

**ARGUMENTS FOR RAISING THE MINIMUM AGE OF CRIMINAL  
RESPONSIBILITY**

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**COMPARATIVE YOUTH PENALTY PROJECT  
RESEARCH REPORT**

Suggested citation: Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney. Available at <http://cyp.unsw.edu.au/node/146>



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## Introduction

The age of criminal responsibility is the primary legal barrier to criminalisation and thus entry into the criminal justice system. This paper<sup>1</sup> provides arguments for raising the minimum age of criminal responsibility (MACR). Nationally the minimum age is 10 years old. Some Australian states set the MACR at 10 years in the mid-to late 1970s (Queensland (1976), NSW (1977) and South Australia (1979)). However, only since the early 2000s has there been a uniform approach to the MACR in all Australian jurisdictions (Cunneen et al 2015: 250). The paper provides a number of reasons for raising the age: international comparisons; the protection of children's rights; the limited ability of the common law doctrine of *doli incapax* to protect young children; child developmental arguments and issues of mental illness and cognitive impairment; criminological arguments relating to the failure of a criminalisation approach; and the views of juvenile justice practitioners. In addition, this paper argues that a low MACR adversely affects Indigenous children who comprise the majority of children under the age of 14 years who come before youth courts in Australia and are sentenced to either youth detention or a community-based sanction.

I acknowledge that there is perhaps little political appetite among Australian states and territories to raise the age, despite calls by academics (eg Crofts 2015, O'Brien and Fitz-Gibbon 2017), various non-government organisations including members of the Child Rights Taskforce<sup>2</sup> (2011: 31-32), Jesuit Social Services (2015), Amnesty International (2015), and criminal lawyers' associations and some Children's Commissioners (Zillman 2017). However, the release of the Royal Commission into Child Protection and Youth Detention Systems of the Northern Territory report may provide a space to further this discussion. This paper does not specify what the minimum age of criminal responsibility should be. However, as will become apparent anything less than 14 years old is unlikely to achieve the desired result of minimizing the adverse consequences of criminalisation. Further, this paper does not specifically address what should replace criminalisation as the most appropriate response for children aged 10 to 14 years who would have otherwise been dealt with through the criminal law. Developing the most appropriate forms of social policy and practice in this area should be the subject of wide consultation – to avoid the mistakes of previous 'welfare' based interventions and the widely acknowledged limitations of current child protection approaches.

Often lost among the discussions around the MACR is an acknowledgement of the children who become caught up in the criminal justice system. Our research for the Comparative Youth Penalty Project shows that the needs of young people in juvenile justice are multiple and complex: they have come from communities of entrenched

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<sup>1</sup> This paper was originally presented as 'Criminalisation, Young People and the Minimum Age of Criminal Responsibility' at the Australian Social Policy Conference, UNSW, 25 September 2017. It draws on research from the Comparative Youth Penalty Project (CYPP) ([www.cypp.unsw.edu.au](http://www.cypp.unsw.edu.au)), including qualitative interviews with criminal justice professionals, and data analysis. The CYPP is an ARC funded project (DP130100184) housed at the University of New South Wales. Chief investigators on the project are Professors Chris Cunneen (UNSW), Eileen Baldry (UNSW), David Brown (UNSW) and Barry Goldson (University of Liverpool), and Ms Melanie Schwartz (UNSW). Ms Sophie Russell is the research associate for the project. I particularly acknowledge that I have drawn on the work of Eileen Baldry and Sophie Russell on mental health disorders and cognitive disability among young people in this paper.

<sup>2</sup> The National Children's and Youth Law Centre, UNICEF, the National Association of Community Legal Centres.

socio-economic disadvantage; and have fragmented experiences of education which are marked by periods of exclusion and expulsion, and result in poor educational outcomes. They have precarious living arrangements including homelessness and/or placements in Out of Home Care (OOHC). They have experienced drug and alcohol related addiction; struggle with unresolved trauma; and have one or more disabilities (Baldry et al. forthcoming).

### **International Comparisons**

At 10 years, the MACR in Australia is inconsistent with prevailing practice in Europe. Indeed, the average minimum age of criminal responsibility in the European Union is 14 years (Goldson 2013) where ‘it can be shown that there are no negative consequences to be seen in terms of crime rates’ (Dünkel, 1996: 38). Similarly, in some 86 countries surveyed worldwide the median age was 14 years and, despite variation, ‘there has been a trend for countries around the world to raise their ages of criminal responsibility’ (Hazel 2008: 31-2). The situation in Australia is clearly anomalous with global norms.

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

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

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

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

### **Human Rights Arguments**

The United Nations (UN) has established a framework of norms for responding to children in conflict with the law, including through the Convention on the Rights of the Child (CRC). O’Brien and Fitz-Gibbon (2017: 135) note that these have been ‘informed by an evidence base on the neurobiological impacts of early childhood trauma and knowledge from developmental psychology about both the corrosive and

protective factors for child wellbeing’. Specifically in relation to the minimum age at which a child can be held legally responsible for their actions, Article 40(3)(i) of the UNCRC requires the implementation of a ‘minimum age below which children shall be presumed not to have the capacity to infringe the penal law.’

Although the Convention does not specify an appropriate age, 12 years has been recommended by the UN Committee on the Rights of the Child (UNCRC) as the absolute minimum age for states to implement (UNCRC 2007: para 32; see also Beijing Rules article 4(1)). The UNCRC has argued that a higher minimum age of criminal responsibility of 14 or 16 years contributes ‘to a juvenile justice system which, in accordance with article 40(3)(b) of the CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child’s human rights and legal safeguards are fully respected’ (UNCRC 2007: para 33). The UNCRC has maintained a longstanding criticism of the low age of criminal responsibility in Australia (UNCRC 1997: [11, 29]; UNCRC 2005: [73]; UNCRC 2012: [82(a)]).

Australia submitted its fourth periodic report (‘the Report’) to the UNCRC on 25 June 2009 (Australian Government 2009). The Report noted that all Australian state and territory legislation on the minimum age of criminal responsibility is the same as the Commonwealth. The Commonwealth *Crimes Act 1914* and the *Criminal Code Act 1995* stipulate that a child under ten years old is not criminally responsible for an offence (Australian Government 2009: [277]). The provisions above include a rebuttable presumption that a child aged between 10 and 14 years of age is incapable of wrong (*doli incapax*). The Australian Government (2009: [278]) considers *doli incapax* to be a practical way of acknowledging differences in children’s developing capacities and a way to achieve gradual transition to full responsibility. The government believes 10 years old is an appropriate minimum age limit based on ‘the impact of increased access to education and information technology, community expectations and the unique historical and cultural context of Australian law and society’ (Australian Government 2009: [277]).

The Australian Report offers no evidence to support the above claims. As argued further below *doli incapax* appears to be a very inadequate way of protecting young children from criminalisation. Further, it is difficult to discern what ‘community expectations’ might be. Our research discussed further below, and other Australian research (O’Brien and Fitz-Gibbon 2017), indicates that professionals working in the youth justice sphere (including juvenile justice staff, children’s lawyers and magistrates) expressed dissatisfaction with the low MACR. Certainly there is a strong argument that informed public opinion sees the current MACR as set too low. No evidence is offered by the Australian government for the assertion that ‘increased access to education and information technology’ justifies the current MACR. One might argue to the contrary that the rise of social media, and the ubiquitous nature of on-line computer gaming for young people, offers little guidance for the moral and emotional development of children. Indeed there is research that suggests that violent video games, which are highly popular among young adolescent boys in particular, may delay or stunt the development of moral reasoning (eg Bajovic 2013, Vieira and Kremer 2011). In relation to education, one of the defining features of young people in juvenile detention is their history of poor educational attendance and outcomes (eg Dowse et al 2014; NSW Health and NSW Juvenile Justice 2016).

The final point in the Report suggests that Australia's 'unique historical and cultural context' offers some explanation for the low MACR. It is difficult to know what to make of this: is the suggestion that Australian culture somehow validates more punitive approaches towards children than found, for example, among our European counterparts? Or that our unique history authorizes or legitimates the over-representation of Aboriginal and Torres Strait Islander children in juvenile justice – which is one of the significant effects of a low MACR discussed further below?

The UNCRC's (2012) Concluding Observations adopted on 15 June 2012 regretted that Australia's juvenile justice system still requires substantial reforms for it to conform to international standards, with particular concern that no action has been undertaken to increase the minimum age of criminal responsibility (UNCRC 2012: [82(a)]). The UNCRC further reiterated its recommendations in previous Observations on Australia to consider raising the minimum age of criminal responsibility to an internationally acceptable level (UNCRC 2010: [84 (a)]).

### ***Doli Incapax***

There have been various criticisms of the limitations of *doli incapax* and its failure to protect young children. *Doli incapax* is a rebuttable presumption that a child aged under 14 years does not know that his or her criminal conduct is wrong unless the contrary is proved (ALRC 1997: [18.17]). The Australian Law Reform Commission (ALRC) noted that:

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

The UNCRC has also noted the limitations of *doli incapax*, stating that 'the system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices' (UNCRC 2007:[30]) (see also Crofts 2015:127).

Despite being held as a major reason for not increasing the MACR, there is very little research on the how *doli incapax* operates in practice in Australian children's courts. The recent work by O'Brien and Fitz-Gibbon (2017) based on research undertaken in Victoria is particularly important in this regard. The researchers found that 'inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers a legal safeguard for very young children in conflict with the law' (2017: 135). Earlier work by Bartholomew (1998), also in Victoria, confirmed similar problems with *doli incapax*. He found an 'increasingly liberal interpretation of issues that constitute "sufficient rebuttal" of the presumption... has the potential to limit the power of this legal protection, and to result in more young offenders being found to have criminal capacity' (Bartholomew 1998: 99). In particular he noted that if there was any form of acknowledgement of wrong doing in a record of interview then defence counsel did not raise the possible defence of *doli*

*incapax* and such a trend runs counter to ‘widespread knowledge about the suggestibility of children in interviews’ (Bartholomew 1998: 100). Indeed more recent research suggests that young people who are apprehended and questioned by police can be characterized ‘by a number of deficits in their cognitive capacity, poor communicative skills, and elevated suggestibility that have profound implications’ (Lamb and Sim 2013: 137). For example, young people are more likely to confess than older suspects and to confess falsely (Lamb and Sim 2013: 137).

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

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

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

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

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

### **Developmental Arguments**

There is widespread recognition of the developmental immaturity of children and young people compared to adults. Immaturity can affect a number of areas of cognitive functioning ‘including impulsivity, reasoning and consequential thinking’

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

This [neurological immaturity] is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy 'discounting' of the future costs of this behaviour, also contribute.

Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes (2012: 11).

The second proposition is that 'individual children of substantially identical age groups and demographics may demonstrate vastly different cognitive capacities for understanding' (Lennings and Lennings 2014: 793). In other words, the process of developing the capacities necessary for criminal responsibility does not take place at a consistent pace between individual children (Crofts 2015:127; also Cauffman and Steinberg 2000). Newton and Bussey (2012) conducted a study of Year 5 students (mean age 10.49) and Year 8 students (mean age 14.29) from five Sydney schools. They found that

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

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

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

In cold conditions, young people are able to make adult-like decisions; certainly, it is suggested, by the age of 16, and often earlier. In hot conditions, where there is high emotional stimulation, adolescent immaturity becomes more pronounced. In hot conditions, the impact of developmental delays and

vulnerabilities are stark and exert a significant impact on the maturity of decision-making (2014: 795).

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

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

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

At present the significant developmental issues raised above can only be dealt with for those young people between the ages of 10 and 14 through *doli incapax*. Yet, as noted, this common law protection is inadequate in terms of its limited and inconsistent application. For *doli incapax* to work as a protection, it would involve appropriate and rigorous screening and assessment of all children between the ages of 10 and 14 who come before the children's courts – a proposition which might well be considered unworkable. And it might be argued, such assessments should be also applied to children in this age group who are subject to pre-court diversions which also assume legal capacity to commit an offence, admit guilt and comply with various undertakings (eg youth justice conferencing). As Crofts (2015: 125) notes, although diversionary measures 'provide an important alternative to prosecution, they do not prevent prosecution, and they can still have criminal justice consequences'.

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

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

In other words, through raising the minimum age of criminal responsibility to 'ensure that young people are kept out of the criminal justice system' (Crofts 2015: 125).

### **Mental Health Disorders and Cognitive Disability**

There has been increasing research on the incidence of mental health disorders and cognitive disabilities among young people in Australian juvenile justice systems. Young people within youth justice systems have significantly higher rates of mental health disorders<sup>3</sup> and cognitive disabilities<sup>4</sup> when compared with general youth

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<sup>3</sup> Examples of mental health disorders include mood disorders (such as depression, bipolar disorder); anxiety and panic disorders; personality disorders; psychotic disorders (such as hallucinations; schizophrenia); eating



populations. They are also likely to experience co-morbidity, that is co-occurring mental health disorders and/or cognitive disability, usually with a drug or alcohol disorder. Australian research suggests that these multiple factors, when not addressed early in life, compound and interlock to *create* complex support needs (Baldry 2017; Dowse et al 2014; Baldry 2014; Baldry and Dowse 2013).

### *Mental health disorders*

The 2015 NSW Young People in Custody Health Survey found that 83 per cent of young people in detention were assessed as having a psychological disorder, with a higher proportion for Indigenous children than non-Indigenous children, depending on the type of disorder (NSW Health and NSW Juvenile Justice 2016). The rate for children in custody is significantly higher than for those living in the community. For example, the 2015 Australian Child and Adolescent Survey of Mental Health and Wellbeing found 14 per cent of four to 17 year olds assessed as having a mental disorder (Lawrence *et al* 2015). Earlier NSW custody health surveys from 2003 and 2009 found similarly high levels of psychological disorders among young people in detention, at 88 per cent and 87 per cent respectively (Indig *et al* 2011; Allerton and Champion 2003). The NSW Young People on Community Orders Health Survey 2003-2006 also found a high prevalence of psychological disorders for young people on community-based juvenile justice orders at 40 per cent of those surveyed (Kenny *et al* 2006).

### *Cognitive disability*

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

There is also evidence to suggest that young people in the youth justice system have a range of other impairments often associated with cognitive disability, including speech, language and communication disorders; ADHD; autism spectrum disorders; FASD; and acquired/traumatic brain injury (Snow *et al* 2016; Anderson *et al* 2016; NSW Health and NSW Juvenile Justice 2016; Farrer *et al* 2013; Education and Health Standing Committee 2012; Bryan *et al* 2007). Research suggests that many

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disorders; obsessive-compulsive disorders; trauma-related disorders (such as post-traumatic stress disorder); and substance use disorders (see Baldry 2017: 109).

<sup>4</sup> Cognitive disability incorporates a range of conditions such as intellectual impairment; communication disorders; attention deficit hyperactivity disorder (ADHD); autism spectrum disorders; acquired brain injury; epilepsy and fetal alcohol spectrum disorders (FASD) (see Baldry 2017: 109).

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

Young people with cognitive disability are particularly vulnerable to criminalisation (McCausland and Baldry 2017; Amnesty International 2015; Gray et al 2009; Kenny and Lennings 2007). Arising from the nature of their impairment they may experience trouble with memory, attention, impulse control, communication, difficulties withstanding peer pressure, controlling frustration and anger, and may display inappropriate sexual behaviour (McCausland and Baldry 2017: 294; Australian Medical Association 2016). Young people with cognitive impairment also have higher rates of recidivism compared to those without cognitive impairment (Frize et al 2008) and are vulnerable to extended and repeat incarceration (Baldry et al 2015). They are also more likely to be refused bail and held on remand because of an inability to understand or comprehend bail conditions or due to a lack of support in the community to comply with conditions (McCausland and Baldry 2017; Education and Health Standing Committee 2012; Gray et al 2009). Protections such as section 32 of the NSW *Mental Health (Forensic Provisions) Act 1990* which provide for dismissal of matters prior to conviction (usually with conditions to engage with treatment), appear to be widely under-utilised and applied inconsistently (for example with Aboriginal people less likely to have received a section 32 outcome) (McCausland and Baldry 2017; Steele et al 2013, 2016).

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

There is some other evidence to support the argument above arising from the Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Project (MHDCD) ([www.mhdcd.unsw.edu.au](http://www.mhdcd.unsw.edu.au)) (Baldry et al 2012, 2015). Baldry et al (2012: 4) found that clients of the NSW Community Justice Program diagnosed with a Borderline Personality Disorder had an *average* first contact with police at 14 years of

age, and had a higher average number of custody episodes. Baldry et al also found that for Indigenous people with a cognitive disability, when compared with non-Indigenous people with a cognitive disability, Indigenous people had police contact over two years earlier, and with earlier first conviction and earlier use of custody (2012: 2). The MHDCD has a number of case studies that substantiate early contact with juvenile justice for people with cognitive impairments. I note below two case studies (abbreviated).

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

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

Raising the minimum age of criminal responsibility will in itself not solve all the problems associated with the criminalisation of people with mental health disorders and/or cognitive impairments. However, it will open a door to firstly, not criminalising young children with mental health disorders and/or cognitive impairments and entrenching them at an early age in the juvenile justice system; and, secondly, provide the space for a considered response as to how these young people should be responded to in the community. At present, 'systemic and welfare responses appear to have only limited impact on preventing early contact with the criminal justice system from escalating into a cycle of incarceration and re-incarceration' (Dowse et al 2014: 175). Indeed, criminal justice agencies have become 'normalised as places of disability management and control' (McCausland and Baldry 2017: 290). Raising the minimum age will set a higher barrier and force us to consider more appropriate responses to this particularly vulnerable group of children.

### **Criminological Arguments and Views of Practitioners**

The level of ongoing contact with the juvenile justice system varies according to a range of factors, with younger offenders having higher levels of re-contact than older

youth. Thus the younger the child is when first having contact with juvenile justice, then the more likely it is the child will become entrenched in the justice system (Chen et al. 2005; Payne 2007; McAra and McVie 2010, 2007). We also know that a small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age (Weatherburn, McGrath and Bartels 2012). For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending. Juvenile offenders also have a higher rate of re-offending than adult offenders. A NSW study of juvenile and adult offenders who appeared in court in 2004 found that almost 80 per cent of juvenile offenders were reconvicted within 10 years, compared with 56 per cent of adult offenders (Agnew-Pauley and Holmes 2015: 1). Further, for juvenile offenders 41 per cent were re-convicted within one year, another 16 per cent were re-convicted within two years, and a further 8 per cent were reconvicted within three years (Agnew-Pauley and Holmes 2015: 2).

Whatever might be said about the efficacy of juvenile justice, preventing re-offending particularly for young children is not evidenced by the data we have. There is therefore an argument to suggest that raising the age of criminal responsibility (particularly to 14 years or higher) has the potential to reduce the likelihood of life-course interaction with the criminal justice system. Indeed, there was widespread agreement among those professionals working with young people who we interviewed in NSW and Queensland for the Comparative Youth Penalty Project for raising the minimum age of criminal responsibility<sup>5</sup>. As a Detention Centre Manager stated, children under 14 ‘can and should be dealt with in another way’ (Bris Gov 6). Another interviewee noted:

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

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

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

A Detention Centre Manager commented,

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

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<sup>5</sup> We interviewed 30 juvenile justice practitioners, lawyers and judicial officers in NSW and Queensland as part of the Comparative Youth Penalty Project.

year old in here. (NSW Gov 1)

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

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

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

### **Young Children Before the Courts, Under Orders and Placed in Detention**

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

#### *Before the Children’s Court*

There does not appear to be recently available national data on the number of young people who appear before children’s courts which breaks down the age grouping of under 14 year olds. Some slightly older data is available. ABS data from 2010/11 shows the following for Children’s Court defendants by each state and territory.

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

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

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

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

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

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

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

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

While the ABS data<sup>6</sup> is several years old it does show the significant number of children who are aged under 14 years who appear in Australian children’s courts. Despite the limitations of Table 3, we can see that the range of offences is concentrated in the categories of theft, assaults and public order.

#### *Community Supervision*

According to the Australian Institute of Health and Welfare (AIHW) data, during the course of the 2015/16 financial year, there were **878** under 14 year olds placed under community-supervision throughout Australia (AIHW 2017: Table S40b). Of those 878 children, 693 were male and 185 were female.

By far the largest number of children placed under community supervision in this age group was in Queensland (325 or 37 per cent of the total), followed by Western Australia (197 or 22 per cent of the total) and NSW (151 or 17 per cent of the total) (AIHW 2017: Table S36b).

#### *Detention*

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<sup>6</sup> More recent data from NSW shows there were 466 children under the age of 14 years with finalised court appearances during 2014 in the Children’s Court (NSW BOCSAR 2015: 84). In Queensland courts there were 581 ‘distinct’ children under the age of 14 who had a matter finalised in 2015-16 (Childrens Court of Queensland 2016: 12).

According to AIHW data, there were **599** under 14 year olds placed in juvenile detention throughout Australia during the course of the 2015/16 financial year (AIHW 2017: Table S78b). Of the 599 children, 472 were male and 127 female.

The largest number of children placed in detention in this age group was in Queensland (152 or 25 per cent of the total), followed by Western Australia (129 or 21 per cent of the total) and NSW (121 or 20 per cent of the total) (AIHW 2017: Table S74b).

Clearly the evidence shows whether we look at court appearances, community-based supervision or juvenile detention, there are many children affected by a low MACR.

### **MACR as an Indigenous Issue**

One of the issues running through this paper is the potential adverse effect that a low MACR has on Indigenous children. I noted above that during the 2015/16 year, there were 599 under 14 year olds placed in detention. Of these, 67 per cent (or 398) were Indigenous children (AIHW 2017: Table S78b). During the same period, there were 878 under 14 year olds placed on community-supervision orders. Of these, 67 per cent (or 589) were Indigenous children.

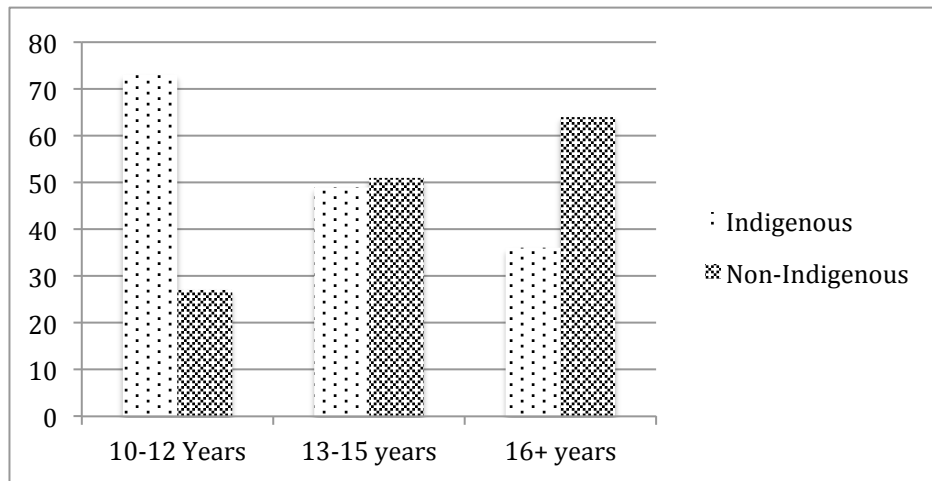
The concentration of Indigenous children is even greater when we look at those aged 12 years or younger. Nationally, some 73 per cent of children placed in detention and 74 per cent of children placed on community-based supervision in the 10-12 year old age bracket (inclusive) were Indigenous children during the period 2015-16 (AIHW 2017: Tables S78b and S40b).

As part of the Comparative Youth Penalty Project we analysed Children's Court data for NSW for the ten year period 2006 -2015.<sup>7</sup> We found that Indigenous children were younger than non-Indigenous children when appearing before the court – in fact comprising the majority of young people (both male and female) before the courts in the 10-15 year old age bracket. Indeed, Indigenous males comprised 73 per cent of all males before the courts in the 10-12 year old age bracket, and Indigenous females 60 per cent of all females before the courts in the 10-12 year old age bracket (see Figures 1 and 2 below).

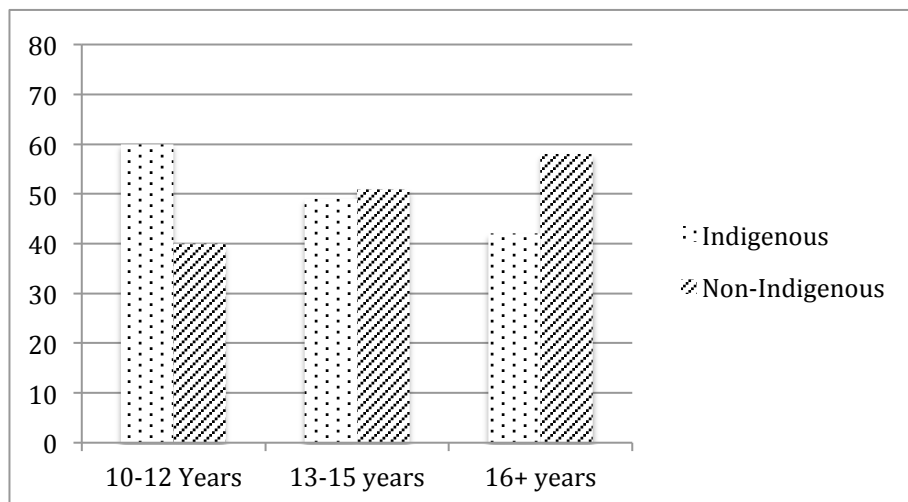
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<sup>7</sup> We requested data covering the 20 top NSW children's courts for children with charges finalized between 2006-15. These courts cover over 70% of all children's matters in NSW (NSW Bureau of Crime Statistics and Research, unpublished data, reference: Dg13/11525)

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



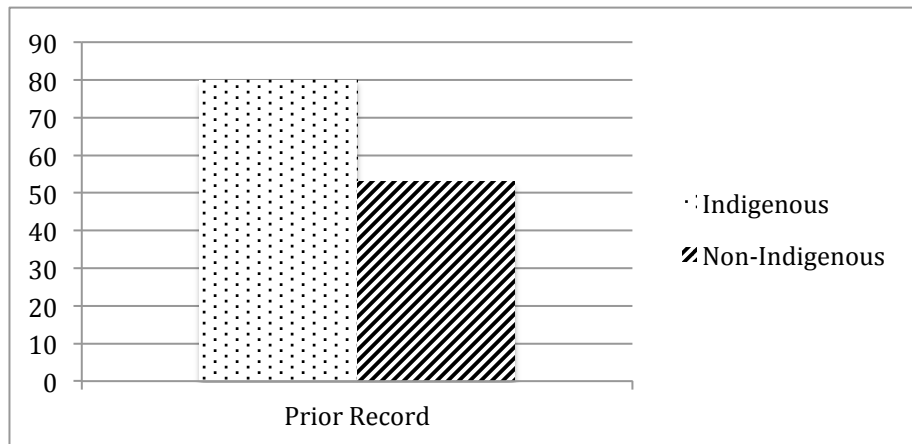
**Figure 2 Percentage of Indigenous and non-Indigenous females with finalised charges by age group, NSW Children’s Court 2006 – 2015**



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



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



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

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

**MACR: Other Possible Responses**

This paper has focused on the importance of raising the MACR preferably to at least 14 years old. However, there are other possible responses that might at a minimum keep young children out of detention.

One option is a legislative restriction on the use of child detention. For example, in **Switzerland** the minimum age of criminal responsibility is 10, but the youth court can only impose ‘educational measures’ on 10-14 year olds. Juvenile prison sentences are restricted to those aged 15 and above (Zimring et al 2017: 21-24). In **England and Wales** the *Criminal Justice Act 1991* abolished the use of prison custody in young offender institutions for 14 year olds and younger, and provided for the abolition of prison remands for 15 and 16 year olds. This part of the legislation was never implemented. There was a dramatic shift in juvenile justice policy after two year old Jamie Bulger was murdered by two 10 year old boys shortly before the relevant sections of Act were due to take effect in 1993. The Review of the Criminal Justice System in **Northern Ireland** (2000: [10.69]) recommended that children aged

10-13 inclusive who were found guilty of criminal offences should not be held in juvenile justice centres and that their accommodation needs should be provided by the care system.

Another option is a higher minimum age which also creates some exceptions. In **Hungary** the minimum age is 14, but from the age of 12 for homicide, voluntary manslaughter, battery, and robbery, provided that the child had the capacity to understand the nature and consequences of his or her act. In **Ireland** the minimum age is 12, but children aged 10 and above can be held criminally liable for murder, manslaughter, rape or aggravated sexual assault (Child Rights International Network <https://www.crin.org/en/home/ages/europe>).

One option to avoid is the **Canadian** response because it increases protections for 10-11 years old but reduces the protections for those aged 12-13 years. Canada raised the MACR to 12 years, but it removed the presumption of *doli incapax* for those aged 12 and 13. By way of contrast **Ireland** raised the minimum age to 12, but also retained the presumption of *doli incapax* to 14 years old (Crofts 2015:126).

### **Conclusion: Social Support or Criminalisation?**

Many of the juvenile justice professionals we interviewed for the Comparative Youth Penalty Project commented on the multiple and complex needs of young people in juvenile justice, stating that most of these children have not been afforded their human rights from an early age. One respondent observed:

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

Our interviewees also referred to the need and importance of a more welfare-oriented approach to juvenile justice in order to address the root causes of criminal justice contact. One respondent commented that, particularly for younger children, community intervention and support should be prioritised 'rather than criminal justice... they need that from an early age whether it's DOCS or some other welfare organisation, [but] not us, not juvenile justice' (NSW Gov 3).

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

The current MACR is neither child-centred nor reflects the best interests of the child. Jesuit Social Services (2017: 17) note, when discussing the higher minimum age of

criminal responsibility in Europe, that we need to recognise ‘the limits of responsibility of children, the fact that their brains are still developing, and the likely permanent harm of early contact with the justice system’. In addition to the arguments relating to the developmental processes of children, this paper has argued there are a host of other reasons for raising the MACR, including the failure of *doli incapax* to protect young children from prosecution and the frequency of young children being criminalised, the failed capacity of the juvenile justice system to respond to the needs of young children (as recognised by youth justice practitioners) which entrenches young children in the justice system, the prevalence of the problems of mental health disorders and cognitive impairment among young people, and the way a low MACR adversely impacts on Indigenous children.

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

As I pointed out in the introduction to this paper, I am not offering any prescriptive conclusions about how non-criminalising responses might be developed. The most appropriate forms of social policy and practice in this area should be the subject of wide consultation and in particular address the specific issues which currently bring children into conflict with the criminal law. There have been many commentators and NGOs who have pointed to what non-criminalising responses might look like in areas such as mental health disorders and cognitive impairment (Dowse et al 2014; McCausland and Baldry 2017), OOHC (McFarlane 2015) and Indigenous young people (Amnesty International 2015; Blagg et al, 2016). The fact that the current political climate may not be conducive to raising the minimum age of criminal responsibility does not make it any less urgent.

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