

Raising the Minimum Age of Criminal Responsibility (MACR): An evidence brief

The purpose of this brief is to outline evidence about raising the Minimum Age of Criminal Responsibility (MACR), including the human rights obligations, medical and child development evidence. It explores the implications for young people with Fetal Alcohol Spectrum Disorder (FASD) and victims' rights and supports, and covers design elements of an alternative model to the current youth justice.

Key points

- Raising the Minimum Age of Criminal Responsibility reflects human rights obligations, medical and child development evidence.
- There is a high prevalence of young people with FASD in the criminal justice system.
- Aboriginal and Torres Strait Islander children are disproportionately impacted by these laws, being significantly over-represented in youth justice systems.
- Effective supports and services implemented as alternatives obviate the need for exemptions to raising the MACR.
- An alternative model to the youth justice system needs to include adequately resourced screening, assessment and support for people with FASD.
- Victims' rights can be supported in raising MACR, including through restorative justice processes.

1. Minimum Age of Criminal Responsibility

The Minimum Age of Criminal Responsibility (MACR) is the age below which a child is deemed incapable of having committed a criminal offence in a specific jurisdiction. The current MACR in almost all Australian State and territory jurisdictions is 10 years old. The Australian Capital Territory (ACT) Government is the first Australian jurisdiction to commit to raising the Minimum Age of Criminal Responsibility (MACR) from 10 to 14 years old.

Raising the MACR is based on the following research and human rights obligations:

- **Medical and social research on child development.** Research evidence on developmental psychology and brain development shows that children are not sufficiently able to reflect before acting or to comprehend the consequences of a criminal action.¹
- **Significantly improved life outcomes.** Neurobiological research on early childhood trauma shows that criminalising children under 14 years old leads to a lifetime of harmful consequences, including sustained contact with the justice system.²
- **International human rights obligations.** Australia has human rights obligations under the United Nations Convention on the Rights of the Child. These obligations state that the MACR should be at least 14 years old.³

2. Fetal Alcohol Spectrum Disorder (FASD)

Fetal Alcohol Spectrum Disorder (FASD) is a diagnostic term describing a range of neurodevelopmental impairments⁴. It describes impacts on the brain and body of individuals prenatally exposed to alcohol. FASD is a lifelong disability. People with FASD experience challenges in their daily living and need

support with motor skills, physical health, learning, memory, attention, communication, emotional regulation, and social skills to reach their full potential.

Raising MACR is important due to the high prevalence of children detained in the criminal justice system, with FASD. Children with FASD can have cognitive, behavioural, health and learning difficulties, including problems with memory, attention, cause and effect reasoning, impulsivity, receptive language and adaptive functioning difficulties.⁵ Despite the lack of intent, this can place them at increased risk of early contact with the criminal justice system.⁶

Recent research at the Banksia Hill Youth Detention Centre in Western Australia identified that more than a third of the young people screened in detention were diagnosed with FASD. Researchers suggested this may be an under-estimate due to, for example, the lack of confirmation of prenatal alcohol exposure, suspecting that almost half of these young people may have FASD.⁷

3. Aboriginal and Torres Strait Islander children over-represented in youth justice systems

Aboriginal and Torres Strait Islander children are disproportionately impacted by these laws, being significantly over-represented in detention, accounting for almost two thirds (65 per cent) of younger children in prisons. The supervision rate for Aboriginal and Torres Strait Islander young people aged 10–17 was 16 times the non-Indigenous supervision rate in 2019–20. Aboriginal and Torres Strait Islander young people (75%) were more likely than non-Indigenous young people (63%) to have been under supervision in a previous year. Nearly 2 in 5 (38%) Aboriginal and Torres Strait Islander young people under supervision in 2019–20 were first supervised when aged 10–13, compared with about 1 in 7 (14%) non-Indigenous young people.⁸

As the Uluru Statement from the Heart says:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.⁹

4. Potential exemptions to raising the MACR

Effective supports and services implemented as alternatives to the justice system can address the causes and consequences of behaviours that would have brought children into contact with the justice system. Community safety remains important in raising the MACR, but must be maintained without criminalising children. To improve community safety, children with behaviour that would have brought them into contact with the justice system, should be supported. Where appropriate they can be referred for clinical assessment to identify causal factors such as trauma and potential neurological disorders, (including FASD). Assessment can help identify causal factors, triggers and appropriate behavioural strategies and approaches.

Early interaction with the criminal justice system does significant harm to children, especially if children are imprisoned. For children with disabilities, particularly disabilities like FASD, this harm is profound. When these children are criminalised or imprisoned early in their lives, they are significantly more likely to experience long-term mental illness, death by suicide, homelessness, repeated imprisonment and other adverse effects throughout the rest of their lives.

For children with disabilities, who lose access to universal healthcare systems such as Medicare and the National Disability Insurance Scheme (NDIS) if they are imprisoned, their interaction with the criminal justice system can be deeply disruptive to their ability to receive the supports that they need.¹⁰ Often this disruption takes many years to be remedied, even after release from prison. In this sense, the criminal justice system can be an intervention which removes children and young people with FASD and

other disabilities from access to any of the supports which enable improvements in future behaviour and wellbeing.

5. An alternative model to the youth justice system

Given the higher prevalence of FASD currently present within youth justice settings, appropriate screening, diagnosis and ongoing support is critical to improving the lives of these children and to establishing an alternate pathway when the MACR is raised.

Submissions to the Senate Inquiry into Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder (Senate FASD Inquiry)¹¹ support a multi-disciplinary and community-based approach responding to the needs, (including cultural needs), of people with FASD who come into contact with the justice system.

Additional funding and resourcing are needed for screening, diagnosis, assessment and support services. Diagnosis is complex, time-consuming and expensive and so it becomes difficult to access and many people miss out on the treatment and support that a diagnosis facilitates.

There must be greater recognition and education of police, lawyers and judiciary regarding children with disabilities and cognitive impairment (including FASD) which can mean they do not have the cognitive capacity to form criminal intent and should not be dealt with by the criminal justice system at all. FASD is a frequently misunderstood and misdiagnosed disability. Given the higher prevalence of FASD among children who come into contact with the justice system, it is especially crucial that police, lawyers and the judiciary improve their understanding of how FASD impacts decision-making.

Another pathway for identifying and responding to children suspected of having FASD is in the school system. As the Senate FASD Inquiry recommended, Governments should ensure all schools can deploy and resource FASD-specific strategies and assistance to support educators and students with FASD and suspected FASD, irrespective of IQ level.¹²

Receiving a diagnosis is critical to children being supported appropriately and managing their disability to reach their full potential. To ensure that this can occur, it is important that there are enough health professionals with the expertise required to undertake a FASD diagnosis in each State and Territory. Justice and legal professionals also need multidisciplinary, trauma-informed, culturally-appropriate training about FASD and its medical, social and legal implications¹³. This can help them identify and manage young people suspected of having FASD or other neurological disorders.

6. Victims' rights and supports

Children who come into contact with the justice system are almost invariably themselves victims of significant abuse and traumatic experiences.¹⁴ In many cases, this abuse has occurred while children are in state care. It is important to acknowledge the broader systems failures which have often occurred in these children's lives, and to avoid binary understandings of who is and is not a 'victim'.¹⁵ This means that by better responding to children with these behaviours (in providing supports and services, instead of engaging with the justice system), State and Territory Governments will also be better addressing the rights of these victims of crime.

For community members who have been harmed by the actions of children aged under 14, there are many ways in which the State and Territory Governments can recognise and redress that harm, outside of criminalising children. For example, there are victims of crime compensation mechanisms through which community members can access both financial compensation and other supports, without charges being laid nor convictions being sought. Other alternative approaches include no-fault schemes which are focused on meeting the needs of all people who have experienced harm.

The rights of victims can also be considered through restorative justice practices which are well established in the justice systems of various States and Territories. The appropriateness of restorative

justice would be dependent upon the cognitive capacity of the child. Restorative justice programs that involve victims in justice processes have been found to increase victim and community satisfaction with the criminal justice system¹⁶. They are also found to be a cost-effective way to reduce imprisonment and reoffending. Some elements of restorative justice programs may be able to be incorporated into the design of new supports and services

References

- ¹ Law Council of Australia (2019) *Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax* <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>
- ² ACTCOSS (2020) *Submission to the Council of Attorneys-General Review of Age of Criminal Responsibility* <https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a3902734ecdd22cc6932ed/1621332008645/ACTCOSS.pdf>
- ³ Cunneen, C (2017) *Arguments For Raising The Minimum Age Of Criminal Responsibility - Comparative Youth Penalty Project Research Report*, UNSW <https://www.cypp.unsw.edu.au/sites/ypp.unsw.edu.au/files/Cunneen%20%282017%29%20Arguments%20for%20raising%20the%20minimum%20age%20of%20criminal%20responsibility.pdf>
- ⁴ Bower C & Elliott EJ (2016) *Australian Guide to the diagnosis of FASD*. https://www.fasdhub.org.au/siteassets/pdfs/australian-guide-to-diagnosis-of-fasd_all-appendices.pdf
- ⁵ NOFASD (2019) *What Is FASD?* <https://www.nofasd.org.au/alcohol-and-pregnancy/what-is-fasd/>
- ⁶ NOFASD (2021) *The Senate Inquiry Series: FASD in The Justice System* <https://www.nofasd.org.au/blog/the-senate-inquiry-series-fasd-in-the-justice-system/>
- ⁷ Bower C, Watkins RE, Mutch RC, et al (2018) *Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia*. <https://bmjopen.bmj.com/content/bmjopen/8/2/e019605.full.pdf>
- ⁸ AIHW (2021) *Youth justice in Australia 2019-20* <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/contents/summary>
- ⁹ National Constitutional Convention (2017) *The Uluru Statement From The Heart* <https://ulurustatement.org/the-statement>
- ¹⁰ Law Council & AMA (2019) *Joint statement on the medical basis for raising the age to 14 years* <https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>
- ¹¹ Senate Community Affairs References Committee (2021) *Submissions to the Inquiry into Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/FetalAlcoholSpectrumDisorder/Submissions
- ¹² Senate Community Affairs References Committee (2021) *Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder Report*, March 2021 p.111 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024357/toc_pdf/Effectiveapproachestoprevention,diagnosisandsupportforFetalAlcoholSpectrumDisorder.pdf;fileType=application%2Fpdf
- ¹³ Passmore HM, Mutch RC, Watkins R, et al (2020) *Reframe the Behaviour: Evaluation of a training intervention to increase capacity in managing detained youth with fetal alcohol spectrum disorder and neurodevelopmental impairments*, <https://www.tandfonline.com/doi/abs/10.1080/13218719.2020.1780643>
- ¹⁴ Wall, Higgins & Hunter (2016) *Trauma-informed care in child/family welfare services*. CFCA PAPER NO. 37 <https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca37-trauma-informed-practice.pdf>
- ¹⁵ Lincoln, Brotto (2019) *Exploring the victim-offender overlap at the intra-individual level: Reimagining justice for crimes of interpersonal violence* <https://research.bond.edu.au/en/publications/exploring-the-victim-offender-overlap-at-the-intra-individual-level>
- ¹⁶ Queensland Productivity Commission (2019) *Inquiry into Imprisonment and Recidivism – Final Report* <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>