

Raising the Minimum Age of Criminal Responsibility in QLD

Submission to the Queensland Parliament Community Support and
Services Committee

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CREATE Foundation

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Introduction

CREATE thanks the **Queensland Parliament Community Support and Services Committee** for the opportunity to comment on the *Criminal Law (Raising the Age of Criminal Responsibility) Amendment Bill 2021*, proposed by Michael Berkman MP, Member for Maiwar. CREATE unequivocally supports raising the minimum age of criminal responsibility (MACR) from 10 to 14 years old, including the transferral of children under 14 out of custody, and the negation of consequences for children under the age of 14 with prior offences/records. Instead, emphasis on prevention, diversion, therapeutic intervention, and rehabilitation are paramount.

As the national peak body and systemic advocate representing children and young people with an out-of-home care experience (i.e., foster care, kinship care, and residential care), the CREATE Foundation would particularly like to highlight the cross over between the youth justice and child protection systems. It would also like to flag the increased risk that vulnerable young people with a care experience may be exposed to because: they may have limited support and parental guidance; be impacted by a trauma; and experience a higher risk of potential exposure to criminal activity or over-criminalisation of behaviours, particularly in group residential homes. CREATE does not want to see children arrested and locked up, nor does it want to see children already marginalised and isolated by their care experience suffer further trauma and neglect by being incarcerated. As the state assumes parental responsibility for children and young people in OOHC, it is the state's responsibility to ensure these individuals are supported, nurtured, mentored, and given priority access to support services, not put in prison.


CREATE therefore believes that raising the MACR would not only improve both the safety and well-being of children and young people in general, but also have potentially significant ramifications for those in out-of-home care. In addition to this, raising the age would also reduce long-term offending and increase community safety. This position is in line with overwhelming medical, legal, and international evidence. CREATE would also like to acknowledge that many young people in out-of-home care are victims themselves of abuse, neglect, and maltreatment and therefore any action taken towards young offenders in this context needs to be trauma-informed and therapeutic-based.

CREATE has drawn upon the voices and experiences of young people who have participated in our consultations and research reports, alongside best-practice literature, to respond affirmatively to the proposed Amendment Bill.

Disproportionate Impact on Young People in Care

The Australian Institute of Health and Welfare (AIHW) (2021) reported that there were 46,000 children and young people living in out-of-home care in Australia between 30 June 2019–2020. In an earlier report, AIHW (2020) also found that 22% of young people under youth justice supervision had been placed in out-of-home care in the last five years, and that 61% of First Nations young people under youth justice supervision had also received child protection services in that period. For young people in youth detention, over 26% had been in out-of-home care. A majority of these children were also found to have been placed in residential care and had lived in five or more placements while in care (Australian Institute of Health and Welfare, 2020).

Similar findings from CREATE's latest report, *Transitioning to adulthood from out-of-home care: Independence or interdependence?*, presenting data from 325 care leavers, showed that 37% of respondents had been involved with the youth justice system whilst in care, and 21% were involved after exiting care (McDowall, 2020). Aboriginal and Torres Strait Islander care leavers were also more likely to have been involved with youth justice after leaving care (31%) compared to non-Indigenous care leavers (18%).



The over-representation and crossover of children and young people in both out-of-home care and youth justice systems is a common concern across Australia. Research shows children and young people who have been abused or neglected are at greater risk of engaging in criminal activity and of entering the youth justice system (Atkinson, 2018). Oftentimes, these children and young people also have an out-of-home care experience and CREATE believes the over-representation of young people with a care experience in the youth justice system is unacceptable (CREATE, 2018a).

Placement instability should not be underestimated. Some young people find themselves moving upwards of ten or more times while in OOHC, making stability, support, and wellbeing difficult to achieve. Further to this is the experience of residential care, and the frequent criminalising of behaviours that would be tolerated in a family home but can escalate to involve the police in care facilities (CREATE, 2018a; McDowall, 2020; Victorian Commission for Children and Young People, 2021). Young people in care can also find themselves being pursued by police for “running away,” for missing curfews or visiting family without telling anyone. Because children and young people with both an out-of-home care and youth justice experience present with more complex needs (and experience situations) that often arise due to past trauma, they face greater social disadvantage than the general youth-justice population (Mendes et al., 2014).

We are not really treated like kids. We are held to greater responsibility than anybody else. If another young person living at home has a fight with their siblings, they are not held to the same responsibility. (Female, 25)

They made me feel like a bad person. I don't know why someone didn't just sit down and talk to me about what was going on and why. I had no support, no one cared. If they had asked me why [I was offending] I could have told them why I was doing it and it might have been able to be fixed earlier. (Male, 24)

I felt let down, I felt like they would have done more if we were a "normal family"... I felt like we are always pushed to the back because we are foster kids. Police think we just make up stories, because of our care experience.

(CREATE, 2018b)


If I had the right carer and didn't get kicked out, I wouldn't commit crime. I did it to survive, eat and sleep. Child Safety Officers may not have kids [of their own]. It's my 9th time in here [youth detention]. I haven't been in resi care since 13, I have been living on the street. It's up to the kid. If he needs support, he should be able to come back [to the Department]. (Male, 17)

(CREATE, 2021b)

CREATE advocates that there needs to be a prioritisation of prevention strategies across state and territory governments that address the root causes of youth offending (including the unique experiences of young people with a care experience) to ensure the needs of these young people are meaningfully met. This includes raising the MACR from 10 years to at least 14 years of age, and additional strategies such as greater investment in diversionary strategies that utilise existing community-based services, increased collaboration between youth justice and child protection systems, and the adoption of a trauma-informed youth justice system. Such reform will assist young people achieve their best outcomes, but also lead to reduced recidivism and increased safety for communities (CREATE, 2018a).

Rationale for Raising the Minimum Age of Criminal Responsibility For All Young People

CREATE believes that governments must raise the minimum age of criminal responsibility with **no exceptions**. Medical evidence has determined that children under the age of 14 years old do not have



the developmental capacity to form criminal intent or comprehend consequences of their actions, including the severity level of their behaviours (Australian Medical Association, 2020). Because of a lack of sufficient neurological development, these children and young people should not be held criminally responsible.

Children under the age of 14 years are also incredibly vulnerable to developmental harm when they come into contact with the criminal legal system, which may contribute to higher instances of poor mental health or illness, unemployment, homelessness, and premature death later in life (Australian Medical Association, 2020). Studies also show that the earlier a young person has contact with the criminal justice system, the more likely it is that the young person will have long-term involvement in crime (Australian Institute of Health and Welfare, 2020). Brown and Charles (2021) have also noted that criminal records and labelling actually creates a harmful, irreversible “criminogenic” identity in which young people struggle to return to society once they have been typecast a criminal. They continue (2021, p. 159) that youth justice reform must “respect maturation and developmental evidence” and “holding children from the age of 10 to account for their actions,” is a socially, emotionally, and neurologically dangerous endeavour.

Calls for Australia to raise the MACR have been strongly voiced both locally and internationally, (Australian Medical Association, 2020; Human Rights Law Centre, 2021) after the United Nations made a recommendation in 2019 to raise the MACR to at least 14 years. Recommendation 27.1 stated in the final *Royal Commission into the Protection and Detention of Children in the Northern Territory report* (2017) also recommended that the age of criminal responsibility be raised, but no progress has been made to date since that report was released.

CREATE strongly supports the need to raise the MACR as it is in the best interests of the child, and their community. CREATE also advocates that the needs of the child must be met in a therapeutic and rehabilitative manner, rather than punitively, possibly leading to the child being exposed to further harm through the criminal justice system.


Prevention and Early Intervention Strategies

Raising the MACR should protect children and young people under the age of 14 from the criminal justice system and should provide the opportunity for diversion and therapeutic intervention. However, CREATE notes that this reform should not be treated as simply delaying the criminal justice system’s engagement with the child until they reach the age of 14 as this undermines the intent of supporting children and young people to learn from their mistakes and be able to grow and contribute positively to society.

CREATE firmly advocates that efforts should be put towards addressing potentially criminal or harmful behaviours by helping children learn from their mistakes, without harming them for life. Community-driven solutions, intensive family support programs, trauma-informed mentorship, and on-country learning are all alternative programs that work and support children and young people to redirect their lives for the better, instead of being locked away.

[I am] conflicted as I have a 10-year-old sister and know that she needs to be held accountable [for her actions], but I do not believe that being locked up is the answer. But [I] believe that their actions needs some consequence and that there is some steps that need to be looked into before lock up (i.e., PCYC and other services) to find out what led the young person to this and also look at distractions as people don’t misbehave for no reason... At 14 I feel the young person is more able to be held to the consequence of what they have done. (Female, 21)

(CREATE, 2018b)



CREATE recommends that various frameworks should be used when adopting alternative models to the youth justice system (CREATE, 2018a). These frameworks include using human rights, child rights, culturally-sensitive practice, and trauma-informed perspectives when working with children who may come in contact with the youth justice system. CREATE also believes that children and young people must be supported to be aware of and understand their rights (CREATE, 2021b).

Based on the key findings from CREATE's *Youth Justice Report* (2018b), which is supported by broader information gathered through our work with young people (McDowall, 2020), CREATE specifically calls for:

1. Increased training and resources provided to residential workers, foster, and kinship carers regarding how to manage challenging behaviour within a trauma-informed framework. This can include the development of protocols and MOU's between OOHC service providers and police, clearly outlining what contexts require the police to attend, and supporting the use of diversionary responses. This will ensure young people in OOHC are not disproportionately having contact with police that would not occur in a non-OOHC environment.
2. The adoption of a trauma-informed and strengths-based youth justice system which promotes policy and practice that better manages challenging behaviours, develops a young person's resilience and strength, and ultimately leads to increased cooperation with youth justice staff and reduced recidivism (Elwyn et al., 2014). Practices aligned with a trauma-informed approach include screening for trauma exposure, using non-judgemental language, and ensuring judicial processes are explained in a developmentally appropriate manner (Branson et al., 2017).
3. A high proportion of young people with a care experience are unsupported during their justice system contact. There is a need for greater clarity regarding the roles and expectations of caregivers and professionals in supporting young people through the justice system. Child protection, youth justice, and community service agencies who provide placements for young people in OOHC need to work together to develop clear protocols about how best to support young people who may have contact with the youth-justice system at each stage, and support the sharing of necessary information to facilitate this.
4. Increased public education and awareness of the impact of stigmatisation on young people in OOHC, and a need to promote positive images of young people in OOHC to reduce internalisation of negative perceptions.

(CREATE, 2018a)

Early intervention for children and young people in care who are exhibiting trauma-based behavioural issues has the potential to minimise involvement in the youth and adult justice systems (Atkinson, 2018). Having appropriate and positive social support from positive peers and social networks could also assist in diverting young people from engaging in criminal activity (CREATE, 2021b).

I don't think they get trauma or behaviours expressed by children and young people in care so there isn't a lot of understanding towards them. It's a lot about punishment rather than rehabilitation. It's more you did the wrong thing regardless of the reasons behind it. (Female, 22)

(CREATE, 2018b)

If a child is committing crimes like this and haven't had the opportunity to explore all resources (counselling etc.), then I think that there should be a chance for rehabilitation in the community before taking such a drastic measure as this could cause mental distress and illness. And feelings of worthlessness in the community. (Female, 16)

(CREATE, 2021b)



Strengthening Therapeutic Supports

CREATE believes that children and young people, particularly with a care experience, should also be able to have ongoing access to emotional and mental health support services. As the majority of children and young people who come into care have experienced past abuse and trauma, CREATE believes that additional specialised therapeutic supports should be made available, accessible, and without cost (CREATE, 2021a). This approach also acts as a preventive measure that can support young people with their social, emotional and mental health challenges and channel these positively, rather than engaging in youth crime.

Young people have consistently voiced their concerns for mental health support; however accessing these services is often difficult due to a limited number of sessions with psychologists or counsellors, feeling as though their counsellor is not the right fit, and the associated financial costs involved (CREATE, 2019; 2020; 2021a; McDowall, 2020). CREATE believes there should be an unrestricted amount of counselling sessions or other identified therapeutic services available for those with a care experience background, and that referrals should be streamlined to avoid challenges in navigating service systems.

Counselling (after using up the free sessions it's really expensive). Help to get a diagnosis (I don't know the process and it's really expensive). Feeling like you have no one to go to, who won't need you to tell your story over for them to understand you. (Female, 20)

(McDowall, 2020)

Further Measures

CREATE supports the Amendment Bill to raise the age of criminal responsibility. However, it also is suggested that other key areas of need for young people with a care experience in the QLD context be addressed. These include:

- *De-escalate Rather Than Incarcerate*
Addressing the over-criminalisation of young people with a care experience. One way this could be achieved is reinforcing and ensuring the Joint Agency Care Protocol is upheld in which unnecessary police calls outs to residential care facilities for minor issues are handled with greater sensitivity and with trained therapeutic professionals rather than police intervention.
- *Parental Responsibility of the State*
The State legally assumes parental responsibility for children and young people with a care experience in Queensland. Therefore, it is reasonable to expect that the State would want to protect their children from incarceration. More responsibility and accountability therefore needs to be placed on the Child Protection system, including priority care placements to be made available for young people in OOHC if their current situation is inciting criminal behavior or exposing the young person to criminal behaviour. There also needs to be priority provision for young people at the end of detention periods to have appropriate placements to go to.
- *Supportive Relationships*
Young people need supportive, trusting people in their lives—strengths-based relationships. Therefore, all effort should be made to ensure youth justice staff have empathy training alongside skills training to deliver quality and meaningful intervention, diversion, and/or rehabilitation. Young people have also spoken about the need for police and judicial staff to build better relationships with young people (and communities) so that children may feel safe and comfortable turning to authorities for help if needed—also de-escalating potentially criminalising situations.

Conclusion

Thank you again for the opportunity to respond to *Raising the age of minimum criminal responsibility*. Youth justice is a complex field, but a reform to raise the MACR from 10 to 14 years is a critical first step in safeguarding the wellbeing and development of young children whilst also ensuring community safety. Should you have any questions or require additional information, please contact: Dr Joseph J. McDowall, Executive Director (Research), CREATE's Policy and Advocacy Unit, on 07 3062 4860 or email joseph.mcdowall@create.org.au.


Yours sincerely,



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About CREATE

CREATE Foundation is the national peak consumer body for children and young people with an out-of-home care experience. We represent the voices of over 45,000 children and young people currently in care, and those who have transitioned from care up to the age of 25. Our vision is that all children and young people with a care experience reach their full potential. Our mission is to create a better life for children and young people in care.

To do this we:

- **CONNECT** children and young people to each other, CREATE and their community to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.

We achieve our mission by providing a variety of activities and programs for children and young people in care, and conducting research and developing policy to help us advocate for a better care system.