



Raising the Minimum Age of Criminal Responsibility

A Pathway to a Brighter Future for Western Australia's most at risk children

Social Reinvestment WA Policy
Paper: Raising the Age of
Criminal Responsibility to 14



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1 Foreword

Dear Reader,

In Western Australia children as young as ten years old are currently being imprisoned.

These children are in primary school, yet being taken away from their families, communities and connection to culture.

This is particularly devastating when we consider that the vast majority of children and young people in the criminal justice system are among our most vulnerable; living with disabilities, trauma, and poverty.

There is significant scientific and medical consensus that demonstrates that children are too neurologically and cognitively immature to be held criminally responsible for their actions. Our current youth justice system is not only vastly expensive, but ineffective at long term rehabilitation or diversion of our young people.

We know that detention in particular harms children, still in the process of learning and growing, in the long term. And once young people enter the criminal justice system; frequently taken into police custody and even imprisoned, they often become trapped in the system for life.

We have a responsibility to uphold the basic human rights of children in Western Australia. The simple fact that children are being detained in the youth justice system is an indictment on our society who have failed to protect them. As a community, we have a responsibility to care for, support, and protect these young people, rather than criminalising them for circumstances largely out of their control.

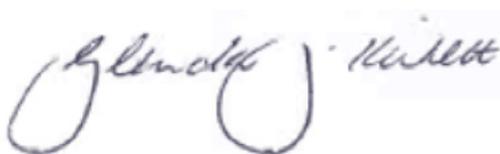
The evidence base shows us that if we focus on a Social Reinvestment Approach to juvenile justice including; targeted, holistic and 'no wrong door' approaches; justice reinvestment; culturally secure initiatives; place based and community led solutions with families involved; and accountable and transparent systems; we will see a reduction in crime, and better social outcomes for Western Australia's young people.

As a whole community, we must do better. In 2021 this is unacceptable.

Together, we can raise the minimum age of criminal responsibility to 14 years; and build a brighter future for the most vulnerable young people, creating safer communities for all Western Australians.

Yours sincerely,

Glenda Kickett and Daniel Morrison
Co-Chairpersons of Social Reinvestment WA



2 Executive Summary

Western Australia currently has a minimum age of criminal responsibility of 10 years old. Effectively this means children from ages 10-13 years old can be charged, tried, and sentenced to criminal sanctions. In 2018-19, there were 143 children aged 10 to 13 years in unsentenced detention.¹

As recently as 2020, an 11-year-old Aboriginal boy from a regional location was charged with stealing after he had taken a pen valued at \$5.00 and a pencil valued at \$4.00 from the community office. This child was arrested, taken into police custody and formally interviewed by police.²

In comparison to many countries across the world, Australia has a very young minimum age of criminal responsibility, lower than countries such as Sierra Leone and China. In early 2021, over 30 nations including Canada, France and Germany condemned Australia's failure to raise its minimum age of criminal responsibility and incarceration of children.³

While all Australian states and territories currently have a minimum age of criminal responsibility of 10 years old, both the Australian Capital Territory and Northern Territory have recently announced commitments to raise their minimum age. Further, the Council of Attorney Generals (CAG) was considering this issue in 2020, prior to the CAG meeting format being reformed.

There is growing national public support for raising the minimum age of criminal responsibility, partially in response to documentary films such as *In My Blood It Runs*, and a national petition last year that garnered over 100,000 signatures in support of the cause.

Many Western Australians are unaware that our laws currently allow for the criminalisation and detention of children so young, with a report last year finding just 7% of Australians correctly identified 10 years old as the age of criminal responsibility, and 51% believed it was already at least 14 years old.⁴

Medical consensus shows us that children are still developing and growing. The overwhelming scientific and medical consensus from around the world demonstrates that children are still developing their cognitive skills and processes, and do not fully complete their neurological development until their early twenties. The United Nations Committee on the Rights of the Child recommended in 2019 that the minimum age of criminal responsibility around the world should be at least 14 years of age. This recommendation was underpinned by '[d]ocumented evidence in the fields of child development and neuroscience' which 'indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing'.⁵ Generally, most 14-year-olds will be either yet to reach puberty, or in the midst of it. These factors ensure young people are not capable of fully comprehending the consequences of their actions, and struggle with risk-taking behaviours, susceptibility to peer pressure, and impulse control issues. As a community, we already take responsibility for young people and children for these very reasons and provide them with the support they need to navigate such a difficult period of transition.

Further, children who are involved in the criminal justice system are already among the most vulnerable members of our community. Approximately 90% of children in Banksia Hill Detention Centre were found by the Telethon Kids Institute to have significant cognitive impairments, including Foetal Alcohol Spectrum Disorder (FASD). Furthermore, 50% of children in the criminal justice system

1 Commissioner for Children and Young People Western Australia, *Contact with the youth justice system* [website], <https://www.cryp.wa.gov.au/our-work/indicators-of-wellbeing/age-group-12-to-17-years/contact-with-the-youth-justice-system/>

2 Information provided by ALSWA (March 2021).

3 D. Hurst, 'More than 30 countries condemn Australia at UN over high rates of child incarceration', *The Guardian*, 21 January 2021, <https://www.theguardian.com/australia-news/2021/jan/21/china-attacks-australia-at-un-over-baseless-charges-as-canberra-criticised-for-keeping-children-in-detention>

4 The Australian Institute, *Most Australians Agree Children As Young as 10yo Do Not Belong in Prison*, 2020 [media release], <https://australianinstitute.org.au/post/most-australians-agree-children-as-young-as-10yo-do-not-belong-in-prison/>

5 United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, paragraph 22.

in Australia have also been involved in the Child Protection System.⁶ In 2019/2020, 72% of the young people incarcerated in Western Australia were Aboriginal or Torres Strait Islander young people, despite making up just 5% of the population.⁷

Our justice system is filled with children who face significant disadvantage and are in need of extra support – such as children with disabilities, children from broken families, children living in poverty and Aboriginal and Torres Strait Islander children who are affected by the ongoing effects of colonisation, intergenerational trauma and racial discrimination.

Criminal justice interventions are far more expensive than other interventions and we know that detention is the most expensive approach to youth justice in existence in Australia.

It costs nearly nine times as much to incarcerate a child than to support them in the community with other interventions⁸. And the cost is not simply economic. Detention and any exposure to the criminal justice system has been demonstrated to cause long-term harm to children.

Detention is harmful and ineffective. Many studies have shown that detention is detrimental to a child's psychological health and mental wellbeing both in the short and long term. Detention also disrupts children's education and social development, as well as exposing them to other children and young people who may encourage anti-social and offending behaviour. Our juvenile detention system fails to effectively rehabilitate and reintegrate young people demonstrated by high recidivism rates; 55% of children in Banksia Hill in 2019/2020 had been imprisoned previously.⁹

The research and data suggest that the youth justice system does not generate any benefits for the child. It is even more important to recognise that rehabilitation and therapeutic support can be provided in the community without causing long-term harm and at only a fraction of the cost.

Australia has committed to uphold the basic human rights of children and eliminate racial discrimination. Australia is a signatory to the United Nations Convention on the Rights of the Child. Australia is, therefore, legally obliged to integrate practice that protects, cares for, and provides bright futures for all young people, underpinned by a focus on human rights.

Article 40(1) of the Convention on the Rights of the Child provides that:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Incarcerating children under the age of 14 years fails to take into account the limitations of their age and developmental stage. It does not promote effective reintegration nor support them to assume a more constructive role in society.

The massive overrepresentation of Aboriginal and Torres Strait Islander young people in the Western Australian justice system is the most disproportionate rate of incarceration in the entire country, and indeed one of the highest disproportionate rates of incarceration the world. The UN Committee to

6 Australian Institute of Health and Welfare 2019. Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018. Data linkage series no. 25. Cat. no. CSI 27. Canberra: AIHW.

7 Department of Justice, 'Annual Report, 2019/20', *The Department of Justice*, WA, The Government of Western Australia, 2020, https://www.wa.gov.au/sites/default/files/2020-09/Department-of-Justice-Annual-Report-2019-2020_0.pdf; the reported average daily detention population in Banksia Hill Detention Centre was 107 young people with 77 Aboriginal and Torres Strait Islander young people.

8 The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

9 Department of Justice, 'Annual Report, 2019/20', *The Department of Justice*, WA, The Government of Western Australia, 2020, https://www.wa.gov.au/sites/default/files/2020-09/Department-of-Justice-Annual-Report-2019-2020_0.pdf.

End Racial Discrimination (UN CERD) has called for urgent action in this area.¹⁰

While the arguments are clear as to why we should raise the age, how do we do it?

We can immediately reform Western Australian legislation to raise the age of criminal responsibility to 14 years by amending section 29 of the Criminal Code (WA). This power rests with the State Government. Police and other government authorities (such as the Department of Communities and Department of Health) regularly come into contact with children under the age of 10 years in the course of their regular work and divert them into appropriate community support services and the care of family. The same approach that now applies to children under 10 years would apply for any child aged between 10 to 13 years if Western Australia raised its minimum age of criminal responsibility to 14 years.

For those young people under the age of 14 years coming into contact with law enforcement we have an opportunity to improve the system. The Young Offenders Act 1994 (WA) was reviewed in 2016 and several areas for reform and improvement were highlighted by the Department of Corrective Services¹¹, yet these are yet to be implemented. Early identification of struggling children and families should not be left until someone formally enters the justice system. If agencies and services work collaboratively and create multiple points of entry for young people and their families to a system of support we can intervene early and build healthier families and safer communities.

We need to invest adequately and significantly into evidence-based, targeted programs resolving the underlying social causes of offending. This includes issues such as access to social housing, support for mental health, improving access to AOD treatment and support, early childhood education and parenting support, and engagement in education and pro-social activities.

Our focus should be on:

- Justice reinvestment, redirecting our resources to early intervention, prevention, diversion, and rehabilitation that resolves the underlying causes of offending.
- Collaboration for culturally secure programs designed by, with, and for Aboriginal and Torres Strait Islander people.
- Holistic support services that recognise and respond to the unique circumstances and complexity of vulnerable individual's experiences, engage the whole family, and can be accessed through no wrong door.
- Placed-based programs co-designed with the communities they seek to engage.
- Ensuring our youth justice system is fair, transparent, and accountable.

Currently, there is no shortage in innovative initiatives that already work here in Western Australia and Australia. This includes justice reinvestment projects such as Olabud Doogethu in Halls Creek WA, which has reduced burglary alone by 58% in its first 18 months, and the Youth Partnership Project in the South-East corridor of Perth that focuses on providing the right support for young people at the right time.

There is an existing evidence base and we know what works. By diverting even just the 14 children under the age of 14 in Banksia Hill in September of 2020 before they reached the court system or detention, we could have saved over \$10.5 million. We simply need to redirect our political will and invest our resources to early intervention and prevention, diversion, rehabilitation, and reintegration.

Raising the minimum age of criminal responsibility to 14 is the right response to the neurological and medical consensus; and evidence on the harm, ineffectiveness, and costliness of juvenile detention. Considering that children in our criminal justice system usually face intersectional disadvantage, and are among the most vulnerable people in society, we have a responsibility to care for them and

¹⁰ Australian NGO Coalition Submission to the UN Committee on the Elimination of Racial Discrimination, 'Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination', 2017, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_29334_E.pdf

¹¹ WA Government Department of Corrective Services, 'Young People in the Justice System: A review of the Young Offenders Act 1994', 2016, <https://www.correctiveservices.wa.gov.au/files/youth-justice/young-people-justice-system-review-yoa.pdf>

uphold their basic human rights. There are already legitimate pathways for diversion that can be utilised for us to 'Raise the Age', and the savings generated by diverting children could be utilised to improve our social support system for struggling young people creating safer communities, and better life outcomes and futures for WA's most at risk youth.

3 Context

In Western Australia, a child over the age of 10 years may be held criminally responsible for an offence. In practice, this means that a child aged 10 years or more can be arrested by police and charged with an offence. This is the first stage of the criminal justice process. If charged, a child may be issued with a notice to attend court, released on bail by police or held in custody before the child can be brought before the Children's Court.

During the period 1 January 2020 to 31 December 2020, the Aboriginal Legal Service of Western Australia's Custody Notification Service (CNS), received 4,753 notifications for Aboriginal children arrested/apprehended and detained in a police facility. The majority of these children were taken into police custody because of alleged offending behaviour.

Children who are detained by police are usually kept in a police cell until they are released or can be transported to court or to Banksia Hill Detention Centre; they are held in the same concrete cells that are used to detain adults. Children detained by police in regional areas may spend a number of days in a police cell before they can be transported to Banksia Hill Detention Centre in Perth.

Many children arrested by police are not released on bail and remain in custody until they can appear before a Magistrate in the Children's Court (usually the next day). Once in court, the young person may or may not be released on bail.

If police or a Magistrate determines that bail is appropriate, there is a further hurdle for children under 17 years; they cannot be released from custody on bail unless a 'Responsible Person' signs an undertaking. In practice, delay from being released from custody is common because a Responsible Person cannot easily be located or they are unable to attend to sign the undertaking due to barriers such as lack of transport. For children under the care of the State, the child cannot be released until a representative from the Department of Communities signs the undertaking. This process is often also delayed. Children therefore spend increased hours, days and even weeks on remand in custody because of a lack of ability or willingness for an adult to sign the Responsible Person undertaking.

Once released on bail, children are required to attend court, usually on multiple occasions. Bail conditions for children will often include curfew conditions (i.e. a condition to remain at their residential premises between specified hours) and may also include residential conditions (i.e. only permitted to live at a specified address). Police conduct regular curfew checks and if a child is found in breach of their curfew or they are not at the specified address, the child will usually be arrested and detained overnight before being taken to court. This happens even if the young person is not engaging in any unlawful behaviour. If a child doesn't attend court (for example, because they had no transport to attend, no adult to accompany them to court or simply forgot), a warrant for their arrest may be issued. Again, this means that police will arrest the child and hold them in custody until they can be brought before a court.

If a child pleads not guilty to an offence, they will be required to instruct a lawyer, attend court for a trial (months later), listen to the evidence of witnesses and potentially be subjected to cross examination. Imagine this for any child, let alone a 10-year-old. If a child pleads guilty they will be sentenced by the court, typically after a comprehensive report from Youth Justice Services is provided to the Magistrate. The child will be required to discuss their life with a youth justice officer, who is often a complete stranger.

There are various sentencing options under the Young Offenders Act 1994 (WA). Frequently, children are sentenced to community supervision orders whereby the child is required to report to Youth Justice Services (e.g. once, twice or three times per week); attend programs (e.g. educational programs, counselling); and/or complete community service hours. Children are expected to meet

these requirements even though they cannot drive, have no independent access to money and often when the locations they are required to attend are large distances from their homes. For example, a young person who lives in Ellenbrook will be required to attend Youth Justice Services in Mt Lawley (about 90 minutes each way by public transport). If the child fails to attend, they may be breached, arrested again and taken into custody.

For those children who are refused bail or where no Responsible Person has signed the undertaking, the child will remain in custody until the charges are dealt with. Children in regional and remote areas must be transported to Perth and remain in Banksia Hill away from family and community.

Throughout the criminal justice process, children are required to communicate and deal with police, lawyers, detention workers, youth justice workers employed by the Department of Justice, magistrates and others. It is not appropriate nor justified for children under the age of 14 to be subjected to this onerous, complicated and highly stressful process.

Our current legislation sees primary school-aged children brought before the criminal justice system for a range of different offences:

- A 12-year-old Aboriginal boy from a regional town was charged by police with receiving a stolen Freddo frog valued at about \$0.70. The boy spent several hours in a police lock up after failing to attend a court date in relation to the charge.
- A 10-year-old Aboriginal boy from a regional town was found by police playing in an abandoned house after another young person had broken a window to enable them to get inside. The boy used a rake to push out the glass to avoid cutting himself when getting inside. The boy was charged by police with criminal damage.
- An 11-year-old with no prior contact with the justice system was charged with threats to harm and doused in capsicum spray by police following an incident at her primary school where she allegedly threatened teachers with plastic scissors.
- A 12-year-old Aboriginal girl who was charged with possession of stolen property after her friend stole two chocolate bars and she took a bite from one of them.¹²

3.1 Western Australia: a snapshot of youth justice

3.1.1 General snapshot

3.1.1.1 Detention

In WA on 30 September 2020, there were 83 children in Banksia Hill Detention Centre.¹³

- 57 (69%) were Aboriginal and/ or Torres Strait Islander children
- 50 (60%) of children were unsentenced (on remand)
- 1 child under 13 years;
- 13 children aged between 13 to 14 years old; and
- 69 children were aged 15 to 18 years old.

3.1.1.2 Community supervision

In WA on 30 September 2020, there were 1,075 children managed in the community.¹⁴ Of these children:

¹² Aboriginal Legal Service of Western Australia Limited (ALSWA), *Submission to the Review of the Age of Criminal Responsibility by Council of Attorneys-General*, 28 February 2020

¹³ Department of Justice, 'Quarterly Statistics - Custodial (Youth Detainee) 2020 - Quarter 3', *Department of Justice: Corrective Services*, Department of Justice, 2020, <https://www.wa.gov.au/sites/default/files/2021-01/2020-quarter3-youth-custodial.pdf>

¹⁴ Department of Justice, 'Quarterly Statistics - Youth Community 2020 - Quarter 3', *The Department of Justice: Corrective Services*, WA, 2020, <https://www.wa.gov.au/sites/default/files/2021-01/2020-quarter3-youth-community.pdf>

- 565 (53%) were Aboriginal and/ or Torres Strait Islander children
- 59 (5%) of children were aged under 13 years old; and
- 250 (23%) of children were aged between 13 and 14 years old.
- 55% had been in juvenile detention previously.¹⁵

3.2 Economic cost

- It costs \$1,339 per day to detain one child in Banksia Hill in 2019-20, roughly equivalent to \$488,735 per child for one year.¹⁶
- In comparison to this, it only costs \$93 per day for one child to be supervised in the community, roughly equivalent to \$33,945 per child for one year.¹⁷

3.3 Who are the children entering our criminal justice system?

An overwhelming majority of children who enter the criminal justice system are vulnerable and at-risk.

- In a 2016 study by the Telethon Kids Institute, 90% of children in Banksia Hill were found to have severe neuro-developmental impairments, including Foetal Alcohol Spectrum Disorder (FASD).¹⁸
- More than half the children in detention and in community supervision were also under the services of child protection (55% and 50% respectively).¹⁹

3.4 Aboriginal and Torres Strait Islander children are disproportionately represented

- In 2019-20, 72% of children in detention were Aboriginal and/ or Torres Strait Islander, while 55% of children supervised in the community were Aboriginal and/ or Torres Strait Islander.²⁰
- Aboriginal and Torres Strait Islander children are 21 times more likely than non-Aboriginal and Torres Strait Islander children to be under youth justice supervision.²¹

3.5 Western Australia's approach to justice

3.5.1 International comparison

Western Australia's age of criminal responsibility is among the lowest in the world, resulting in

¹⁵ Department of Justice, 'Annual Report, 2019/20', *The Department of Justice*, WA, The Government of Western Australia, 2020, https://www.wa.gov.au/sites/default/files/2020-09/Department-of-Justice-Annual-Report-2019-2020_0.pdf

¹⁶ The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

¹⁷ The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

¹⁸ Telethon Kids Institute, *Nine out of ten young people in detention found to have severe neuro-disability* [media release], 2016, <https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>

¹⁹ Australian Institute of Health and Welfare, 'Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018', *Australian Government*, 2019, <https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2014-18/contents/table-of-contents>

²⁰ The Western Australian Government, 'Department of Justice Annual Report, 2019-2020', *Department of Justice*, Perth, WA, 2019, https://www.wa.gov.au/sites/default/files/2020-09/Department-of-Justice-Annual-Report-2019-2020_0.pdf

²¹ The Australian Government, 'Youth justice in Western Australia 2018-19', *Australian Institute of Health and Welfare*, 2019, <https://www.aihw.gov.au/getmedia/721ae212-5fde-4d3a-9fd8-989628252c84/aihw-juv-132-factsheet-WA.pdf.aspx>

children as young as 10 years old being taken away from their families and communities. Globally, the current median minimum age of criminal responsibility is 14 years old, and the average is 13.5 years.²²

Countries	Minimum Age of Criminal Responsibility
Scotland, Canada and the Netherlands	12
Austria, Germany, Italy, Japan and Spain	14
Denmark, Finland, Iceland, Norway and Sweden	15
Portugal and Belgium	16
Luxembourg	18

Many of these countries are comparable to Australia in a number of areas. They have managed to raise the minimum age of criminal responsibility to 14 years old or over, while addressing the urgent need to support their most vulnerable children and build safe communities, with significant positive effects on the community.

3.5.2 Interstate comparison

Western Australia has the second highest average rate of children in detention in Australia after the Northern Territory, detaining some 4.96 young people aged 10-17 per 10,000.²³ As previously noted, Aboriginal and Torres Strait Islander young people are detained in Western Australia at a rate almost double the national average. They are also currently 49 times more likely to be detained than non-Aboriginal and Torres Strait Islander young people (ranging from 31-54 times more likely over the last four years), which is the highest disproportionate rate-ratio in the country.

3.6 Raise the Age: A national movement for change

A national movement and campaign to Raise the Age of Criminal Responsibility has garnered over 100,000 signatures on a petition; and in 2020, thousands of Australians shared photos of themselves at 10 years old on social media in support of the cause. Public awareness is growing on the minimum age of criminal responsibility in Australia, and this has been furthered on the public agenda by the release of film *In My Blood it Runs*; the Council of Attorneys General call for submissions; and announcements from the ACT government that they intend to investigate raising the age.

3.6.1 Australian Capital Territory (ACT) move to Raise the Age

Weeks before the 2020 ACT election, the ACT Labor Government endorsed raising the age from 10 to 14 years.²⁴ Following their re-election in October 2020, the ACT Labor-Greens Government confirmed its commitment to implementing these reforms in the next parliamentary term, regardless of whether a national consensus is reached.²⁵ There is an opportunity for the WA government to lead the rest of the country in raising the age, similar to the ACT.

22 National Children's Commissioner, 'Children's Rights Report 2016', *Australian Human Rights Commission*, Sydney, NSW, 2016, https://humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf

23 Australian Institute of Health and Welfare, 'Youth detention population in Australia 2019', *Australian Government*, 2020, <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2019/contents/summary>

24 Australian Broadcasting Corporation, 'Criminal responsibility age to be raised from 10 to 14 if ACT Labor re-elected, after Government endorses reform', *ABC News*, <https://www.abc.net.au/news/2020-08-21/act-criminal-responsibility-children-reform-if-labor-re-elected/12580696>

25 K. Lewis, 'ACT government first Australian jurisdiction to commit to raise criminal age of responsibility', *Canberra Times*, 3 November 2020, <https://www.canberratimes.com.au/story/6995946/historic-step-act-government-to-raise-age-of-criminal-responsibility/>

3.6.2 Council of Attorneys-General

Raising the age has received significant media and public attention over recent years. In response to significant public interest, this issue has been considered by the Council of Attorneys-General (CAG). In 2018 a CAG Working Group was established to review the issue and report its findings.²⁶ Whilst the final report was originally due to be delivered in July of 2020, it was delayed and CAG in its previous form was disbanded due to the establishment of the new National Cabinet group during COVID. CAG subsequently has not yet committed to raising the minimum age of criminal responsibility, leaving Australia out of step with the rest of the world.

3.6.3 'In My Blood It Runs'

The issue of children in detention has received increased media focus in recent years. A powerful example is the critically acclaimed 2019 Australian documentary film, 'In My Blood it Runs', which tells the story of Djuwan Hoosan. Djuwan is a 10-year-old Arrernte/Garrwa boy from Alice Springs who was nearly imprisoned after getting in trouble with the law. The documentary depicts the failings of Australia's Western education system in providing a culturally-appropriate curriculum to Aboriginal and Torres Strait Islander children, and how resultant disengagement contributes to offending behaviour. In September 2019, at 12 years of age, Djuwan became the youngest person to ever address the United Nations Human Rights Council. In a separate speech to the Northern Territory Parliament, he said "I know I was real cheeky, but no kid should be in jail."²⁷ The minimum age of criminal responsibility in Australia has received global condemnation in light of our lack of action on this issue.

4 Why we should raise the age of criminal responsibility

All children have the right to a safe and happy childhood and have the opportunities to grow and thrive. Raising the minimum age of criminal responsibility in Western Australia from 10 to 14 years old will help protect our most vulnerable children and create a society in which all children have the opportunity to be supported and cared for.

- Overwhelmingly, the medical and scientific evidence highlights that children's neurological development is ongoing until their early 20s.
- Vulnerable children, particularly children with mental health or neurodevelopmental challenges, should be supported and cared for. However, our current youth justice system is ill-equipped and, in fact, causes more harm to children.
- Australia has been internationally condemned by the United Nations. The United Nations has urged Australia to raise its minimum age of criminal responsibility to the internationally accepted age of 14 years, as well as ending the systemic racial discrimination of Aboriginal and Torres Strait Islander people.²⁸

4.1 Children are still developing and growing

The international medical and scientific consensus is that children and young people are still in

²⁶ Council of Attorneys-General, 'Age of Criminal Responsibility Working Group Terms of Reference', Department of Justice, The Government of Western Australia, 2019, <https://www.department.justice.wa.gov.au/files/TOR-age-criminal-responsibility.pdf>

²⁷ J. Breen, 'No kid should be in jail': 12yo at centre of documentary issues plea to NT Parliament', *ABC News*, 7 August 2019, <https://www.abc.net.au/news/2019-08-07/alice-springs-boy-almost-jailed-nt-parliament-child-imprisonment/11393252>

²⁸ D. Hurst, 'More than 30 countries condemn Australia at UN over high rates of child incarceration', *The Guardian*, 21 January 2021, <https://www.theguardian.com/australia-news/2021/jan/21/china-attacks-australia-at-un-over-baseless-charges-as-canberra-criticised-for-keeping-children-in-detention>; Australian NGO Coalition Submission to the UN Committee on the Elimination of Racial Discrimination, 'Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination', 2017, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_29334_E.pdf

ongoing neurological development, not fully maturing until they are at least in their early twenties.²⁹ Children's skills in emotional regulation, reasoning and decision-making require ongoing support to build and develop. Evidently, our focus with children should be on empowering them to develop these essential life skills and to provide them the tools in which they can thrive and create their own futures, instead of criminalising them.

The overwhelming medical and scientific consensus suggests that children should not be held criminally responsible, given they are still neurologically developing. This is supported by the Australian Medical Association (AMA) who argue that children forced into contact with the criminal justice system are less likely to complete their education, further preventing them to neurologically develop and grow into thriving adults.³⁰ In their submission to CAG, the AMA fully supports raising the age of criminal responsibility to 14 years and has highlighted that raising the age of criminal responsibility will prevent the unnecessary criminalisation of vulnerable children.³¹

Australia, in particular Western Australia, continues to hold children as young as 10 years old criminally responsible, despite overwhelming medical and scientific evidence that this is not appropriate. At 10-11 years old, children are still in Years 5 and 6 in primary school. Toyworld's recommended products for this age group include Unicorn Glitter Art and Beyblades. If a young person engages in offending at this age, a reasonable society cannot hold them criminally responsible. Instead, we need to consider how as a community we can best respond to support these young people to have a bright future ahead of themselves.

4.2 Children in detention are also our most vulnerable

Children involved in our criminal justice system are frequently our community's most vulnerable young people. Children at risk need intensive support, not criminalisation.

4.2.1 Children with neurodevelopmental or cognitive challenges are at risk

In 2016, medical experts from the Telethon Kids Institute found that 90% of children in Banksia Hill Detention Centre had a severe neuro-disability or cognitive challenges, and that nearly 40% of the children suffered from Foetal Alcohol Spectrum Disorder (FASD).³² Of even greater concern was that these children were undiagnosed and unsupported until the time of the study.

Children with neuro-developmental and cognitive challenges are prone to a number of challenges including difficulties with communication, memory and attention; susceptibility to peer pressure; inability to regulate emotions; and, some instances, displays of inappropriate behaviour. Young people with FASD experience neurological differences, and require support to understand cause and effect; individualised education models to learn from past encounters; and support to enhance decision making.

The criminal justice system is not equipped to support young people whose offending is contributed to by neurodevelopmental and cognitive difficulties. Children (and adults) imprisoned are currently denied federal funded healthcare access, including Medicare, National Disability Insurance Scheme (NDIS) and Pharmaceutical Benefits Scheme (PBS), and with higher rates of health issues they are

29 C. Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility', *Comparative Youth Penalty Project*, Sydney, University of New South Wales, 2017, p. 5-6, <http://cypp.unsw.edu.au/node/146>.

30 Social Reinvestment WA, Submission to the Age of Criminal Responsibility Working Group, Council of Attorneys General, Perth, WA, February 2020, <https://bit.ly/3tBKjYz>

31 The Australian Medical Association, 'AMA submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review', <https://ama.com.au/submission/ama-submission-council-attorneys-general-age-criminal-responsibility-working-group-review>

32 Telethon Kids Institute, *Nine out of ten young people in detention found to have severe neuro-disability* [media release], <https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>

disproportionately affected by this deprivation of services and continuity of care.³³ Raising the minimum age of criminal responsibility instead provides opportunities for early intervention for young people with neurological differences, with greater investment in diagnosis and support.

Furthermore, children with neuro-developmental and cognitive challenges experience additional barriers in the criminal justice system. With reference to the observations above regarding the criminal justice process, it is inconceivable that 10–14-year-olds with cognitive impairments coupled with socio-economic disadvantages would have any chance of understanding, remembering and complying with the often-onerous conditions of bail and court-imposed orders.

4.2.2 Children in child protection

For children in Australia's youth justice system, 50% had also been in the care or services of child protection.³⁴ These children have already been removed from their families and are under the protection of government services.

They are among the most vulnerable cohort in our community, and as such they need intensive support and a safe environment. The evidence shows that the removal of children from their families has a traumatising impact upon those children, even when done for their own safety. When children in the child protection system end up in the criminal justice system, they have been failed by systems supposed to protect them and our community.

It is also important to highlight that children under the care of the State are particularly prone to early criminalisation. Some children (particularly, young children) engage in anti-social behaviour in a family or school environment but nevertheless avoid the formal intervention of the justice system. For example, damaging property (smashing a glass) or minor assaults between siblings or among family members will often be dealt with without recourse to the police. Likewise, if a parent found a prohibited drug in their child's possession they would not necessarily contact the police and request that charges be laid. However, many children under the care of the State are dealt with for this type of behaviour by the formal justice system. Government and contracted workers in residential facilities often contact police to respond to low level offending. Raising the minimum age of responsibility would ensure that children under 14 years who are in the care of the State, are dealt with in a far more appropriate and effective manner.

4.2.3 Aboriginal and Torres Strait Islander children are affected disproportionately

In Western Australia, a majority of children in the youth justice system are Aboriginal and Torres Strait Islander children, despite being less than 5% of WA's population. According to the Department of Justice in 2019-20, 72% of children in detention were Aboriginal and/ or Torres Strait Islander, while 55% of children supervised in the community were Aboriginal and/ or Torres Strait Islander.³⁵

Aboriginal and Torres Strait Islander people and communities already face significant entrenched socio-economic disadvantage, due to the historical legacy of Australia's colonisation and oppressive policies such as stolen generations, stolen wages, and the dispossession of Aboriginal and Torres Strait Islander people to their ancestral lands.

In addition to this, over-policing is also a key cause of the over-representation of Aboriginal and

33 C. Cumming, C. SA. Kinner, DB. Preen, and A. Larsen, 'In Sickness and in Prison: The Case for Removing the Medicare Exclusion for Australian Prisoners', *Journal of Law and Medicine* vol. 26, no. 1, 2018, pp. 140.

34 Australian Institute of Health and Welfare, 'Youth detention population in Australia 2019', Australian Government, 2020, <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2019/contents/summary>

35 Department of Justice, 'Annual Report, 2019/20', *The Department of Justice*, WA, The Government of Western Australia, 2020, https://www.wa.gov.au/sites/default/files/2020-09/Department-of-Justice-Annual-Report-2019-2020_0.pdf

Torres Strait Islander people in the criminal justice system.³⁶ Research has found that between 2012 to 2016, the WA Police could have diverted between 88% - 96% of offences by young people, however, they instead only diverted less than half (40% - 49%).³⁷ This is further highlighted when WA Police statistically divert less Aboriginal or Torres Strait Islander young people (35%), compared to non-Aboriginal and Torres Strait Islander young people (45%).³⁸

The history and evidence of over-policing on Aboriginal and Torres Strait Islander communities has led to the increased likelihood of contact for Aboriginal and Torres Strait Islander people, including children, in the Western Australian criminal justice system. The examples at the beginning of this paper provide clear evidence of over-policing. Consequently, this has reinforced the often-poor relationships between Aboriginal and Torres Strait Islander people and police.

In recent years, there have been attempts made by the WA Police to heal the historic mistrust with Aboriginal communities. During NAIDOC week in 2018, WA Police Commissioner Chris Dawson issued a formal apology to Aboriginal and Torres Strait Islander people for the historic mistreatment by the WA Police.³⁹ Commissioner Dawson has also been reported to say that “the ‘vast volume’ of Aboriginal children who are charged with a criminal offence could be dealt with through community justice arrangements and not end up in custody”.⁴⁰ Following Commissioner Dawson’s apology in 2018, the WA Police established the Aboriginal Affairs Division and also created its first Reconciliation Action Plan in 2019, which includes an Aboriginal Police Advisory Forum. Initiatives by the WA Police, such as Warakurna Multi-Functional Police Facility near the WA and NT border is the first Aboriginal-run police station in the state led by police officers who are from the Warakurna communities themselves.⁴¹

However, despite these efforts in recent years, there remains an urgent need for WA Police’s internal policies and culture to prevent the continuation of over-policing of Aboriginal and Torres Strait Islander children. This is especially important given that they are the first responders and often first contact for young people in the criminal justice system.

4.3 The juvenile justice system is both economically costly and ineffective

All children deserve the right to a childhood and to be free from fear, while having the opportunity to grow up and develop in a healthy and safe environment. When we are holding children, as young as 10 years old criminally responsible, we take away their right to a childhood and push them towards a cycle of trauma and harm.

In 2019-20, \$95.6 million dollars was spent on the juvenile justice system in WA.⁴² However, the expenditure is significantly higher as this doesn’t include the cost of policing, courts and legal transportation costs from regional areas to Perth and between police stations and courts. Most importantly, this does not effectively protect or rehabilitate children, particularly those at-risk, nor

36 The Senate Standing Committee on Finance and Public Administration, ‘Aboriginal and Torres Strait Islander experience of law enforcement and justice services’, Commonwealth of Australia, 2016, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Legalassistanceservices/Report

37 Western Australian Auditor General’s Report, ‘Diverting Young People Away From Court’, Office of the Auditor General Western Australia, Perth, WA, 2017, [https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4010921ab3e-486d2e648e528482581cb0017c646/\\$file/921.pdf](https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4010921ab3e-486d2e648e528482581cb0017c646/$file/921.pdf)

38 Western Australian Auditor General’s Report, ‘Diverting Young People Away From Court’, Office of the Auditor General Western Australia, Perth, WA, 2017, [https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4010921ab3e-486d2e648e528482581cb0017c646/\\$file/921.pdf](https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4010921ab3e-486d2e648e528482581cb0017c646/$file/921.pdf)

39 J. Carmody, ‘Police Commissioner Chris Dawson apologises to WA Aboriginal people for past mistreatment’, *ABC News*, 12 July 2018, <https://www.abc.net.au/news/2018-07-12/wa-police-commissioner-apologises-to-aboriginal-people/9984154>

40 C. Wahlquist, ‘WA police says ‘vast volume’ of Indigenous children shouldn’t be in custody’, *The Guardian*, 3 June 2019, <https://www.theguardian.com/australia-news/2019/jun/03/wa-police-says-vast-volume-of-indigenous-children-shouldnt-be-in-custody>

41 Western Australia Police Force, ‘Reconciliation Action Plan 2019-2020’, Western Australian Police Force, 2019, <https://www.police.wa.gov.au/Our-Community/Aboriginal-Communities>; T. Joyner, ‘Warakurna welcomes first all-Indigenous police station, aiming to repair a community’s mistrust’, *ABC News*, 20 June 2018, <https://www.abc.net.au/news/2018-06-20/this-is-the-first-indigenous-run-police-station-in-australia/9861778>

42 The Government of Western Australia, ‘Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2’, Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

does it allow the building of safer communities in the future. This is discussed further in 'Section 6: Cost Benefit Analysis' towards the end of the paper.

Research has found that a majority of Australians (65%) would prefer the government to spend money on social services, rather than sending children into detention and nearly half (45%) believe that sending children away into detention actually makes their communities less safe.⁴³ If we want to invest in safer communities, then it is clear that the simple solution of criminalising children needs to be seriously re-considered.

In reality, sending a child to Banksia Hill is the most expensive form of youth justice. The total average cost per day for each young person in detention in Western Australia in 2020-21 was \$1339 (an annual cost of approximately \$488,735 per child), compared to \$93 for community-based supervision and/or diversion methods (annual cost of \$33,945 per child).⁴⁴ By comparison, youth-work-based programs have been proven to reduce youth recidivism by half, with an annual cost of just \$1,680 per person.⁴⁵

Economic modelling has estimated that it costs around three times as much to imprison a child as opposed to imposing a community-based order.⁴⁶ This research found that over a five-year period, significant savings could be achieved by diverting offenders from short periods of incarceration to community corrections orders.⁴⁷ The potential to save millions of dollars every year and spend it on early identification, intervention, and support services is massive, while also ensuring we are building safer communities in the long-term.

The core of this argument, however, is understanding that sending children to Banksia Hill is the most ineffective method of youth justice, given that 55.8% of children return to Banksia Hill within 12 months of their release.⁴⁸ Clearly, these children are not provided the opportunity to be rehabilitated or supported. The Office of the Inspector of Custodial Services (OICS) found that 'the three factors most strongly linked to recidivism are age, prior prison admissions and problematic substance abuse'.⁴⁹ Harsh criminal penalties imposed on children, like detention, can exacerbate and cause further harm and lead them to a cycle of crime.

Social reinvestment approaches and alternatives proven to work will be detailed later in this paper.

4.4 Our criminal justice system harms our children

Children who are torn away from their families, communities and connections to country – particularly vulnerable children – are also subject to more trauma and hurt when detained by police and/or sent to Banksia Hill. This exacerbates mental health challenges. With around 90% of children having some form of neurological or cognitive impairment in Banksia Hill,⁵⁰ it is clear that the current

43 The Australian Institute, *Most Australians Agree Children As Young as 10yo Do Not Belong in Prison* [media release], <https://australianinstitute.org.au/post/most-australians-agree-children-as-young-as-10yo-do-not-belong-in-prison/>.

44 The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

45 P. Armytage and J. Ogloff, 'Meeting needs and reducing reoffending', *Department of Justice*, Melbourne, VIC, Government of Victoria, 2017, <https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-review-and-strategy-meeting-needs-and-reducing-offending>.

46 A. Morgan, 'How much does prison really cost? Comparing the costs of imprisonment with community corrections Research Report 05', *Australian Institute of Criminology*, Canberra, ACT, Australian Government, 2018, p. 65, https://www.aic.gov.au/sites/default/files/2020-05/rr_05_240418_2.pdf.

47 A. Morgan, 'How much does prison really cost? Comparing the costs of imprisonment with community corrections Research Report 05', *Australian Institute of Criminology*, Canberra, ACT, Australian Government, 2018, p. 65, https://www.aic.gov.au/sites/default/files/2020-05/rr_05_240418_2.pdf.

48 Productivity Commission, 'Report on Government Services 2021, Part F, Section 17', *Productivity Commission*, 2021, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/community-services/youth-justice/rogs-2021-partf-section17-youth-justice-services.pdf>;

49 Office of Inspector of Custodial Services, 'Recidivism rates and the impact of treatment programs', *Office of Inspector of Custodial Services*, WA, Government of Western Australia, 2018, <https://www.oics.wa.gov.au/reports/recidivism-rates-impact-treatment-programs/key-findings/recidivism-risk-factors/>.

50 Telethon Kids Institute, *Nine out of ten young people in detention found to have severe neuro-disability* [media release], <https://www.telethonkids.org.au/news-events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>

youth justice system is ill equipped to look after the best interests of our children and provide them with the opportunities to thrive and create their own futures. As highlighted earlier, the justice system also disproportionately affects Aboriginal and Torres Strait Islander people.

It is no coincidence that some of the most vulnerable groups in our community end up in the criminal justice system. Many children involved in the criminal justice system are struggling in their communities and subjecting them to the criminal justice system including detention denies the opportunity for them to prosper. Detention of children only increases their likelihood to be trapped in cycle of crime.

In fact, research shows that children whose parents have been incarcerated are more likely to suffer from a multitude of health, social, and welfare disadvantages and end up in the criminal justice system themselves.⁵¹ The institutionalisation of children at a young age, particularly those under 14 years, can be highly damaging and this has led to attempts of suicide and self-harm. In 2017-18, it was reported that Banksia Hill had experienced at least an attempted suicide or self-harm once every two days throughout the year.⁵² The figures are concerning and remain a real and present risk.

Children exposed to traumatic environments, such as Banksia Hill, are undeniably vulnerable. Judge Dennis Reynolds, former President of the Children's Court of Western Australia, highlights that the youth justice system fails to support young and vulnerable children:

*'What this whole system does is it divides kids into good kids and bad kids, we're putting kids with neurodevelopmental impairments and other very serious underlying issues – homelessness, abuse, sexual, emotional, that sort of stuff – we're saying they're bad kids. What we should be saying is that they're kids crying out for support, and we need to provide it.'*⁵³

Of more concern is that a majority of children (60%) that are in Banksia Hill are unsentenced.⁵⁴ This demonstrates that a high turnover of children who have not been convicted and sentenced are entering Banksia Hill with the likelihood that they are negatively influenced and affected by older children. The potential for younger children to be influenced by older teenagers also occurs at police stations, courts and Youth Justice Facilities.

'I went to Banksia... I got over all the people bullying me all the time. I was acting out, defending myself. I'd end up dropped on the floor, handcuffed, they would fold my legs up. Pull all their body weight on me, all the guards... With kids in jail, it's just being poor, being angry, the drugs... it's not like they like it and they want to get back in there...'

*Gaby, Stories From the Inside*⁵⁵

4.5 Australia's obligations to human rights and the dignity of children

In Australia, a 'child' is defined as any person under the age of 18 years old.⁵⁶ Protecting and upholding the rights of children include ensuring that all children have the opportunity to be educated; are able to access adequate healthcare and support; and have the right to a childhood free of fear, exploitation and abuse.

51 V. Saunders and M. McArthur, 'Children of Prisoners: Exploring the needs of children and young people who have a parent incarcerated in the ACT', *SHINE for Kids*, Canberra, ACT, Australia Catholic University, 2013, https://www.shineforkids.org.au/documents/research/ChildrenofPrisoners_NeedsAnalysis_Oct2013.pdf.

52 Social Reinvestment WA, 'Submission to the Age of Criminal Responsibility Working Group Council of Attorneys General', *Social Reinvestment WA*, Perth, WA, Social Reinvestment WA, 2020, <https://bit.ly/3tBKJYz>

53 L. Murphy-Oates, 'Treat children like children': Indigenous kids are crying out for help, judge says, not punishment! *The Guardian*, 20 January 2021, <https://www.theguardian.com/australia-news/2021/jan/20/treat-children-like-children-indigenous-kids-are-crying-out-for-help-not-punishment>

54 Department of Justice, 'Quarterly Statistics - Custodial (Youth Detainee) 2020 - Quarter 3', *Department of Justice: Corrective Services*, Perth, WA, Department of Justice, 2020, <https://www.wa.gov.au/sites/default/files/2021-01/2020-quarter3-youth-custodial.pdf>

55 'Ep. 4 Gaby', *Stories From The Inside* [podcast], Social Reinvestment WA, <https://www.socialreinvestmentwa.org.au/stories>

56 Law Library of Congress, *Children's Rights: Australia* [website], <https://www.loc.gov/law/help/child-rights/australia.php>

However, the minimum age of criminal responsibility across Australian states and territories is overtly out of step with the United Nations Convention on the Rights of the Child (the Convention), to which Australia is a signatory, and under which it has binding obligations. The United Nations Committee on the Rights of the Child (the Committee) has recommended that in light of scientific findings, parties to the Convention should raise their minimum age to at least 14 years of age.⁵⁷ This recommendation reflects the reality that children do not belong in the justice system or prisons and that they deserve to receive support within their existing community and family structures.

Article 40 of the Convention obliges signatories to pursue, where appropriate and desirable, alternative measures to judicial proceedings for children, provided that human rights and legal safeguards are fully respected. These measures should be appropriate to the child's circumstances, ensure their well-being and be proportionate to their actions. Further, Article 37 provides that imprisonment should be used "as a measurement of last resort for the shortest appropriate time." The international framework of norms for children's contact with the justice system embodied within the Convention is directly informed by evidence of the "neurobiological impacts of early childhood trauma" and knowledge from "developmental psychology of childhood wellbeing."⁵⁸ A low age of criminal responsibility thus flies in the face of internationally accepted standards for the appropriate treatment of children.

For these reasons, Australia has repeatedly been criticised by the United Nations and advised to raise its minimum age of criminal responsibility 'to an internationally acceptable level'. Most recently, in January 2021, the Universal Periodic Review of UN member states' human rights records identified the need for Australia to raise the minimum age, with 31 nations recommending this action be taken.⁵⁹

4.6 Ending racial discrimination in Australia

The disproportionate impact of the current minimum age of criminal responsibility on Aboriginal and Torres Strait Islander children is a profound human rights concern. As previously discussed, the grossly disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system and detention is linked to systemic racism and a failure of our justice system to provide the appropriate supports to allow young people to thrive.

This has resulted in significant international condemnation towards Australia, particularly towards ending racial discrimination. The United Nations Committee on the Elimination of Racial Discrimination (United Nations CERD) conducted a review in 2017 on Australia and stated that Australia had not made significant progress in recent years and, in fact, regressed in some areas.⁶⁰ This includes the United Nations Special Rapporteur on the rights of Indigenous peoples in 2017 having found deeply disturbing numerous reports on the prevalence of racism against Aboriginal and Torres Strait Islander people.

The United Nations CERD review highlighted areas of concern such as:

- Australian Governments have maintained and, in some cases, created laws and policies that contributed to worsening rates of Aboriginal and Torres Strait Islander over-imprisonment and increase risks of Aboriginal deaths in custody; and

⁵⁷ United Nations Committee on the Rights of the Child, 'General Comment No 24 on children's rights in the child justice system: UN Doc CRC/C/GC/24', 2019, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewie3pXl-srnvAhXyzzgGHXV2CR0QFjAAegQIAxAD&url=https%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCRC%2FShared%2520Documents%2F1_Global%2FCRC_C_GC_24_8968_E.docx&usg=AOvVaw1qpnlqrzZdBH1f7GFYhcBQ

⁵⁸ W. O'Brien and K. Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, vol. 17, no. 2, 2017, p.135.

⁵⁹ United Nations Committee on the Rights of the Child, Concluding observations (2019) CRC/C/AUS/CO/5-6, paragraph 47, <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AUIndex.aspx>; United Nations Committee on the Rights of the Child, Sessions of the Committee, 1997: paragraphs 11 and 29, 2005: paragraph 73; 2012: paragraph 82(a); D. Hurst, 'More than 30 countries condemn Australia at UN over high rates of child incarceration', *The Guardian*, 21 January 2021, <https://www.theguardian.com/australia-news/2021/jan/21/china-attacks-australia-at-un-over-baseless-charges-as-canberra-criticised-for-keeping-children-in-detention>

⁶⁰ Australian NGO Coalition UN CERD, 'Australia's Compliance with the International Convention of the Elimination of All Forms of Racial Discrimination', 2017, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_29334_E.pdf

- Australia has failed to take adequate steps to stem the alarming increase in the number of Aboriginal and Torres Strait Islander children taken away from their families into out of home care.

Raising the minimum age of criminal responsibility in Western Australia will be a positive step towards reducing the appalling overrepresentation of Aboriginal and Torres Strait Islander children in the justice system.

5 How do we raise the age? Considering a new approach to justice

While raising the minimum age of criminal responsibility will require legislative change, it will most importantly require a holistic approach to reform focused on children's well-being. Fortunately, Western Australia does not have to start from scratch. A social reinvestment approach towards reform will enable children under 14 years to be supported and protected in culturally-appropriate settings that are community-led and sustainable for the long-term future.

There are many projects and initiatives that are currently active and ongoing in Australia, while demonstrating that supporting and empowering children at-risk directly addresses the root causes of criminality. If we want to build safe communities throughout Western Australia, supporting and empowering children at-risk is key to achieving so.

Any pathways for the future require investment and raising the age will ensure these pathways and approaches, such as the justice reinvestment projects in Halls Creek and Bourke, will increasingly become the norm in which we engage our most vulnerable and at-risk children. Raising the age will also lead to systemic changes that are running in parallel with the youth justice system, such as early learning and development (education and health).

5.1 What laws need to be changed?

Raising the age of criminal responsibility to at least 14 years of age necessitates legislative change at both the state and federal level.⁶¹ Criminal offences under federal law relate to subjects such as customs and excise, taxation, insurance, social security, broadcasting and the internet. The overwhelming majority of offences dealt with in Western Australia for children involve state laws. Therefore, this paper focuses on amending Western Australian law.

Section 29 of the Criminal Code (WA) currently provides that a 'person under the age of 10 years is not criminally responsible for any act or omission'. Section 29 should be amended to provide that a 'person under the age of 14 years is not criminally responsible for any act or omission'.

5.2 Doli incapax: An ineffective protection of children under 14

Doli incapax is a rebuttable legal presumption that children between the ages of 10 and 13 are not capable of forming criminal intent, or to do 'wrong' in the moral sense.⁶² If we raise the age to 14 years old, doli incapax ceases to be relevant.

Currently, in Western Australia the principle is legislated in section 29 of the Criminal Code (WA), which provides that:

A person under the age of 14 years is not criminally responsible for an act or omission,

⁶¹ For example, *Crimes Act 1914* (Cwlth). ss. 4M and 4N

⁶² *C v DPP* (1995) 2 All ER 43; *R v Gorrie* (1918) 83 JP 136; *R v ALH* (2003) 6 VR 276; *R v M* (1977) 16 SASR 589; *R v CRH* unreported NSWCA (1996). The presumption is legislatively embedded in *Criminal Code Act Compilation Act 1913* (WA) s. 29

unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

However, unclear language and lack of detail leaves it just as open to interpretation as the common law principle in states such as Victoria. The nebulous nature of *doli incapax* and the concept of 'wrongness' means that it is often applied inconsistently, and in practice it can often have a minimal protective effect, or even a reverse effect to what was intended in theory, therefore causing more harm in application. By drawing on interviews with youth justice professionals and examining case studies, researchers in Victoria determined that "inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers an effective legal safeguard for very young children in conflict with the law"⁶³. This study and others conducted in the Northern Territory, Queensland and nationwide have demonstrated that applications of *doli incapax* in dealings with young people aged 10-14 have shifted significantly from the principle's intention.

Additionally, the threshold for rebutting the principle (i.e. proving that the child knows what they did was wrong, and therefore justifying a criminal charge) is often negligible⁶⁴. An examination of application of the principle in Queensland (whose legislation is identical to Western Australia) found that the provision actually creates a lower bar for young people to be found criminally responsible. They argue that the wording of the legislation is often interpreted to mean that the only determination needed is that the child has a general capacity (often based on the general intelligence and capabilities of the age group) to distinguish that an act 'ought not to have been done', however, no proof of knowledge of the specific degree of wrongfulness is required to convict.⁶⁵ This consideration also fails to consider whether that wrongness was influenced by issues such as poverty, homelessness, abuse or neglect.

Moreover, the existence of *doli incapax* (as contained in s 29 of the Criminal Code WA)) does not prevent children aged between 10 and 14 years from being subjected to the criminal justice process. These children are still arrested, subject to bail conditions, remanded in custody and required to attend court on multiple occasions. As explained earlier, young children remain liable to arrest and detention for breaching bail conditions and failing to attend court.

6 If not the criminal justice system; what?

Police already respond to children under 10; the same process can be utilised for children under the age of 14 years old.

Understandably, some members of the community may worry about the alternative response to children aged between 10 and 14 years who engage in more serious offending behaviour, if the minimum age of criminal responsibility is increased to 14 years. First, it must be highlighted that this is a comparatively small number of children. Second, there are children under 10 years of age now who engage in offending behaviour and the current system has options to respond. While therapeutic and rehabilitative support should always be the preferred response, in some instances children who are or who are at risk of engaging in serious offending may be apprehended by police and/or taken into residential placements or other institutions.

Under section 41 of the Children and Community Services Act 2004 (WA), police have the power to apprehend a child who is found at a place other than their usual place of residence and the 'officer believes on reasonable grounds ...that the child is not under the immediate supervision of a parent of the child or an adult capable of adequately supervising the child and there is a risk to the wellbeing of the child because of the nature of the place where the child is found, the behaviour or vulnerability of the child at that place, or any other circumstance'.

63 W. O'Brien and K. Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, vol. 17, no. 2, 2017, p.135.

64 T. Bartholomew, 'Legal and Clinical Enactment of the Doli Incapax Defence in Supreme Court of Victoria, Australia'. *Psychiatry, Psychology and Law*, vol. 5, no.1, 1998, <https://www.tandfonline.com/doi/abs/10.1080/13218719809524923>

65 Youth Advocacy Centre Inc, 'Submission regarding the age of criminal responsibility for the Australian Council of Attorneys-General', Youth Advocacy Centre Inc, https://communitylegalqld.org.au/sites/default/files/downloads/pages/yac_submission_re_macr_council_of_ags_2020.pdf

While the police cannot hold a child in a lock up under this provision, they can detain the child until other arrangements can be made. In practice, this involves locating a responsible adult or guardian or, if necessary, contacting the Department of Communities – Child Protection and Family Support. In the period 1 January 2020 to 31 December 2020, the Custody Notification Service received approximately 555 notifications for children apprehended by police under this provision.

In addition, the Department of Communities – Child Protection and Family Support may institute proceedings to take a child into care and this may involve removing them from their families and placing the child in an alternative accommodation placement. While this drastic step should not be undertaken lightly, it is available if a child is engaging in behaviour that places others at risk of harm. Children under the care of the state can also be placed in the secure care facility (Kath French Centre) in specified circumstances.

For children with a mental illness, the involuntary treatment order provisions under the Mental Health Act 2014 (WA) may be invoked where the child poses, among other things, a ‘significant risk to the health or safety of the [child] or to the safety of another person’. If this occurs, the child may be detained in an authorised facility.

These options should always be used as a last resort and never in preference to therapeutic community- based early intervention options. As observed by the United Nations Committee on the Rights of the Child in 2019:

Early intervention for children who are below the minimum age of criminal responsibility requires child-friendly and multidisciplinary responses to the first signs of behaviour that would, if the child were above the minimum age of criminal responsibility, be considered an offence.....As an absolute priority children should be supported within their families and communities. In the exceptional cases that require an out-of-home placement, such alternative care should preferably be in a family setting, although placement in residential care may be appropriate in some instances, to provide the necessary array of professional services, it is to be used only a measure of last resort and for the shortest appropriate period of time and should be subject to judicial review.⁶⁶

When assessing the impact of raising the minimum age of criminal responsibility to 14 years, the abovementioned existing non-criminal justice system options to address ‘offending’ behaviour should not be overlooked.

6.1 Western Australian children fall through the cracks before they reach the criminal justice system

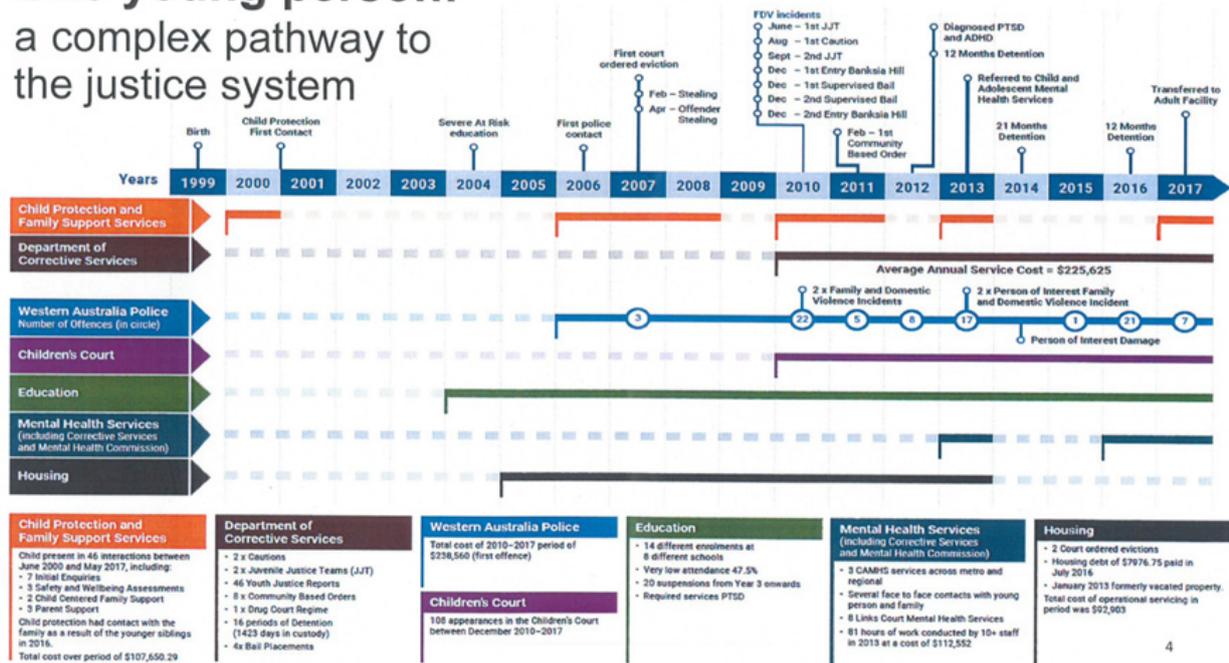
The current reality is that children are not receiving the intensive support and care they need, long before they have contact with the youth justice system. In fact, many children’s first opportunity for any support, rehabilitation or diversion only occurs when they are apprehended by police or when they are sent to Banksia Hill. Further, research suggests that even when children are diverted to support services by Western Australia Police, there is no follow-up assistance or the programs do not provide meaningful or needs-based help to address their challenges.⁶⁷ This is far too inadequate and we must focus on early identification, intervention and ultimately prevention to build safer communities.

Research from the Department of Community’s Target 120 Program shows the significant disadvantages faced by one child from birth, and the numerous interactions they had with other government and social support systems before reaching the youth justice system, and then entering the Adult Justice System in 2017. It demonstrates the multiple points at which the young person was identified as at risk in a critical domain, across multiple departments and service providers; yet failed to access or be referred to relevant or effective intervention, diversion, and support programs.

⁶⁶ United Nations Committee on the Rights of the Child, *General Comment No. 24*, 2019 on Children’s Rights in the Child Justice System, Paragraph 11.

⁶⁷ Western Australian Auditor General’s Report, ‘Diverting Young People Away From Court’, Office of the Auditor General Western Australia, Perth, WA, 2017, [https://www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/4010921ab3e-486d2e648e528482581cb0017c646/\\$file/921.pdf](https://www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/4010921ab3e-486d2e648e528482581cb0017c646/$file/921.pdf)

One young person: a complex pathway to the justice system



Source: Department of Communities, Target 120 Program Case Study

6.1.1 A 'No Wrong Door' Approach

A holistic approach would see government agencies, and community support services working together to support children. Families and young people should be supported to navigate multiple systems to receive the help they need. As opposed to slipping through the cracks, young people like the case study above would be identified early, and provided the right support, at the right time.

A key mechanism to achieving this is A 'No Wrong Door' approach guided by four key principles:⁶⁸

- People know where to go to get help
- People tell their stories once
- Service Providers talk to one another
- People are connected to the right service at the right time

Critically this requires mechanisms for struggling young people, their families and primary service providers to access help; triage services to be available and resourced to support a person to navigate a system and engage in appropriate programs and services; and those programs and services to be adequately funded so spaces are available.

6.1.2 Diversion Mechanisms and Triage Options

In 2020 the COVID Response Youth Taskforce developed a business case for diverting at risk street present young people (known as 'State-wide Embedded Youth Outreach Program') during the COVID pandemic. This Business Case was supported by the NFP Community Services Sector, the Department of Communities, and Department of Justice. It broadly proposed providing resourcing for local non for profits that work with at risk young people to have youth workers "on call" for local police. Local police could call and ask for assistance to respond to street present and at risk young people they encountered or apprehended, and immediately divert them into the care of qualified

68 Government of Western Australia, 'Enabling a No Wrong Door System in Homelessness', Department of Communities, 2019, <https://www.communities.wa.gov.au/media/2763/no-wrong-door-report.pdf>

and experienced workers to support the young people to access the right supports at the right time.

This model or similar could be introduced in conjunction with the existing available police diversion options for young people, and children under 10 years old.

6.1.3 Funding for appropriate programs

Fortunately, Western Australia does not have to start from scratch in finding ways to support children who have or are at-risk of offending. There are already some well-established programs that can act as alternatives to the criminal justice system, and alternatives are in place in similar nations across the world.

Critically, however, these programs need to be adequately funded, effectively evaluated so we can learn and improve, available to at risk young people before they offend, and be adapted considering the cultural and social contexts which are unique to Western Australia; particularly those of Aboriginal and Torres Strait Islander communities. Some of these approaches are discussed in more detail below. The 2020-2021 State Budget announced \$637 million in new funding for police and prison expansions, but just \$52.8 million in new funds for early intervention, prevention, and rehabilitation in the justice space.⁶⁹

What could this look like in practice?

- A young person is at risk of offending.
- They are identified by: their families, school, health practitioners, Department of Communities - Child Protection and Family Support, or Western Australia Police (Primary Care or Service Providers).
- The Primary Care or Service Provider engages the young person with local youth workers at a NFP service resourced to triage and provide holistic case management.
- Youth workers engage the young person in relevant and appropriate programs that are appropriate to their unique needs and circumstances.
- If the young person fails to engage, existing mechanisms for U10s could be utilised where required.

6.2 Pathways for the future: a social reinvestment approach and program examples

By raising the age of criminal responsibility as proposed, all children under the age of 14 years old could be supported and provided with the opportunity to thrive, rather than criminalised and pushed into a cycle of trauma and harm.

A social reinvestment approach is integral to the success of raising the age of criminal responsibility. This approach is explored in greater detail in SRWA's Youth Justice Report. A Social Reinvestment Approach to justice is evidence based, and responds to the underlying causes of offending, reducing both crime and costs, and supporting the social and economic development of disadvantaged communities. The social causes of crime are complex, and a one-size-fits-all approach does not work. Creating healthier families, safer communities, and implementing smart justice approaches requires both cross government and cross sector collaboration and reform; and empowered communities leading local solutions.

⁶⁹ The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

6.2.1 Justice Reinvestment: Redirecting resources to respond to the underlying causes of offending by promoting social wellbeing

If we want to create safer communities and build brighter futures for young people, we need to redirect expenditure to focus on supporting families early to prevent and address the underlying causes of offending; divert young people in contact with the criminal justice system into support programs that will rehabilitate or prevent future crime; and assist young people to reintegrate into the community. Healing trauma and building cultural, social, and emotional wellbeing is critical to overcoming many of the social causes of crime.

Community services such as AOD and mental health counselling, mentoring, re-engagement in education and training, pro-social activities, housing, and health initiatives are generally significantly less expensive than the criminal justice system. Resources for these types of services and supports should be sourced from funds previously allocated to the tertiary end of the justice system, such as the significant costs currently spent incarcerating children under 14 years. The added benefit of these types of initiatives is they improve social outcomes in a broad number of areas, generating fiscal savings and net benefits more broadly than just throughout the justice system.

6.2.1.1 Case study: Maranguka Justice Reinvestment, Bourke NSW.

In the heart of Bourke lies Maranguka ('Caring for others' in Ngemba), the first justice reinvestment project in Australia which began in 2013. Bourke is a rural town 800km northwest of Sydney, situated on the Darling River. Bourke is home to 21 different Tribal Groups, and forms part of a traditional boundary area for the Ngemba, Murrawarri, Budgiti and Barkinji Tribal Groups. Around 2,634 people live in Bourke with 31.5% being Aboriginal and Torres Strait Islander and a relatively young population with 34.3% of people aged under 25 years old.⁷⁰

The town of Bourke faced high crime rates and a rising levels of social disadvantage, particularly for Aboriginal and Torres Strait Islander communities, and so in partnership with Bourke's Aboriginal and Torres Strait Islander community and Just Reinvest NSW, Maranguka emerged as a solution to these issues. Importantly, it is an Aboriginal-led place-based model of justice reinvestment with a focus on preventative, diversionary and community development initiatives that address the underlying causes of crime.⁷¹

In 2018, the Maranguka Justice Reinvestment Project released its findings highlighting:

- 23% reduction in domestic violence incidents
- 31% increase in Year 12 student retention
- 14% reduction in bail breaches
- 42% reduction in days spent in custody

Importantly, KPMG's impact assessment highlights that Maranguka's impact is five times greater than the operational costs and should Bourke sustain just half of the results achieved in 2017, an additional gross impact of \$7 million dollars over the next five years could be delivered.⁷²

See 6.2.4.1 for Western Australia's own justice Reinvestment Site, Olabud Doogethu.

6.2.2 Aboriginal and Torres Strait Islander-led and culturally secure solutions

Any programs administered for Aboriginal children must be culturally relevant and appropriate in

⁷⁰ Australian Bureau of Statistics, 2016 *Census QuickStats* [website], https://quickstats.censusdata.abs.gov.au/census_services/get-product/census/2016/quickstat/SSC50600

⁷¹ KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment', Just Reinvest NSW, 2018, <https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

⁷² KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment', Just Reinvestment, 2018, <https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

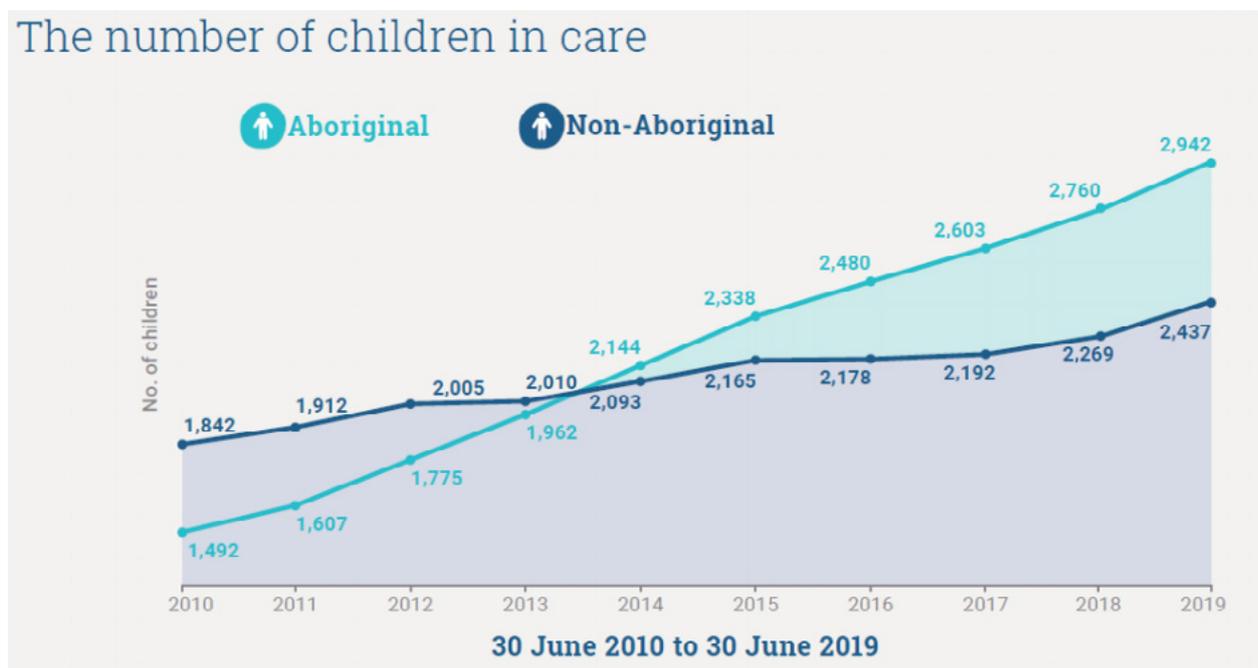
order to be the most effective. If Aboriginal and Torres Strait Islander-led solutions are not available, service providers must engage with local Aboriginal and Torres Strait Islander communities to consult on the cultural appropriateness of programs.

Solutions that remove children from their families and country, for example, are not culturally appropriate given the history of the Stolen Generation and intergenerational trauma experienced by Aboriginal and Torres Strait Islander families.⁷³ Culture plays a critical role in forging strong identities and healing symptoms of intergenerational trauma for Aboriginal people impacted by the Stolen Generations and Colonisation. Engaging in Aboriginal and Torres Strait Islander-led solutions ensures that programs are culturally relevant and will provide a supportive environment to help children feel comfortable and have the opportunity to thrive in their own way.⁷⁴ This is also the case for young people from other culturally and linguistically diverse backgrounds currently in the criminal justice system.

6.2.2.1 Case study: Aboriginal family led decision making

In August 2020, the McGowan Government announced a new trial, Aboriginal Family Led Decision Making (AFLDM) to address the over-representation of Aboriginal children in care.⁷⁵ The \$715,000 investment into the two-year AFLDM program is seeking to create a culturally safe space for family and extended family to weigh in on decisions regarding their children, and for these decisions to be made in a culturally appropriate way.

It is a promising step in Western Australia, particularly as the number of children in care has consistently grown, particularly in terms of Aboriginal children (see below).⁷⁶ AFLDM has shown to reduce the number of Aboriginal and Torres Strait Islander children taken into protective custody (especially when identified at an early stage), and keeps children who are in out-of-home care connected to their culture and families.



Source: Department of Communities, The Government of Western Australia

⁷³ Australians Together, *Intergenerational Trauma* [website], <https://australiantogether.org.au/discover/the-wound/intergenerational-trauma/>

⁷⁴ Oxfam Australia, 'In Good Hands: The people and communities behind Aboriginal-led solutions', Oxfam Australia, Carlton, VIC, 2019, https://www.oxfam.org.au/wp-content/uploads/2019/10/2019-AP-001-IN_GOOD_HANDS_FINAL_FA_WEB.pdf

⁷⁵ Government of Western Australia, *New trial to help address number of Aboriginal children in care* [media release], <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/08/New-trial-to-help-address-number-of-Aboriginal-children-in-care.aspx>

⁷⁶ Department of Communities, *The Number of Children in Care*, pp 3. <https://www.communities.wa.gov.au/media/2385/oohc-fact-sheet.pdf>

It is also important to note that while the AFLDM is a positive step towards protecting our children, it must also be integrated into a broader approach which encompasses areas such as education and health, in addition to those of family and accommodation. The need for such a holistic approach has been noted in a report in Queensland's AFLDM model. This report found that integrating the AFLDM model with culturally appropriate community-wide support networks (such as schools, housing and health services and Aboriginal and Torres Strait Islander Elders) is "critical to the success of future models of practice".⁷⁷

6.2.3 Targeted and holistic support services for children and their families

Data sharing and collaboration between government agencies, the NGO services sector, researchers, and place-based service providers will develop more accurate understandings of the experiences of disadvantage across Western Australia. Once communities and/or individuals in need are identified, in conjunction with community led design, these understandings can subsequently inform more effective, targeted, and holistic solutions to social issues. This ensures we can get the right supports, to the right young people, at the right time.

Often when children who are at-risk of offending, there are a multitude of factors causing the behaviours which are out of the child's control. This can include intergenerational trauma, exposure to family violence, systemic poverty, food insecurity, and more. Furthermore, home and family circumstances are the biggest influence on children's experiences and behaviour. It is therefore important that children and their families are provided holistic services to provide wrap-around support for the child. For example, treatment of inner ear infection in children improves their school performance leading to long term behavioural improvement and decreased chances of engagement with crime.⁷⁸ Giving parents and carers the tools and resources to better care for their children improves outcomes in an array of areas for the child. It is integral to support both whole families and communities, so that their children can have the best opportunity to thrive and build their own future.

6.2.3.1 Case study: Youth Partnership Project

The Youth Partnership Project (the YPP) operates in the South-East corridor of Perth (namely, Armadale and Gosnells) and focuses on identifying and supporting young people early to prevent involvement in the criminal justice system.⁷⁹ Since 2014, the YPP has brought together state government agencies, local government and not-for-profit community sector to support children with complex needs who are at-risk of engaging with the youth justice system.

As a place-based collective impact initiative, the YPP Model begins by developing an organised and structured collaboration of cross-sector partners with a common goal: providing the right support to the right young people at the right time, to create significant savings in expenditure on youth justice services, and enabling young people to thrive in their families and communities.

The partnerships' cross-sector definition of young people with complex needs, supported by information sharing, allows the YPP to proactively identify children aged 8-12 years, who are at risk of engaging with the youth justice system, but who haven't yet offended. The partnership, led by a dedicated operational team, then engage with both young people and their families, focusing on building positive safe and trusting relationships that provide the basis needed for effective holistic support. Drawing on strong local partnerships, the YPP ensures children and their families are supported in a truly holistic way, with a focus on access to resources, family support, social and emotional wellbeing, life skills, educational engagement, and safe community and belonging.

Early outcomes indicate a substantial decline in suspensions rates of participants, as well as

⁷⁷ Secretariat of National Aboriginal and Islander Child Care, 'Report on Aboriginal and Torres Strait Islander Family-led Decision Making Trials, Queensland, January 2017 to June 2017', *Secretariat of National Aboriginal and Islander Child Care*, 2018, https://www.snaicc.org.au/wp-content/uploads/2018/02/SNAICC_Final_Report_ATSIFLDM_Trials_Old-Jan._2016-Jun._2017-Feb._2018.pdf
⁷⁸ Australian Institute of Health and Welfare, *Ear disease in Aboriginal and Torres Strait Islander children* [website], <https://www.aihw.gov.au/getmedia/c68e6d27-05ea-4039-9d0b-a11eb609bacc/ctgc-rs35.pdf.aspx?inline=true>; Feed the Little Children, *Statistics* [website], <https://www.feedthelittlechildren.org.au/statistics/>

⁷⁹ Youth Partnership Project, *A Better Approach to Youth Justice* [website], <https://www.youthpartnershipproject.org.au/>

improved school attendance, behaviour, literacy, social and emotional development, and life skills. Following the successful pilot and refinement of the YPP Model in Armadale, it is now being implemented in Gosnells to further establish the scalability and adaptability of the model. A formal evaluation of the YPP's approach is expected to be available in late 2021.

6.3.2.2 Case study: Target 120

Target 120, a \$20.4 million initiative, was introduced by the McGowan Government in 2017 as an effort to focus on 120 of Western Australia's most vulnerable and at-risk children and their families. An expansion of the Family Intensive Team program, the Target 120 approach dedicates a single contact person to each family, ensuring that holistic support through multi-systemic therapy. Multi-systemic therapy is an intensive family and community-based approach that seeks to change the behaviour of children and their families through empowerment and by addressing issues in the home environment.⁸⁰ Target 120 has expanded from Bunbury and Armadale, and now includes Kununurra, Kalgoorlie, Mirrabooka, Albany, Geraldton, Rockingham, Midland, Port Hedland and Northam.⁸¹

The holistic approach and individualised targeted support for children at-risk and their families is a welcome step, and in December 2020 the Minister of Community Services, Simone McGurk, has stated that 'almost two thirds of current participants [in Target 120] have had no further police contact since joining the program'.⁸²

6.2.4 Place-based programs and funding, co-designed and led in partnership with the community

Local communities have critical insight into solutions to their local problems, and solutions designed without the input and support of the community they serve are destined to be ineffective. Community development principles should be at the heart of leading community co-designed, place-based solutions. This ensures solutions address the causal factors unique to individual communities; are owned and driven by an empowered community to ensure longevity and responsibility; and self-determination is fostered and upheld for Aboriginal peoples.

Importantly, funding mechanisms should also support these communities and place-based solutions.⁸³ This requires a change in policy directives, to enable communities in partnership with organisations to propose solutions for funding after co-design, as opposed to governments procuring pre-determined services through a tendering process, prior to co-design with communities.

6.2.4.1 Case study: Olabud Doogethu, smart justice in the heart of the Kimberley

Olabud Doogethu ('all of us together' in Kriol) is the first Western Australian justice reinvestment project situated in the Shire of Halls Creek. Beginning in 2019, Olabud Doogethu was co-led and co-designed by 11 Aboriginal communities, namely Balgo (Wirrimanu), Billiluna (Mindibungu), Mulan, Ringer Soak (Kundat Djaru), Warmun (Turkey Creek) and Yiyili Mardiwah Loop, Yardgee and Nicholson Town Camp, in collaboration with the Shire of Halls Creek and supported by Social Reinvestment WA.

The Shire is one of the most disadvantaged communities in Australia, particularly when it comes to

80 WA Labor, 'Target 120: Plan to Target Juvenile Crime', *WA Labor*, Perth, WA, 2017, https://australianpolitics.com/downloads/wa/2017_election-policies/alp/Target_120.pdf

81 Government of Western Australia, *Target 120 expands to Geraldton, Rockingham and Midland* [media release], https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/11/Target-120-expands-to-Geraldton-Rockingham-and-Midland.aspx?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news; Government of Western Australia, *Target 120 to turn young lives around in Port Hedland and Northam* [media release], <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/12/Target-120-to-turn-young-lives-around-in-Port-Hedland-and-Northam.aspx>

82 Government of Western Australia, *Target 120 to turn young lives around in Port Hedland and Northam* [media release], <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/12/Target-120-to-turn-young-lives-around-in-Port-Hedland-and-Northam.aspx>

83 Ten20 Foundation, 'Funding community-led place based practice: Insights and actions for funders and communities', Social Ventures Australia, 2019, <https://www.socialventures.com.au/assets/Funding-community-led-place-based-practice-report.pdf>

early childhood learning, unemployment, and low levels of household income.⁸⁴ Home to around 3,200 people, a majority of the community (74.2%) are Aboriginal and or Torres Strait Islander people while 43.2% are under 25 years old.⁸⁵ The lack of job opportunities, a high crime rate and the challenges of growing up in an isolated and rural community caused many to worry about the future generation of Halls Creek.

Through Olabud Doogethu, communities in the Shire of Halls Creek have focused on supporting and providing opportunities for their children to thrive and grow. This began with the Youth Engagement Night Officer (YENO) program, where local community members patrol the streets of Halls Creek at night. Each officer has familial and community ties in the Shire, which has led to building rapport with all children who regularly walk the streets at night. Through YENO's presence every night (9pm – 4am), they ensure the children are engaging positively and that they are safe. In the day, the Youth Engagement Day Officers (YEDO) work closely with local police, communities and families of the children at-risk providing an opportunity for early identification.

Since then, Olabud Doogethu has expanded its programs focused on delivering alternative education models that offers cultural learning for children who have disengaged with the traditional model of education, as well as paid traineeships with the Shire of Halls Creek for every high school graduate to support their job-skill growth and employability readiness. Initial results show that Olabud Doogethu has contributed to a significant reduction of crime in the Shire, including:

- 58% reduction in burglaries;
- 35% reduction in stolen motor vehicles; and
- 28% reduction in stealing offences.⁸⁶

6.2.5 A transparent, fair, and accountable system

It is critical that any systems that have power over vulnerable populations have clear, transparent, and accountable governance, reporting, and oversight mechanisms. This ensures the rights of those people are upheld, particularly when those people are children. The introduction of the Custody Notification Service run by the Aboriginal Legal Service is an excellent step in this direction. OICS regularly delivers recommendations in regards to increasing transparency and improving care for young people at Banksia Hill Detention Centre including phasing out and reducing reliance on strip searching, especially as a deterrent or punishment;⁸⁷ revising policies to allow girls fairer self-care privileges;⁸⁸ ensuring allegations of misconduct and abuse are prioritised for investigation; ensuring that the use of restraints is recorded; and ensuring that caregivers are notified when young people attempt self-harm⁸⁹ These recommendations should be prioritised for implementation, and similar oversight should be extended for children detained in police lock ups. Additionally, the introduction of an Aboriginal Justice Advisory Committee or an Aboriginal Justice Agreement to ensure there are Aboriginal voices involved in decision making at the highest level would support the creation of a more transparent, fair, and accountable justice system.⁹⁰

84 Bankwest Curtin Economics Centre, Inequality drives deep divide between Australian children [media release], <https://bcec.edu.au/media/inequality-drives-deep-divide-between-australian-children/>; Australian Bureau of Statistics, 2016 Census QuickStats [website], https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC50600

85 Australian Bureau of Statistics, 2016 Census QuickStats [website], https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC50600

86 Olabud Doogethu, 'Olabud Doogethu: Smart Justice in the Heart of Kimberley', *Shire of Halls Creek*, Halls Creek, WA, https://olabuddoogethu.org.au/wp-content/uploads/2020/12/prospectus-booklet-olabud_WEB.pdf

87 Office of the Inspector of Custodial Services, 'Strip searching practices in Western Australian prisons', *Office of the Inspector of Custodial Services*, 2019, <https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>

88 Office of the Inspector of Custodial Services, '2017 Inspection of Banksia Hill Detention Centre', *Office of the Inspector of Custodial Services*, 2018, <https://www.oics.wa.gov.au/wp-content/uploads/2018/04/Banksia-Hill-Report-116-FINAL.pdf>

89 Office of the Inspector of Custodial Services, 'Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre', *Office of the Inspector of Custodial Services*, 2018, <https://www.oics.wa.gov.au/wp-content/uploads/2018/07/Amnesty-Review.pdf>

90 Australian Law Reform Commission, 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC 133 Summary)', *Australian Government*, 2018, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-133-summary/>

6.2.5.1 Youth Engagement Program, Aboriginal Legal Service Western Australia

There are also successful programs working with young people in the youth justice system that could easily be redesigned and re-scoped to provide support for young people at risk of offending behaviour instead of only being available to young people once they have been formally charged by police and enmeshed in the formal youth justice system. For example, the Aboriginal Legal Service of Western Australia operates a Youth Engagement Program (YEP) for young people appearing in the Perth Children's Court and, more recently, in Broome. Aboriginal diversion officers who are strong cultural role models work closely with young Aboriginal people to provide culturally secure, individualised support and mentoring. This program supports young people to reengage in educational activities and access necessary services to address disadvantages such as trauma, substance abuse and a lack of safe and suitable accommodation. However, significant effort is spent helping young people engage with youth justice services and the court and to assist young people to comply with their often onerous justice related obligations. If the age of criminal responsibility is raised to 14 years, there should be substantial investment in and expansion of programs such as YEP for young Aboriginal people who are experiencing crisis in their lives and require holistic support.

7 Cost benefit analysis of raising the age

In reality, sending a child to Banksia Hill is the most expensive form of youth justice.

Cost of One Child in the Youth Justice System in Western Australia ⁹¹		
	Detention-based supervision	Community-based supervision
Average cost per day	\$1,339	\$93
Average cost per year	\$488,735	\$33,945

The total average cost per day for each young person in detention in Western Australia in 2020-21 was \$1339 (an annual cost of approximately \$488,735 per child), compared to \$93 for community-based supervision and/or diversion methods (annual cost of \$33,945 per child).⁹² By comparison, youth-work-based programs have been proven to reduce youth recidivism by half, with an annual cost of just \$1,680 per person.⁹³

Western Australia spent \$95.6m in 2019/2020 on juvenile offender services.⁹⁴ This figure does not include Children's Court costs, or policing, so does not give the entire picture of expenditure.

This brief analysis is an estimate only and limited by publicly available information about the number of children under the age of 14 years who have been detained. However, the current available data shows that there was at least one child under the age of 13 years and 13 children between the ages of 13 and 14 years in detention on 30 September 2020. No data is available for the police costs involved in arresting and charging these children.

91 The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

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94 The Government of Western Australia, 'Western Australia State Budget 2020-21, Budget Paper, No. 2, Budget Statements Volume 2', Perth, WA, The Government of Western Australia, <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>

Cost Benefit Analysis from Social Reinvestment WA (Based on Publicly Available Data)			
No. Children U13 in Banksia Hill 30 Sep 2020 ⁹⁵	Cost Per Day for Imprisonment ⁹⁶	Median no. days under youth justice supervision ⁹⁷	TOTAL COST
1	\$1339	75	\$100,425
No. Children U13 in Banksia Hill 30 Sep 2020	Cost per case in WA Children's Court ⁹⁸	Cost for Police Charges and Arrest per case	
1	\$662,000	Unavailable	\$662,000
			\$762,425

Despite these limitations **we estimate that diverting just one young person aged 10-13 from our criminal justice system would save \$762,425 dollars**, which could be reinvested into community-based prevention, intervention, diversion, rehabilitation, and reintegration.

Hypothetically, based on the same estimations above, **if the 143 children** in unsentenced detention in the year 2018-2019 had been diverted from the criminal justice system prior to court and detention, **over 100 million dollars (\$109,026,775 in total) could have been saved.**

8 Conclusion

Children have a right to a childhood, free from fear, and deserve the chance to thrive, supported and empowered. As a community, we have a responsibility to protect and care for our most vulnerable members, and the data demonstrates that young people in Western Australia's criminal justice system are among the most at-risk group already facing trauma and intersecting experiences of disadvantage, especially those under the age of 14. According to the scientific consensus, young people under the age of 14 years do not have the developmental capacity to be held responsible for crimes, especially those with a disability. Furthermore, putting children through the criminal justice system is extremely costly and causes them further harm in both the immediate and long term.

Western Australia has the opportunity to lead the country and amend our legislation to raise the age of criminal responsibility to 14 right now, utilising mechanisms that already exist. Raising the Minimum Age of Criminal Responsibility also offers an opportunity to improve our system, to provide more targeted, holistic, and effective responses to our most at risk young people. There is an existing evidence base, and suite of initiatives and program examples our state can use to support investing in early intervention, prevention, diversion, and rehabilitation in the community - ensuring children's well-being is at the front and centre of our future response, whilst critically maintaining community safety.

Together, we can take a step forward to build safer communities, and a better future for Western Australia's most at-risk young people by raising the minimum age of criminal responsibility to 14 years old.

95 Corrective Services Quarterly Statistics

96 WA Budget 2020

97 AIHW Fact Sheet 2018-2019

98 WA Budget 2020

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This report is endorsed by the following organisations

The 73 non-government organisations listed below endorse Social Reinvestment WA's paper, and support our call to Raise the Minimum Age of Criminal Responsibility in Western Australia to 14 years old. They reflect organisations across sectors, purposes, and the entire state, united in this call for reform to the WA Government.





12 Buckets Inc

Nicki McKenzie CEO

Aboriginal Health Council of Western Australia (AHCWA)

Des Martin, CEO

Aboriginal Legal Service WA

Dennis Eggington, CEO

Accordwest

Evan Nunn, CEO

Amnesty International

Samantha Klintworth, CEO

Anglican Parish of Bull Creek-Leeming

Rev Bruce Hyde

Anglicare WA

Mark Glasson, CEO

Australian Childhood Foundation

Joe Tucci CEO

Australian Lawyers for Human Rights

Kerry Weste, President

Australian Physiotherapy Association

Scott Willis National President

Bringing Them Home WA Inc

Keith Bodman, Director

Centrecare Inc

Tony Pietropiccolo, CEO

Centre for Human Rights Education, Curtin University

Caroline Fleay

Communicare

Melissa Perry, CEO

Community Legal WA

Sharryn Jackson, Executive Director

ConnectGroups

Antonella Segre, CEO

CREATE Foundation

Jacqui Reed, CEO

Curtin Student Guild

Jesse Naylor Zambrano, President

Cyrenian House

Carol Daws CEO

Daydawn Advocacy Centre

Mark Reidy, Director

Earbus Foundation of WA

Paul Higginbotham, CEO

Ebenezer Aboriginal Corporation

Martin Smith CEO

Ethnic Communities Council of WA

Vivienne Pillay, Executive Officer

Financial Counselling Association of WA (FCAWA)

Ashleigh Small, CEO

Foundations Care

Shona Robertson, State Manager

Glass Jar Australia LTD

Fran Haintz EO

GRAI

Michael Berry, Chair

Hello Initiative

Ashleigh Small, CEO

Holyoake

Angie Paskevicius

Indigo Junction

Sharon Gough, CEO

Key Assets

Brenda Yelland, State Director

Kimberley Aboriginal Law and Culture Centre

Gordon Marshall, Chair

Lifestyle Solutions

Petra Green, Executive General Manager, Child and Family

Life Without Barriers

Jennie Burns, Director WA

Local Drug Action Groups Inc

Jennifer O'Mullane CEO

Maaraka Kwob Aboriginal Corporation

Norma Morrison, Executive Secretary

Media on Mars

Kammi Rapsey, Principal

MercyCare

Anthony Smith, CEO

Millennium Kids Inc

Catrina Luz Aniere

Ngala

Fiona Beermier CEO

Noongar Family Safety and Wellbeing Council (NFSWC)
Barbara Henry, Executive Officer

Outcare
Bridget Harvey, CEO

Oxfam
Ngarra Murray, National Manager
First Peoples Programs

Palmerston Association Inc
Emma Jarvis, CEO

Parkerville Children and Youth Care Inc
Kim Brooklyn CEO

Peel Community Development Group
Liz Prescott Chairperson

Peel Youth Services
Liz Prescott CEO

Perth Inner City Youth Service
Andrew Hall, Executive Officer

Propel Youth Arts WA
Jamie McGleave, General Manager

Reconciliation WA
Jody Nunn, CEO

Rise
Justine Colyer CEO

Riverview Community Services Inc
Dr Tania Watson, Executive Minister

Shelter WA
Michelle Mackenzie, CEO

Southcare
Dr Nicky Howe CEO

St Vincent de Paul Society WA
Susan Rooney, CEO

Swan City Youth Service
Ray Tanielu, Youth Services Manager

**The Religious Society of Friends (Quakers)
West Australian Regional Meeting**
David Tehr, Clerk

The Salvation Army Australia
Major Paul Hateley, Head of
Government Relations

Tom Price Youth Support Association Inc (TPYSA)
Marian Hearne

Uniting Aboriginal & Islander Christian Congress (WA)
Rev Robert Jetta, Chairperson

Uniting Church WA
Susy Thomas, Moderator

Uniting WA
Amanda Hunt, CEO

UWA Student Guild
Emma Mezger, President

WA AIDS Council (WAAC)
Lisa Dobrin CEO

WACOSS
Louise Giolitto, CEO

WA Justice Association
Tom Penglis, Executive Director

WANADA
Jill Rundle, CEO

Wanslea Ltd
Tricia Murray, CEO

West Australian Stolen Generations Aboriginal Corporation
Jim Morrison, Chair

Wirrpanda Foundation
Lisa Cunningham, CEO

Wungening Aboriginal Corporation
Daniel Morrison, CEO

YACWA
Ross Wortham, CEO

Yorganop
Dawn Wallam, CEO

Youth Involvement Council
Vicki-Tree Stephens

