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DESIGNING A BETTER RESPONSE TO YOUTH OFFENDING IN QUEENSLAND:

Raising the age of criminal
responsibility: Issues paper



Queensland
Family & Child
Commission



Acknowledgements

The Queensland Family and Child Commission (QFCC) acknowledges Aboriginal and Torres Strait Islander peoples as the Traditional Custodians across the lands, seas and skies on which we walk, live and work. We recognise Aboriginal and Torres Strait Islander people as two unique peoples, with their own rich and distinct cultures, strengths and knowledge. We celebrate the diversity of Aboriginal and Torres Strait Islander cultures across Queensland and pay our respects to their Elders past, present and emerging. We acknowledge the children and young people whose lives have been impacted by their involvement in the youth justice system when that was not the help or support needed. We also acknowledge those who represent the best interests of children in contact with police or youth justice and are bringing national attention to the urgent issue of raising the minimum age of criminal responsibility.

About this Report

Queensland Family and Child Commission
Level 8, 63 George Street
PO Box 15217, Brisbane City East QLD 4002
Email: strategicpolicy@qfcc.qld.gov.au
www.qfcc.qld.gov.au

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Principal Commissioner Luke Twyford

The Queensland Family and Child Commission (QFCC) welcomes opportunities to comment on the systems that affect the lives of Queensland's children. **We have advocated for an increase to the minimum age of criminal responsibility since 2017, and it is our position that that age should be raised to 14.** This position is shared by all Australian and New Zealand Children's Commissioners and Guardians and it is also the position advocated by the United Nations (UN).

I acknowledge that raising the age of criminal responsibility requires complex system changes. During this important debate, I would like to emphasise that all children and young people in Queensland are valued. Very few children commit offences. On any given day less than one per cent—in fact, less than half of one per cent—of Queensland children are involved in the youth justice system. We do not need to demonise young people when discussing youth justice. Testing boundaries and making mistakes are an important part of growing up. **It is our role as a community to ensure that young people learn responsibility and accountability for their actions in ways that are pro-social.** Consequently, raising the age of criminal responsibility does not mean taking away responsibility.

As a society we create a criminal justice system not to punish but, hopefully, to protect. Therefore, the sanctions we provide to young people, in fact to any person, should be as much about rehabilitation—that is, that the person will learn and not do it again—as it is about restoration, which is that the victim and the community are put back to a place that corrects the harm done to them. **The idea that criminal sanctions designed for adults will work on an 11-year-old or a 12-year-old needs to be questioned.**

For young people, a restorative justice response is more effective than a criminal justice response. Evidence shows that criminal justice responses are not working. Data from the Department of Children, Youth Justice and Multicultural Affairs shows a child who enters the statutory youth justice system at age 11 is more likely to stay in the system than a child who enters at 15. We also know that a criminal justice system can do more harm than good. Young people who leave detention are often more likely to commit more crime. Last year, 61 per cent of young people who exited detention returned within 12 months.

If we want to reduce youth offending, we need to provide targeted trauma-informed responses to children that take into account the factors that contribute to their behaviour. **A child who is not yet in high school does not belong in a prison setting or a watch house.**

Our response to young people who do wrong must focus on **restitution, rehabilitation and restoration.** Evidence shows that children in contact with the youth justice system are some of the most vulnerable and disadvantaged members of our community. **It should not surprise anyone that family dysfunction, domestic violence, mental health, poor educational engagement, and cognitive and other health issues are the key factors in determining who will enter the youth justice system.** In addition, we know Aboriginal and Torres Strait Islander children are disproportionately overrepresented.

In 2021, the QFCC released [Changing the Sentence](#), a report into Queensland's youth justice initiatives and options for further reform. Children and young people with lived experience of going through the youth justice system spoke to a lack of holistic support both before and after their experience with the youth justice system.

Raising the age of criminal responsibility and improving the restorative justice practices for children will more effectively address the underlying behaviours and experience of trauma of young people who commit offences. An increase in the minimum age of criminal responsibility should be considered as part of the ongoing youth justice reforms aimed at ensuring that the rights, wellbeing and safety of our children and community are upheld.

Commissioner Natalie Lewis

If an eight-year-old, a 10-year-old, a 12-year-old or a 14-year-old were to approach any one of us and talk to us about an experience of feeling unsafe at home, about not having the food that they need, about not being able to attend school, we would, I would hope—and I can only imagine for most of the population—respond with compassion and that we would focus on the failure of the adults, services and systems to meet the needs of vulnerable children. We would focus on accountability and responsibility of services to act and to ensure an appropriate response to provide the supports that they need and that they are entitled to as children in Queensland. However, for the same child with the same circumstances of vulnerability who may have committed an offence or even multiple offences, we spontaneously shift the focus of responsibility and accountability solely towards the child on the basis of their actions or behaviour. **We seem to automatically forgive or forget the failings of the adults, of the services, systems and broader society that create the conditions for offending behaviour to develop in the first place.**

We appear to accept, despite overwhelming evidence to the contrary, that a firm punishment or a criminal consequence in the absence of supports to address a child's basic needs will somehow suffice. It has not and it will not.

Children aged 10 to 13 years lack the emotional, mental and intellectual maturity of adults. The history of abuse and trauma of many young people involved in the youth justice system further impacts their ability to make sound decisions. **Acknowledging the circumstances of a young person is not about providing an excuse for their behaviour or privileging their rights above the rights of victims. It is about understanding what contributes to the offending behaviour of individuals so that we can provide appropriate opportunities for rehabilitation and restoration.** It is to reduce the likelihood of reoffending. It is to make communities safe.

Queensland's current minimum age of criminal responsibility has had devastating effects for Aboriginal and Torres Strait Islander children and young people. The empirical reality for our children is that their rate of contact with the youth justice system remains unacceptably high. The level of over-representation and disparity of outcomes are present across all points on the youth justice continuum. They enter earlier, stay longer and exit the system under positive circumstances far less often. **Our children who have committed an offence are two times less likely to be afforded the opportunity to be diverted from the youth justice system. Conversely, compared to non-Indigenous young people, Aboriginal and Torres Strait Islander young people were 27 times more likely to be held in custody on an average day.** Adjusting for the different population sizes, in 2021 the rate of detention in Queensland for Aboriginal and Torres Strait Islander children aged 10 to 13 was 28 times the rate of non-Indigenous children in the same age cohort. The National Agreement on Closing the Gap has adopted a target to reduce the rate of Aboriginal and Torres Strait Islander young people in detention by 30 per cent by the year 2031.

In the context of raising the minimum age of criminal responsibility, **a dedicated focus upon 10 to 13-year-olds presents a significant opportunity to disrupt the offending trajectory of young people and move beyond rhetoric to close the gap in the incarceration rates of Aboriginal and Torres Strait Islander young people** and adults. This success, though, is contingent on meeting each of the other socioeconomic targets across the areas that have an impact on the life outcomes for Aboriginal and Torres Strait Islander children: things like infant and early years development, health equity, stable housing, living free from violence, education and employment, achieving equality and economic participation and, critically, the preservation or restoration of our connection to culture. What is certain is that without disruption, without a circuit-breaker, to divert investment in inaction

towards prevention and early intervention to address the drivers of the offences, there will continue to be relentless demand on the criminal justice system and absolutely no hope of reaching those targets.

In the *Changing the Sentence* work that we did, we had direct engagement with young people involved in the criminal justice system to talk about the things that they felt would make a difference. There were no surprises. They talked about having access to supports, about being treated fairly, about their parents being more actively involved and made aware of the things that were going on, about the importance of a trusted person and the opportunity to start to believe that returning to school might be a possibility or that a job in the future is not beyond them. When we created those opportunities for young people to imagine different, those were the types of things that generated the most input. In conclusion, let me be clear that **we share the community's interest in reducing crime, increasing safety and creating an effective youth justice system that is safe for children, young people and staff. The evidence is clear that criminal justice responses will not deliver these results.** We are firmly committed to reform that enables a just and age-appropriate system. I believe that raising the age of criminal responsibility to 14 will contribute to that goal. We all want and deserve to live in safe communities. To have safe communities, we have to provide support to vulnerable children so that they, too, can experience safety.

QFCC's position

The minimum age of criminal responsibility in Queensland must be increased to 14, and no child under 14 should be sentenced to detention.

On 17 December 1990, Australia ratified the UN *Convention on the Rights of the Child* (UNCRC), which enshrines the rights of every child to a life of dignity and self-fulfilment. Under Article 40 of the UNCRC, children accused of, or recognised as, having infringed the law must be treated in a manner consistent with the child's age and need for rehabilitation into society.¹ Supported by a growing body of evidence, the UN, along with a large number of organisations across Australia, has recommended the minimum age of criminal responsibility be raised to at least 14 years. Children under this age are developmentally and neurologically unable to form criminal intent and should not be held criminally responsible for their behaviour.² A supportive system can allow children to take responsibility for their actions, understanding the impact of their behaviour without the need for criminal sanctions.

The minimum age of criminal responsibility in Queensland is currently 10 years. Raising this to 14 years will enable the causes of children's offending behaviour to be addressed in an individualised and developmentally appropriate way that reduces the risk of future offending.

Evidence points to the social benefits of therapeutic intervention, preventative and rehabilitative solutions that hold children accountable without criminalising them. The arrest and imprisonment of any child should always be a last resort, but for children under the age of 14 this criminal response can have significant negative outcomes for a child's health and rehabilitation – meaning that it is a poor form of preventing crime. In addition, the cost of this system is high: keeping a child in detention costs Queensland \$1,879.80 per day, per child.³ Repurposing this money into programs that will address the causes of harmful behaviours will save the community money and provide better support to families and communities who have experienced the impact of youth offending.

In line with international human rights standards and medical consensus on brain development, Queensland should increase the minimum age of criminal responsibility to 14 years and implement a legislative restorative justice and rehabilitative solution that increases child and family accountability, upholds the rights of victims, sits outside the criminal justice system, and provides interventions that address the underlying causes of behaviour.

There is a clear discrepancy between the expectations of children's development regarding their capacity to commit criminal offences, and their capacity to engage with supports to address any emerging issues they face outside the justice system. For example, children need to be at least 12 years of age to access mental health services through headspace.⁴ They need to be 15 years before they can apply for a Medicare card, to seek health care without the support of a parent or guardian.⁵ They need to be 16 years old to be eligible for financial support, such as Youth Allowance, from the Commonwealth Government, unless there are special circumstances.⁶ In Queensland, it is a criminal offence - with a maximum penalty of three years in jail - to leave a child under 12 unattended 'for an unreasonable amount of time'⁷ yet children can be criminally responsible for their actions, and locked in a detention cell, from age 10. In addition, in Queensland, children cannot be legally employed for most work until the age of 13 years.⁸ Our current criminal justice system is out of date.

The QFCC envisions a system where young children are supported to address their behaviour without being criminalised. Ten- to 13-year-olds need to be held accountable for their behaviour by their family and community in a way that engages them to demonstrate empathy and remorse, understand the impact of their behaviour, and

change their behaviour. **Our evidence suggests the criminal system designed for adults is not the right system for children.** To minimise confusion while moving towards a standardised approach to raising the age to 14 years, incremental carve outs could be adopted for children under 14 years for certain serious offences (see Appendix 1).

Research shows that around two-thirds of young people who contact the youth justice system change their behaviour and do not return. These low-frequency contacts are more regularly dealt with earlier in the justice system using cautions, diversions, and restorative justice conferencing. For the remaining one-third of children, and for most of whom experience detention, our existing system of criminal penalties does not lead to a reduction in crime. For too many children, an experience with the criminal justice system increases the likelihood of reoffending throughout adolescence and adulthood. For these children we have designed and continue to operate a system that is achieving the opposite of its intent.

We support the introduction of new processes for engaging children under the age of 14 in holistic individual and family support programs focused on restitution and rehabilitation. We also support extending community-controlled programs and increasing access to restorative justice approaches that prevent future offending. This will help to guarantee that children are provided with responses that support their pathway out of offending behaviour – via strengthened family, health, education and employment outcomes. Children, families and communities will benefit from a renewed approach to reducing harmful behaviour that has better long-term success at delivering community safety.

There are already numerous programs in place in Queensland that address children’s behaviour outside the formal criminal justice system. These should be harnessed and expanded to make sure Queensland can address the causes of youth offending and provide meaningful support to victims. Implementing a restorative justice response outside the criminal system will support the goals of *Working Together Changing the Story: Youth Justice Strategy 2019-23* and the targets outlined in the *National Agreement on Closing the Gap*.

The Queensland Family and Child Commission (QFCC) is committed to youth justice reforms, as part of our ongoing commitment to children’s rights and reducing the over-representation of Aboriginal and Torres Strait Islander children and young people at all points of the youth justice continuum.

Feedback – Do you agree?

We welcome ideas, evidence, case studies or any additional feedback to help further develop an improved justice model for children aged 10 to 13.

If you have information or options that could inform this future work, please contact us at:

strategicpolicy@qfcc.qld.gov.au

In 2020 in Queensland there were:



540,100

children aged 10-17 years.

279,000

children aged 10-13 years.

8%

of children aged 10-17 years were Aboriginal and Torres Strait Islander.

In 2019-20:



569

offence.

children aged 10-13 appeared in court and **464** children aged 10-13 had a proven

In 2020-21:

126 children aged 10-13 spent time in youth detention – **0.045%** of all children this age.

79.4% (100 of the 126) were Aboriginal and Torres Strait Islander – **0.454%** of Aboriginal and Torres Strait Islander children this age.

39.2% of all children aged 10-18 received police diversions, while these were offered to only **26.3%** of Aboriginal and Torres Strait Islander children.

10- to 17-year-olds from the lowest socioeconomic areas are **five times** more likely to be under youth justice supervision than those from the highest socioeconomic areas.

Aboriginal and Torres Strait Islander children are significantly over-represented in the justice system: the younger the child, the greater the over-representation.

87% of 10-year-olds, **85%** of 11-year-olds, **76%** of 12- year-olds and **60%** of 13-year-olds who appeared in court were Aboriginal and Torres Strait Islander.

In 2020-21, Aboriginal and Torres Strait Islander children aged 10-13 were:

- **61.3 times more likely** to be under community-based supervision
- 50.4 times more likely to be in detention.

It cost **\$1,879.80** per day to keep a child in detention. Annual cost to the state: **\$162m.**

It cost **\$253.42** per day to keep a child under community-based supervision.

What is the minimum age of criminal responsibility?

The minimum age of criminal responsibility (MACR) is the age from which a person can be held criminally responsible for offences against the law, and can be arrested, charged with, and convicted of a crime.

Currently set at 10 years across Australia, the MACR is determined by governments aiming to seek a balance between acknowledging the limits of children's accountability for their actions, prospects of children's rehabilitation, the need for community safety,⁹ and cultural and societal attitudes.¹⁰ Across Australia, the MACR in all states and territories is currently 10 years of age.¹¹ Under the Constitution, states and territories set the MACR for matters relating to state criminal codes, while the Commonwealth sets the MACR for matters relating to the Commonwealth criminal code.¹²

Historically, while education and labour laws evolved in step with the development of the concept of childhood, the MACR was left behind. In the 1930s, while minimum ages of employment increased to 13 or 14 years to accommodate education reform, the MACR remained largely unchanged.¹³ In Queensland, the MACR was set to seven years for most of the 20th century. It was not until 1976 that it was raised to 10 years.¹⁴

This means prior to their 10th birthday, individuals cannot be arrested, charged, or convicted of a crime.

In Queensland, the MACR was first legislated at seven years under the *Criminal Code Act 1899*. The legislation included a clause which ensured a person under 14 was not criminally responsible for an act or omission, unless it was proven that the child had capacity at the time of doing the act (the concept known as *doli incapax* – see appendix 3).¹⁵

Obviously cognitive ability and individual development take different timelines for different people. Arbitrary ages are convenient and make running systems very easy, but in many cases there does need to be discretion around someone's idea of right and wrong and someone's ability to know before committing an act, as much as after an act, that what they did was illegal. Testing that through a police process and the court is critical if we are to maintain criminal responsibility. There are questions around the current approach we take with a young offender, around asking them if they did know right from wrong.

Luke Twyford, Evidence provided to Queensland Parliament - 14 February 2022

Over time, the age of criminal responsibility and the age to which *doli incapax* has applied:

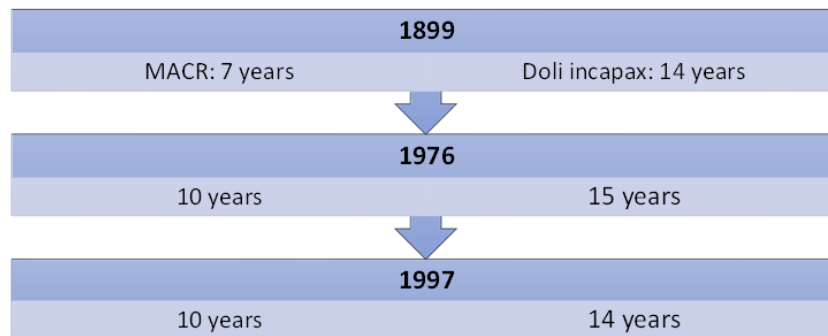


Figure 1 Evolution of MACR and *doli incapax* in Queensland, 1899 to present. Reference: Criminal Code Act 1899 (Queensland) s. 29, An Act to Amend the Criminal Code in Certain Particulars (No. 25) 1976 and Criminal Law Amendment Act (Act No. 3 of 1997).

Minimum ages of criminal responsibility around the world

Many countries have recognised the benefits of a higher MACR, and that it is possible to have a different approach to youth crime while minimising adverse consequences. Common to these international jurisdictions is the principle that the state provides first and foremost for the care and protection of any child or young person who demonstrates offending behaviour, providing responses that are educational or therapeutic in nature. Children below the age of criminal responsibility are treated by a system seeking to protect them from harm. Children over the age of criminal responsibility are treated in a youth justice system with an emphasis on diversion and rehabilitation.

MACR	Country
18	Luxembourg
16	Portugal, Argentina, Cuba
15	Denmark, Finland, Iceland, Norway, Sweden, Greece, Czech Republic
14	Austria, Germany, Italy, Russian Federation, Bulgaria, Cyprus, Croatia, Hungary, Albania, Andorra, Armenia, Azerbaijan, Estonia, Georgia, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Montenegro, Romania, Serbia, Slovenia, Spain, Ukraine, Bolivia, Chile, Colombia, Paraguay, Peru, Venezuela
13	France, Poland, Monaco, Dominican Republic, Guatemala, Haiti, Nicaragua, Uruguay
12	Canada, the Netherlands, Republic of Ireland, Scotland, Turkey, Belize, Brazil, Costa Rica, Dominica, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, St Lucia
11	Barbados
10	England, Wales, Northern Ireland, Switzerland, New Zealand, Australia, South Africa Anguilla, Guyana, St Kitts and Nevis, Suriname

Table 1: Minimum ages of criminal responsibility in countries around the world. Table references:¹⁶

Case studies

Norway: In Norway, the age of criminal responsibility is 15 years.¹⁷ The Norwegian justice system is based on principles of preventative and restorative justice measures. Children below the age of 15 who offend are acquitted but are generally subject to measures within the national child protection agency.¹⁸

Sweden: In Sweden, the age of criminal responsibility is 15 years. Children below the age of criminal responsibility who offend can be referred to the social welfare system, which includes child protection services along with a wider range of community planning and social assistance. This assistance can include assigning a contact person for a family, receiving financial support, being referred to noninstitutional care programs, or being placed in out-of-home care.¹⁹

The Netherlands: The age of criminal responsibility in the Netherlands is 12. Children under 12 who offend cannot be prosecuted criminally. The police either speak to their parents or refer them to the child protection agency. The courts can take measures when there is increased risk of further offending.

Greece: In Greece, 'educational or curative measures' can apply to children aged between eight and 13 years, even though they cannot be held criminally responsible until the age of 12.²⁰

Recent interest in the minimum age of criminal responsibility in Australia

In March 2018, the **Northern Territory** government announced it agreed in principle to increase the age of criminal responsibility to 12, in line with a recommendation from the *Final Report* of the Royal Commission into the Protection and Detention of Children in the Northern Territory.²¹

In November 2018, a **Council of Attorneys-General** working group was established to review the MACR and provide recommendations the following year.²² In August 2020, the **Australian Capital Territory** Legislative Assembly committed to raising the MACR, having passed a motion to raise the age of criminal responsibility from 10 to 14.²³ In November 2021, the Attorneys-General released a statement in which they agreed to 'support development of a proposal to increase the minimum age of criminal responsibility from 10 to 12 years including with regard to any carve outs, timing and discussion of implementation requirements'.²⁴ No timeframe for this was provided.

Bills to raise the age to 14 were tabled in **Queensland, Victoria, and New South Wales** during 2021.

In early 2022, the Queensland Parliament's **Community Support and Services Committee** examined the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*, which sought to raise the MACR to 14. During committee hearings, evidence was given supporting the view that there were insufficient resources and programs to manage and support offending children which would need to be in place before or at the same time there is legislative reform. The Committee recommended the Bill not be passed but did recommend the Queensland Government continue to work with all state and territory Attorneys-General to consider the increase of the MACR from 10 to 12 years. The Committee also recommended that any alternative proposal to the youth justice system considered by the Queensland Government should include adequate and effective diversion programs and services, including place-based and culturally appropriate practices, to support young people and address factors which lead to offending behaviour.²⁵

Is there a youth justice crime wave?

The short answer is no.

The rate of youth offending in Queensland has been steadily decreasing since 2008. From 2008-09 to 2020-21 the number of **young offenders proceeded against by police** aged between 10 and 17 years in Queensland decreased from 16,709 to 10,314 (a rate of 3,575.8 per 100,000 persons aged between 10-17 year to 1,909.7).²⁶ The number of children aged 10-13 in contact with the youth justice system is low. In 2019-20, only 464 children in that age group were proven to have offended.

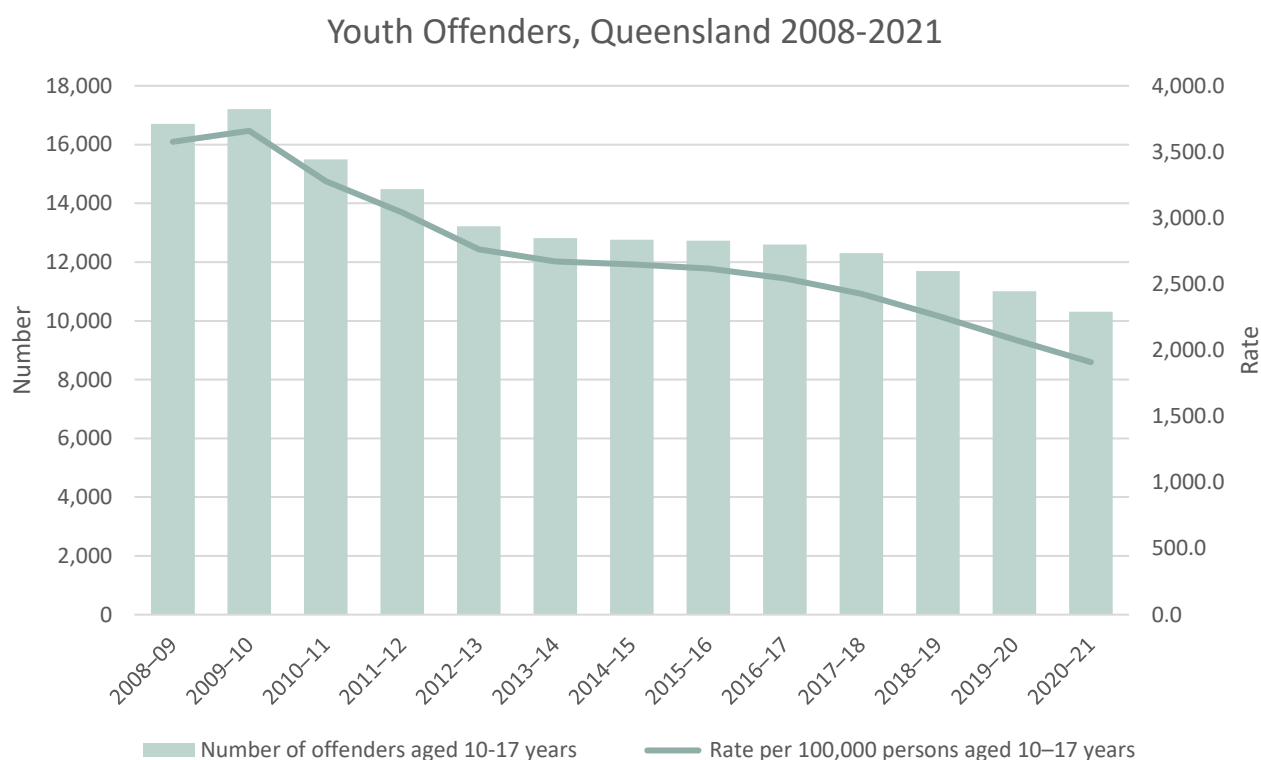


Figure 2 Youth offenders preceded against by police, number and ratio, Queensland 2008-09 to 2020-21

Not all offenders proceeded against police go to court. Of those young offenders who went to court in 2019-2020, the number and rate of **child defendants** were at their lowest in ten years (note: in February 2018, 17-year-old offenders transitioned from the adult to the youth justice system).²⁷

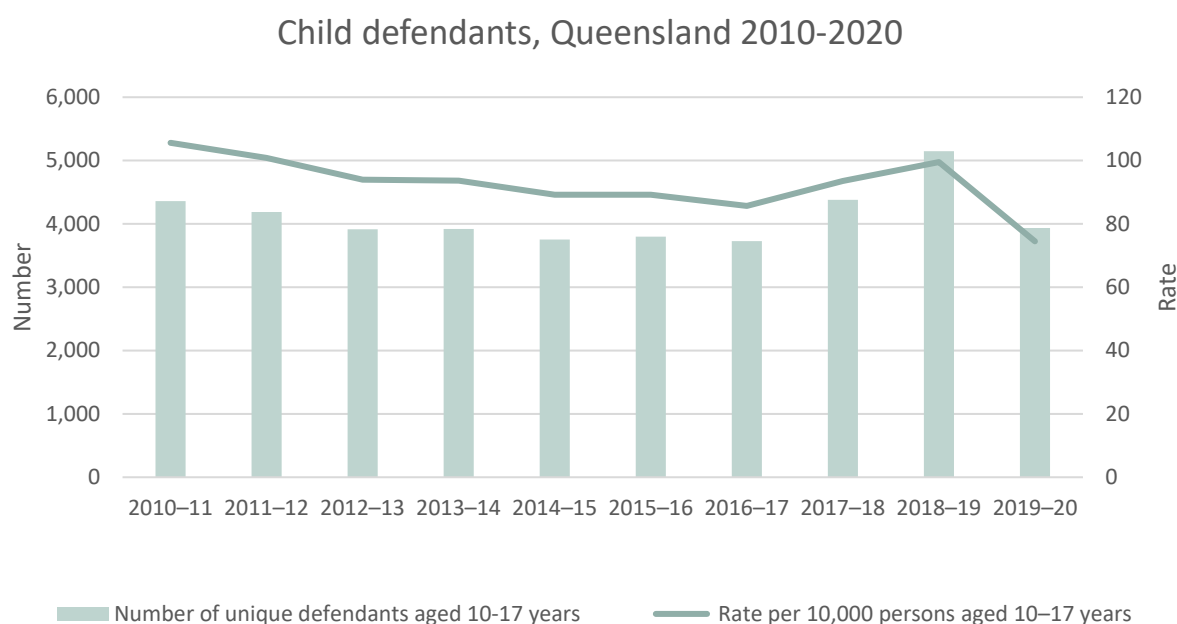


Figure 3 Child defendants with at least one finalised appearance in a Queensland criminal court, number and ratio, 2010 to 2021

Not all children who go to court have an offence proven. During 2019-20 the number and rate of children convicted of an offence (**child defendants with a proven offence**) was the lowest in 10 years (3,395 or 64.3 per 10,000).²⁸ (Note: in February 2018, 17-year-old offenders transitioned from the adult to the youth justice system).

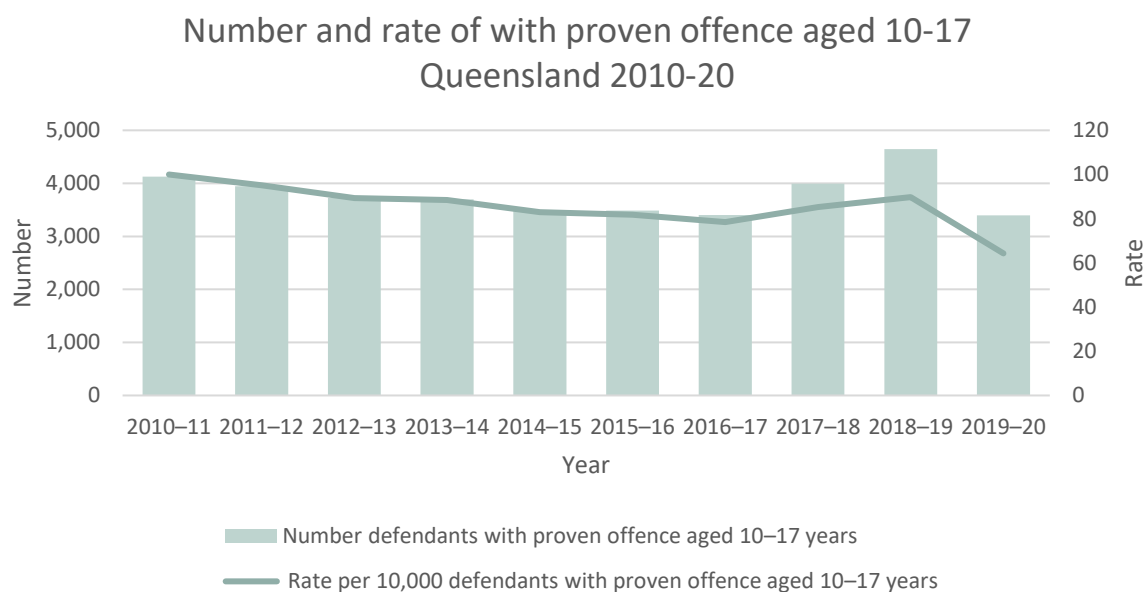


Figure 4 Number and rate of children with proven offences in Queensland over 10 years

Who are we talking about?

Characteristics of young offenders in Queensland

In 2021, a total of 1,642 young offenders were surveyed in the *Youth Justice Census*. Of these:

- 18% had an Active Child Protection Order
- 32% had been living in unstable and/or unsuitable accommodation
- 51% had experienced or been impacted by domestic and family violence
- 52% were disengaged from education, training or employment
- 31% had at least one parent who spent time in adult custody
- 15% had a disability (assessed or suspected), including 14% who had a cognitive or intellectual disability
- 45% had at least one mental health or behavioural disorder (diagnosed or suspected).²⁹

In 2020-2021, 10- to 17-year-olds from the lowest socioeconomic areas were five times more likely to be under youth justice supervision than those from the highest socioeconomic areas.³⁰

In 2019-2020, 72 per cent of child defendants in Queensland were male.³¹ Of children in detention in 2020-21, almost 90 per cent (89.5) were male.³² Of children subject to community-based supervision in 2020-21, 72.75 per cent were male.³³

Queensland's children are detained at an average rate of 4 per 10,000 on an average day. This rate varies significantly for boys (7.1 per 10,000) and girls (0.09 per 10,000).³⁴

Ages of children in contact with the justice system

Children under the age of 14 years make up a small proportion of youth offenders. In 2019-2020 of **child defendants** in Queensland, 14.5 per cent (569 of 3,933) were aged 10-14. 17-year-old offenders accounted for 30.8 per cent of child defendants (1,210 of 3,933).³⁵ Of those with a **proven offence**, 13.6 percent (464 of 3,395) were aged 10-14.³⁶

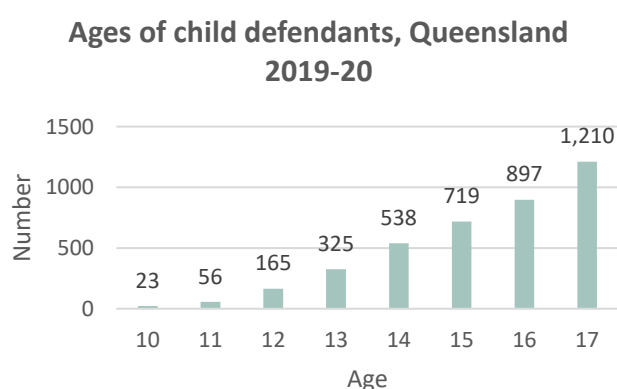


Figure 5 Ages of child defendants in Queensland 2019-20

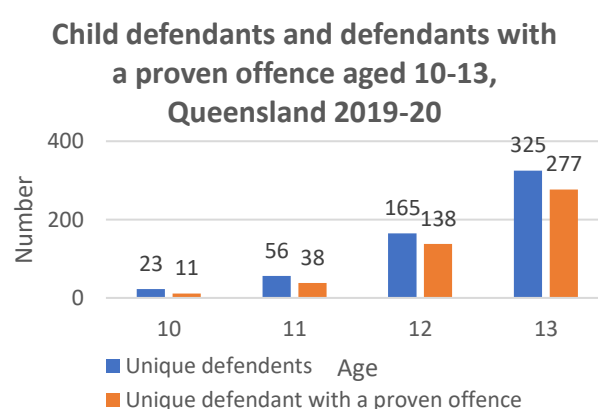


Figure 6 Child defendants and defendants with a proven offence, by age for 10-13 year olds

For children aged 10 to 13 years who went to court, the rate of conviction was between 48 to 85 per cent, increasing with age.³⁷

Offences committed

Offenders aged between 10 and 17 years accounted for 12 per cent of all offenders proceeded against by police in Queensland in 2020–21 (10,314 of 84,389 offenders).³⁸ The most common principal offence type for young offenders were acts intended to cause injury (21.52 per cent) followed by illicit drug offences (16.83 per cent), theft (14.65 per cent) and unlawful entry with intent (12.21 per cent).³⁹

Principal offences by young offenders, Queensland 2020–21

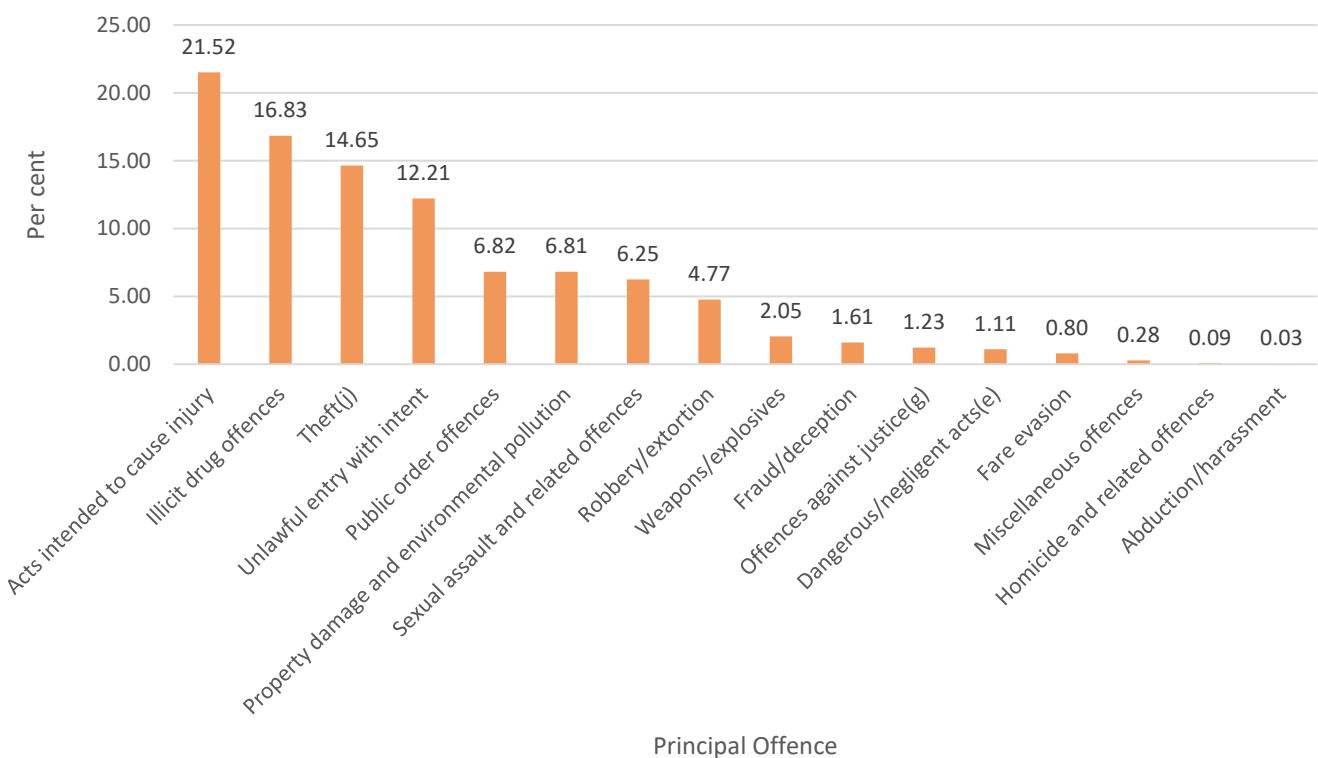


Figure 7 Young offenders, principal offence type, Queensland 2020–21

Number and ages of children under youth justice supervision

On an average night in 2020–21 there were 228.2 children in detention centres in Queensland, more than any other state or territory in Australia. During that financial year, 64 per cent of these were Aboriginal and/or Torres Strait Islander children.⁴⁰

Over 2020–21, 993 children aged 10–17 spent 83,354 nights in Queensland's youth detention centres. Of these, 126 were aged 10–13 years (12.7 per cent).⁴¹ In that same year, 2,591 children were under youth justice supervision in the community. Of these, 194 were aged 10 to 13 years (7.5 per cent).⁴²

Aboriginal and Torres Strait Islander children

Reforming the youth justice system is particularly important for Aboriginal and Torres Strait Islander children. Aboriginal and Torres Strait Islander children are significantly over-represented at all points in the justice system: the younger the child, the greater the over-representation.

Despite comprising around only 8 per cent of all children aged 10-17 years in Queensland, in 2020–21, Aboriginal and Torres Strait Islander children accounted for **46 per cent of all child defendants** who had a charge finalised in a Queensland court.⁴³ Aboriginal and Torres Strait Islander child defendants in the younger ages are *substantially* over-represented. In 2020-21 87 per cent of 10-year-olds, 85 per cent of 11-year-olds, 76 per cent of 12- year-olds and 60 per cent of 13-year-old defendants were Aboriginal and Torres Strait Islander.⁴⁴

Distinct child defendants by Indigenous status and age at offence, 2020–21

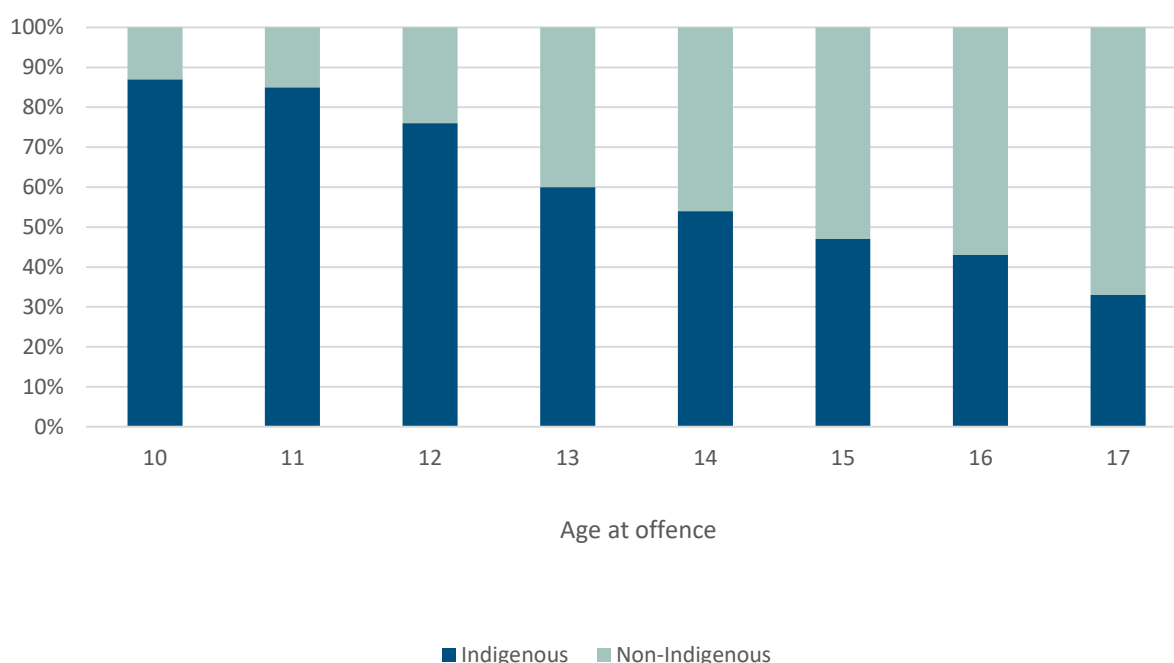


Figure 8 Aboriginal and Torres Strait Islander distinct child defendants continue to be substantially over-represented in the younger age groups between 10 and 14 years.

In 2018, an evaluation of restorative justice in Queensland found Aboriginal and Torres Strait Islander children were more likely than other young people to receive court-based referrals at later stages of the criminal justice process, including court diversion referrals (33% versus 24%) and sentence-based restorative justice orders.⁴⁵ Of children who spent time in detention, Aboriginal and Torres Strait Islander children spent more time in detention than their non-indigenous counterparts. Average number of nights in detention:

- Aboriginal and Torres Strait Islander children: 88.05
- Non-Indigenous children: 78.71.

While Aboriginal and Torres Strait Islander children as a whole are much more likely than non-Indigenous children to be under youth justice supervision both in the community and in detention, Aboriginal and Torres Strait Islander children aged 10-13 are significantly more likely to be under youth justice supervision than non-Indigenous children their age.⁴⁶

Under community-based supervision		Supervised in detention	
10 - 13 years old	14 - 17 years old	10 - 13 years old	14 - 17 years old
61.3 times more likely	16.5 times more likely	50.4 times more likely	16.9 times more likely

Figure 9 Young people who were supervised in the community and in detention centres, by age and Indigenous status

On an average night in 2020-21, 64 per cent of all children aged 10-17 years in detention were Aboriginal and/or Torres Strait Islander.⁴⁷

126 children aged 10-13 spent time in **youth detention** in Queensland in 2020-21, 100 of whom (80 per cent) were Aboriginal and/or Torres Strait Islander.⁴⁸

Aboriginal and Torres Strait Islander children (between 10 and 17 years) who spent time in detention spent **more nights in detention** than their non-Indigenous counterparts.⁴⁹

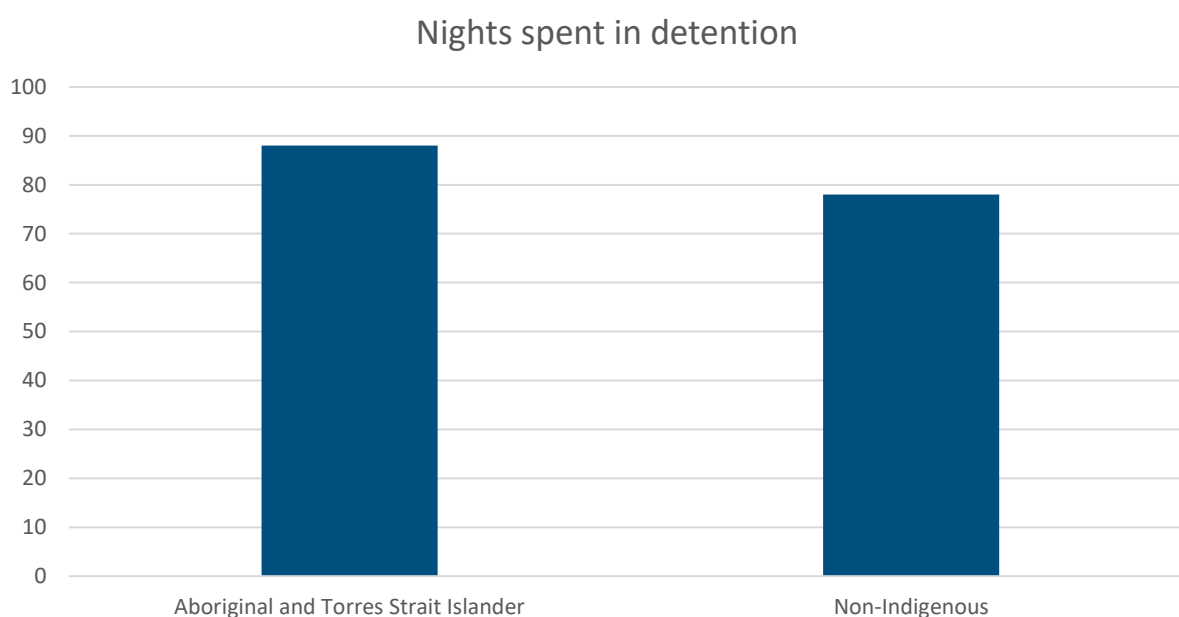


Figure 10 Time spent in detention by Indigenous status 2020-21

Despite their over-representation at all points in the justice system, and the overwhelming success rates of **group conferencing** for both First Nations and non-Indigenous children,⁵⁰ Aboriginal and Torres Strait Islander children are far less likely to complete group conferencing.⁵¹

Number of group conferences

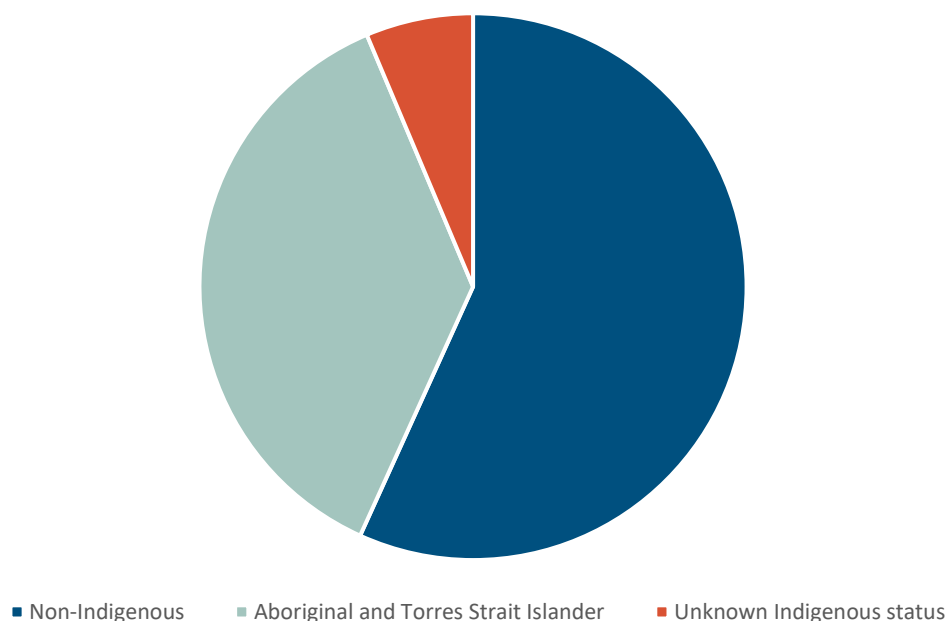


Figure 11 Group conferencing by Indigenous status, 2020-21

In 2017, the UN Committee on the Elimination of Racial Discrimination noted concern about the ‘high proportion of Indigenous children in contact with the [Australian] criminal justice system’ and the age at which they were entering the justice system. The Committee recommended Australian governments address the issue of the high rate of incarceration of First Nations children, in consultation with First Nations people. It specifically recommended Australia raise the MACR to ‘an internationally agreed age’.⁵²

Children under dual orders

The number of children subject to a youth justice supervision order who are also, at the same time, on an active child protection order has remained relatively stable since 2015-16. These ‘dual order’ children are of particular importance, given the Government is responsible for their care before, during and after a period of youth justice supervision.⁵³ **During 2019-20, there were 411 children subject to dual child protection orders and youth justice orders.**⁵⁴ (See Appendix 4)

In the Children’s Court of Queensland 2020-21 *Annual Report*, Judge Deborah Richards, President of the Children’s Court of Queensland, noted the number of these children as ‘a matter of concern’.⁵⁵ The report notes:

*These children usually have complex needs that are difficult to manage but are very much in need of protection. They are often in residential care facilities or bouncing from kinship carer to families of friends and they regularly abscond from their placements. Urgent work needs to be done to assist these children.*⁵⁶

Causes of children's offending - why raising the minimum age of criminal responsibility will work

The current justice system, from arrest to detention, seeks to rehabilitate young offenders and promote community safety. For some children, the threat of criminal penalties can serve as a precaution and can encourage children to change their behaviour. However, this is often not at the forefront of a young mind when the act of offending occurs. For too many children under the age of 14 years, early contact with the justice system leads to further contact, and eventually to time in adult prison.

By raising the MACR to 14 years, we can move away from a criminal justice response to young children who have offending behaviour toward a holistic, systemic response to meet their unique underlying needs and prevent further offending behaviour. This response can support justice without criminalisation. It will require investment in trauma-informed, therapeutic, culturally safe support for children across the entire range of social support systems in Queensland. It may also require legislative change to require parents and carers, including child protection services, to access these services where children under the age of 14 years engage in harmful behaviours. Research shows alternatives to criminal penalties, such as programs aimed to address the causes of children's behaviour, can lead to significantly better outcomes for children, and reduced offending in their communities. While criminal penalties may help some children to overcome offending, for many children exposure to the criminal justice system is linked to ongoing offending and poor outcomes in health and education.

Neurodevelopment and mental health profile of children who offend

The ability to plan and foresee the consequences of one's actions is vastly less developed in a 10-year-old than an adult.⁵⁷ A review of neuro-imaging research from children and young people at different ages indicates that the frontal lobes – the part of the brain responsible for cognitive functions such as impulse control, future planning, empathy and social interactions – is not fully developed until around 25 years of age.⁵⁸ The underdevelopment of the frontal lobes can have notable effects on adolescent behaviours. It is not unusual for adolescents to experience:

- difficulty holding back or controlling emotions
- a preference for physical activity
- a preference for high excitement and low effort activities (video games, sex, drugs)
- poor planning and judgement (rarely thinking of negative consequences)
- more risky, impulsive behaviours, including experimenting with drugs and alcohol.⁵⁹

Children in youth detention have a very different neurodevelopmental and mental health profile compared to children who are not in custody. A multidisciplinary assessment of 99 children in youth detention in Western Australia's youth detention centre found 89 per cent had at least one severe neurodevelopmental or mental health disorder.⁶⁰ These disorders included Fetal Alcohol Spectrum Disorder (FASD), intellectual disability, Attention Deficit Hyperactivity Disorder (ADHD), trauma/attachment disorders, depression, anxiety, learning difficulties, and speech and language disorders. The findings highlight that many, if not most, incarcerated children with a chronological age of 10 years are likely to have a functional age much younger than 10 years of age, impacting impulse control and decision making.

There are known gaps in the child and family support system for children whose high-risk behaviours are considered too complex to be addressed by universal services, but not complex enough for specialist or statutory services. These children can miss out on early, timely responses that may keep them safe and away from involvement in the youth justice system.⁶¹

Outcomes for children involved with the justice system

For many children, contact with police can be linked to complex life circumstances, so it may not be the only cause of adverse health, social and offending outcomes. A recent study undertaken in New South Wales showed that almost one in six children had contact with police by the age of 13, either as a victim, person of interest or a witness. Children who have contact with police, whether as a person of interest or a victim, are more likely to have further contact in separate incidents. This means police contact is a signifier of wider disadvantage. Consequently, any contact with police should be accompanied by delivery of programs aimed to mitigate risk factors and promote protective processes aimed to prevent later offending behaviour.⁶²

Police practices generally also have a considerable impact on outcomes for children and young people. In the United States, 'aggressive' policing of children and young people has been found to impact education outcomes, particularly among children from culturally and linguistically diverse backgrounds.⁶³ Intrusive police contact has also been found to be associated with symptoms of depression in children and young people, even after accounting for the other factors in these children's lives.⁶⁴

Periods of detention in early adolescence are linked to lower educational attainment and increases the likelihood of contact with the adult criminal justice system.⁶⁵ A body of research has emerged showing that, following time in detention, young people have difficulty finding housing and employment, participating in social groups, and maintaining interpersonal and family relationships.⁶⁶

A recent Australian study showed a majority of young offenders in detention, particularly from Aboriginal and Torres Strait Islander backgrounds, have come to identify crime as their 'way of life', leading to further involvement with the criminal justice system.⁶⁷ The youth detention environment also has the potential to reinforce the trauma previously experienced by young offenders, which may also increase the likelihood that a child reoffends.⁶⁸ The age of offenders can make an important contribution as well: children who are arrested before the age of 14 years have been shown to be three times more likely than children arrested after 14 years to become chronic adult offenders.⁶⁹

In the US, a recent study has found people with a history of youth detention are more likely to be convicted for a drug offence in adulthood.⁷⁰ Life outcomes following a period of detention can be influenced by other intersecting vulnerabilities, such as gender and ethnicity.⁷¹

People who spent time in detention as children have been shown to be more likely than other people to experience poor mental and physical health outcomes in adulthood, including depression and suicidal ideation.⁷² While this can be related to the existing vulnerabilities of the cohort of children who encounter the detention system, it shows that these children need greater support for their physical and mental health.

Sadly, there may also be a link between contact with the criminal justice system and certain causes of death of children. Analysis of data from the Queensland *Child Death Register* indicates children with recorded history of

contact with the justice system are overrepresented in child deaths from external causes (i.e. deaths from transport, drowning, other non-intentional injury, suicide, and fatal assault and neglect) in Queensland.

In the five-year period, from 1 July 2016 to 30 June 2021, 243 children aged 10–17 years died in Queensland from external causes. Of those, 21 per cent had evidence of prior contact with the justice system (50 of 243 deaths).

Suicide was a cause of death for 132 of these young people, for whom 22 per cent (29 of 132 deaths) had prior contact with the justice system.⁷³

A non-criminal justice response can achieve the objectives of Queensland's *Youth Justice Act 1992* including accountability, rehabilitation and community safety. To be effective the response must be proportionate to the child's offending behaviour and achieve proximity, relevance and rehabilitative potential.

This will not be easy. However, it is necessary to offer children the support they need to stop offending, to reduce the amount of youth offending in communities, and to bring Queensland in line with international standards. Government and non-government partners will need to work together to strengthen existing support systems to achieve strong, positive outcomes for children, families and communities.

Better outcomes for children outside the criminal justice system

Just as research has demonstrated the potential negative impacts of criminal penalties on children, there is increasing evidence that non-criminal responses can help to support children and reduce offending. In 2010, an international review of 29 trials over a 35-year period, showed that criminal justice responses were more likely than diversionary programs to lead to children reoffending.⁷⁴ A similar study in 2018 showed police-led diversion to be more effective than traditional justice responses, with a 44 per cent reoffending rate compared to 50 per cent.⁷⁵

A recent study by the UK Police has also showed police diversion has been successful at reducing reoffending among young people, compared to traditional criminal justice processes.⁷⁶ Non-criminal responses can be particularly effective with children who may be at higher risk of deeper involvement with justice systems, based on their cultural background.⁷⁷

Across Europe, cognitive and behavioural programs for young offenders are more common than programs based on punishment and deterrence, owing to the evidence that punitive approaches may contribute to reoffending rather than reduce it. These programs are typically mandatory for participants, delivered in community settings by social workers, educators or mental health professionals. By operating on a risk-need-responsivity model, which targets the programs in a way that responds to the needs of the young person, they have led to average reductions in reoffending by 30 per cent.⁷⁸

While it is possible to increase the role of diversion and targeted approaches within a criminal justice model, the success of non-criminal penalties and programs shows the possibility of achieving significant outcomes outside the justice system altogether. Raising the MACR, in favour of a targeted and supportive approach to children under the age of 14 years, could have the dual effect of reducing crime while acknowledging the developmental needs of young children and protecting their rights.

The crime reducing effect of education

Engagement in education is shown to have a positive impact for social success. There is a negative correlation between crime and the age at which a person discontinued with education. Internationally, education is considered a key policy tool in efforts to reduce crime.⁷⁹ Equitable access to quality, inclusive and responsive education is a fundamental pillar of an alternative response to children's offending behaviour. In Queensland access to education is recognised as a human right and must be available to all children in all parts of the state.⁸⁰

Cost of keeping children under supervision

There are substantial costs involved in the provision of youth justice services in their current form. Keeping a child in **detention-based supervision** costs the state \$1,879.80 per day per child. Real government expenditure on detention-based supervision is \$162 million per annum.⁸¹ **Community-based supervision** costs \$253.42 per day per child, costing the government almost \$128 million per annum.⁸²

Group conferencing costs \$3,175.06 per concluded group conference. In 2020-21 there were 2,110 group conferences concluded at a total cost of \$6,699,000 to the government.⁸³ Group conferencing almost always results in agreement – in 2020-21, 98.1 per cent of group conferences resulted in agreement.⁸⁴

Current Government distribution of expenditure
on some youth justice services

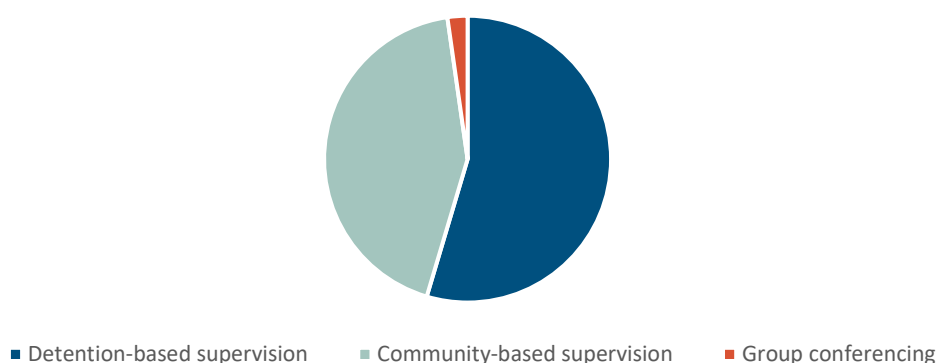


Figure 12 Current Government distribution of expenditure on some youth justice services

Growing support for raising the minimum age of criminal responsibility

The UN has been advocating for change in the way countries determine their minimum ages of criminal responsibility and how young people who have offended are treated under the law since 1985.⁸⁵ The UN recommends jurisdictions determined the minimum age of criminal responsibility based on the most up to date evidence about emotional, mental, and intellectual maturity.⁸⁶ (See Appendix 2)

Raising the age of criminal responsibility is considered a priority for human rights, child advocacy and Indigenous justice groups. The National Aboriginal and Torres Strait Islander Legal Services,⁸⁷ Amnesty International,⁸⁸ Human Rights Law Centre,⁸⁹ Save the Children,⁹⁰ the Royal Australasian College of Physicians,⁹¹ the Law Council of

Australia and the Australian Medical Association⁹² are some amongst many others⁹³ who support a raise in age based on their respective areas of expertise.

The Australian and New Zealand Children's Commissioners and Guardians group, which includes the Queensland Family and Child Commission, has been advocating to raise the age to at least 14 years since 2019.⁹⁴

How can Queensland raise the minimum age of criminal responsibility to 14 years?

The behaviour of young children is influenced by factors including adverse childhood experiences, health and mental health issues, negative peer and family influences, and gaps in services, which may not be accessible, available or suitable to support children's development.

Currently, children younger than 10 years who behave in antisocial ways are provided guidance and support to change their behaviour – those aged 10 years and over are met with a criminal justice system that responds with criminal penalties. There is a growing body of evidence that shows this approach does not reflect the level of maturity children hold at such a young age, and does not provide the best outcomes for children, their families and the communities they live in.

To make a difference we need a system that holds young people and their families accountable for poor behaviour in a way that enables the young person to demonstrate empathy and remorse, understand the impact of their behaviour, and change their behaviour. This is called restorative justice. It is used throughout our world, by parents, schools, workplaces and social groups where behaviours are regulated in a way that encourages learning and change, allowing children to make conscious choices to change their behaviour with the support of people and services.

All I would say on that is that as parents we tend to get it right. Parents with two children will punish or respond to poor behaviour differently depending on the child. The good parent will be focusing their actions on changing that young person's mind and teaching them through the process, but also having a level of compassion that the punishment that is doled out is not creating permanent harm and is not offsetting the respect between a parent and a child, but is driving towards better behaviour. As a society, I question how we create a system that does that. Many of us have referred to restorative justice approaches for that very reason, that is, we need to understand what is driving each young person and take them through a process of learning why what they did was wrong but, more deeply, why they did what they did; and engaging victims, the community and, in fact, statutory authorities around them to put in place the pillars that we have also spoken about today to ensure that the community is safer. – Queensland Family and Child Principal Commissioner Luke Twyford - Evidence provided to Queensland Parliament - 14 February 2022

Restorative Justice

The foundational principles of a restorative approach are to cause no further harm, work with those involved and set relations right. Maintaining social order, restoring moral balance, and promoting deterrence are all legitimate outcomes of a justice system. However, relying primarily on punishment to restore balance and teach lessons can be ineffectual, even counterproductive, particularly for marginalised young people.

Restorative justice holds that an official response to crime should not only (i) *respond* to the specific incident and the harm it has caused, but also work to: (ii) *prevent* harmful behaviour from recurring, and (iii) *promote* the wellbeing of those affected. This work of *responding* to something bad, *preventing* something else bad from happening, and *promoting* something good, typically requires that an intervention effect some sort of ‘**restoring right relations**’, or ‘**re-setting relations**’ within the community of people affected by the harm.

Authorities that focussed primarily on punishment can tend to neglect the needs of victims of crime. In contrast to retributive justice, the core ideas of restorative justice are that:

- because crime causes harm, a core requirement of justice should be to repair that harm for the victim and the community
- the people most immediately affected should be supported in their search for compensation/restitution
- members of a broader community (including professionals) may also participate in that search.

In restorative justice authorities are primarily responsible for providing a suitable process, rather than imposing an outcome. An appropriate process should enable the people involved to agree on how, in this particular case, our particular community will:

- respond to the specific harm
- prevent further harm in general
- promote wellbeing.

If our focus is on providing support necessary to change their circumstances, we can create the opportunity for just consequences and the possibility to understand how their behaviour has impacted upon others so they can take responsibility and make amends. A just outcome is more likely to be achieved in the context of the rights and lived experiences of both the victims and the offender.

Commissioner Natalie Lewis - Evidence provided to Queensland Parliament - 14 February 2022

To effectively respond to children under the age of 14, the Queensland government should establish a restorative justice approach outside the criminal justice system. This system would ensure:

- those who work and engage with children are equipped to identify behaviours that can escalate to become harmful or offending
- clear referral pathways exist for children to receive dedicated services focused on addressing the causes of their behaviour
- case managers and service providers make active efforts to address a child's individual needs, helping them and their family make sustainable changes for long-term positive outcomes
- where children have behaved in harmful or unsafe ways, decisions can be made by a panel of diverse professional and community members with expertise in child and adolescent development, psychology, children's rights and service provision
- responses are provided within a statutory framework which clearly outlines the responsibilities of service providers, families and carers to make sure children receive the support that addresses their needs.

In this system, the community should expect:

- restitution when they are impacted by the behaviour of a young person
- rehabilitation for young children in their community who are behaving in anti-social ways
- a clear responsibility on parents and carers to ensure children address their behaviours
- community safety promoted by the prevention of the causes of offending behaviour.

In this system, children should expect:

- dedicated services focused on their best interests
- meaningful support to overcome the causes of harmful or unsafe behaviour
- a system that aims to prevent further issues and break the trajectory into the youth justice and adult corrections systems.

While the detailed design of the system will require full consideration, options for implementation could include

- programs to support people, including children, who have been impacted by offending
- a strengthened, trauma-informed, therapeutic child rights and wellbeing system, incorporating housing, education, health and child protection services, offering supports and referral pathways to reverse a child's trajectory toward offending
- investment and commitment to transforming the child wellbeing system so it can provide therapeutic, responsive care that supports children with harmful behaviours and prevents further offending
- priority health and disability screening for children at key developmental points
- trauma-informed support officers in schools, provided outside police or child protection systems, empowered to refer children to appropriate services
- a behaviour framework for schools that replaces school disciplinary absences (suspensions and exclusions) with alternative education pathways, to make sure children remain in contact with schooling
- therapeutic alternatives to residential care services for children in out-of-home care
- consideration of secure therapeutic care available for children with serious health or mental health issues and behaviours that are harmful to themselves, or others
- a new statutory framework guiding the requirements of parents, carers, government agencies and service providers to make sure children are supported to access the supports they need.

Existing programs to support children and young people

There are programs currently operating in Queensland which support children and seek to address the causes of their offending behaviour, promoting community safety by preventing reoffending. Police and the courts can choose to refer a child to an alternative diversion program. These programs are designed to help the child understand the harm caused by their behaviour and allow the child an opportunity to take responsibility for the offence.⁹⁵

Actions and programs can include:

- remedial actions
- activities intended to strengthen the child's relationship with their family and community
- educational programs.⁹⁶

While alternative diversion exists in legislation and policy, if the MACR is raised to 14 years, children below that age will no longer be technically 'diverted' from the criminal justice system as that system will no longer apply to them. However, the same or similar programs may still be useful to support children under the age of 14 and prevent further harmful behaviour. In particular, interventions involving a child's family have been shown to reduce reoffending. For children in out-of-home or residential care, therapeutic day programs have been shown to deliver good outcomes.⁹⁷

The Queensland Government currently delivers programs to children involved with the youth justice system, including:

- [Transition 2 Success](#), providing job skills training, social skills training, and behavioural management training for over 15-year-olds who are in the youth justice system or at risk of entering it
- [Changing habits and reaching targets](#), a program to reduce young peoples' risk of reoffending
- [Aggression replacement training](#), a rehabilitative program for young people who have been found guilty of a violent offence or shown violent behaviour
- [Adventure based learning](#), challenging anti-social behaviour an environment where being part of a team is necessary.

A range of non-government organisations also deliver intervention and prevention programs, including:

- [Community Youth Response Diversionary Program](#), funded by the Queensland Government Department of Youth Justice and facilitated through Kurbingui, a restorative justice program or have been involved in activities that may result in police intervention.
- [Reconnect](#), funded by Australian Government Department of Social Services, a community based early intervention program for young people aged 12 to 18 years who are homeless or at risk of homelessness⁹⁸
- [Youth Support Program](#), facilitated by YETI (Youth Empowered Towards Independence), providing access to programs that support social and personal development, referrals to community support services and outreach support for vulnerable young people aged 12-18 in the Cairns area
- [Pamle Pamle](#), facilitated by Deadly Inspiring Youth Doing Good, supporting young people in out-of-home care (located in Cairns)
- [The Hut](#), facilitated by IYS (Inspire Youth and Family Services), an early intervention outreach program for vulnerable young people aged 12-25 years (located in Inala) [Emerge](#), facilitated by Emerge Café, a youth support service in Toowoomba.

On Country programs

Culture plays an important role in how children manage and express traumatic life experiences, protect against the risk of continued trauma and identify supports and interventions that are effective.⁹⁹ On Country programs can help Aboriginal and Torres Strait Islander children strengthen cultural and spiritual connections, improve family relationships and connect with community leaders, Elders and Traditional Owners. On Country programs promote self-identity and can lead to re-engagement with education, while providing children with support to access family and other support services.

Justice Reinvestment

In 2013, the town of Bourke in north-west New South Wales began to pilot an Aboriginal-led place-based model of justice reinvestment, known as Maranguka. It sought to redirect funding away from crisis response, youth detention and adult corrections, toward preventative, diversionary and community development initiatives. In 2018, KPMG found the program had achieved a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five youth offence categories. The positive impacts of the program were seen to have a value five times greater than its operational costs for the 2017 calendar year.¹⁰⁰

Lessons from other jurisdictions

Several jurisdictions have considered requirements and strategies for increasing the MACR in detail. While each of these jurisdictions are demographically and geographically different from our own, there is much Queensland can learn from their research and experiences so far.

Australian Capital Territory

On 25 August 2020, the Australian Capital Territory committed to raising the MACR to 14 years. In August 2021, the ACT Government released *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (the ACT Review).¹⁰¹ The ACT Review highlights the need for improved responses to support children under the age of 14 years who behave in harmful ways, including improvements in:

- health
- mental health
- responses to children who use or are victims of violence
- substance misuse
- education
- statutory child protection
- early intervention services.

The ACT Review states the need for models that respond to children with complex needs. The model must:

- be multi-level and ecologically complex in their delivery
- coordinate multiple services and challenge barriers created by service silos
- emphasise continuity over time, ensuring both seamless delivery and engagement by staff with clients, patients or residents
- be negotiated on a case-by-case basis, with services matched to people's cultures and contexts
- be designed to offer a continuum of interventions from least to most intrusive

- be effective.

Models considered by the ACT include: multidisciplinary models; an alternative supportive police response; safe and secure accommodation options (e.g. secure care); and therapeutic jurisprudence and solution-focused courts.

Tasmania

Raising the minimum age of criminal responsibility: law reform considerations is a report commissioned by the Tasmanian Commissioner for Children and Young People. The report considers an alternative legal framework and legal implications of raising the MACR in Tasmania. The report recommends amendment and recalibration of existing law to ensure the rights and interests of relevant communities are adequately addressed and that appropriately tailored child protection and care is mandated.

Recommendations include:

- victims of crime compensation legislation be expanded to cover property damage caused by children aged below the MACR
- a new provision be added to the Criminal Code to proscribe the intentional recruitment of children to commit an offence
- the *Children, Young Persons and Their Families Act 1997 (Tas)* be amended to clarify that children who cause risk to themselves or others come within the jurisdiction of the Act
- roles, responsibilities and restrictions for police dealing with children younger than the MACR be clarified by statute
- police powers to collect forensic evidence from children be amended to reflect any new MACR.

New Zealand

Although New Zealand's minimum age of criminal responsibility is set at 10 years, in practice children aged 10-13 years are provided with a different response to children aged 14-17 years. The majority of children aged 10-13 years who offend are addressed through police diversion. For more serious offences, the police may consult with Youth Justice to determine whether to convene a Family Group Conference. This is a restorative justice approach that gathers the young person, their family, any victims, Police Youth Aid, the young person's Youth Advocate and other professionals to establish a plan to address the offending and underlying causes, providing for the victims' interests and helping the young person to take responsibility for their actions.¹⁰²

The Youth Court operates primarily for children aged 14-17 years, but also deals with serious offending by children aged 12-13 years, and the offences of murder or manslaughter for children aged 10-13 years.¹⁰³ If a child aged 10-13 years commits serious or repeat offences, they may be considered to be 'in need of care or protection' under s.14(e) of the *Oranga Tamariki Act 1989* (NZ).

Only 20 to 30 per cent of police apprehensions come before the Youth Court. Youth Court judges focus on cases involving serious offending by young people with complex needs, which can also result in Family Group Conferences rather than traditional sentences.¹⁰⁴ The number and rate of youth offending in New Zealand has decreased markedly over the 10-year period 2010-11 to 2020-21:

- the proportion of children aged 10-13 years whose offending was serious enough to lead to Family Group Conferencing or court action has fallen by 61 per cent
- the overall offending rate for children aged 14-17 years has reduced by 63 per cent
- there has a 57 per cent decrease in offending rates for Māori children aged 14-17 years, however offences are recorded for Māori children at four times the rate of European/other children.¹⁰⁵

Scotland

Keeping the Promise to our children, young people and families is the Scottish Government's strategy to guide delivery of child protection and wellbeing services by 2030. Released in March 2022, it follows the recent increase of the age of criminal responsibility in Scotland from eight to 12 years, and a commitment to end the use of youth detention centres for children under the age of 18 years.¹⁰⁶

Keeping the Promise includes immediate actions across the Scottish Government to bring 'transformational change' for children and young people. It seeks to reduce the number of children who require out-of-home care placements, and reduce harmful behaviours, by providing early and significant support to children and families in need.

Currently, Scotland only uses its 'Young Offenders Institutions' for children aged 16 and 17 years. Children below the age of 16 years can be placed in secure care, which is a locked, therapeutic accommodation option for children at risk to themselves or others, or children who have criminally offended.

Where to from here?

Alternatives to criminal penalties have been shown to reduce reoffending by addressing children's needs in more age-appropriate ways. These programs, delivered outside a criminal justice system, protect children's rights and improve community safety.

Raising the minimum age of criminal responsibility to 14 years aims to respond to their individual circumstances and prevent further harmful behaviours. Queensland already has programs in place to divert children away from the criminal justice system. To increase community safety, reduce crime and improve life outcomes, these programs should be strengthened. The broad child and family support system, encompassing health, education, housing, child protection and other services, should coordinate availability and access to these services to make sure children at risk of harmful behaviours receive interventions that redirect their behaviour.

Priority should be given to making sure services are available across Queensland, including in regional and remote areas. All children in Queensland should have equal access to services that seek to prevent further offending.

In addition, new therapeutic supports may be required for the small number children who present a risk to themselves or others. Some consideration should be given to legislative change that would legally require parents and carers, including out-of-home care providers, to provide children with access to this support. Crucially, this support would need to be based on meeting a child's behaviour needs in ways that are therapeutic, trauma-informed, and culturally safe.

By strengthening our age-appropriate responses to children under the age of 14 outside the criminal justice system, we can change the sentence for children, families and communities across Queensland.

Feedback

As part of our ongoing work on youth justice in Queensland, the QFCC will continue to explore options to strengthen responses to youth offending. We welcome ideas, evidence, case studies or any additional feedback to help further develop an improved model for children aged 10 to 13.

If you have information or options that could inform this future work, please contact us at strategicpolicy@qfcc.qld.gov.au.

Appendix 1: Carve Outs

A 'carve out' is a legal term describing elements of limitations or exclusions from a law, for example, having different penalties for different types of crime. In November 2021, a statement from Attorneys-General around Australia indicated they would consider the use of carve outs if implementing an increase to the MACR.

In 2019, the UN Committee on the Rights of the Child expressed concern over practices that allows exceptions to a minimum age of criminal responsibility. The Committee stated a '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.'¹⁰⁷

The court already holds discretionary powers regarding the publication of identifying information about a child for offences which involve violence against a person and if the offence is considered to be a particularly heinous offence.¹⁰⁸ A similar threshold could be used to determine which offences might be captured in any proposed carve out.

If a carve out is implemented, court processes should also be strengthened to make sure children under the age of 14 years are guaranteed their right to be treated in a manner consistent with their age. The process for determining *doli incapax* should be strengthened for carved out offences, to make sure the court can be satisfied the child understood wrongdoing. Independent assessments of health, mental health and cognitive capacity should be required. In all cases, preference should be given to restorative justice processes.

Where a child under the age of 14 is found guilty of an offence, restorative justice responses should still be available, responding to the serious nature of the offending with a commensurate level of intervention to address the causes of the behaviour and ensure community safety.

Appendix 2: Australia's international obligations

Convention on the Rights of the Child

On 20 November 1989, the United Nations General Assembly adopted the *Convention on the Rights of the Child* (UNCRC). The UNCRC establishes an international standard for the recognition and support of the rights of the child and proclaims that children are entitled to special care and assistance.

The UNCRC provides 54 fundamental rights of children, including:

- the best interests of the child shall be a primary consideration in all decision making (**Article 3 (1)**), and
- the arrest, detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time (**Article 37 (b).9**)

As a signatory to the UNCRC Australia has committed to ensuring children enjoy the rights in the UNCRC and to realise their full potential.

The United Nations' recommendations

Between 2007 and 2019, the UN Committee recommended 12 years as the minimum acceptable MACR.¹⁰⁹ In 2019, it released a new document (*General Comment No. 24*) that revised this to *at least 14*.¹¹⁰ The change was made to reflect to contemporary knowledge about child development that shows adolescent brains continue to mature beyond the teenage years.¹¹¹ In its 2019 concluding observations on the combined fifth and sixth periodic reports of Australia, the UN Committee urged Australian governments to bring their youth justice systems in line with the Convention and raise the minimum age of criminal responsibility to the internationally accepted level of at least 14 years.¹¹²

The Beijing Rules

The UN's *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) guide and supplement the provisions of the UNCRC which relate to youth justice.

The Beijing Rules were adopted by the UN General Assembly on 29 November 1985. While the Beijing Rules do not specify a minimum age, they state the MACR should 'not be fixed at too low an age, bearing in mind the facts of emotional, mental and intellectual maturity.'¹¹³

The Beijing Rules also state there should be a relationship between the MACR and other rights and responsibilities, such as the age of majority.



Figure 13 Timeline of United Nations recommendations on MACR

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

In December 2017, Australia ratified the United Nations *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT). OPCAT provides further guarantees for children's rights, by requiring regular inspections of places of detention in order to reduce the likelihood of mistreatment in these challenging environments. OPCAT implicitly recognises the risk that children may be mistreated in detention settings, adding weight to arguments to raise MACR to an internationally acceptable level.¹¹⁴

Appendix 3: *Doli Incapax*

Doli incapax is a rebuttable presumption that children are incapable of forming criminal intent. A presumption of *doli incapax* or criminal incapacity applies to children under the age of 14 years.¹¹⁵ The legal test works by requiring the prosecution to argue against the presumption, using evidence that shows a child knew their actions were morally wrong.

In theory, *doli incapax* should act as a safeguard for children who lack the capacity to understand where a crime has been committed. In practice, *doli incapax* has proven difficult to administer through courts and it is often the case that a child who is arrested will say that they did the wrong thing to the police officer. The 2018 *Report on Youth Justice* found *doli incapax* is 'rarely a barrier to prosecution' in Queensland.¹¹⁶

Children can be held in custody for long periods before the presumption is tested and the child is acquitted.¹¹⁷ It can also be difficult to determine whether a child knew the relevant act was wrong, which has led to the court considering highly prejudicial evidence that would normally be inadmissible. The Australian Law Reform Commission has stated 'in these circumstances, the principle may not protect children but be to their disadvantage.'¹¹⁸

Failure to routinely apply the principle of *doli incapax* results in children who may have cognitive or other impairments receiving criminal sanctions and becoming embedded in the criminal justice system.¹¹⁹ The current administration of *doli incapax* places pressure on clinical resources and courts, as well as doing harm to children: children remain in the justice system, including in custody, until the process is complete.¹²⁰

The Australian Human Rights Commission has recommended a national review of the operation of *doli incapax*, and its effectiveness in providing adequate protection to children who lack the capacity to understand where an offence has been committed.¹²¹ Raising the age of criminal responsibility to 14 years would allow Queensland to remove the principle of *doli incapax* from criminal law for this age group.

Appendix 4: Interaction between child protection and youth justice outcomes

Child abuse and neglect have particularly pervasive and long-lasting effects on children and their futures. The negative repercussions of child abuse and neglect are wide-ranging and impact many aspects of children's lives. This can include poor emotional and mental health, social difficulties, cognitive dysfunction and behavioural problems (e.g. aggression, offending behaviours, adult criminality, abusive or violent behaviour).¹²²

Governments have a responsibility to promote physical and psychological recovery and social reintegration of any child who has experienced abuse and neglect.¹²³ Many children under youth justice supervision (community or detention-based supervision) have current or previous contact with child protection services. In 2018-2019, of the 3,128 children under youth justice supervision in Queensland, **56.8 per cent** had also received child protection services (including investigated notifications, care and protection orders or out-of-home care) in the previous five years.¹²⁴ Aboriginal and Torres Strait Islander children and females under youth justice supervision were most likely to have received a child protection service in those five years.¹²⁵

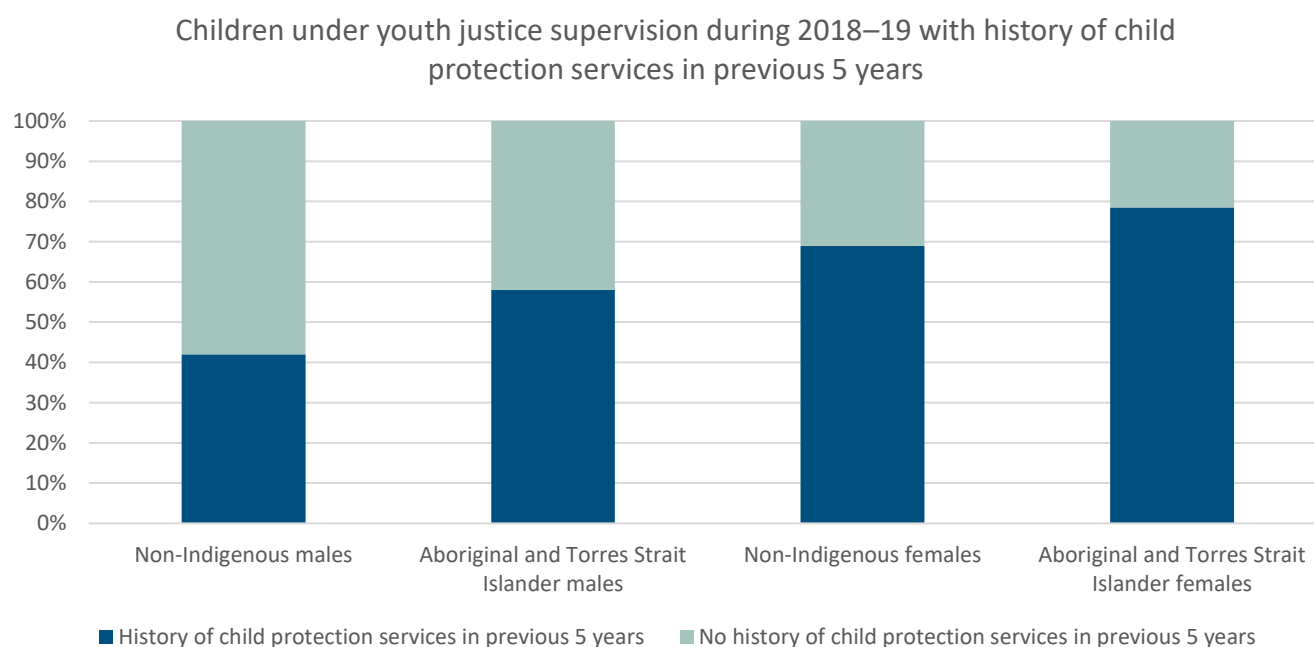


Figure 14 Children under youth justice supervision during 2018–19 with history of child protection services in previous 5 years

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