

### CREATE's Position

At present, all Australian states and territories can find a child as young as 10 guilty of a crime (Davis, 2022). Some jurisdictions require the conditions of *doli incapax* to be met (that the child can demonstrate a understanding of right and wrong); however, even if this principle were applied consistently (Australian Human Rights Commission, 2021), 10 is far younger than the age of 14 advocated for by the United Nations Committee on the Rights of the Child (UNCRC, 2019) as the minimum acceptable. CREATE supports raising the minimum age of criminal responsibility (MACR) from 10 to 14 years.

Governments should instead emphasise prevention, diversion, therapeutic intervention, and rehabilitation. Youth justice is a complex field, but this reform is a critical first step in safeguarding the wellbeing and development of young children, and avoiding the stigma of criminalisation, whilst also ensuring community safety.

At the Meeting of Attorneys-General held on 15<sup>th</sup> November 2021, all state Attorneys-General supported the development of a proposal to increase the minimum age of criminal responsibility from 10 years to 12 years (Davis, 2022). The ACT government has indicated it intends to raise MACR to 14 two years later (Twyford, 2022).

CREATE maintains 12 must be considered an interim stage as all medical and legal evidence, as well as the UN guidance identifies 14 as the minimum. Indeed, the UNCRC (2019) already shows some jurisdictions around the world are accepting 16 years of age as a minimum for recognising criminal responsibility.

### Evidence

- The United Nations Committee on the Rights of the Child called on Australian Governments to raise the MACR to an “internationally accepted level and make it conform with the upper age of 14 at which *doli incapax* applies” (UNCRC, 2019).
- During the UNUPR Working Group, 31 countries encouraged Australia to increase its MACR to 14 years (UN, 2021), a call Australia rejected.
- Amnesty International notes that the ACT is the only State or Territory that has committed to increasing the MACR to 14 (Amnesty International, 2022).
- Raising the MACR is of particular concern for children and young people with a care experience. 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). This can be due to a range of pre-care (e.g., trauma) and in-care risk factors (e.g., placement instability, socio-economic disadvantage, isolation from culture, and police involvement in response to challenging, non-criminal behaviours). Their youth justice involvement can continue due to greater level of scrutiny, e.g., increased risk of being remanded for bail breaches (e.g., McFarlane et al., 2018; Victorian Commission for Children and Young People, 2021).

- The Australian Institute of Health and Welfare (2020) reported that 22% of young people under youth justice supervision had been placed in out-of-home care in the last five years.
- AIHW (2020) also reported that 61% of First Nations young people under youth justice supervision had received child protection services in that same period.
- 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 while in care (AIHW, 2020).
- McDowall (2020) showed that 37% of respondents had been involved with the youth justice system whilst in care, and 21% were involved after exiting care. 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%).
- Brown and Charles (2021) have noted that criminal records and labelling actually create a harmful, irreversible “criminogenic” identity in which young people struggle to return to society once they have been typecast a criminal.
- Medical evidence has determined that children under the age of 14 years do not have the developmental capacity to form criminal intent or comprehend consequences of their actions, including the severity level of their behaviours (Australian Medical Association, 2020).
- The earlier a young person has contact with the criminal justice system, the more likely it is that they will have long-term involvement in crime (AIHW, 2020).
- #raisetheage campaign managed by the Human Rights Law Centre in association with First Nations people

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(<https://raisetheage.org.au>), is continuing to pressure Australian governments to increase the MACR to 14.

- As Walsh et al. (2021) demonstrate, there are numerous alternative treatments that can be used effectively to modify young people's behaviour and produce a more satisfactory outcome for the young person and the community rather than criminalisation and/or detention.

### Actions

Calls for Australia to raise the MACR have been strongly voiced both locally and internationally (Australian Medical Association, 2020; Human Rights Law Centre, 2021; McDowall, 2021) after the United Nations made a recommendation in 2019 to raise the MACR to at least 14 years.

CREATE recommends using various frameworks including human rights, child rights, culturally-sensitive practice, and trauma-informed perspectives when working with children who may come in contact with the youth justice system. CREATE specifically calls for:

1. Australian Governments to enact legislation that raises the age of criminal responsibility to 14 years; Children under 14 to be transferred out of custody;
2. Increased training and resources to be provided to residential workers, foster, and kinship carers regarding how to manage challenging behaviour within a trauma-informed framework
3. Trauma-informed training for youth justice workers and police officers;
4. Strengthening therapeutic supports during young people's time in the out of home care sector to act as a preventative measure of youth justice contact;
5. The provision of community-based early intervention, wrap around family support services, trauma informed mentorship, and on-country learning for First Nations children.

These programs and initiatives all work to support children and young people to redirect their lives for the better, instead of acquiring a criminalised future.

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