this age can only be found criminally responsible where the child knows that their conduct was wrong. This is a question of fact and the onus of proof falls on the prosecution. This provides a safeguard for children between 10 and 14 years and recognizes each child’s evolving capacities (Australian Government 2019: [65]).

As in previous Australian Government reports, *doli incapax* is presented as the major reason for not increasing the minimum age of criminal responsibility. For example, in the fourth periodic report it was stated

The Australian Government believes the age limit for the application of this principle [*doli incapax*] is appropriate as it is a practical way of acknowledging differences in children’s developing capacities, allows for a gradual transition to full criminal responsibility, and protects children between 10 and 14 from the full force of the law (Australian Government (2009: [278])).

Beyond a formal statement of *doli incapax*, Australian periodic reports have offered no evidence that indeed children between the ages of 10 and 14 are protected from ‘the full force of the law’. As argued further below, *doli incapax* appears to be a very inadequate way of protecting young children from criminalisation.

Although absent in the fifth and sixth periodic report, the Australian government had previously offered other reasons for maintaining the minimum age at 10 years. The fourth periodic report noted that the government believes 10 years old is an appropriate minimum age limit based on ‘the impact of increased access to education and information technology, community expectations and the unique historical and cultural context of Australian law and society’ (Australian Government 2009: [277]). There was no evidence offered to support these claims. It is difficult to discern what ‘community expectations’ might be. Our research discussed further below, and other Australian research (O’Brien and Fitz-Gibbon 2017; RCPDCNT 2017), indicates that professionals working in the youth justice sphere (including juvenile justice staff, children’s lawyers and magistrates) have expressed dissatisfaction with the low

MACR. Certainly, there is a strong argument that informed public opinion sees the current MACR as set too low.¹² No evidence is offered by the Australian government for the assertion that ‘increased access to education and information technology’ justifies the current MACR. One might argue to the contrary that the rise of social media, and the ubiquitous nature of on-line computer gaming for young people, offers little guidance for the moral and emotional development of children. Indeed, there is research that suggests that violent video games, which are highly popular among young adolescent boys in particular, may delay or stunt the development of moral reasoning (eg Bajovic 2013, Vieira and Krcmar 2011). In relation to education, one of the defining features of young people in juvenile detention is their history of poor educational attendance and outcomes (eg Dowse et al 2014; NSW Health and NSW Juvenile Justice 2016). The final point in the fourth periodic report suggests that Australia’s ‘unique historical and cultural context’ offers some explanation for the low MACR. It is difficult to know what to make of this. Indeed, one of the core abusive outcomes of a low MACR in Australia is the compounding negative effects on Aboriginal and Torres Strait Islander children (discussed further below).

4. *Doli Incapax*

There have been various criticisms of the limitations of *doli incapax* and its failure to protect young children. *Doli incapax* is a rebuttable presumption that a child aged under 14 years does not know that his or her criminal conduct is seriously and morally wrong (rather than naughty or mischievous) unless the contrary is proved. The onus is on the prosecution to rebut the presumption.¹³ The Australian Law Reform Commission (ALRC) noted more than twenty years ago that:

Doli incapax can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage (ALRC 1997: [18.19]).

In General Comment 10, the UNCRC has also noted the limitations of *doli incapax*, stating 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’ (UNCRC 2007:[30]) (see also Crofts 2015:127). The UN Committee’s concerns have been repeated in similar terms in General Comment 24, which further notes that although two minimum ages may have been originally designed as a protective mechanism, ‘it has not proved so in practice’ (UNCRC 2019:[26]).

Despite being held as a major reason for not increasing the MACR, there is very little research on the how *doli incapax* operates in practice in Australian children’s courts. The recent work by O’Brien and Fitz-Gibbon (2017) based on research undertaken in Victoria is particularly important in this regard. The researchers found that ‘inconsistencies in practice undermine the extent to which the common law

¹² See for example submissions to the National Children’s Commissioner and submissions to the RCPDCNT (Mitchel 2016: 164, 189-190; RCPDCNT 2017: Vol 2B, 418).

¹³ See *RP v the Queen* [2016] HCA 53, 21 Dec 2016, Case Number S193/2016.

presumption of *doli incapax* offers a legal safeguard for very young children in conflict with the law’ (2017: 135). Earlier work by Bartholomew (1998), also in Victoria, confirmed similar problems with *doli incapax*. He found an ‘increasingly liberal interpretation of issues that constitute “sufficient rebuttal” of the presumption... has the potential to limit the power of this legal protection, and to result in more young offenders being found to have criminal capacity’ (Bartholomew 1998: 99). In particular he noted that if there was any form of acknowledgement of wrong doing in a record of interview then defence counsel did not raise the possible defence of *doli incapax* and such a trend runs counter to ‘widespread knowledge about the suggestibility of children in interviews’ (Bartholomew 1998: 100). Indeed, more recent research suggests that young people who are apprehended and questioned by police can be characterized ‘by a number of deficits in their cognitive capacity, poor communicative skills, and elevated suggestibility that have profound implications’ (Lamb and Sim 2013: 137). For example, young people are more likely to confess than older suspects and to confess falsely (Lamb and Sim 2013: 137).

O’Brien and Fitz-Gibbon found from their interviews with legal stakeholders in Victoria that *doli incapax* was not engaged in a manner consistent with the common law. ‘Rather, the onus for *doli incapax* now falls, informally, to the defence, who must initiate (and bear the cost of) psychological assessments of a child’s capacity in instances where they think this is appropriate’ (2017: 140).

Initiating psychological assessments requires resources at a time when Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services face budgetary constraints. O’Brien and Fitz-Gibbon (2017: 140) note that the availability and quality of child psychologists who can provide ‘timely, accurate and fulsome assessments’ is an issue in both metropolitan and regional Victoria. This problem is considerably exacerbated for Aboriginal and Torres Strait Islander Legal Services operating in rural and remote areas across Australia (Cunneen and Schwartz 2008).

O’Brien and Fitz-Gibbon (2017: 142) found that in practice *doli incapax* is not engaged as a matter of course for all children aged 10–13 and that ‘inconsistencies in practice have largely eroded this legal safeguard’. They write:

Were this common law principle upheld all children in this age range would be automatically safeguarded from adjudication unless the prosecution were able to successfully rebut the presumption of *doli incapax* to demonstrate that, at the time of the offence, the child possessed the capacity to know that their actions were seriously wrong. In sharing examples from their professional practice, legal stakeholders confirm that this safeguard no longer applies, automatically, to all Victorian children. Instead, for a child to be deemed *doli incapax* the onus now falls to the defence to actively pursue an assessment that determines the child lacked the capacity to know that their actions were seriously wrong. In practice, this can mean that children are denied the protection of being *doli incapax* (2017: 142).

In June 2019 the Northern Territory Court of Appeal allowed an appeal in the case of *KG v Firth* which ‘demonstrated the uncertainty surrounding *doli incapax* and the risks of its erroneous application’. Recently, the Law Council of Australia (2019) also noted that the difficulties of applying *doli incapax* in court.

The presumption continues to wreak confusion as to whether the defence or prosecution bears the burden of proving that a child knew their conduct to be wrong. This leads to errors and results in children being held in custody for lengthy periods of time before the presumption can be led or tested in court and the child acquitted (2019: 1).

The potential length of time a child might be held in custody until a hearing is set to determine *doli incapax* is a further barrier to its use.

Legal Aid NSW (2019: 17-20) has also raised serious concerns with *doli incapax*, many of which confirm those noted above. In addition, Legal Aid NSW also draws attention to low utilisation; inconsistent application across the state, particularly in regions without specialist children's magistrates or practitioners; and indications of inconsistent or discriminatory application for Indigenous children.

As noted above, there has been little research on the practical operation of *doli incapax* in the children's courts. The work by O'Brien and Fitz-Gibbon (2017) and earlier work by Bartholomew (1998) fills an important gap in this area by identifying the limitations of this protection for 10-13 year olds. Our research, explored further below, on the large number of children going before the courts who under the age of 14 and who are convicted, placed on orders, and in some cases sentenced to detention, further confirms the limitation of this protection for young children.

5. Developmental Arguments

There is widespread recognition of the developmental immaturity of children and young people compared to adults. Immaturity can affect a number of areas of cognitive functioning 'including impulsivity, reasoning and consequential thinking' (Lennings and Lennings 2014: 794). There are a number of propositions from the research that are relevant to this discussion. The first is the general proposition that children and young people are less psychosocially mature than adults which affects their decision-making (see Cauffman and Steinberg 2000), and the neurobiological evidence that adolescent brains are not fully mature until their early twenties (for a summary of this evidence, see the Sentencing Advisory Council of Victoria 2012: 11; also Crofts 2015, 2016; Delmage 2013). According to the Sentencing Advisory Council:

This [neurological immaturity] is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy 'discounting' of the future costs of this behaviour, also contribute. Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes (2012: 11).

The second proposition is that 'individual children of substantially identical age groups and demographics may demonstrate vastly different cognitive capacities for understanding' (Lennings and Lennings 2014: 793). In other words, the process of developing the capacities necessary for criminal responsibility does not take place at a consistent pace between individual children (Crofts 2015:127; also Cauffman and

Steinberg 2000). Newton and Bussey (2012) conducted a study of Year 5 students (mean age 10.49) and Year 8 students (mean age 14.29) from five Sydney schools. They found that

The majority of children in both age groups demonstrated knowing the difference between right and wrong in relation to ‘real-life’ transgressions. Further analyses... revealed that children who engaged in delinquent behaviour were unable to exercise this knowledge appropriately to regulate their behaviour. They were less able to resist peer pressure for transgressive conduct, had low levels of empathic and academic self-efficacies, and disengaged from moral standards (Newton and Bussey 2012: 1).

As O’Brien and Fitz-Gibbon (2017:147) note, discussion on increasing the minimum age of criminal responsibility ‘requires that we challenge the assumption that capacity adheres uniformly to chronological age’.

The third proposition is that within an individual child, ‘there may be present a sufficient capacity to make decisions, including moral decisions, regarding some aspects of their lives, but, on the evidence, the child demonstrates insufficient maturity in respect of an understanding of the concept of “serious wrong” to be criminally culpable of the particular actions forming the basis of the charge’ (Lennings and Lennings 2014: 793). In discussing the work of cognitive neuroscience, Lennings and Lennings note differences in decision-making within an individual child depending on particular circumstances.

In cold conditions, young people are able to make adult-like decisions; certainly, it is suggested, by the age of 16, and often earlier. In hot conditions, where there is high emotional stimulation, adolescent immaturity becomes more pronounced. In hot conditions, the impact of developmental delays and vulnerabilities are stark and exert a significant impact on the maturity of decision-making (2014: 795).

According to Delmage (2013), based on her reading of the neuroscience evidence, in order to bring the minimum age of criminal responsibility more into line with current developmental research:

A minimum age of 14 might be sought, whilst children aged 14 and 15 could reasonably be subject to [a] rebuttable presumption of developmental immaturity... with the burden of proving competence resting with the prosecution (2013: 108).

The proposal for a rebuttable presumption of developmental immaturity for 14 and 15 year olds is outside the scope of this paper. However, at a minimum it raises questions about capacity in this older age group. For further discussion on this issue, see also Fitz-Gibbon (2016).

At present the significant developmental issues raised above might be dealt with for those young people between the ages of 10 and 14 through *doli incapax*. Yet, as noted, this common law protection is inadequate in terms of its limited and inconsistent application. For *doli incapax* to work as a protection, it would involve appropriate and rigorous screening and assessment of all children between the ages of

10 and 14 who come before the children's courts – a proposition which might well be considered unworkable. And it can be argued, such assessments should be also applied to children in this age group who are subject to pre-court diversions which also assume legal capacity to commit an offence, admit guilt and comply with various undertakings (eg youth justice conferencing). As Crofts (2015: 125) notes, although diversionary measures 'provide an important alternative to prosecution, they do not prevent prosecution, and they can still have criminal justice consequences'. Similarly, NSW Legal Aid (2019: 19) has argued,

For more minor offences, police will often offer a diversion under the *Young Offenders Act 1997* (NSW) (YOA). Because this avoids court, it is a tempting option for a child (even one who is adamant that they were *doli incapax*). However, YOA cautions and conferences become permanent records which can be used against the child as police intelligence, in subsequent court matters and in a range of job applications. While it is a diversionary measure, YOA options are still part of the criminal justice system.

Perhaps, as Goldson (2013: 116) has argued, rather than becoming

pre-occupied with whether or not children aged 10 years and above are sufficiently capacitated to legitimize their exposure to the formal youth justice apparatus... the question might be more profitably framed in terms of whether it is preferable to decriminalize children's transgressions and address their behaviour without recourse to prosecution, sentence and youth justice intervention.

In other words, there is the capacity to raise the minimum age of criminal responsibility to 'ensure that young people are kept out of the criminal justice system' (Crofts 2015: 125) and, as an alternative, to respond to children through educational and support services.

6. Mental Health Disorders and Cognitive Disability

There has been increasing research on the incidence of mental health disorders and cognitive disabilities among young people in Australian juvenile justice systems. Young people within youth justice systems have significantly higher rates of mental health disorders¹⁴ and cognitive disabilities¹⁵ when compared with general youth populations. They are also likely to experience co-morbidity, that is co-occurring mental health disorders and/or cognitive disability, usually with a drug or alcohol disorder. Australian research suggests that these multiple factors, when not addressed early in life, compound and interlock to *create* complex support needs (Baldry 2017; Dowse et al 2014; Baldry 2014; Baldry and Dowse 2013).

6.1 Mental health disorders

¹⁴ Examples of mental health disorders include mood disorders (such as depression, bipolar disorder); anxiety and panic disorders; personality disorders; psychotic disorders (such as hallucinations; schizophrenia); eating disorders; obsessive-compulsive disorders; trauma-related disorders (such as post-traumatic stress disorder); and substance use disorders (see Baldry 2017: 109).

¹⁵ Cognitive disability incorporates a range of conditions such as intellectual impairment; communication disorders; attention deficit hyperactivity disorder (ADHD); autism spectrum disorders; acquired brain injury; epilepsy and fetal alcohol spectrum disorders (FASD) (see Baldry 2017: 109).

The 2015 NSW Young People in Custody Health Survey found that 83 per cent of young people in detention were assessed as having a psychological disorder, with a higher proportion for Indigenous children than non-Indigenous children, depending on the type of disorder (NSW Health and NSW Juvenile Justice 2016). The rate for children in custody is significantly higher than for those living in the community.¹⁶ Earlier NSW custody health surveys from 2003 and 2009 found similarly high levels of psychological disorders among young people in detention, at 88 per cent and 87 per cent respectively (Indig *et al* 2011; Allerton and Champion 2003). The NSW Young People on Community Orders Health Survey 2003-2006 also found a high prevalence of psychological disorders for young people on community-based juvenile justice orders at 40 per cent of those surveyed (Kenny *et al* 2006).

6.2 Cognitive disability

Some 18 per cent of young people in custody in NSW have cognitive functioning in the low range (IQ < 70) indicating cognitive disability. This rate is much higher for Indigenous children compared to non-Indigenous children in custody (24.5 per cent and 11 per cent respectively) (NSW Health and NSW Juvenile Justice 2016). Furthermore, various studies have shown that between 39-46 per cent of young people in custody in NSW fall into the borderline range of cognitive functioning (IQ 70-79), and are also higher for Indigenous children. Such rates are significantly higher than those found for young people living in the community (NSW Health and NSW Juvenile Justice 2016; Haysom *et al* 2014; Kenny and Nelson 2008). The NSW Young People on Community Orders Health Survey 2003-2006 also found that between 11 and 15 per cent (depending on the scale used) of young people on community-based juvenile justice orders had scores consistent with a possible intellectual disability (Kenny *et al* 2006).

There is also evidence to suggest that young people in the youth justice system have a range of other impairments often associated with cognitive disability, including speech, language and communication disorders; ADHD; autism spectrum disorders; FASD (Foetal Alcohol Spectrum Disorder); and acquired/traumatic brain injury (Snow *et al* 2016; Anderson *et al* 2016; NSW Health and NSW Juvenile Justice 2016; Farrer *et al* 2013; Education and Health Standing Committee 2012; Bryan *et al* 2007). Bower *et al* (2018) found in youth detention in Western Australia, in a sample that was 74 per cent Indigenous, 89 per cent of all young people had at least one severe neurodevelopmental disorder and 36 per cent had a FASD diagnosis.

Research suggests that many Indigenous young people in detention have hearing and language impairments that are not diagnosed and their behaviour is misinterpreted as non-compliance, rudeness, defiance or indifference (Snow *et al* 2016; Howard 2016; Vanderpoll and Howard 2012). While FASD is by no means an issue specific to Indigenous young people, the evidence suggests higher rates among Indigenous children (Blagg *et al* 2016; Bower *et al* 2018: 2).

Young people with cognitive disability are particularly vulnerable to criminalisation (McCausland and Baldry 2017; Amnesty International 2015; Gray *et al* 2009; Kenny and Lennings 2007). Arising from the nature of their impairment they may experience

¹⁶ For example, the 2015 Australian Child and Adolescent Survey of Mental Health and Wellbeing found 14 per cent of 4-17 year olds were assessed as having a mental disorder (Lawrence *et al* 2015).

trouble with memory, attention, impulse control, communication, difficulties withstanding peer pressure, controlling frustration and anger, and may display inappropriate sexual behaviour (McCausland and Baldry 2017: 294; Australian Medical Association 2016). Young people with cognitive impairment also have higher rates of recidivism compared to those without cognitive impairment (Frize et al 2008) and are vulnerable to extended and repeat incarceration (Baldry et al 2015). They are also more likely to be refused bail and held on remand because of an inability to understand or comprehend bail conditions or due to a lack of support in the community to comply with conditions (McCausland and Baldry 2017; Education and Health Standing Committee 2012; Gray et al 2009). In Western Australia where it was found that nine out of ten people in youth detention were severely impaired in at least one area of brain function such as memory, language, attention, and executive function, 'such deficits would strongly impact on their ability to conform with legal instructions, and with other aspects of the justice system such as being interviewed in court'. (Passmore 2018).

Protections such as section 32 of the *NSW Mental Health (Forensic Provisions) Act 1990* which provide for dismissal of matters prior to conviction (usually with conditions to engage with treatment), appear to be widely under-utilised and applied inconsistently (for example with Aboriginal people less likely to have received a section 32 outcome) (McCausland and Baldry 2017; Steele et al 2013, 2016). In addition, Legal Aid NSW (2017:11) note that

Although diversion is available under the *Mental Health (Forensic Provisions) Act 1990* (NSW), before a child can access such diversion they may have suffered the trauma of arrest, charge, time in custody and/or on strict bail conditions and a spiral of potentially adverse dealings with the police and criminal justice system.

One of the significant limitations of the available data on young people with mental health disorders and/or cognitive impairment in contact with juvenile justice is the absence of specific information on those aged below 14 years. For example, the various health surveys conducted in NSW of young people in custody or serving community-based sanctions does not distinguish between specific ages within the juvenile cohort, making it difficult to know the prevalence of mental health disorders or cognitive impairments of younger children under 14 years. However, we can reasonably assume there is some degree of prevalence of these disorders and impairments among the under 14 years olds. For example, in the 2015 NSW health custody survey, the *average* age at which young people entered custody for the first time was 15 years (NSW Health and NSW Juvenile Justice 2016), meaning there must have been a significant proportion under 14 years to result in this average figure. Further the *average* age of Indigenous children first coming into custody was even younger at 14.5 years (NSW Health and NSW Juvenile Justice 2016). Given the widespread prevalence of mental health disorders (83 per cent) and to a lesser extent borderline cognitive functioning (39-46 per cent) and cognitive impairments (18 per cent) among young people in custody, it is difficult to conceive that a substantial proportion of under 14 years olds would not be affected. And this result would be particularly pronounced for Indigenous children.

Further evidence to support the argument that children under the age of 14 years with

mental health disorders and/or cognitive impairment are criminalised can be found in the Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Project (MHDCD) (www.mhdcd.unsw.edu.au) (Baldry et al 2012, 2015). The MHDCD dataset contains lifelong administrative information on a cohort of 2,731 persons who have been in prison in NSW and whose mental health and cognitive impairment diagnoses are known. Of this group 766 people (or 28 per cent of the total cohort) were first charged by police when they were under the age of 14 years. Some 54 per cent of the 766 individuals charged by police under the age of 14 years were Indigenous (Baldry & Winley 2017).

The MHDCD has a number of case studies that substantiate the repeated early contact with juvenile justice for people with cognitive impairments.¹⁷ Noted below are two case studies (abbreviated).

Robert is an Indigenous man in his late 30s. He is identified as having a mild intellectual disability with a total IQ of 67 (verbal IQ of 68 and non-verbal IQ of 72)... At the age of 11 Robert had his first contact with police when he was arrested for stealing, and his offences progressed from stealing to bag snatching, break and enters and drug offences in his teens. He had six juvenile justice custody episodes. Robert has had frequent contact with police in inner Sydney, primarily in connection with his drug misuse. He has had 143 police contacts, with 35 episodes of police custody (Baldry et al 2015: 57).

Ryan is an Indigenous man in his early thirties. Over his life he has been diagnosed with borderline intellectual disability and a number of mental health disorders, some connected to long-term drug misuse. Ryan was a state ward from the age of five and spent the majority of his childhood in OOHC, involving 27 distinct foster care placements. Ryan did not complete schooling beyond year 5. Police describe him at 11 as 'very emotionally disturbed' and as having experienced 'physical and psychological abuse'. Ryan's contact with police began at 9 as a missing person. He was recorded as a missing person 18 times prior to his first criminal charge aged 11... At 11 he had his first custodial episode after police assessed bail as being 'inappropriate', with the reason for remand recorded by juvenile justice being 'lack of community ties'. Ryan subsequently had 185 charges recorded, resulting in 38 periods in juvenile justice custody and 7 in adult custody, both on remand and sentenced (Baldry et al 2015: 60).

Baldry et al (2012: 4) found that clients of the NSW Community Justice Program diagnosed with a Borderline Personality Disorder had an *average* first contact with police at 14 years of age, and had a higher average number of custody episodes. Baldry et al also found that, when compared with non-Indigenous people with a cognitive disability, Indigenous people with a cognitive disability had police contact over two years earlier, an earlier first conviction and earlier use of custody (2012: 2).

Raising the minimum age of criminal responsibility will in itself not solve all the problems associated with the criminalisation of people with mental health disorders and/or cognitive impairments. However, it will open a door to firstly, not criminalising young children with mental health disorders and/or cognitive

¹⁷ For other case studies see Legal Aid NSW (2017: 11).

impairments and entrenching them at an early age in the juvenile justice system; and, secondly, providing the space for a considered response as to how these young people should be responded to in the community. At present, ‘systemic and welfare responses appear to have only limited impact on preventing early contact with the criminal justice system from escalating into a cycle of incarceration and re-incarceration’ (Dowse et al 2014: 175). Indeed, criminal justice agencies have become ‘normalised as places of disability management and control’ (McCausland and Baldry 2017: 290). Raising the minimum age will set a higher barrier and force us to consider more appropriate responses to this particularly vulnerable group of children.

7. Child Protection, Out of Home Care and Youth Justice

There is a close link between children subject to Care and Protection Orders and involvement in the youth justice system. Children subject to Care and Protection Orders are 20 times more likely to also be under juvenile justice supervision than children who are not subject to such orders (AIHW 2016a). The same study found 41 per cent of young people in youth justice detention were also in the child protection system in the same year (AIHW 2016a).

Young people with experiences of child protection and out-of-home care (OOHC)¹⁸ placements are more likely to come into contact with the youth justice system at a younger age. For youth justice clients with child protection notifications, 21 per cent first entered supervision aged 10-13 compared with 6 per cent of those with no child protection notifications (AIHW 2012: vii). Three in five (60 per cent) of children aged 10 at their first youth justice supervision were also in child protection (AIHW 2016b: vi). Indigenous children were also more likely than non-Indigenous children to come into contact with child protection agencies from a younger age, with median ages of 7 and 8 respectively (AIHW 2016b: 16), and are twice as likely to be placed in care before the age of 16 (Haysom et al 2014: 1009). Young Indigenous males are the most likely group to be both in OOHC and under youth justice supervision (AIHW 2016a: 10).

Analysis by McFarlane (2017) found that children in OOHC appeared before the NSW Children’s Court on criminal charges at disproportionate rates compared to children who were not in out-of-home care. ‘The out-of-home care cohort had a different and negative experience of the justice system, entering it at a significantly younger age and being more likely to experience custodial remand, than children who had not been in out-of-home care’ (McFarlane, 2017: 1). The difference in the age between the groups at the time of first contact with the criminal justice system was statistically significant and was ‘somewhat at odds with the doctrine of *doli incapax*’ (McFarlane, 2017: 11). A further key observation of the research was that many children in OOHC were arrested, charged and remanded in custody for offences that arose out of and were unique to the care environment. McFarlane (2017: 5-6) notes:

The failure of care homes to implement appropriate processes to manage children who are likely to have experienced significant trauma leads to an over-reliance on criminal sanctions... children in OOHC, particularly those in residential care, are commonly arrested for minor matters that ought not to

¹⁸ ‘Out-of-home-care’ refers to the care of children and young people (up to 18 years of age) who are unable to live with their families and are placed in care including residential care, family group homes and home-based care.

have incurred a police response.

Victoria Legal Aid (2017: 1) found in a recent review of their child protection client data found that:

Almost one in three young people we assist with child protection matters who are placed in out-of-home care later returns to us for assistance with criminal charges; [and] young people we assist placed in out-of-home care are almost twice as likely to face criminal charges as those who remain with their families.

Similar to the findings of McFarlane (2017) in NSW, Victoria Legal Aid found that:

While serious offending by young people may warrant a police response, we also see cases where police have been called to a residential facility to deal with behaviour by a young person that would be unlikely to come to police attention had it occurred in a family home. We have represented children from residential care who have received criminal charges for smashing a cup, throwing a sink plug or spreading food around a unit's kitchen. As the case studies in this report demonstrate, frequently children who may never have had a criminal charge prior to entering care, quickly accrue a lengthy criminal history due to a cycle of "acting out" followed by police responses which develops in a residential unit (Victoria Legal Aid 2017: 1).

NSW Legal Aid (2019: 15-17) also has a series of case studies similar to Victoria Legal Aid showing the vulnerability and complex needs of this group of children, and the need to address these needs outside of the criminal justice system.

The relevance of the findings of the relationship between OOHC and criminalisation by McFarlane, Victoria Legal Aid and NSW Legal Aid to the question of raising the MACR is the prevalence of young children coming from OOHC into youth justice. As noted above, three in five of children aged 10 who were first placed on a supervision order (either in detention or community supervision) by the court were also in the child protection system.

8. Criminological Arguments and Views of Practitioners

The level of ongoing contact with the juvenile justice system varies according to a range of factors, with younger offenders having higher levels of re-contact than older youth. Thus, the younger the child is when first having contact with juvenile justice, then the more likely it is the child will become entrenched in the justice system (Chen et al. 2005; Payne 2007; McAra and McVie 2010, 2007). We also know that a small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age (Weatherburn, McGrath and Bartels 2012). For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending. Juvenile offenders also have a higher rate of re-offending than adult offenders. An NSW study of juvenile and adult offenders who appeared in court in 2004 found that almost 80 per cent of juvenile offenders were reconvicted within 10 years, compared with 56 per cent of adult

offenders (Agnew-Pauley and Holmes 2015: 1). Further, for juvenile offenders 41 per cent were re-convicted within one year, another 16 per cent were re-convicted within two years, and a further 8 per cent were re-convicted within three years (Agnew-Pauley and Holmes 2015: 2).

Whatever might be said about the efficacy of juvenile justice, preventing re-offending particularly for young children is not evidenced by the data we have. There is therefore an argument to suggest that raising the age of criminal responsibility (particularly to 14 years or higher) has the potential to reduce the likelihood of life-course interaction with the criminal justice system. Indeed, there was widespread agreement among those professionals working with young people, interviewed in NSW and Queensland for the Comparative Youth Penalty Project, for raising the minimum age of criminal responsibility¹⁹. As a Detention Centre Manager stated, children under 14 ‘can and should be dealt with in another way’ (Bris Gov 6). Another interviewee noted:

We should be looking at what the best practice is around the world... and most of the world would tell us that it’s much higher than 10 [years old] ... If you’re saying that a 10 year old is responsible for criminal behaviour and activity and they understand what they are doing, then I think you don’t take human rights very seriously (NSW Gov 7).

Several interviewees commented on the difference between the chronological age of young people in custody and their emotional, mental and developmental age (NSW Gov 1, NSW Gov 4, Bris Gov 1). One respondent stated,

I think it’s very young... The youngest person who has been in one of our centres was 11 and... Whilst that young person might have had a chronological age of being 11, he could have just been 7 or 8... We really need to be looking at where these young people are functioning. (NSW Gov 4)

A Detention Centre Manager commented,

We’re recognising that young people, their brains don’t mature until quite late... I’ve got 12 year-olds, 13 year-olds there that can’t really link behaviour and consequences... So I think that 10 is very, very young. I’d hate to see a 10 year old in here. (NSW Gov 1)

Similarly another commented, ‘It makes sense that the younger a young person is the less likely it is they are going to have a really full understanding of how what they did was wrong and how that impacted upon someone else, so that obviously comes with age and maturity’ (Bris Gov 2). Another Detention Centre Manager stated,

They’re young kids so we need to keep them more active. They obviously present their own behaviour management challenges because they’re not necessarily able to reflect on their own behaviours as effectively as an older lad might be able to. (NSW Gov 2)

¹⁹ We interviewed 30 juvenile justice practitioners, lawyers and judicial officers in NSW and Queensland as part of the Comparative Youth Penalty Project.

Our research work echoes the results of O’Brien and Fitz-Gibbon (2017) in Victoria where they interviewed 48 legal stakeholders and youth justice practitioners. They found that ‘the overwhelming majority of participants indicated that they would like to see the minimum age increased’ (2017: 138). And further, that ‘the view shared by many of the participants who work directly with children is that it is in children’s best interests that the minimum age be increased to 14, despite the political pressures of the current punitive climate relating to youth justice’ (2017: 138).

The evidence we have of the experience of people working with children and young people within the youth justice sector supports the need to raise the MACR.

9. Young Children Before the Courts, Under Orders and Placed in Detention

One question which arises in discussions on the MACR and the potential impact of raising the age to 14 years, is how many children are we actually talking about? There are limitations to the available data. However, there is enough information to show that the criminalisation of children under 14 years of age is far from uncommon.

9.1 Before the Children’s Court

There is no recently available national data on the number of young people who appear before children’s courts which breaks down the age grouping of *under 14 year olds*. Current ABS published data covers children aged 10-14 years inclusive (ie it includes 14 years old in the age grouping).²⁰

Some slightly older data is available. ABS data from 2010/11 shows the following for Children’s Court defendants by each state and territory.

Table 2. Australian Children’s Courts. Number of Finalised Defendants Aged 10-13 Inclusive by State/Territory. 2010-2011

State / Territory	No
NSW	439
Victoria	334
QLD	974
SA	274
WA	705
Tas	67
NT	40
ACT	19
Total	2852

Source: ABS (2012: Children’s Court Supplementary Data Cube, Table 2).

Table 2 shows that there were 2852 defendants under the age of 14 years with finalised matters before the Children’s Courts in 2010-11. The highest number was in Queensland (974), followed by WA (705) and NSW (439).

²⁰ Eg, ABS, *Criminal Courts Australia 2017-18*, Table 3.

In 2013 ABS published the total number of defendants finalised in the Children’s Courts by age but not for each jurisdiction. They did however provide information on the principal offence, although this is limited by the large number characterised as ‘Other’.

Table 3. Australian Children’s Courts. Number of Finalised Defendants Aged 10-13 Inclusive by Principal Offence. 2011-2012

Principal Offence	No
Acts Intended to Cause Injury	520
Dangerous/Negligent Acts Endangering Persons	45
Theft and Related Offences	652
Illicit Drug Offences	13
Public Order Offences	201
Traffic and Vehicle Regulatory Offences	34
Offences Against Justice	46
Other	1184
Total	2695

Source: ABS (2013: Children’s Court Supplementary Data Cube, Table 7).

While the ABS national data²¹ is several years old it does show the significant number of children who are aged under 14 years who appear in Australian children’s courts. Despite the limitations of Table 3, we can see that the range of offences is concentrated in the categories of theft, assaults and public order.

9.2 Community Supervision

According to the Australian Institute of Health and Welfare data, during the course of 2017-18, there were **782** children aged less than 14 years placed under community-supervision throughout Australia (AIHW 2019: Table S40b). Of those 782 children, 618 were male and 164 were female.²²

By far the largest number of children placed under community supervision in this age group was in Queensland (326 or 42 per cent of the total), followed by Western Australia (232 or 30 per cent of the total) and NSW (86 or 11 per cent of the total) (AIHW 2019: Table S36b).

9.3 Detention

According to AIHW data, there were **601** children aged less than 14 years placed in juvenile detention throughout Australia during the course of 2017-18 (AIHW 2019: Table S78b). Of the 601 children, 483 were male and 118 female.²³

²¹ More recent data from NSW shows there were 466 children under the age of 14 years with finalised court appearances during 2014 in the Children’s Court (NSW BOCSAR 2015: 84). NSW Legal Aid (2017: 12) refer to data showing 424 finalised court appearances by children under the age of 14 in NSW in 2018. In Queensland courts there were 611 ‘distinct’ children under the age of 14 who had a matter finalised in 2018-19 (Childrens Court of Queensland 2019: 14).

²² On an average day there were 315 children aged less than 14 years under community-supervision nationally (AIHW 2019: Table S40a).

²³ On an average day there were 60 children aged less than 14 years in detention nationally (AIHW 2019: Table S78a).

The largest number of children placed in detention in this age group was in Queensland (182 or 30 per cent of the total), followed by Western Australia (166 or 28 per cent of the total) and NSW (126 or 21 per cent of the total) (AIHW 2019: Table S74b).

Clearly the evidence shows whether we look at court appearances, community-based supervision or juvenile detention, there are many children affected by a low MACR. Additionally, it is important to recognise the compounding effect of early contact with the youth justice system, given that we know these children are more likely to become entrenched in the justice system. For example, the AIHW (2019: 8, 27) found that in 2017-18, 7 per cent of all young people under supervision were aged 10 to 13 years. However, some 26 per cent of all young people under supervision were *first supervised* when aged 10 to 13. In addition, 39 per cent of Indigenous young people under supervision were first supervised when aged 10 to 13.

10. MACR as an Indigenous Issue

One of the issues running through this paper is the potential adverse effect that a low MACR has on Indigenous children. It was noted above that during 2017/18 there were 601 children aged less than 14 years placed in detention. Of these, 69 per cent (or 417) were Indigenous children (AIHW 2019: Table S78b). During the same period, there were 782 children aged less than 14 years placed on community-supervision orders. Of these, 68 per cent (or 529) were Indigenous children (AIHW 2019: Table S40b).

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

As part of the Comparative Youth Penalty Project we analysed Children's Court data for NSW for the ten year period 2006 -2015.²⁴ We found that Indigenous children were younger than non-Indigenous children when appearing before the court – in fact comprising the majority of young people (both male and female) before the courts in the 10-15 year old age bracket. Indeed, Indigenous males comprised 73 per cent of all males before the courts in the 10-12 year old age bracket, and Indigenous females 60 per cent of all females before the courts in the 10-12 year old age bracket (see Figures 1 and 2 below).

²⁴ We requested data covering the 20 top NSW children's courts for children with charges finalized between 2006-15. These courts cover over 70% of all children's matters in NSW (NSW Bureau of Crime Statistics and Research, unpublished data, reference: Dg13/11525)

Figure 1 Percentage of Indigenous and non-Indigenous males with finalised charges by age group, Top Twenty NSW Children’s Court 2006 – 2015

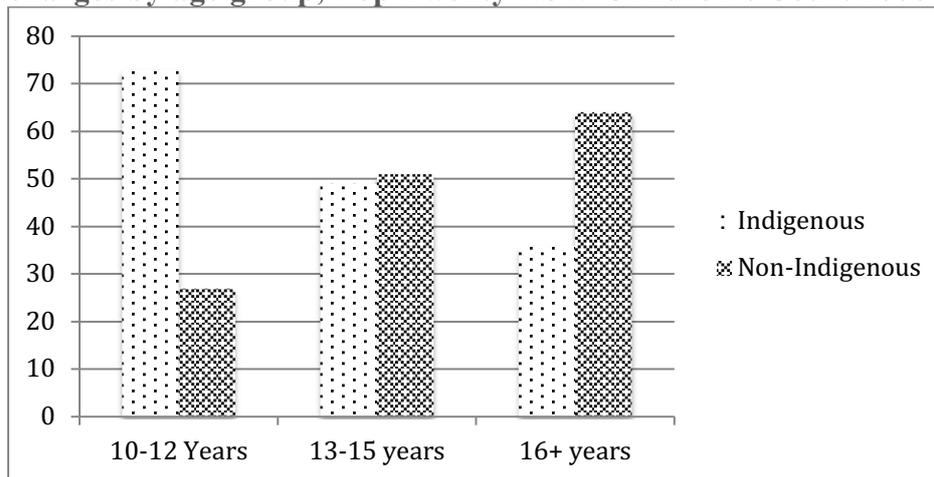
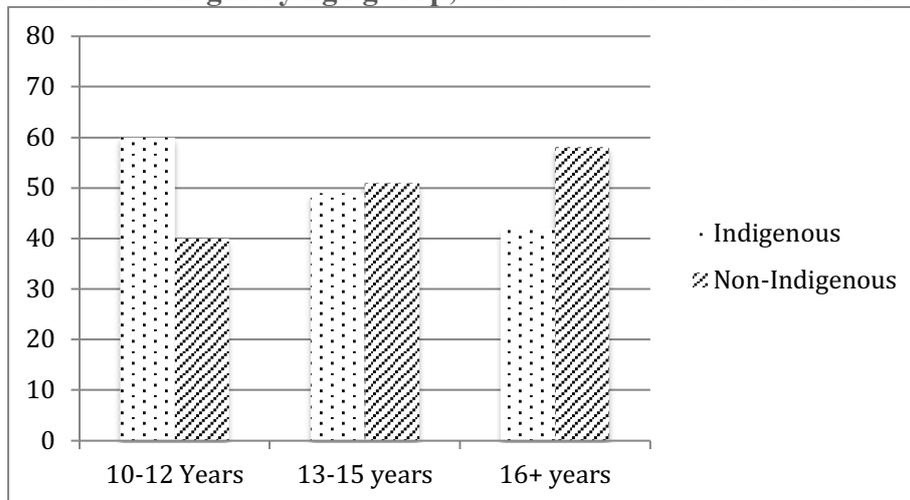
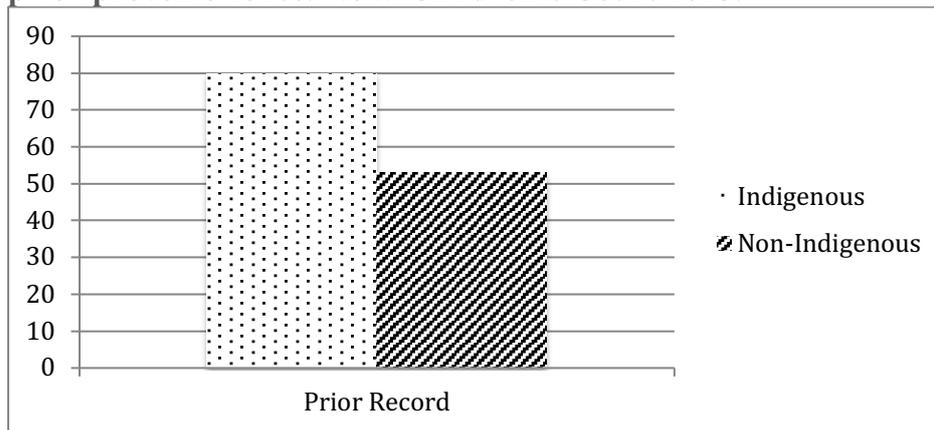


Figure 2 Percentage of Indigenous and non-Indigenous females with finalised charges by age group, NSW Children’s Court 2006 – 2015



One result of this early contact with the Children’s Court is the accumulation of a history of prior convictions. We found that 79 per cent of Indigenous children had a prior criminal record compared to 53 per cent of non-Indigenous children. Figure 3 shows the magnitude of the difference between Indigenous and non-Indigenous young people in relation to whether they had a prior proven offence at the time they were found guilty of a fresh offence.

Figure 3 Indigenous and non-Indigenous children by percentage of previous prior proven offence. NSW Children’s Court 2015.



It was noted above that the low MACR also impacts on the use of police diversionary measures. This also specifically affects Indigenous young people. The available research shows that Indigenous children are less likely to receive the benefit of a diversionary option and are more likely to be arrested (rather than receive a court attendance notice), to have bail refused and to have their matter determined in court compared to non-Indigenous youth (Cunneen *et al* 2015: 154-159). These processes ensconce Indigenous children in the more punitive reaches of the juvenile justice system. For example, research indicates that Children’s Courts are more likely to impose custodial sentences on young people brought before them by way of arrest than by way of an attendance notice (summons), even when the seriousness of the charge and the criminal history of the defendant is controlled for (Allan et al. 2005; Kellough and Wortley 2002).

Raising the MACR can eliminate the effects of the adverse use of police discretion for younger Indigenous children and their entrenchment in the juvenile justice system from a young age.

11. Conclusion

This paper has focused on the importance of raising the MACR to at least 14 years old. Many of the juvenile justice professionals interviewed for the Comparative Youth Penalty Project commented on the multiple and complex needs of young people in juvenile justice, stating that most of these children have not been afforded their human rights from an early age. One respondent observed:

You really need to pay particular attention to the very vulnerable children because they’re not having their basic rights met in society; they don’t have a home, they’re not safe, they’re not developing necessarily in a healthy way, they don’t have access to services that other children have had, they’re not having [an] education. So all of these basic human rights are being denied. (Syd Policy 2)

Our interviewees also referred to the need and importance of a more welfare-oriented approach to juvenile justice in order to address the root causes of criminal justice

contact. One respondent commented that, particularly for younger children, community intervention and support should be prioritised ‘rather than criminal justice... they need that from an early age whether it’s DOCS or some other welfare organisation, [but] not us, not juvenile justice’ (NSW Gov 3).

These themes were echoed in the interviews conducted by O’Brien and Fitz-Gibbon (2017:139) where interviewees acknowledged that children who came into conflict with the law had suffered ‘profound childhood adversity and trauma, including histories of physical or sexual abuse, neglect, family disruption and/or significant economic disadvantage’ and that children required supportive responses rather than punitive interventions. Interviewees also noted that raising the MACR must be ‘accompanied by a strong network of therapeutic supports for young children’ (O’Brien and Fitz-Gibbon 2017:139).

The current MACR is neither child-centred nor reflects the best interests of the child. Jesuit Social Services (2017: 17) note, when discussing the higher minimum age of criminal responsibility in Europe, that we need to recognise ‘the limits of responsibility of children, the fact that their brains are still developing, and the likely permanent harm of early contact with the justice system’. In addition to the arguments relating to the developmental processes of children, this paper has argued there are a host of other reasons for raising the MACR, including the failure of *doli incapax* to protect young children from prosecution and the frequency of young children being criminalised, the failed capacity of the juvenile justice system to respond to the needs of young children (as recognised by youth justice practitioners) which entrenches young children in the justice system, the prevalence of the problems of mental health disorders and cognitive impairment among young people, and the way a low MACR adversely impacts on Indigenous children.²⁵

Raising the MACR enables the opening of a productive space where we can talk about responding to the needs of young children in a way that does not rely on criminalisation, with its short term and long term negative impacts. It enables a conversation about the best responses to children who often have a range of issues including trauma, mental disorders and cognitive impairment, who come from highly disadvantaged backgrounds, have been in OOHC, and particularly who are Indigenous children often removed from their families and communities. It is important to acknowledge that raising the MACR in itself will not solve all these issues, but it opens the door for approaches that are better able to respond without the blunt instrument of the criminal law.

²⁵ There have been many commentators and NGOs who have pointed to what non-criminalising responses might look like in areas such as mental health disorders and cognitive impairment (Dowse et al 2014; McCausland and Baldry 2017), OOHC (McFarlane 2015) and Indigenous young people (Amnesty International 2015; Blagg et al, 2016).

References

- Agnew-Pauley, W., and Holmes, J. (2015) 'Re-Offending in NSW', *Crime and Justice Statistics*, Brief No 108, NSW Bureau of Crime Statistics and Research, Sydney.
- Allan, A., Allan, M., Froyland, I., Drake, D. & Giles, M. (2005) 'An Observational Study of Bail Decision-making', *Psychiatry, Psychology and Law*, 12(2), 319–33.
- Allerton, M. and Champion, U. (2003) *2003 NSW Young People in Custody Health Survey: Key Findings Report*, Sydney: NSW Department of Juvenile Justice.
- Amnesty International (2015) *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia*.
<http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf>
- Amnesty International (2018) *The Sky is the Limit: Keeping Children Out of Prison by Raising the Age of Criminal Responsibility*. <<https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>>
- Anderson, A., Hawes, D. and Snow, P. (2016) 'Language Impairments Among Youth Offenders: A Systematic Review', *Children and Youth Services Review*, 65(c): 195-203.
- Atkinson, B. (2018) *Report on Youth Justice*, Queensland Government, Brisbane.
- Australian Bureau of Statistics (2012) *Criminal Courts Australia 2010-11*, Cat No 4513.0, ABS, Canberra.
- Australian Bureau of Statistics (2013) *Criminal Courts Australia 2011-12*, Cat No 4513.0, ABS, Canberra.
- Australian Government (2009) *Fourth Periodic Report*. Convention on the Rights of the Child, UN Doc CRC/AUS/4.
- Australian Government (2019) *Fifth and Sixth Periodic Report*. Convention on the Rights of the Child, UN Doc CRC/AUS/5-6.
- Australian Institute of Health and Welfare (AIHW) (2016a) *Young people in Child Protection Services and Under Youth Justice Supervision 2013 – 2014*, Australian Institute of Health and Welfare, Canberra.
- Australian Institute of Health and Welfare (AIHW) (2016b) *Child Protection Australia 2014 – 15*, Australian Institute of Health and Welfare, Canberra.
- Australian Institute of Health and Welfare (AIHW) (2012) *Children and young people at risk of social exclusion: link between homelessness, child protection and juvenile justice*, Australian Institute of Health and Welfare, Canberra.

Australian Institute of Health and Welfare (AIHW) (2019) *Youth Justice in Australia 2017-18*, Australian Institute of Health and Welfare, Canberra.

Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in the Legal Process*, Report 84, Australian Law Reform Commission, Canberra.

Australian Medical Association (AMA) (2016) *AMA submission to Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia*. Canberra: Australian Medical Association.

Australian Medical Association (AMA) (2019) 'AMA calls for age of criminal responsibility to be raised to 14 years of age' (25 March 2019) <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>.

Bajovic, M. (2013) 'Violent Video Gaming and Moral Reasoning in Adolescents: Is There an Association'. *Educational Media International*, 50(3), 177-191.

Baldry, E. (2014) 'Disability at the margins: limits of the law', *Griffith Law Review*, 23(3): 370-388.

Baldry, E. (2017) 'People with Multiple and Complex Support Needs, Disadvantage and Criminal Justice Systems: 40 years after the Sackville Report' Chapter 8 in Durbach, A., Edgeworth, B., Sentas, V. (eds) (2017), *Law and Poverty in Australia: 40 Years after the Sackville Report*, Federation Press, Sydney.

Baldry, E., Briggs, D., Goldson, B. and Russell, R. (forthcoming) "'Cruel and unusual punishment": an inter-jurisdictional study of the criminalisation of young people with complex support needs', *Youth Studies*, Published online 21 November 2017, <https://doi.org/10.1080/13676261.2017.1406072> (accessed 22 November 2017).

Baldry, E. and Dowse, L. (2013) 'Compounding Mental and Cognitive Disability and Disadvantage: Police as Care Managers' in D Chappell (ed), *Policing and the Mentally Ill: International Perspectives*, USA: CRC Press.

Baldry, E., Dowse, L. and Clarence, M. (2014) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, University of New South Wales, Sydney.

Baldry, E., McCausland, R., Dowse, L., and McEntyre, E. (2015) *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW: Sydney.

Baldry, E. & Winley, N. (2017) 'Young people under 14 years: police charges and court outcomes in the MHDCC data bank'. UNSW School of Social Sciences: Sydney.

Bartholomew, T. (1998) 'Legal and Clinical Enactment of the *Doli Incapax* Defence in Supreme Court of Victoria, Australia', *Psychiatry, Psychology and Law*, 5(1), 95–

105.

Blagg, H., Tulich, T. and Bush, Z. (2016) 'Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)', *Australian Indigenous Law Review*, 19(2), 4-16.

Booth, A. (2016) Age of criminal responsibility must rise, say experts, after 11 year-old's murder charge. *NITV*, 16 February.
<<http://www.sbs.com.au/nitv/article/2016/02/11/age-criminal-responsibility-must-rise-say-experts-after-11-year-olds-murder>>.

Bower, C., Watkins R.E., Mutch, R.C., et al. (2018) 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia'. *BMJ Open*, 8(2), 1-10, doi:10.1136/bmjopen-2017-019605.

Bryan, K., Freer, J., and Furlong, C. (2007) 'Language and communication difficulties in juvenile offenders', *International Journal of Language and Communication Disorders*, 42(5): 505-520.

Cauffman, E. and Steinberg, L. (2000) '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults', *Behavioral Sciences and the Law*, 18, 741-60

Chen, S., Matruglio, T., Weatherburn, D. and Hua, J. (2005) 'The Transition from Juvenile to Adult Criminal Careers', *Crime and Justice Bulletin No 86*, BOCSAR, Sydney.

Child Rights International Network (2017) *Minimum Ages of Criminal Responsibility in Europe*, Child Rights International Network, London,
<https://www.crin.org/en/home/ages/europe>

Child Rights Taskforce (2011) *Listen to Children. Child Rights NGO Report Australia*, National Children and Youth Law Centre, Sydney.
<http://www.ncylc.org.au/images/2011report.pdf>

Childrens Court of Queensland (2019) *Annual Report 2018-2019*, Children's Court of Queensland, Brisbane.

Committee on Law and Safety. (2018) *The Adequacy of Youth Diversionary Programs in New South Wales*, Report 2/56. Sydney: Legislative Assembly of New South Wales.

Crofts, T. (2015) 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', *Current Issues in Criminal Justice* 27(1), 123-31.

Crofts, T. (2016) 'Reforming the Age of Criminal responsibility', *South African Journal of Psychology*, 46(4): 436-448.

- Cunneen, C., Russell, S., Schwartz, M. and Porter, A. (forthcoming) 'Principles in Diversion of Aboriginal and Torres Strait Islander Young People from the Criminal Jurisdiction', *Current Issues in Criminal Justice*.
- Cunneen, C. and Schwartz, M. (2008) 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', *Criminal Law Journal*, 32(1), 38-53.
- Cunneen C, White R and Richards K (2015) *Juvenile Justice. Youth and Crime in Australia*, Oxford University Press.
- Delmage, E. (2013) 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective', *Youth Justice* 13(2): 102–110.
- Dowse, L., Cumming, T.M., Strnadova, I., Lee, JS and Trofimovs, J. (2014) 'Young People with Complex Needs in the Criminal Justice System', *Research and Practice in Intellectual and Developmental Disabilities*, 1(2): 174-185.
- Education and Health Standing Committee (2012) *Foetal Alcohol Spectrum Disorder: The Invisible Disability*, Perth: Education and Health Standing Committee.
- Fitz-Gibbon, K. (2016) 'Protections for Children Before the Law: An Empirical Analysis of the Age of Criminal Responsibility, the Abolition of Doli Incapax and the Merits of a Developmental Immaturity Defence in England and Wales', *Criminology and Criminal Justice*, 16(4), 391–401.
- Frize, M., Kenny, D. and Lennings, C. (2008) 'The relationship between intellectual disability, Indigenous status and risk of reoffending in juvenile offenders on community orders', *Journal of Intellectual Disability Research*, 52(6): 510-519.
- Gray, A., Forrell, S. and Clarke, S. (2009) *Cognitive Impairment, Legal Need and Access to Justice*. Sydney: Law and Justice Foundation of NSW.
- Goldson, B. (2013) "'Unsafe, unjust and harmful to wider society": grounds for raising the minimum age of criminal responsibility in England and Wales', *Youth Justice*, 13(2): 111-130.
- Haysom, L., Indig, D., Moore, E., Gaskin, C. (2014) 'Intellectual disability in young people in custody in New South Wales, Australia – prevalence and markers', *Journal of Intellectual Disability Research*, 58(1): 1004-1014.
- Hazel, N. (2008) *Cross-national comparison of youth justice*, London: Youth Justice Board.
- Howard, D. (2016) *Statement: Royal Commission into the Protection and Detention of Children in the Northern Territory*, NT: Commonwealth of Australia.
- Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S., Mamone, N., Muir, P., van den Dolder, P. and Whitton, G. (2011) *2009 Young People in Custody Health Survey: Full Report*, Sydney: Justice Health.

- Jesuit Social Services (2015) *Too much too young: Raise the age of criminal responsibility to 12*, Jesuit Social Services, Melbourne.
- Jesuit Social Services (2017) *Justice Solutions Tour. Expanding the Conversation*, Jesuit Social Services, Melbourne.
- Kellough, G. & Wortley, S. (2002) 'Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions', *British Journal of Criminology*, 42(1), 186–210.
- Kenny, D., Allerton, M., Butler, T., Champion, U. and Lennings, C. (2006) *Young People on Community Orders Health Survey 2003-2006*, University of Sydney, Sydney.
- Kenny, D. and Lennings, C. (2007) 'The relationship between head injury and violent offending in juvenile detainees', *Contemporary Issues in Crime and Justice*, no. 107: 1-15.
- Kenny, D. and Nelson, P. (2008) *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs*, Sydney University Press, Sydney.
- Lamb, M. E. and Sim, M. P. Y. (2013) 'Developmental factors affecting children in legal contexts', *Youth Justice* 13(2): 131–144.
- Law Council of Australia (2019) 'Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax', <<https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>>
- Lawrence, D., Johnson, S., Hafekost, J., Boterhoven De Haan, K., Sawyer, M., Ainley, J., and Zubrick, S.R. (2015) *The Mental Health of Children and Adolescents. Report on the second Australian child and adolescent survey of mental health and wellbeing*. Canberra: Department of Health.
- Legal Aid NSW (2019) *Minimum Age of Criminal Responsibility*, Legal Aid NSW submission to the Council of Australian Government's review of the minimum age of criminal responsibility, Legal Aid NSW, Sydney.
- McAra, L. and McVie, S. (2007) 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending', *European Journal of Criminology*, 4(3): 315–45.
- McAra, L. and McVie, S. (2010) 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime', *Criminology and Criminal Justice*, 10(2): 179–209.
- McCausland, R. and Baldry, E. (2017) "'I feel like I failed him by ringing the police': Criminalising disability in Australia', *Punishment & Society*, 19(3): 290-309.

McFarlane, K. (2015) *Care-Criminalisation: The Involvement of Children in the Out of Home Care in the NSW Criminal Justice System*, PhD Thesis, University of NSW, Sydney.

McFarlane, K (2017) 'Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system', *Australian and New Zealand Journal of Criminology*, DOI: 10.1177/0004865817723954, published online 8 August 2017.

McLean, S. (2016) *Report on Secure Care Models for Young People at Risk of Harm*, Australian Centre for Child Protection, Adelaide.

Mitchell, M. (2016) *Children's Rights Report 2016*, Australian Human Rights Commission, Sydney.

Newton, N. C., and Bussey, K. (2012) 'The Age of Reason: An Examination of Psychosocial factors involved in delinquent behaviour', *Legal and Criminological Psychology*, 17(1), 75–88.

Nowak, M. (2019) *United Nations Global Study on Children Deprived of Their Liberty*, United Nations, Geneva.

NSW Bureau of Crime Statistics and Research (2015) *NSW Criminal Court Statistics 2014*, NSW Bureau of Crime Statistics and Research, Sydney.

NSW Health and NSW Juvenile Justice (2016) *2015 Young People in Custody Health Survey: Key Findings for All Young People*, Sydney: NSW Health and NSW Juvenile Justice.

O'Brien, W. and Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, 17(2): 134-152.

Passmore, H., Bower C., Watkins R. and Mutch, R. (2018) 'Almost every young person in WA detention has a severe brain impairment', *The Conversation*, February 14, 2018. <https://theconversation.com/almost-every-young-person-in-wa-detention-has-a-severe-brain-impairment-90695>

Payne, J. (2007) *Recidivism in Australia: Findings and Future Research*, Research and Public Policy Series No. 80, Canberra: Australian Institute of Criminology.

Review of the Criminal Justice System in Northern Ireland (2000) *The Report of the Criminal Justice System Review*, Available at <http://cain.ulst.ac.uk/issues/law/cjr/report30300.htm>

Royal Commission into the Protection and Detention of Children in the Northern Territory [RCPDCNT] (2017) *Report of the Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory*, Darwin. <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

- Sentencing Advisory Council (2012) *Sentencing Children and Young People in Victoria*, Sentencing Advisory Council, Melbourne.
- Snow, P., Woodward, M., Mathis, M. and Powell, M. (2016) 'Language Functioning, Mental Health and Alexithymia in Incarcerated Young Offenders', *International Journal of Speech-Language Pathology*, 18(1): 20-31.
- Steele, L., Dowse, L. and Trofimovs, J. (2013) *Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)*. Available at: <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1534&context=lhapapers>. (accessed 26 October 2017).
- Steele, L., Dowse, L. and Trofimovs, J. (2016) 'Who is diverted?: Moving beyond diagnosis towards a social and political analysis of diversion', *Sydney Law Review* 38(2): 179–206.
- United Nations Committee on the Rights of the Child (UNCRC) (1997) *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.79.
- United Nations Committee on the Rights of the Child (UNCRC) (2005) *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268.
- United Nations Committee on the Rights of the Child (UNCRC) (2007), *General Comment No 10*, UN Doc CRC/C/GC/10.
- United Nations Committee on the Rights of the Child (UNCRC) (2012) *Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4.
- United Nations Committee on the Rights of the Child (UNCRC) (2019) *Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/5-6.
- United Nations Committee on the Rights of the Child (UNCRC) (2019), *General Comment No 24*, UN Doc CRC/C/GC/24.
- Vanderpoll, T. and Howard, D. (2012) 'Massive prevalence of hearing loss among Aboriginal inmates in the Northern Territory', *Indigenous Law Bulletin*, 7(28): 3-7.
- Vieira, E. and Krcmar, M. (2011) 'The Influence of Video Gaming on US Children's Moral Reasoning About Violence', *Journal of Children and Media*, 5(2), 113-131.
- Victoria Legal Aid (2017) *Care not Custody – a new approach to keep kids in residential care out of the criminal justice system*. Victoria Legal Aid, Melbourne.
- Zillman, S. (2017) 'Hopes Resting on Royal Commission to Recommend Raising Age of Criminal Responsibility', *ABC News*, <http://www.abc.net.au/news/2017-09-25/criminal-responsibility-age-should-be-raised-advocates-say/8986474>

Zimring, F., Langer, M. and Tanenhaus, D. (eds) (2017) *Juvenile Justice in Global Perspective*, New York University Press, New York.