RACP
Specialists. Together
EDUCATE ADVOCATE INNOVATE

# RACP submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility

**July 2019**

## About The Royal Australasian College of Physicians (RACP)

The RACP trains, educates and advocates on behalf of over 17,000 physicians and 8,000 trainee physicians, across Australia and New Zealand. The College represents a broad range of medical specialties including general medicine, paediatrics and child health, cardiology, respiratory medicine, neurology, oncology, public health medicine, occupational and environmental medicine, palliative medicine, sexual health medicine, rehabilitation medicine, geriatric medicine, and addiction medicine. Beyond the drive for medical excellence, the RACP is committed to developing health and social policies which bring vital improvements to the wellbeing of patients.

# Executive summary

Children aged 10 to 13 years old in the youth justice system are physically and neurodevelopmentally vulnerable. Most children in the youth justice system have significant additional neurodevelopmental delays. These children also have high rates of significant pre-existing trauma.[1]

A range of problematic behaviours in 10 to 13 year old age children that are currently criminal under existing Australian law are better understood as behaviours within the expected range in the typical neurodevelopment of 10 to 13 year olds (typically actions that reflect poor impulse control, poorly developed capacity to plan and foresee consequences such as minor shoplifting or accepting transport in a stolen vehicle).[2]

Young children with problematic behaviour, and their families, need appropriate healthcare and protection. Involvement in the youth justice system is not an appropriate response to problematic behaviour. It further damages and disadvantages already traumatised and vulnerable children.

More appropriate approaches include:

- Better support through community-based and acute paediatric and general mental health services
- Support to schools to maintain children in the education system
- Support for parents struggling with mental health and drug and alcohol issues
- Working with Aboriginal and Torres Strait Islander communities to develop culturally appropriate solutions within the community
- Expansion to child protection services to support vulnerable children and their families, including specially trained services for Indigenous clients and communities.

The Royal Australasian College of Physicians (RACP), along with the Australian Medical Association and the Australian Indigenous Doctors' Association recommends that the minimum age of criminal responsibility be raised to 14 years of age as it is inappropriate for 10 to 13 year olds to be in the youth justice system. Alternative approaches to managing problematic behaviour are likely to be less damaging to young children, and evidence shows incarceration in this age group does not deter future offending.[3]

The RACP welcomes this opportunity to highlight to the Attorneys-General the significant physical and neurocognitive vulnerabilities of children as young as 10 years of age that make it inappropriate for them to enter the youth justice system.

The cohort of children currently in custody have extensive mental health and trauma morbidities, and consideration of other models of care to manage problematic behaviour for 10 to 14 year olds is needed.

The RACP position statement on the Health and Wellbeing of Incarcerated Adolescents provides further detail on the health issues of young people in contact with the criminal justice system.

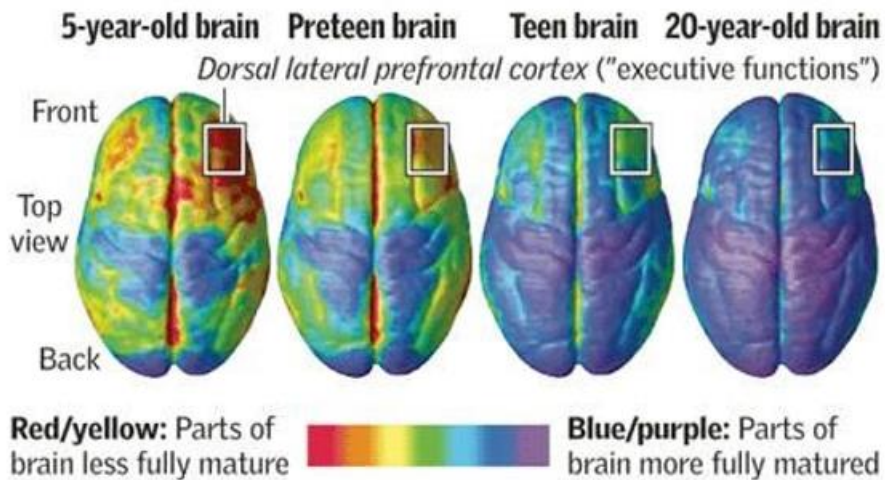
# Neurocognitive Development

## Neurocognitive vulnerability

Functional neuro-imaging indicates that the pre-frontal cortex of the brain, the part of the brain that controls "executive functions" (that is impulse control, planning and weighing up long term consequences of one's actions), is not fully developed until around 25 years of age.[4]

Impulse control, the ability to plan and foresee the consequences of one's actions is vastly less developed in a 10 year old than an adult.[5] As such, when faced with a choice of jumping into a stolen car with peers, or being left on the side of the road alone, it is highly conceivable that a 10 year old may jump into the stolen car, and thus become an accessory to a crime, without having planned this or thought through the consequences.

**Figure 1**[6]




There are many examples of how our society is organised and structured to recognise the physical, neurocognitive and emotional vulnerabilities of children between the ages to 10 to 13 years and to protect children physically and emotionally. People under 18 generally cannot marry in Australia, exemptions to this age limit can be sought (by judicial hearing) for one person under 18 but not, in any circumstance, under 16. Facebook requires users to be 13 years of age, Qantas considers children travelling under 12 years of age as unaccompanied minors.

Current Australian laws that allow 10 year old children to be incarcerated seem to be incongruous in this regard.

## Neurodevelopmental and Mental Health Profile of Incarcerated Children

There is now mounting evidence the children in youth detention in Australian have a very different neurodevelopmental and mental health profile compared to children who are not in custody.

A large multidisciplinary assessment of 99 young people aged between 10–17 years 11 months and sentenced to detention in the only youth detention centre in Western Australia, from May 2015 to December 2016[7], showed:

Of 99 children in detention in Western Australia, it was found that 89% had at least one severe neurodevelopmental impairment.[8] These impairments included:

| | |
|---|---|
| Foetal Alcohol Spectrum Disorder | Intellectual Disability |
| ADHD | Trauma / Attachment |
| Depression | Anxiety |
| Learning Difficulties | Speech and Language Disorders |

This included 36 children who were diagnosed with Foetal Alcohol Spectrum Disorder.[9]

Notably, the majority of children diagnosed with neurodevelopmental disorders had not been previously identified until the study occurred, highlighting the need for appropriate screening and assessment[10]

These findings highlight that many, if not most, incarcerated children with a chronological age of 10 years are likely to have a functional age younger than 10 years of age, further impacting decision making.

### Trauma profile of children in the youth justice system

Children in the child protection and out of home care systems have almost by default experienced some form of physical or mental health trauma.[11]

The report "Crossover Kids: Vulnerable Children In The Youth Justice System" published by the Sentencing Advisory Council of Victoria, clearly highlights the over-representation of children in the child protection/out of home care systems in the youth justice system.[12]

Of particular relevance to the issue of raising the minimum age of criminal responsibility, the report clearly highlights that the younger children are at first sentence, the more likely they are to be known to Child Protection (i.e. to have experienced trauma).[13]

Of the 438 children aged 10 to 13 years at age of first sentence or diversion:

- **1 in 2** were the subject of a report to child protection
- **1 in 3** were the subject of a child protection order
- **1 in 3** experienced out-of-home care
- **1 in 4** experienced residential care[14]

Children who have experienced trauma can exhibit a range of problematic behaviours as a result of this trauma, for many reasons including being in a persistent heightened state, or dissociation due to misreading cues and being quickly triggered into a fear response. This often presents as aggression and disobedience.[15]

### Understanding behaviours in 10 to 13 year old children

The RACP proposes that many problematic behaviours in 10 to 13 year old age children that currently are considered "crimes" under current Australian law are better understood to be within the range of behaviours one would expect, in context of the normal neurodevelopmental profile of 10 to 13 year olds (poor impulse control, poorly developed capacity to plan and foresee consequences) coupled with behaviours one would expect in young children with significant neurodevelopmental impairment and / or who have experienced significant past trauma.[16]

Children with problematic behaviour (and their families) need care, support and treatment, not punishment. Criminalisation and incarceration further damages children who are often traumatised.

Criminalisation and incarceration results in adverse developmental trajectories. Adolescence is a time of transition between childhood and adulthood, during which one develops not only physically, but also mentally and socially. It is over this period that one's sense of self identity is fully developed.[17]

The most important positive influences on a successful transition from childhood to adulthood are:

- Connection with community
- A positive and supportive family environment
- Connection with the education system
- Positive peer experiences

If a young person enters the youth justice system and is removed from these positive influences, they are often sent on a different, less positive developmental trajectory. Furthermore, it would be expected that the removal from family or care, and isolation in police cells or incarceration, will further traumatise children who have already experienced significant past trauma, and trigger further mental health issues and problematic behaviour.

The younger a child enters the youth justice system, the more likely it is there will be recidivist behaviour.[18]

## Physical vulnerabilities

Children who are 10 years old are physically very different to 14 year old children. Children who are 10 years old are generally pre-pubertal. Puberty, and the accompanying growth spurt generally occurs between the ages of 10 and 14 years, although there is significant variation in this.

The average weight of both 10 year old boys and girls is around 30 kg, and in some normal children may be as low as 20 kg at the age of 10 years.[19] Under current Australian law, such children can be incarcerated.

The average height of a 10 year old boy is 138cm, but may be as low as 125 cm in some normal 10 year old boys.[20] The average height of a 10 year old girl is around 135 cm, but may be as low as 122 cm in some normal 10 year old girls.[21] Under current Australian law, children as short as 122 cm may be arrested and incarcerated, leaving them vulnerable to physical harm.

The Royal Children's Hospital, Victoria, recommends that children travelling in a car are safest in a booster seat until they are 145 cm. Under current Australian law, children who are still small enough to need the protection of a booster seat while travelling in a car, can be arrested and incarcerated.

The RACP argues that the physical vulnerabilities of a 10 year old are such that it is inappropriate that under current Australian law they can be arrested, held in police cells and / or incarcerated.

Accepting that there must be a legal minimum age of criminal responsibility, we argue that, from a physical vulnerability perspective, that a minimum age of 14 years is much more appropriate.

## Alternative approaches

*Please note this submission does not discuss alternate approaches to sentencing within the legal system which may include Diversion Programs, and Restorative Justice approaches such as Group and Family Conferencing as this is outside of the RACP's areas of expertise.*

### Bio-psycho-social culturally appropriate approaches

Behavioural paediatricians and mental health clinicians are skilled at working with children and their families to help them develop appropriate strategies and consequences to manage problematic childhood behaviour. Clinicians work with children to help them develop a sense of responsibility for their own actions from a young age (for example, if a three-year-old throws their Lego across the room, they help clean it up and the Lego goes away for a while).

Schools need support and strategies to maintain children with neurocognitive difficulties and problematic behaviours in the education system. Clinicians also support parents struggling with addiction or mental health issues.

In most jurisdictions, if a 9 year old child was found by police to be in a stolen car, or if they were involved in an assault on another child, these actions would be considered serious child protection issues and attempts would be made to put supports around this child and their family. The child may be referred to a mental health worker / service for assessment, and management of behavioural issue. They may be referred to a paediatrician for consideration of medication. Attempts would be made to keep this child in the education system.

The RACP would argue that the approach should be no different for 10 to 13 year olds, and that merely by having had their 10th birthday, addressing problematic behaviours through the youth justice system should not become an option.

Ultimately, there will need to be investment in child protection, education and mental health services to care for and protect vulnerable children with problematic behaviour. Investing in such an approach would undoubtedly have better long-term individual and societal outcomes than current approaches.

### Aboriginal and Torres Strait Islander Children in the youth justice system

Australia's youth justice system is intrinsically racially discriminatory, and more so at the younger age bracket. Over 600 children under the age of 14 years are incarcerated in Australia each year. Over 60% of these

children were Aboriginal or Torres Strait Islander. The younger the cohort of children in custody, the higher the percentage of this cohort is Aboriginal or Torres Strait Islander. Culturally appropriate local solutions need to be developed and implemented with Aboriginal and Torres Strait Islander communities and families.

Specifically for Aboriginal and Torres Strait Islander children, adolescence is a developmental period of strengthening individual identity, cultural identity, links to cultural practices and concepts of culture.[22]

The refresh of the Closing the Gap targets, to which all COAG governments are party, is considering criminal justice targets to address high rates of Aboriginal and Torres Strait Islander incarceration.

## Conclusion

The RACP strongly recommends the age of criminal responsibility is raised to reflect the neurodevelopment of 10 to 13 years olds and the prevalence of pre-existing trauma and neurological impairment in children in contact with the criminal justice system.

---

[1] Abram KM, Teplin LA, Charles DR, Longworth SL, McClelland GM, Dulcan MK. *Posttraumatic Stress Disorder and trauma in youth in juvenile detention*. Archives of General Psychiatry, 2004. 61. p403–410

[2] Johnson, Sara B. et al. Adolescent Maturity and the Brain: T*he Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* Journal of Adolescent Health, Volume 45, Issue 3, 216 - 221

[3] Specifically, "the imposition of a custodial sentence had no effect on the risk of reoffending." McGrath, A., & Weatherburn, D. (2012). *The effect of custodial penalties on juvenile reoffending*. Australian & New Zealand Journal of Criminology, 45(1), 26–44. https://doi.org/10.1177/0004865811432585.

[4] Johnson, Sara B. et al. *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* Journal of Adolescent Health, Volume 45, Issue 3, 216 - 221

[5] Ibid

[6] Paul Thompson, National Institute of Mental Health (https://www.denverpost.com/2006/02/17/research-points-to-changing-teen-brain/)

[7] Bower C, Watkins RE, Mutch RC, et al *Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia* BMJ Open 2018

[8] Ibid

[9] Ibid

[10] Ibid

[11] State of Victoria, Sentencing Advisory Council, 2019 *Crossover Kids: Vulnerable Children In The Youth Justice System* https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-youth-justice-system

[12] Ibid

[13] Ibid

[14] Ibid

[15] Women's Health Goulburn North East 2012 *Literature review – a trauma-sensitive approach for children aged 0-8years* Funded by the Australian Government Department of Families, Community Services and Indigenous Affairs

[16] Johnson, Sara B. et al. *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* Journal of Adolescent Health, Volume 45, Issue 3, 216 - 221

[17] Aldermann E, Rieder J, Cohen M. *A History of Adolescent Medicine*. Pediatric Research. 2003;54:137-47.

[18] Richards K 2011. *Measuring juvenile recidivism in Australia*. Technical and background paper series no. 44. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tbp/tbp044

[19] Centres of Disease Control Height and Weight Growth Charts for Children, https://www.cdc.gov/growthcharts/index.htm

[20] Ibid

[21] Ibid

[22] Medical Journal of Australia *Emerging themes in Aboriginal child and adolescent mental health: findings from a qualitative study in Sydney, New South Wales* 2010; 192 (10): 603-605.