



create
FOUNDATION

creating a better life
for children and young
people in care

CREATE Foundation Submission: Youth Justice and Child Wellbeing Reform across Australia

CREATE Foundation

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About CREATE Foundation

CREATE Foundation welcomes the opportunity to contribute to the National Children's Commissioner's consultation on reforms to youth justice and related systems in Australia.

CREATE Foundation is the national consumer body representing the voices of children and young people with an out-of-home care (OOHC) experience. We provide programs and services to children and young people with a statutory care experience and develop policy and research to advocate for a better care system.

Our Vision

All children and young people with a care experience reach their full potential.

Our Mission

Creating a better life for children and young people in care. To 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.

Core principles

- Children and young people are the centre of the work we do.
- Our practice is inclusive and respectful of culture and diversity.
- Our advocacy is independent and driven by the voices of children and young people.
- We believe that meaningful participation is essential for engaging children and young people.
- Partnerships with Government, NGOs and individuals are important to success.
- We are enthused by creativity and fun.
- We invest in our people.
- We provide a safe and inclusive environment for children and young people where they are safe, respected and have opportunities to have a say, free of judgement and prejudice.

Objectives

CREATE Foundation objectives are to ensure that all children and young people in care are respected, listened to, and are active participants in decisions which affect their lives.

We aim to provide all children and young people in care with opportunities to create better life outcomes and to reach their full potential.

We work to effect system changes for the benefit of all children and young people in care into the future by building community capacity with key stakeholders.



Submission

What factors contribute to children's and young people's involvement in youth justice systems in Australia?

Most children and young people involved with the youth justice system experience significant and intersecting disadvantage, including homelessness and poverty, mental health and other health issues, substance abuse, childhood trauma, maltreatment and cognitive impairment (Tasmanian Sentencing Advisory Council, 2021, pp 9–22).

CREATE's submission is focused primarily on the over-representation of children with an OOHC experience in the justice system, which is sometimes referred to as the "care-to-custody pipeline." Young people with an OOHC experience are far more likely to have contact with the justice system than young people without a care experience. More than half (53%) of the young people under youth justice supervision during 2020–21 had an interaction with the child protection system in the preceding 5-year period and 21% had been in out-of-home care in the last 5 years. Sadly, nearly one-third (30%) of the young people under youth justice supervision during this period were the subject of a substantiated notification for abuse or neglect (Australian Institute of Health and Welfare [AIHW], 2022).

In 2019, the Australian Institute of Criminology (AIC) conducted a detailed case file audit of 300 "crossover" children (i.e., those in youth justice also with current or historical statutory child protection involvement) appearing before the Victorian Children's Court in 2016–17 (Baidawi & Sheehan, 2019). The study showed that "crossover" children present with more serious offending profiles than other court-involved children, and emphasised the need to prevent, divert, and respond to crossover children's criminal justice contact. Key findings included:

- 91% of all the children had previous child protection notifications.
- 80% of the children had spent time in OOHC, which was more common among children with an intellectual disability (19% vs 9%), a trauma or attachment-related disorder (23% vs 7%). 43% of the children were in OOHC when their criminal matter was before the courts, with the majority of those (69%) in residential care:
 - Females were significantly more likely to have run away from home or care placements, and to have either been at risk of or experienced sexual exploitation, while males were significantly more likely to display challenging behaviours and sexualised behaviours.
- Two children were identified as being homeless.
- Almost three-quarters of the children had been exposed to family violence. Relative to non-Indigenous children, higher proportions of Indigenous children had been exposed to family violence (95% vs 71%).
- At least 50% had a household member with mental health concerns, including five to 10 percent whose parent experienced psychosis, psychiatric hospitalisation, or suicide attempts.
- At least 20% of children had a deceased parent. Deaths were often traumatic in nature, including homicides, suicides, and overdoses, and several children were present when the deaths occurred or later discovered the deceased body.
- 25% of children had physical health concerns and secondary complications owing to neglect of physical health were seen. Around half of children had diagnosed neurodevelopmental or neurological conditions.
- Three-quarters of children had misused substances (drugs and/or alcohol), and there was evidence that 40% had used 'hard drugs' (crystal methamphetamine, other amphetamines, heroin or inhalants).

CREATE (2018) interviewed 148 young people nationally to gain a better understanding of the engagement and experiences of young people from OOHC in the justice system. The young people who



participated provided important insights into how they became involved with the justice system, their treatment by justice system personnel, the support they received during their interactions and their recommendations for improving the justice system for young people with an OOHC experience. Key recommendations made by these young people have been incorporated into our advice below.

What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

Raising the age of criminal responsibility

Recommendation: All Australian Governments should immediately commit to raising the age of criminal responsibility to 14 years. Improved diversion programs and therapeutic interventions must be rolled out concurrently to ensure that the legislative reform does more than delay children's entry into the system.

CREATE urges all governments to raise the age of criminal responsibility to 14 as a matter of priority this year. This reform is a critical first step in safeguarding the rights, wellbeing, and development of young children and avoiding the stigma of criminalisation. Critically, this reform must be implemented in conjunction with increased investment in programs focused on prevention, diversion, therapeutic intervention, and rehabilitation.

Medical and legal evidence shows that 14 should be the minimum age of criminal responsibility (CREATE, 2022). Children under the age of 14 years 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). Indeed, not only has the United Nations Committee on the Rights of the Child (2019) indicated 14 years should be the minimum age, it has also highlighted that a number of jurisdictions internationally have already moved to accept 16 years of age as a minimum age.

Detention has a devastating impact on children's and young people's health, development, mental health, and wellbeing (Human Rights Law Centre, 2023), and evidence shows that the earlier a child has contact with the criminal justice system, the more likely it is they will have long term involvement in crime (AIHW, 2022).

At the Meeting of Attorneys-General on 15 November 2021, all jurisdictions supported the development of a proposal to increase the minimum age of criminal responsibility from 10 years to 12 years. However, since then, only three jurisdictions have committed to or enacted these changes.

Recommendation: Governments must accelerate efforts in Closing the Gap in outcomes for Aboriginal and Torres Strait Islander children and young people.

Recommendation: The Commonwealth Government should establish a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People to drive the reforms and hold governments to account.

Simply raising the age of criminal responsibility will not address the already high and unacceptable rates of Aboriginal youth in the justice system. Aboriginal and Torres Strait Islander young people are under youth justice supervision at significantly higher rates than non-Indigenous young people. Between 2017–18 and 2021–22, the rate of Indigenous young people aged 10–17 under supervision on an average day was 121 per 10,000, compared to 6.5 per 10,000 for non-Indigenous young people (AIHW, 2023).

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report (2011) *Doing Time – Time for Doing* concluded that the impact of intergenerational trauma, poverty and social and economic disadvantage was leading Aboriginal and Torres Strait Islander children and young people into contact with the criminal justice system. Reforms aimed at reducing the number of Aboriginal



and Torres Strait Islander children in the justice system therefore must focus upstream on self-determination, healing inter-generational trauma, and better addressing the needs of Aboriginal and Torres Strait Islander children and families through culturally safe, Aboriginal and Torres Strait Islander community-led initiatives.

Implementation of priority reforms and actions under the National Agreement on Closing the Gap and the Aboriginal and Torres Strait Islander First Action Plan of *Safe and Supported: The National Framework for Protecting Australia's Children 2021-2031* must be accelerated through increased resourcing for Aboriginal Community Controlled Organisations to reduce the over-representation of Aboriginal and Torres Strait Islander children and young people in child protection systems and to ensure that appropriate and effective community-led solutions are put in place. It will also be important to consider any recommendations that flow from the upcoming scoping study into the interface between child protection and youth justice systems, as committed to under *Safe and Supported*.

CREATE also supports SNAICC's call for a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People to address the unacceptably high levels of multiple and intersecting forms disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander children and young people across all Australian states and territories. The National Commissioner should be legislatively empowered to protect and promote the rights of Aboriginal and Torres Strait Islander children and young people in Australia.

Improved therapeutic supports for young people in OOHC

Recommendation: State and territory governments should enhance therapeutic supports for young people in OOHC, particularly in residential care settings, to act as a preventative measure of youth justice contact. Residential workers and foster and kinship carers should be better equipped, through training and other resources, to manage challenging behaviour within a trauma-informed framework.

The residential care environment is increasingly being identified as a factor influencing the association between in-care experiences and offending behaviour. Ryan, Marshall, Herz and Hernandez (2008) assessed a sample of over 8,000 young people between the ages of 7 and 16 who had at least one OOHC placement, with no arrests prior to first placement. Compared to young people placed in foster homes, young people with at least one group home placement were 2.5 times more likely to have been arrested than young people in foster homes. This finding was replicated by Baskin and Sommers (2011), who found that young people placed in a group home were significantly more likely to have been arrested and charged than young people placed in a foster home or whom remained with their families.

In a residential environment multiple young people with challenging behavioural and emotional disturbances are often co-tenanted. Young people may be confronted with peer pressure to commit crimes, or to imitate the criminal behaviour modelled by co-tenants (Hayden, 2010). However, understanding the impact of placement breakdowns and residential care is complicated by the fact that young people with pre-existing complex behavioural and emotional difficulties (oft the result of trauma experiences) are placed in residential facilities following placement instability as a result of these behavioural difficulties (Staines, 2017).

Residential care could be seen as an opportunity to provide specialist evidenced-based, trauma-informed services to particularly vulnerable young people, e.g., the Sanctuary and CARE models. A recent review (McLean, 2018) of such therapeutic approaches encouraged the extension of these services that were tailored to individual needs, involved relationshipbased support and provided for connection to family and culture to facilitate healing.

Young people placed in OOHC are more likely to have contact with the justice system due to the criminalisation of behaviours that may otherwise be considered acceptable or tolerable in a home environment. Young people in a family home may damage property or threaten harm whilst angry, but parents typically manage this behaviour. In the OOHC environment, residential facility staff or foster



carers are more likely to prematurely engage the police to manage the young person's behaviour, particularly when incidents are frequent (though not necessarily serious) and the young person does not respond to other sanctions, such as threat of being grounded (Shaw, 2017).

High quality, trauma-informed, and culturally safe care must be provided to children and young people in a nurturing environment by appropriately trained staff who respond to the individual needs of children and young people in out-of-home care. This includes considering a therapeutic model for residential care that has seen success within Australia and in many jurisdictions around the world. Residential staff need to be highly trained to acquire the varied skills required for managing challenging behaviours. They must be trauma-informed and have a sound knowledge of conflict resolution and the application of diversionary strategies. Having staff who can confidently apply these approaches in a caring and supportive way, while respecting relationships, should assist in decriminalising the residential-care experience.

Greater support for young people leaving care and transitioning to adulthood

Recommendation: Governments should increase the financial support provided to young people transitioning out of OOHC urgently, in recognition of Australia's cost of living crisis and the heightened impact this has on vulnerable young people.

While CREATE was pleased to see the final two states recently commit to providing some form of extended support to care leavers until the age of 21, the level of financial support provided in most jurisdictions remains too low to meet the basic needs of young people transitioning into independent living.

Governments should review their current payment amounts and apply an increase that is commensurate with the true cost of living and which better reflects the financial barriers that young care-leavers face. The Commonwealth's Transition to Independent Living Allowance (TILA), in particular, which offers a one-off payment of up to \$1,500, is significantly too low. Despite numerous reviews and consultations, this payment has not increased for over 10 years.

Any increase in financial support for vulnerable young people to assist them in relation to education, training, health services and accommodation, will reduce the risk of poverty, which can be a risk factor for criminal behaviour.

Recommendation: The Commonwealth Government should boost funding to state and territory governments under the *National Housing and Homelessness Agreement* and/or prioritise social housing for young people leaving care under its new \$2 billion social housing package. All Governments should include clear actions and strategies to reduce the risk of homelessness for care leavers in the new *National Housing and Homelessness Plan*.

In their recent report, the Sentencing Advisory Council of Tasmania ("the SAC"; 2021) highlighted links between young people's experience of homelessness and their involvement in the criminal justice system. Many young people in Australia are committing offences out of necessity, or for reasons associated with poverty, including unstable housing. This is reflected in statistics relating to the types of offences committed by young people, which show property offences (in particular, stealing) are offences for which young people are commonly charged. Homelessness is also a factor considered by the courts in deciding whether a young person should be released on bail or remanded into custody. As noted by the SAC, lack of secure accommodation or other community support can significantly impact a child's ability to successfully engage with or complete a supervised order.

Young people leaving care should be provided with a choice of appropriate accommodation options, and wrap around supports to ensure they are able to maintain long-term, safe and secure accommodation. Standard 13 of the National Standards for out of home care (FaHCSIA, 2011) highlights the need for young people to have safe and appropriate housing arranged before leaving care as detailed in their transition plan. However, Australia's housing affordability crisis means this not always a reality for care leavers.



Recent research in Australia has shown that 36% of young people preparing to transition did not know where they would be living after leaving care, 49% left their care accommodation on turning 18, and 30% of young people experienced homelessness within the first year of leaving care (McDowall, 2020).

To reduce the risk of homelessness, young people leaving care must have the option to remain in, or return to, their placement up until 21 years. In addition, a specialist mix of housing supports should be available to divert young people leaving care from homelessness. This should include:

- increased supported accommodation options for young people who are unable to remain in their current placement or prefer to live independently but still require support.
- access to specialist homelessness services for emergency and transitional accommodation support.
- priority access to housing assistance and social housing until the age of 25 years.

Recommendation: Improved leaving care plans are required to ensure that the needs of young people are better met, and to identify and address risks and vulnerabilities that may lead to youth offending.

Workers should be engaging with young people earlier to ensure they are active participants in the development of their own individualised leaving care plans. Plans should identify and minimise the factors that increase the risk of a young person entering the justice system. The planning process should involve connecting young people to appropriate specialist supports as required (such as mental health support), ensuring foster carers and residential workers are appropriately trained to manage challenging behaviour without police involvement, and ensuring the young person feels safe and supported in their care environment, which can minimise the triggers associated with challenging behaviour.

Leaving care plans must also involve an extension of any cultural support plans to ensure Aboriginal and Torres Strait Islander young people are appropriately supported with regard to connection to their families, culture, and communities. Sadly, CREATE's consultation with recent care leavers in Queensland in 2022 indicated that half of the Aboriginal and Torres Strait Islander young people who had transitioned out of care in the previous 1-7 years reported feeling "Not at all connected to their culture or cultural community".

Recommendation: Governments should invest in trauma-informed mentoring programs for young people leaving care, to provide support around decision-making and navigating life's challenges.

As a result of adverse childhood experiences and trauma, many care-leavers face compounding barriers to achieving social and economic participation, which can be driving factors in crime. One of the most effective interventions for at-risk young people is to connect them with a caring and responsible adult mentor who can offer ongoing and consistent post-care support around navigating life challenges and improving stability (Poon et al., 2021). If young people with an OOHC experience are connected to appropriately qualified, trained and supported mentors, they are more likely to successfully transition to independence and adulthood. The presence of healthy, positive adult relationships will contribute to improved wellbeing outcomes longer term.

Improved trauma-informed engagement with young people in justice settings

Recommendation: State and territory governments should review and enhance their trauma-informed training for youth justice workers and police officers.

Immediate improvements must be made to the treatment of young people in youth justice systems across Australia. The justice system should adopt a trauma-informed approach when interacting with children and young people, particularly those with an OOHC experience. A trauma-informed model includes explaining judicial processes and terminology in a developmentally appropriate manner, clearly articulating what is expected of the young person, and ensuring that justice system authorities are trained to correctly identify and respond to trauma-influenced behaviour.



The Northern Territory Royal Commission (2017) revealed that vulnerable young people were exposed to extensive abuse in youth detention centres. Rather than being rehabilitated by receiving the necessary, individualised support they needed, young people were subjected to degrading and humiliating treatment by the adults entrusted with their care. In cases where young people presented with mental health concerns, punitive measures such as restraints were implemented as opposed to therapeutic intervention. Sadly, recent media exposés have revealed that similar practices continue in many states today.

Can you identify reforms that show evidence of positive outcomes, including reductions in children’s and young people’s involvement in youth justice and child protection systems, either in Australia or internationally?

Recommendation: The Office of the National Children’s Commissioner should conduct a stocktake of recent contributions by non-government organisations to various reviews and inquiries in relation to youth justice and related systems, highlighting any government responses to those inquiries, where relevant.

Recommendation: The Office of the National Children’s Commissioner should complete and publish a literature review of recent research and best practice in relation to youth justice and related systems to ensure any reforms are evidenced-based and in recognition of the plethora of specialist advice already available in this field.

CREATE notes the significant number of recent inquiries, reviews, and consultations across Australia on the issue of youth justice and child safety and wellbeing, and the plethora of independent research available exploring both the factors that drive youth crime and effective interventions. We recommend that government officials consider the existing evidence base, particularly in relation to diversionary programs, restorative justice, and therapeutic interventions that will reduce the rate of children entering the justice system, when developing reform options (Walsh et al., 2021). CREATE recommends that particular attention be provided to submissions made by Aboriginal and Torres Strait Islander-led organisations and peak bodies.

From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

Greater efforts are required nationally to address the major risk factors for children entering the justice system, and critically, this must include better addressing the needs of children and young people in OOHC.

There are substantial benefits to taking a national approach to these critical reforms, as outlined in our recommendations above, including improved quality and consistency in service provision for vulnerable young people, and increased accountability and transparency in relation to Government compliance with existing Standards and implementation of commitments. To support this, the Commonwealth Government must play a stronger role in leading and coordinating national reform efforts.

Recommendation: The Commonwealth Government should work with states and territories to expedite the refresh of the National Out of Home Care Standards, and to reinstate annual, public reporting on compliance with the Standards.

Under the First Action Plan (2023-26) of *Safe and Supported: The National Framework for Protecting Australia’s Children 2021-2031* all governments have committed to refreshing the National OOHC Standards and Indicators and considering options for measuring and reporting on the Standards, in consultation with children and young people. This work must be expedited to address the lack of transparency around the extent to which children and young people’s needs and rights are being met in



care. Reporting on state compliance with the National Standards should form the basis for more targeted reforms in OOHC and youth justice moving forward.

Recommendation: All Australian Governments should work together to introduce a nationally consistent minimum payment/allowance for care leavers, to ensure that young people leaving care across Australia receive adequate support, regardless of the jurisdiction they reside in.

The fact that each state and territory government has introduced different levels of financial (and other) support and different arrangements for administering payments and supports to young people is deeply problematic. The fairness and effectiveness of administering the payments and supports also varies across states.

The reality for many young people trying to access payments through a federated model means they are faced with navigating multiple complex systems and interacting with a number of different service providers. For example, young people leaving care in Australia may need to engage with Services Australia to access Centrelink payments such as Youth Allowance or Rent Assistance; state-based agencies to access the Commonwealth's Transition to Independent Living Allowance; state based government and/or non-government agencies to access the allowances provided by their state government; and then the Australian Tax Office to ensure that appropriate taxes are paid on those payments as well as any income they may earn from employment.

Maintaining an arrangement whereby young people with a care experience are forced to navigate multiple complex service systems and engage with multiple separate services is inconsistent with what we know to be the needs and challenges of young people with an OOHC experience, including that:

- Many care leavers face significant barriers in accessing basic records that are required for applying for payments.
- Repeatedly explaining their circumstances to different service providers can be re-traumatising.
- Many care leavers do not have an adult in their life that is able to explain how application processes work for various payments, or to provide advice on managing their finances and paying taxes.
- We also know from recent reviews and consultations around TILA, for example, that many young people are not even aware they are payments and support services they are eligible for.

Governments should work together to agree a national minimum payment/allowance amount for care leavers. The payments should be administered through a simple and nationally consistent payments framework, which clearly outlines eligibility and other conditions, and with improved promotion and guidance for young people around accessing the payments. This approach should make it easier for young people to access and navigate the application process, and reduce the level of discretion held by providers.

Recommendation: The Commonwealth Government should review its taxation arrangements to ensure that care leavers do not incur taxes on their state-based leaving care payments.

The Commonwealth Government should explore tax reforms to ensure young care leavers do not have taxes imposed on their various payments, including any state-based leaving-care allowances. This reform would increase the overall take-home payments for young people, lifting them above the poverty line, and remove one of the current disincentives for state governments to increase their payment amounts and methods of distributing funding to young people.



Recommendation: The design and implementation of any national reforms relating to youth justice and related systems in Australia must be informed directly by children and young people with lived experience in both OOHC and the youth justice system.

From here we recommend that the following guiding principles for the national reform process:

- a. *Reforms will be informed directly by the voices of children and young people, including those with lived experience in both OOHC and the youth justice system.*
- b. *Reforms will uphold the human rights of the child in accordance with Australia's commitments under international law.*
- d. *Reform efforts will focus on primary and early intervention to reduce the number of children and young people entering the criminal justice system, and take a "life course" approach to ensure appropriate supports are available for children at all stages of their development.*
- e. *Policy and service reforms will be trauma-informed and involve appropriate therapeutic interventions.*
- f. *Reforms will be culturally safe and community-led.*
- c. *The implementation and evaluation of any reforms will underpinned by effective and meaningful participation of children and young people.*



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