



creating a better life
for children and young
people in care

ACT Raising the Minimum Age of Criminal Responsibility

Submission to the ACT Government

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CREATE Foundation

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Introduction

CREATE Foundation appreciates the opportunity to respond to ACT *Raising the minimum age of criminal responsibility* (MACR).

CREATE applauds the ACT Government's leadership in announcing its intention to raise the minimum age of criminal responsibility from 10 to 14 years old in line with the overwhelming medical, legal, and international evidence. CREATE believes such a decision would improve both the safety and well-being of children and young people, reduce long term offending, and increase community safety.

Studies show that the earlier a young person has engagement with the criminal justice system, the more likely it is that the young person will have long-term involvement in crime (Australian Institute of Health and Welfare, 2020). CREATE advocates that instead of punishing children and young people with legal action, an outcome that can adversely affect their development and alter their entire life's trajectory. They deserve treatment focusing on early prevention and providing diversionary supports that will not impede their possibility of future success. particularly when considering children as young as 10 years of age.

Research shows that children and young people who have been abused or neglected are at greater risk of engaging in criminal activity and of entering the youth justice system (Atkinson, 2018). Oftentimes, these children and young people also have an out-of-home care experience and CREATE believes the over-representation of young people with a care experience in the youth justice system is unacceptable (CREATE, 2018a).

As the national peak body and systemic advocate representing children and young people with a care experience, we would like to highlight their voices. Our submission is based on the experiences of those who have participated in CREATE's consultations and research reports, and is supported by additional literature.


Disproportionate Impact on Young People in Care and First Nations Children and Young People

The over-representation of children and young people that interact with both the out-of-home care and youth justice systems is a common concern across Australia. The Australian Institute of Health and Welfare (2021) reported that there were 46,000 children and young people living in out-of-home care in Australia between 30 June 2019–2020. Of this number, 18,900 children identified as Aboriginal and/or Torres Strait Islander.

Further data reported by the Australian Institute of Health and Welfare (2020) found that 22% of young people under youth justice supervision had been placed in out-of-home care in the last five years, and that 61% of Indigenous young people under youth justice supervision had also received child protection services in the last five years. For young people in youth detention, over 26% had been in out-of-home care. A majority of these children were also found to have been placed in residential care and had lived in five or more placements (Australian Institute of Health and Welfare, 2020).

Findings from CREATE's latest report, *Transitioning to adulthood from out-of-home care: Independence or interdependence?*, presenting data from 325 care leavers, showed that 37% of respondents had been involved with the youth justice system whilst in care, and 21% were involved after exiting care (McDowall, 2020). Aboriginal and Torres Strait Islander care leavers were also more likely to have been involved with youth justice after leaving care (31%) compared to non-Indigenous care leavers (18%).

Experiences of placement instability, particularly being placed in residential care, and criminalising of behaviours that would be tolerated in a family home but can escalate to involve the police in care



facilities are several factors that increase the likelihood of offending by a care-experienced young person (CREATE, 2018a; McDowall, 2020; Victorian Commission for Children and Young People, 2021). Because children and young people with both an out-of-home care and youth justice experience present with more complex needs that often arise due to past trauma, they face greater social disadvantage than the general youth justice population (Mendes, Baidawi, & Snow, 2014).

We are not really treated like kids, we are held to greater responsibility than anybody else. If another young person living at home has a fight with their sibling they are not held to the same responsibility. (Female, 25)

They made me feel like a bad person, I don't know why someone didn't just sit down and talk to me about what was going on and why. I had no support, no one cared. If they had asked me why [I was offending] I could have told them why I was doing it and it might have been able to be fixed earlier. (Male, 24)

(CREATE, 2018b)

If I had the right carer and didn't get kicked out, I wouldn't commit crime. I did it to survive, eat and sleep. Child Safety Officers may not have kids [of their own]. It's my 9th time in here [youth detention]. I haven't been in resi care since 13, I have been living on the street. It's up to the kid. If he needs support he should be able to come back [to the Department]. (Male, 17)

(CREATE, 2021b)


CREATE advocates that there needs to be a prioritisation of prevention strategies across state and territory governments that address the root causes of youth offending to ensure the needs of these young people are met. This includes raising the MACR from 10 years to at least 14 years of age, and additional strategies such as greater investment in diversionary strategies that utilise existing community-based services, increased collaboration between youth justice and child protection systems, and the adoption of a trauma-informed youth justice system. Such reform will assist young people achieve their best outcomes, but also lead to reduced recidivism and increased safety for communities (CREATE, 2018a).

Rationale for Raising the Minimum Age of Criminal Responsibility

CREATE believes that governments must raise the minimum age of criminal responsibility with **no exceptions**. Medical evidence has determined that children under the age of 14 years old do not have the capacity to form criminal intent or comprehend consequences of their actions, including the severity level of their behaviours (Australian Medical Association, 2020). Because of a lack of sufficient neurological development, these children and young people should not be held criminally responsible.

Children under the age of 14 years are also incredibly vulnerable to developmental harm when they come into contact with the criminal legal system, which may contribute to higher instances of poor mental health or illness, unemployment, homelessness, and premature death later in life (Australian Medical Association, 2020).

Calls for Australia to raise the MACR age have been strongly voiced both locally and internationally, (Australian Medical Association, 2020; Change The Record, 2021; Human Rights Law Centre, 2021) after the United Nations made a recommendation in 2019 to raise the MACR to at least 14 years. Recommendation 27.1 stated in the final *Royal Commission into the Protection and Detention of Children in the Northern Territory report* (2017) also recommended that the age of criminal responsibility be raised, but no progress has been made to date since that report was released.



CREATE strongly supports the need to raise the MACR as it is in the best interests of the child, and their community. CREATE also advocates that the needs of the child must be met in a therapeutic and rehabilitative manner, rather than the child being exposed to further harm through the criminal justice system.

Prevention and Early Intervention Strategies

Raising the MACR should protect children and young people under the age of 14 from the criminal justice system, and should provide the opportunity for diversion and therapeutic intervention. However, CREATE notes that this reform should not be treated as simply delaying the criminal justice system's engagement with the child until they reach the age of 14 as this undermines the intent of supporting children and young people to learn from their mistakes and be able to grow and contribute positively to society.


CREATE firmly advocates that efforts should be put towards helping children learn from their mistakes, not harming them for life. Community-driven solutions, intensive family support programs, trauma-informed mentorship and on-country learning are all alternative programs that work and support children and young people to redirect their lives for the better, instead of being locked away.

[I am] conflicted as I have a 10 year old sister and know that she needs to be held accountable [for her actions] but I do not believe that being locked up is the answer. But [I] believe that their actions needs some consequence and that there is some steps that need to be looked into before lock up (i.e., PCYC and other services) to find out what led the young person to this and also look at distractions as people don't misbehave for no reason... At 14 I feel the young person is more able to be able to held to the consequence of what they have done. (Female, 21)

CREATE recommends that various frameworks should be used when adopting alternative models to the youth justice system (CREATE, 2018a). These frameworks include using human rights, child rights, and trauma-informed perspectives when working with children who may come in contact with the youth justice system. CREATE also believes that children and young people must be supported to be aware of their rights (CREATE, 2021b).

Based on the key findings from CREATE's *Youth Justice Report* (2018b), which is supported by broader information gathered through our work with young people (McDowall, 2020), CREATE specifically calls for:

1. Increased training and resources provided to residential workers, foster, and kinship carers regarding how to manage challenging behaviour within a trauma-informed framework. This can include the development of protocols and MOU's between OOHC service providers and police, clearly outlining what contexts require the police to attend, and supporting the use of diversionary responses. This will ensure young people in OOHC are not disproportionately having contact with police that would not occur in a non-OOHC environment;
2. The adoption of a trauma-informed youth justice system which promotes policy and practice that better manages challenging behaviours, develops a young person's resilience and strength, and ultimately leads to increased cooperation with youth justice staff and reduced recidivism (Elwyn et al., 2014). Practices aligned with a trauma-informed approach include screening for trauma exposure, using non-judgemental language, and ensuring judicial processes are explained in a developmentally appropriate manner (Branson et al., 2017);

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3. A high proportion of young people with a care experience are unsupported during their justice system contact. There is a need for greater clarity regarding the roles and expectations of caregivers and professionals in supporting young people through the justice system. Child protection, youth justice, and community service agencies who provide placements for young people in OOHC need to work together to develop clear protocols about how best to support young people who may have contact with the youth-justice system at each stage, and support the sharing of necessary information to facilitate this;
 4. Increased public education and awareness of the impact of negative language and stereotyping on young people in OOHC, and a need to promote positive images of young people in OOHC to reduce internalisation of negative perceptions.

(CREATE, 2018a)

Early intervention for children and young people in care who are exhibiting trauma-based behavioural issues has the potential to minimise involvement in the youth and adult justice systems (Atkinson, 2018). Having appropriate and positive social support from positive peers and social networks could also assist in diverting young people from engaging in criminal activity (CREATE, 2021b).

I don't think they get trauma or behaviours expressed by children and young people in care so there isn't a lot of understanding towards them. It's a lot about punishment rather than rehabilitation. It's more you did the wrong thing regardless of the reasons behind it. (Female, 22)

(CREATE, 2018b)

If a child is committing crimes like this and haven't had the opportunity to explore all resources (counselling etc.), then I think that there should be a chance for rehabilitation in the community before taking such a drastic measure as this could cause mental distress and illness. And feelings of worthlessness in the community. (Female, 16)


(CREATE, 2021b)

CREATE supports the principles listed in the Discussion paper for alternative models to the youth justice system (ACT Government, 2021). We would also like to highlight the five key areas of need as identified by Change The Record (2021) to consider for addressing current service delivery gaps in the ACT landscape. These include:

- The lack of multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including further assessment, and assistance and treatment for drug and alcohol misuse;
- The absence of Function Family Therapy – Youth Justice and/ or other evidence-based programs targeted to this cohort;
- The limited availability of psycho-social services for young people, particularly young people living with disabilities;
- The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness;
- A broad need for greater education across services to improve the identification of, and response to, disability support needs.

Strengthening Supports for Victims of Young Offenders

CREATE believes that victims of young offenders should also be able to have ongoing access to emotional and mental health support services. As the majority of children and young people who come into care have experienced past abuse and trauma, CREATE believes that additional specialised



therapeutic supports should be made available, accessible and without cost (CREATE, 2021a). Not only will this support victims of young offenders, but this approach also acts as a preventive measure that can support young people with their social, emotional and mental health challenges and channel these positively, rather than engaging in youth crime.

Young people have consistently voiced their concerns for mental health support, however accessing these services are often difficult due to a limited number of sessions with psychologists or counsellors, feeling as though their counsellor is not the right fit, and the associated financial costs involved (CREATE, 2019; 2020; 2021a; McDowall, 2020). CREATE believes there should be an unrestricted amount of counselling sessions or other identified therapeutic services available for those with a care experience background, and that referrals should be streamlined to avoid challenges in navigating service systems.

Counselling (after using up the free sessions it's really expensive). Help to get a diagnosis (I don't know the process and it's really expensive). Feeling like you have no one to go to, who won't need you to tell your story over for them to understand you. (Female, 20)

(McDowall, 2020)


Conclusion

Thank you again for the opportunity to respond to *Raising the minimum age of criminal responsibility*. CREATE welcomes the leadership the ACT Government is taking with this significant reform. Youth justice is a complex field, but reforms to raise the MACR from 10 to 14 years is the first step in safeguarding the wellbeing and development of young children whilst also ensuring community safety.

Should you have any questions or require additional information, please do not hesitate to contact Lisa Wylie, CREATE's ACT State Coordinator on 0439 764 163 or email lisa.wylie@create.org.au.

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About CREATE

CREATE Foundation is the national peak consumer body for children and young people with an out-of-home care experience. We represent the voices of over 45,000 children and young people currently in care, and those who have transitioned from care up to the age of 25. Our vision is that all children and young people with a care experience reach their full potential. Our mission is to create a better life for children and young people in care.

To do this we:

- **CONNECT** children and young people to each other, CREATE and their community to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.

We achieve our mission by providing a variety of activities and programs for children and young people in care, and conducting research and developing policy to help us advocate for a better care system.