The age of criminal responsibility in Queensland
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The Queensland Family and Child Commission (QFCC) is committed to influencing change so Queensland is a safe place where children, young people and their families thrive in supportive communities. As Principal Commissioner of the QFCC, one of my roles is listening to the voices of children and young people and promoting and advocating for their safety and wellbeing. Their voices, the voices of their families as well as the vast body of academic literature shows us that contact with the youth justice system can have a lasting impact on a child’s wellbeing and future prospects.

The reality of life in youth detention has been brought home to the broader community with recent confronting media stories and images. It has prompted many people to question whether there is a different way to work with children and young people who come into contact with the youth justice system. We need to consider what else might be happening in children’s lives and the impact of past experiences on their current actions. It is with these questions in mind that the QFCC decided to explore the impact Queensland’s minimum age of criminal responsibility has on our young offenders.

The minimum age of criminal responsibility is the minimum age at which children can be arrested for, charged with, or convicted of a crime. In Queensland, the minimum age of criminal responsibility is 10 years. This paper considers whether the available research and data support a higher minimum age. We found 10 to 12-year-olds are not developmentally mature enough to be held criminally responsible for their actions. When we looked at the characteristics of very young offenders, we found many struggled with issues such as poverty and homelessness, abuse and neglect and mental illness. The low minimum age of criminal responsibility further victimises children who are already victims of circumstance.

We also know Aboriginal and Torres Strait Islander children are overrepresented in the youth justice system and comprise the majority of children in youth detention. The release of the ninth Closing the Gap report by the Prime Minister on 15 February 2017 has again highlighted the high rates of Aboriginal and Torres Strait Islander incarceration. The Closing the Gap report stressed the importance of working collaboratively with Aboriginal and Torres Strait Islander communities to create real opportunities for our First Nations People.

In light of this evidence, the QFCC provides three options for improving the way the youth justice system responds to 10 to 12-year-old offenders. First, increase the minimum age of criminal responsibility in Queensland to at least 12 years. Second, eliminate youth detention as a sentencing option for 10 to 12-year-old offenders. Third, make participation in youth justice conferences compulsory for 10 to 12-year-old offenders.

I hope this paper will provoke discussion about the treatment of young people in the youth justice system. I encourage you to join the QFCC in campaigning for a fairer youth justice system in Queensland.
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Revelations of brutality against detainees in the Northern Territory’s Don Dale Detention Centre, televised on the Australian Broadcasting Corporation’s *Four Corners* program¹ in July 2016, have renewed the debate on youth justice in Australia. The primary subject of the program, Dylan Voller, was 11 years old when he was first incarcerated. Mr Voller’s incarceration and subsequent allegations of mistreatment at Don Dale Detention Centre raise the question of whether he, or any 11 year old, should be held criminally responsible for his or her actions.

The process of determining an appropriate minimum age of criminal responsibility (MACR) is incredibly complex and requires consideration of a number of interlinking factors. The Australian Institute of Criminology has remarked,

> ‘one of the most difficult areas of criminal justice policy lies in providing appropriate legal mechanisms to reflect the transition from the age of childhood innocence through to maturity and full responsibility under the criminal law.’²

Goldson also questions whether it is even possible to define an arbitrary MACR that ensures all young offenders have the capacity to understand both:

1. what the law requires them to do or not to do, and
2. the consequences for committing illegal acts.³

The MACR for the Commonwealth of Australia, and in all Australian states and territories, is currently 10 years (see Table 1 in the Appendix). This is complimented by a presumption against criminal responsibility until 14 years. This is in direct contradiction to the position of many stakeholders, including the United Nations (UN), which has recommended the MACR be set at 12 years or higher.⁴

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This information paper examines research and data with a specific focus on the 10 to 12 year old cohort and will consider whether the research establishes a strong evidence base for setting the MACR at a minimum of 12 years.

The paper also considers alternative options to increasing the MACR, including removing 10 to 12 year olds from youth detention, and the possibility of mandating the use of youth justice conferences for sentencing of all non-violent offences committed by 10 to 12 year olds.

The available evidence is considered in the following ways:

• comparative analysis of international MACR data
• MACR in the Australian context
• analysis of available Queensland-specific data
• characteristics of young offenders, and
• research on children’s brain development and the implications for determining the MACR.
Chapter two

What is the minimum age of criminal responsibility?

2.1 The Australian context

In order to determine whether there is a case to increase Queensland’s MACR, the legal context in Australia and expectations in relation to international conventions must be considered.

The Criminal Code Act 1899 (Criminal Code) sets out the MACR in Queensland. Section 29 (1) provides that a person under 10 years is not criminally responsible for any act or omission.

Section 29 (1) reflects the common law presumption that children under 10 years are dolio incapax, or incapable of doing wrong, as they lack mens rea, criminal intent.5

For the purpose of this information paper, ‘child’ means a person under 18 years.

The Criminal Code further provides a presumption against criminal responsibility for children under 14 years, unless it can be proven that at the time of doing the act the young person had capacity to know that he or she should not to do the act or make the omission.\(^6\)

To prove capacity, the Crown must prove beyond reasonable doubt that the accused had the capacity to know that he or she ought not to do the act.\(^7\)

### 2.2 The United Nations’ recommendation

#### 2.2.1 Convention on the Rights of the Child

On 20 November 1989, the UN General Assembly adopted the *Convention on the Rights of the Child* (CRC). The CRC establishes an international standard for the recognition and support of the rights of the child and proclaims that childhood is entitled to special care and assistance.\(^8\)

While the CRC does not specifically discuss the MACR, it 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).\(^9\)

Australia is a signatory to the CRC and through this has committed to ensuring children enjoy the rights in the CRC. Australia must also provide the UN Committee on the Rights of the Child (the Committee) with periodic reports on its progress against the objectives of the CRC.

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\(^6\) *Criminal Code Act 1899*, s 29(2).


\(^9\) Ibid.
In its concluding observations on periodic reports submitted by Australia in 2005, the Committee expressed concern that Australia’s MACR was too low. The Committee recommended Australia consider raising its MACR to an internationally acceptable level.\(^{11}\) The Committee provided its interpretation of ‘an internationally acceptable’ MACR in a General Comment on *Children’s Rights in Juvenile Justice* in 2007.\(^{12}\)

In its concluding observations on Australia’s 2012 periodic report on the CRC, the Committee noted that no action had been taken to increase the MACR. The Committee again recommended that Australia consider raising its MACR.\(^{13}\)

### 2.2.2 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 CRC which relate to youth justice.

The Beijing Rules were adopted by the UN General Assembly on 29 November 1985 following a recommendation from the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders that a set of rules on juvenile justice be developed.\(^{14}\)

While the Beijing Rules do not specify a minimum age, rule 4.1 states that Member States’ MACRs should ‘not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.’\(^{15}\) The Beijing Rules also state there should be a relationship between MACRs and other rights and responsibilities, such as the age of majority.\(^{16}\)

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\(^{10}\) UN Committee on the Rights of the Child, 2007, p.11.
\(^{11}\) UN Committee on the Rights of the Child, ‘Consideration of Reports Submitted by Parties under Article 44 of the Convention,’ 40th sess, CRC/C/15/Add.268 (20 October 2005), p.15.
\(^{16}\) Ibid.
2.2.3 Legal status of the CRC in Australia

Although Queensland’s MACR is inconsistent with the UN’s position, in the case of the *Minister for Immigration and Ethnic Affairs v Teoh* in 1995, the High Court of Australia held that international conventions are not legally binding in Australia unless they are incorporated into domestic law through statute.\(^{17}\)

This means that as Australia has not implemented the provisions of the CRC which relate to the MACR into domestic law, those provisions of the CRC are influential but not legally binding.

Legal commentators have critically observed that Australia’s

> ‘internationally-oriented face enjoys the international status it receives from being a party to the treaties; while the nationally-turned face refuses to acknowledge the domestic implications of its international obligations.’\(^{18}\)

While the UN has chastised Australia for its MACR, it has also identified a number of other Australian policies and laws which breach the CRC.\(^{19}\) For example, the UN has repeatedly called for Australia to end the offshore detention of young asylum seekers, however, governments have not actioned the UN’s recommendation.\(^{20}\) The Chair, Children’s Rights International, has remarked,

> ‘successive Australian governments have consistently breached the CRC and show every intention of continuing to do so.’\(^{21}\)

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20 Ibid.
2.3 MACRs around the world

While there is variation internationally, Australia’s MACRs are still low compared with many countries. MACRs around the world range from seven to 18 years (see Table 2 in the Appendix which sets out MACRs in selected countries).22 The average MACR in Europe is 14 years.23

A study of 90 countries found that the median MACR worldwide was 14 years and that 68% of countries had a MACR of 12 years or more.24 There is no established relationship between MACRs over 12 years and higher crime rates.25

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2.3.1 Case studies

Ireland
The MACR in Ireland is 12 years. There are exceptions for young offenders aged 10 years and above who have been charged with murder, manslaughter, rape, or aggravated sexual assault. These young offenders may be prosecuted with the approval of the Director of Public Prosecutions.

New Zealand
The New Zealand legal system provides for a gradual transition to criminal responsibility. The MACR is 10 years, however, children aged 10 or 11 years can only be held responsible for murder or manslaughter. Children aged 12 or 13 may be held responsible for offences where the maximum penalty is 14 years imprisonment or greater.

France
The MACR in France is 13 years. Welfare and educative measures are applied to children who commit criminal offences prior to reaching the MACR. These measures are proven to reduce the likelihood of children reoffending.

27 Ibid.
29 Urbas G., 2000, p.2.
Offences committed by children

To holistically view the implications of the MACR on young offenders, the broader youth justice sector and the community, it is important to understand the type of offences being committed by very young offenders.

The Department of Justice and Attorney-General, the Queensland Police Service and Queensland Courts have provided the QFCC with key data to support the development of this information paper. Currently, the data presented is arranged in the cohort ages of: 10–12 years, 13–14 years, and older. While there are limitations in relation to how the data is able to be interpreted in the context of the MACR, the data does provide a strong overall picture of youth offences in Queensland.
3.1 Number of offences committed

The number of proven charges for offenders aged 10 to 17 years remained relatively stable between 2011–12 and 2015–16. Children aged 10 to 12 years formed only a small proportion of the distinct children with a proven offence recorded between 2011–12 and 2015–16. In 2015–16, 1,366 proven offences were recorded for children aged 10 to 12 years, representing 5.8% of the total among children.33

Children aged 13 to 14 years recorded a higher number of offences than those aged 10 to 12 years. In 2015–16, 6,603 proven offences, or 27.8%, were recorded against 13- and 14-year-old offenders.34

3.2 Number of young offenders

In 2015–16, a total of 214 children aged 10 to 12 years had a proven offence recorded against them (see figure 1). During this period, these children comprised 6.1% of all children with a proven offence.35

In 2015–16, 921 children aged 13 to 14 years had a proven charge on record. This represents 26.4% of children with a proven offence. Across all age groups, 1,106 young offenders, or 32%, accounted for 75% of all proven offences.36 In other words, a relatively small number of offenders are responsible for the majority of offences committed by children.

The majority of children with a proven offence were male (73%).37

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33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.
A ‘supervised youth justice order’ is a court order which requires that a child found guilty of an offence report to youth justice unit personnel, undertake supervised community work if directed, and to satisfy any other conditions.\(^\text{38}\)

3.3 Types of offences committed

The highest total number of charges against children during 2015–16 were for ‘other’ offences (27,295). The most common charges varied according to age. The rate of arrests for offences against the person (violent offences) involving young offenders was relatively low.\(^\text{39}\)

In 2015–16, children aged 10 to 18 were charged with a total of 4,236 violent crimes. Of these, 10 to 12 year olds accounted for 464 charges, or 11%.\(^\text{40}\)


39 Queensland Police Service, ‘Number of Offenders Ages 10 to 18 Years by Offences and Sex, Queensland, 01/07/2010 to 30/06/2016.’

40 Ibid.
The number of charges for offences against the person increased until children reached 15 years. Across all age groups, the most common offences were assault and robbery.\textsuperscript{41}

### 3.4 Outcomes of offending

The outcomes of offences vary according to age groups. There is a clear decrease in the percentage of cautions as age increases, but an increase in arrests, notices to appear, and ‘other’. The number of cautions was significantly higher than other actions in the 10 to 12 year old cohort.\textsuperscript{42}

**Fig. 2: Young people in detention on an average day**

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Department of Justice and Attorney-General, Youth Justice Annual Summary Statistics 2011–12 to 2015–16.

\textsuperscript{41} Ibid.

\textsuperscript{42} Ibid.
3.5 Demographics of youth detention

3.5.1 Children aged 10 to 12 years

On an average day in 2015–16, there were four children aged 10 to 12 years in youth detention in Queensland. This represents 2.2% of all children in detention on an average day. In 2015–16, 10 to 12 year-olds comprised 6.7% of the total admissions to youth detention.

Fig. 3: Total number of young people in detention

Department of Justice and Attorney-General, Youth Justice Annual Summary Statistics 2011–12 to 2015–16.

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3.5.2 Children aged 13 to 14 years

The number of children aged 13 to 14 years in youth detention is much higher than those aged 10 to 12 years. Forty-four children aged 13 to 14 years were detained on an average day in 2015–16. This represents 23.7% of children in detention on an average day. Children aged 13 to 14 years comprised 35.4% of the total number of admissions to youth detention.46

3.5.3 Overrepresentation of Aboriginal and Torres Strait Islander offenders

In 2015–16, 59% of all children with a youth justice order were Aboriginal or Torres Strait Islander. Aboriginal and Torres Strait Islander children across all age groups were more likely to have a supervised youth justice order than an unsupervised order.47

On an average day in 2014–15, three of the five children aged 10 to 12 years in youth detention, and 35 of the 40 children aged 13 to 14 years, were Aboriginal or Torres Strait Islander. This reflects the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system. Out of the total 172 children in detention on an average day, 111 were Aboriginal or Torres Strait Islander.48

3.5.4 Implications for the MACR

The data shows that 10 to 12 year olds accounted for 5.8% of offences committed by children in 2015–16. The majority of offences were classified as ‘other’ offences. Based on this data we could not anticipate that any changes to the MACR, despite having a profound impact on very young offenders, would result in a reduction in the total number of young children in detention.49

46 Ibid.
Stakeholders who support increasing the MACR argue that children aged 10 to 12 years should be protected from the youth justice system because:

- their backgrounds and age make them particularly vulnerable,
- their ability to remove themselves from negative influences and environments is much more limited than adult offenders, and
- the youth justice system criminalises social need and victimises children who are already victims.

There is overwhelming evidence proving a direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment and having one or more parents with a criminal record. The research also shows that young offenders are more likely Aboriginal or Torres Strait Islander. These risk factors will be addressed in turn.

### 4.1 Poverty and homelessness

There is a proven link between socioeconomic disadvantage and youth criminality. Goldson argues that

> *the corollaries between child poverty, social and economic inequality, youth crime and processes of criminalisation are undeniable.*

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50 Jesuit Social Services, 2015. ‘Too Much Too Young: Raise the Age of Criminal Responsibility to 12,’ p.3.


53 Jesuit Social Services, 2015, p.3.


The Australian Institute of Health and Welfare found that 10 to 17 year olds with the lowest socioeconomic status were six times more likely to be under youth justice supervision than those with the highest socioeconomic status.\textsuperscript{56}

Another study found that children from low socioeconomic families were three times more likely to have contact with the youth justice system than children from high socioeconomic families.\textsuperscript{57}

Further, the Youth Advocacy Centre reported that, in 2013–14, 44% of its clients in the youth justice system, or at risk of becoming involved in youth justice system, were homeless or at risk of homelessness.\textsuperscript{59}

These statistics highlight both the direct and indirect relationship between low income status and children’s offending; that it can be both a product of necessity and of environment. During consultations, children and social workers said that detention was not a deterrent for some offenders as they appreciated having secure and stable accommodation.

4.2 Abuse and neglect

Children who have experienced poor parental supervision, harsh or punitive discipline, rejecting parental attitudes or physical abuse are much more likely to engage in criminal behaviour than other children.\textsuperscript{60}


\textsuperscript{59} Youth Advocacy Centre, \textit{Annual Report 2013–14}, p.15.

In New South Wales, 81% of females and 57% of males in youth detention had been abused or neglected.  

4.2.1 Relationship with out-of-home care

Abuse and neglect are precipitating factors for children entering out-of-home care. They are also independent risk factors for youth criminality.

In Victoria, 78% of 10 to 12 year olds subject to youth justice orders were known to child protection. Eighty-eight per cent of all children sentenced to detention had been the subject of an average of 4.6 child protection notifications and nearly one third had been subject to six or more notifications. Further, 86% had been in out-of-home care and over half had five or more placements.

Children who had lived in out-of-home care were four times more likely to have contact with youth justice system than those who had not lived in out-of-home care. They were also 15 times more likely to have been in youth detention than children who had not been in out-of-home care.

65 The NSW Community Services Commission in Cashmore, J., 2011, p.32.
4.3 Mental illness

There are significant links between individual factors, such as diagnosed mental illness and criminal offending. Mental illnesses commonly found in young offenders include depressive, psychotic, anxiety and disruptive disorders. These disorders are broadly defined as including:

- depression and bipolar disorder (depressive disorders)
- conditions such as schizophrenia (psychotic disorders), and
- conditions such as post-traumatic stress disorder (anxiety disorders).

Mental health is relevant to children’s offending behaviours, particularly when the impacts of these conditions have the potential to increase the possibility children will engage in physically aggressive behaviour. For example, children with disruptive behaviour disorders may be more physically aggressive than other children and children who suffer from PTSD may respond to perceived threats aggressively.

A Jesuit Social Services report found that 87% of children in detention in Victoria had at least one diagnosed mental illness and that 75% had two or more disorders. A NSW study found this figure was even higher, with 92% of females and 86% of males in detention having a mental illness.

Research has also indicated a link between substance use disorders and children in detention. A study in the United States found the rate of substance use disorders for children in detention was triple that of children who had not been detained. Substance use disorders are linked with continued offending.
4.3.1 Intellectual impairment

Three per cent of Australians have an intellectual disability, defined as having an intelligence quotient (IQ) of below 70.75 (The average IQ range is between 85 and 115.76) In contrast, 17% of young detainees in Australia are classed as having an intellectual disability.77 Further, international studies have shown that between 30 and 50% of young offenders have a physical or intellectual disability, compared with 13% of the general public.78 Intellectual disabilities and impairments are more prevalent among Aboriginal and Torres Strait Islander offenders.79 Children with an intellectual impairment are also more likely to reoffend.80

4.4 Family criminality

There are established links between parental criminality and children’s offending. One international study found that children who had been arrested were 4.7 times more likely to have a father with a criminal record and 3.7 times more likely to have a mother with a criminal record.81

The Youth Advocacy Centre’s 2013–14 Annual Report, which includes statistics on their client’s characteristics, notes that 23% of its clients had one or more parents involved in the criminal justice system.82

Criminal offending can become normalised when family members are involved in the criminal justice system. During consultations undertaken by the QFCC’s Advocacy and Engagement team, social workers emphasised that there was often a lack of role models for children, which exacerbates offending behaviours if appropriate programs and services are not available.

76 Ibid.
77 Ibid.
79 Frize, Kenny and Lenning in Richards, K., 2011, p.4.
80 Ibid.
4.5 Aboriginal and Torres Strait Islander children

Research shows that Aboriginal and Torres Strait Islander children are disproportionately affected by the low MACR as they are detained at a higher rates than non-Indigenous children.

While Aboriginal and Torres Strait Islander 10 to 17 year olds comprised less than 7.5% of all 10 to 17 year-olds in Queensland in 2013–14, they accounted for 65% of the 10 to 17 year olds held in detention. They were 24 times more likely to be detained than non-Indigenous 10 to 17 year olds. Aboriginal and Torres Strait Islander 10 to 11 year olds comprised 62% of all 10 to 11 year olds held in detention in Australia.83

There may be a correlation between this data and research conducted by the Australian Institute of Health and Welfare (AIHW). The AIHW found that 10 to 17 year olds living in remote areas were seven times more likely than those living in major cities to be under supervision. 10 to 17 year olds living in very remote areas were nine times as likely to be under supervision.\textsuperscript{84}

4.6 Reasons for offending

Many children who participated in consultations with the QFCC cited boredom as a reason for offending. Others were influenced by older friends and committed crimes to belong. For some children, their friends are like their family as their parents were disengaged. Social workers have indicated that children’s offending was often the product of trauma or a distorted understanding of right and wrong. They said that many children were exposed to domestic violence and parental substance use disorders.

\textsuperscript{84} Australian Institute of Health and Welfare, 2016, p.9.
Neuroscientists and behaviour scientists consider that the MACR does not reflect children’s developmental immaturity.

5.1 Children’s brain development

This section considers models of development and how these might impact on children’s offending behaviours.

During adolescence, children’s brains are still developing.

‘There is now incontrovertible evidence that adolescence is a period of significant changes in the brain structure and function.’

The prefrontal cortex, which is required for the performance of executive functions, including behavioural and emotional control and working memory, is not fully developed until young people reach about 25 years.

‘They (children) feel pressure to break the law from friends. They feel like it is the only way they are going to fit in’ – family member, Far North Queensland.

On the other hand, the amygdala, which is responsible for reward seeking, is developed in early adolescence. This is consistent with findings that children are more likely to weigh short-term gain more heavily than long-term consequences.

In fact, adolescence is the second and last significant period of ‘heightened [brain] malleability’ during a person’s lifetime. The first occurs between ages zero to three. Steinberg considers that this represents both risk and opportunity. Children who are exposed to positive experiences during adolescence will thrive. Conversely, children who have adverse psychosocial experiences will ‘suffer in powerful and enduring ways.’

In this way ‘premature and/or overzealous youth justice intervention can be counterproductive.’ Goldson further argues that the overwhelming majority of children ‘grow out of crime.’

During adolescence, maintaining peer relationships is very important. Children are more susceptible to peer pressure and more likely to seek approval from their peers. If children are excluded by their peers, their brains react similarly to threats to health or food supply.

86 Friedman, R., 2014. ‘Why Teenagers Act Crazy.’
90 Ibid.
91 Ibid.
92 Goldson, B., 2013, p.121
93 Ibid.
5.2 Young offender’s brain development

There are marked differences in the brain development of young offenders compared with other children. Children who have experienced abuse or neglect have a diminished ability to develop social, emotional and cognitive skills. The brain’s neural pathways are shaped by experiences. Brain development is disrupted and delayed in children who have adverse psychosocial experiences.

5.2.1 Foetal Alcohol Spectrum Disorders

Foetal alcohol spectrum disorders (FASD) also affect cognitive and behavioural functioning. FASD describe a spectrum of conditions caused by foetal alcohol exposure. There is no standardised testing for FASD in Australia and symptoms are not always visible so FASD often go undiagnosed. While the number of young offenders who are affected by a FASD is unknown, Aboriginal and Torres Strait Islander people with cognitive impairments are over-represented in the criminal justice system. It follows that a proportion of young offenders would be affected.

5.3 Implications for the MACR

While there is no definitive recommendation from neuroscience or behavioural science regarding the MACR, there is agreement that 10 years is too low.

‘At the age of ten the brain is developmentally immature, and continues to undergo important changes linked to regulating one’s own behaviour.’

97 Steinberg, L., 2012, p.76
98 Jesuit Social Services, 2015, p.3.
However, it is difficult to determine at what age a young person is sufficiently developmentally mature to be held criminally responsible for his or her actions. There are conflicting views in neuroscience and behavioural science as to when a young person reaches neurobiological maturity. Fried and Reppucci consider 14 year olds of average and above average intelligence to be developmentally mature enough to make decisions.102 Steinberg argues that neurobiological maturity occurs between 15 and 22 years.103

102 Ibid.
103 Steinberg, L., 2012, p.76.

‘Getting older is the biggest factor that stopped her from getting into trouble’ – family member, Far North Queensland.
Options for reform

In consideration of the evidence presented in this information paper, Queensland should consider raising its MACR to 12 years. Other options could also be considered, including: removing the 10 to 12 year old cohort from youth detention centres and mandating that 10 to 12 year old offenders participate in youth justice conferences. These options are discussed in more detail below.

6.1 Retain the current MACR

Advocates for retaining or even decreasing the MACR of 10 years have argued that children below the MACR would be used to commit crimes by others who know they cannot be held criminally responsible. A recurring theme in the QFCC’s consultations on youth justice has been examples of young children being used by older children to commit crimes. Young children are being used because of the perception that they will not be punished or will receive a lesser penalty than older children.

‘Doli incapax’ is a Latin term meaning incapable of wrong. It describes the inability of young people under the minimum age of criminal responsibility to form criminal intent.104

Another reason to retain the MACR is that increasing the MACR may not be palatable to the general public who may be concerned with ‘high youth crime rates’ and consider that a ‘hard-line’ approach would be more effective in addressing this problem.\textsuperscript{105}

Some research has identified a link between male offenders being diverted from the youth justice system and an increased likelihood of reoffending.\textsuperscript{106}

### 6.2 Raise the age of criminal responsibility

There is scientific and anecdotal evidence suggesting a MACR of 10 years is too low. Raising the age of criminal responsibility to 12 years and retaining \textit{doli incapax} to 14 years would bring Queensland into line with the UN’s recommendation. It would also better reflect young offender’s neurological development and psychosocial adversities.

The UN considers having two ages associated with criminal responsibility to be confusing and has voiced concerns that the rebuttable presumption is discretionary and potentially discriminatory. However, Crofts argues that the two ages reflect children’s gradual transition to criminal responsibility. He says that \textit{doli incapax}

> makes police and prosecutors think about whether a young person should be held legally responsible or whether diversionary responses would be more appropriate. It allows developmentally mature young people to be held legally accountable and developmentally immature young people to be diverted from the youth justice system.\textsuperscript{107}

Perhaps the most compelling reason to raise the MACR is that children who come into contact with the youth justice system prior to 15 years are less likely to complete their school education, undertake further education or training, or gain employment.\textsuperscript{108}

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Children who are arrested before 14 years are three times more likely than children arrested after 14 years to become chronic adult offenders.110

‘The deeper that children and young people penetrate youth justice systems the more “damaged” they are likely to become and the less likely they are to “desist” from offending.’111

‘Serious violence is typically the end of a developmental progression of offences that begins with low-level offences (vandalism and shoplifting), progresses to non-confrontational offences (theft), and then to violent offences (aggravated assault and rape). Delinquents do not begin their antisocial activities by shooting someone.’112

6.3 Remove children aged 10 to 12 years from detention

Research and QFCC consultations show detention is not rehabilitative. Rather, it exposes children to more negative influences. One young person revealed, detention ‘taught me to be a better criminal. I went in stealing cars and came out knowing how to cook meth and murder people.’

Detention is not a suitable environment for 10 to 12 year olds. The recent introduction of legislation transitioning 17 year olds to youth detention strengthens this argument.

Further, the cost of detaining young offenders is high. The estimates vary but the Western Australian Government has reported that it costs $814 per child per day, or $297,110 per annum.113 A Victorian study found that more than 50% of these children reoffend within 2 years of being released from youth detention.114

111 McAra and McVie in Goldson, B., 2013, p.122.
‘Given that [being detained] doesn’t seem to stop them reoffending when they get out, the question is whether that money could be put into more worthwhile intervention programs.’

Non-government organisations have consistently advocated for intervention programs, however, there is still a lack of programs available.

6.4 Youth justice conferencing

Youth justice conferences have proven to be a particularly effective Queensland youth justice system response. In 2015–16, there was a 99% satisfaction rate for the 714 conferences held.

The benefits for the offender include:

- accepting responsibility for their actions
- gaining an understanding of how their actions have affected others, and
- starting to repair the harm they have caused.  

The potential benefits for the victim include:

- being able to share their experience, and
- contributing their views on the offender’s sentence.  

Youth justice conferencing (known as family group conferences) underpins New Zealand’s youth justice system. Eighty-three per cent of youth offending is now dealt with by the police through issuing cautions, initiating alternative action plans or holding family group conferences. Criminal proceedings are a last resort and youth justice conferences must be held before matters are referred to Youth Court.  

A Victorian Government study found children who participated in youth justice conferencing were less likely to have reoffended within 12 to 24 months than children who were sentenced to probation or a supervised youth justice order.  

The QFCC suggests that further analysis of outcomes achieved through youth justice conferencing in Queensland be undertaken.  

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118 Ibid.  
6.5 Support for raising the MACR

The Kennedy Commission of Review into Corrective Services in Queensland, 1988
While the Commission did not specifically comment on the MACR, it found there should be a ‘special emphasis on diverting them [young people under 18 years] out of prison.’ Further, the Commission recommended that other options, such as community work and attendance centres, be developed for young offenders.122

New South Wales Commission for Children and Young People, 2011
In its submission to the review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987, the New South Wales Commission for Children and Young People recommended that the MACR be raised to 12 years. The Commission’s argument was based on the UN’s recommendation and evidence on children’s brain development.123

The National Association for Youth Justice, United Kingdom, 2012
The National Association for Youth Justice, United Kingdom, supported by 50 individuals and organisations, argued that the MACR be raised to 16 years.124

The United Nations Committee on the Rights of the Child, 2012
The 1985 Beijing Rules cautioned Member States that MACRs not be too low but did not specify an appropriate age. In 2007, the Committee labelled MACRs below 12 years as ‘internationally unacceptable.’125 The Committee has criticised Australia for setting its MACR at 10 years.126

125 UN Committee on the Rights of the Child, 2007, p.11.
126 Ibid.
Amnesty International, 2015
In its submission on the Youth Justice and Other Legislation Amendment Bill 2015, Amnesty International argued that the Queensland Government should raise the MACR to 12. It noted that the UN had stated that 12 years was an internationally acceptable level.127

Too Much Too Young: Raise the Age of Criminal Responsibility to 12, 2015
In 2015, Jesuit Social Services released its report, Too Much Too Young: Raise the Age of Criminal Responsibility to 12. The report made six recommendations:

1. raise the MACR in all Australian states and territories
2. develop mechanisms to address serious antisocial behaviour in children under 12 years
3. retain *doli incapax* until 14 years
4. include diversionary frameworks in all youth justice legislation
5. provide pre-plea diversion programs, and
6. invest in specialist children’s, including Aboriginal and Torres Strait Islander children’s, courts.

Over 30 individuals and organisations, including Amnesty International and the former Victorian Principal Commissioner for Children and Young People, supported the report.128

Amnesty International, 2016
Amnesty International criticised Queensland’s MACR in its report, ‘Heads Held High: Keeping Queensland Kids out of Detention, Strong in Culture and Community.’ The report stated that the MACR was in contravention of the CRC and disproportionately affected Aboriginal and Torres Strait Islander children.129

Professor Kerry Carrington and Lisa Durnian, 2016
Professor Carrington, QUT, and Lisa Durnian, Griffith University, launched a petition on change.org calling on the Queensland Government to remove 10 to 14 year olds from youth detention. The petition was supported by the Youth Advocacy Centre, the Aboriginal and Torres Strait Islander Legal Service and PeakCare Queensland.130

In the *Children’s Rights Report 2016: National Children’s Commissioner*, the National Children’s Commissioner recommended that states and territories raise the MACR to 12 years on the basis that:

- the criminal justice system does not address young offenders’ needs
- a higher MACR could reduce the overrepresentation of Aboriginal and Torres Strait Islander children in youth detention
- the current MACR does not take into account children’s brain development
- children under 12 years are not able to fully engage with the youth justice system, and
- the younger children are when they enter the youth justice system, the more likely they are to reoffend.\(^\text{131}\)

Youth justice is presently at the forefront of not only state and Commonwealth government agendas but also the minds of the general public. Stories of immense suffering and trauma experienced by children while in detention have been increasingly made public following the Australian Broadcasting Corporation’s *Four Corners* report.

This information paper has shown the extent of young offenders’ vulnerabilities. Young offenders are typically exposed to complex experiences including intergenerational disadvantage, poverty, homelessness, abuse and neglect, mental illness and parental criminality.

Children who come into contact with the youth justice system at an early age are more likely than other children to become chronic adult offenders. They are also less likely to complete their education or undertake further training or studies. To achieve positive outcomes for these children we need to apply appropriate interventions rather than sentencing them to youth detention.

Given the profound impact contact with the youth justice system has on a child’s long-term prospects, it makes sense to keep children under 13 years out of the youth justice system. There is a need to shift the focus from responding to consequences of youth crime to addressing the underlying behaviours, experiences and trauma of young offenders.132

Rather than sentencing young offenders, we should be directing focus and resources to diversionary programs, restorative justice principles, prevention and early intervention models.133

With the Queensland Parliament recently confirming the transition of 17 year olds back to the youth justice system and the Independent Review into Youth Detention soon drawing to a close, now is the time to continue to advocate for youth justice reform.

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133 Ibid.
Appendix

Table 1: Age of criminal responsibility in Australia

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>MACR</th>
<th>Presumption against criminal responsibility</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Crimes Act 1914</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Criminal Code Act 1995</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Children (Criminal Proceedings) Act 1987</td>
</tr>
<tr>
<td>Victoria</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Children and Youth Families Act 2005</td>
</tr>
<tr>
<td>Queensland</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Criminal Code Act 1899</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Criminal Code Act Compilation Act 1913</td>
</tr>
<tr>
<td>South Australia</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Young Offenders Act 1993</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Criminal Code Act 1924</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Criminal Code 2002</td>
</tr>
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<td></td>
<td></td>
<td></td>
<td>Children and Young People (Consequential Amendments)</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Under 10 years</td>
<td>10 years to under 14 years</td>
<td>Criminal Code Act</td>
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</table>
Table 2. Minimum ages of criminal responsibility worldwide

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum Age</th>
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</thead>
<tbody>
<tr>
<td>Australia</td>
<td>14</td>
</tr>
<tr>
<td>Austria</td>
<td>14</td>
</tr>
<tr>
<td>Belgium</td>
<td>14</td>
</tr>
<tr>
<td>Canada</td>
<td>14</td>
</tr>
<tr>
<td>Denmark</td>
<td>14</td>
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<tr>
<td>England</td>
<td>12</td>
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<tr>
<td>Finland</td>
<td>14</td>
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<tr>
<td>France</td>
<td>14</td>
</tr>
<tr>
<td>Germany</td>
<td>14</td>
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<tr>
<td>Greece</td>
<td>14</td>
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<tr>
<td>Iceland</td>
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<tr>
<td>India</td>
<td>14</td>
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<tr>
<td>Italy</td>
<td>14</td>
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<tr>
<td>Japan</td>
<td>14</td>
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<tr>
<td>Kenya</td>
<td>14</td>
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<tr>
<td>Luxembourg</td>
<td>14</td>
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<tr>
<td>Morocco</td>
<td>14</td>
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<tr>
<td>Netherlands</td>
<td>14</td>
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<tr>
<td>Norway</td>
<td>14</td>
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<tr>
<td>Portugal</td>
<td>14</td>
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<tr>
<td>Russia</td>
<td>14</td>
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<tr>
<td>South Africa</td>
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<tr>
<td>Spain</td>
<td>14</td>
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<tr>
<td>Sweden</td>
<td>14</td>
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<tr>
<td>Switzerland</td>
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</tr>
</tbody>
</table>

Glossary of terms

10 to 12 year olds
For the purpose of this information paper, ‘10 to 12 year olds’ means young people who are 10, 11 or 12 years old.

Child
For the purpose of this information paper, ‘child’ means a person under 18 years.

Doli incapax
A Latin term meaning incapable of wrong. Doli incapax describes the inability of young people under the minimum age of criminal responsibility to form criminal intent.134

Minimum age of criminal responsibility (MACR)
The minimum age at which young people can be arrested for, charged with, or convicted of, a crime. The MACR in Queensland is currently 10 years.

Out-of-home care
Refers to the care of children who are unable to live with their families (often due to child abuse and neglect). It involves placement of a child with alternative care givers on a short or long-term basis.135

Proven offence
A proven offence means that the offender has been found guilty of an offence at court.

Supervised youth justice order
A court order which requires that a child found guilty of an offence report to youth justice unit personnel, undertake supervised community work if directed, and to satisfy any other conditions.136

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