

## Representations to NSW Attorney General on raising the age of criminal responsibility

### INTRODUCTION

The Children in Care Collective was formed in 2016 by a group of out-of-home care service providers and leading experts in working with children with complex needs in out-of-home care.

The aim of the Collective is to share experience, discuss best practice informed by research, provide advocacy and learn from policy and practitioner experts in out-of-home care. The Collective seeks to address solutions to difficult systemic practice issues faced by the sector and to improve outcomes for children and young people with complex needs living in out-of-home care. The Collective's website is at <http://childrenincarecollective.com.au/>.

Members of the Collective are: Allambi Care; Anglicare NSW South, NSW West and ACT; Anglicare Sydney; CareSouth; Key Assets; Life Without Barriers; Mackillop Family Services; Marist180; Settlement Services International; Institute of Child Protection Studies (ICPS) - Australian Catholic University; Australian Centre for Child Protection (ACCP) - University of South Australia.

We understand that the Council of Attorneys General aims to make a decision in 2021 about raising the age of criminal responsibility in Australia from 10 years to 14 years. The change would bring us into line with the recommendation of the United Nations Committee on the Rights of the Child in its 2019 General Comment 24. The Committee, having considered extensive evidence and submissions, called on all States to raise the minimum age of criminal responsibility to at least 14 years.

In the original general comment No. 10 (2007), the Committee had considered 12 years as the absolute minimum age. However, the Committee finds that this age indication is still low. States parties are encouraged to increase their minimum age to at least 14 years of age. At the same time, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age.<sup>1</sup>

It is worth noting that the median minimum age of criminal responsibility in some 86 countries in the world is 14 years. As Professor Cunneen goes on to argue:

International comparisons by themselves do not provide an argument for increasing the minimum age in Australia. However, they do clearly demonstrate the feasibility of raising the age, and doing so without adverse effects on crime rates. Indeed, many of the countries identified above also have low incarceration rates for older juveniles who are subject to criminal law, for example Germany and Norway (see Jesuit Social Services 2017), suggesting the absence of a younger cohort of children who would otherwise have become entrenched

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<sup>1</sup> Committee on the Rights of the Child. General Comment No. 24 (2019), replacing General Comment No. 10 (2007): Children's rights in juvenile justice. 2019. <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>.

in the system through re-offending and the accumulation of a prior offending history, and less punitive approaches to juvenile justice generally.<sup>2</sup>

We are making these representations because our work focuses on children with complex needs in out-of-home care and all too often these children and young people are over-represented in the juvenile justice systems of all states and territories in Australia. The Collective wishes to contribute to the discussion about the importance of raising the age of criminal responsibility as one way in which we can prevent children moving from the care system into the criminal justice system.

## WHAT WE KNOW ABOUT JUVENILE CRIME AND CHILDREN IN CARE IN AUSTRALIA

The most recent national statistics about juvenile crime and its nexus with children known to child protection services were collated and published by the Australian Institute for Health and Welfare (AIHW). Its report '*Young people under youth justice supervision and in child protection 2018-2019*' is based on the seven jurisdictions with data included in both the youth justice and child protection national minimum data sets (NMDS).<sup>3</sup> New South Wales was excluded from the analysis because it does not provide AIHW with standard child protection NMDS data.<sup>4</sup>

AIHW notes that as years of data accumulate, it will be possible to expand on the current set of analyses and areas of interest, including health and welfare. It is very regrettable that New South Wales does not contribute to this valuable understanding of a key child protection issue.

In the absence of data from New South Wales – and therefore a complete picture - this report draws on the findings of two reports which, while focused on particular cohorts of children and not completely contemporaneous, provide relevant information on the situation in this State. These reports are '*2015 Young People in Custody Health Survey: Full Report*' by the Justice Health & Forensic Mental Health Network and Juvenile Justice NSW<sup>5</sup> and '*Offending Among Young People in Contact with the Out-of-Home Care System*'<sup>6</sup>, a report from the Pathways of Care Longitudinal Study of children and young people aged 0-17 years in out-of-home care in New South Wales.

### AIHW Data

AIHW reported that 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, confirming what is well

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<sup>2</sup> Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney. Available at <http://cypp.unsw.edu.au/node/146>

<sup>3</sup> Australian Institute of Health and Welfare 2020, *Young people under youth justice supervision and in child protection 2018–19*. Data linkage series no. 26. Cat. no. CSI 28. Canberra: AIHW (available online at <https://www.aihw.gov.au/getmedia/8442b61a-f3b9-4741-a5d7-75023cb0cd19/aihw-csi-28.pdf.aspx?inline=true>) p1

<sup>4</sup> New South Wales provides aggregated child protection data rather than unit record child protection NMDS

<sup>5</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW 2017, *2015 Young People in Custody Health Survey: Full Report*. Justice Health NSW

<sup>6</sup> Zhou, A. (2020). *Offending Among Young People in Contact with the Out-of-Home Care System*. Pathways of Care Longitudinal Study: Outcomes of Children and Young People in Out-of-Home Care. Research Report Number 18. Sydney. NSW Department of Communities and Justice.

known and researched. Of particular relevance to the cross over between out-of-home care and juvenile justice, in its 2020 report the AIHW reported that:

- more than 1 in 2 children (54%) under youth justice supervision had also received child protection services in the five years from 1 June 2014 – 30 July 2019. Sixty-one per cent of Indigenous children and 71 per cent of females had received child protection services
- about one-third of youth justice-involved young people were the subject of a substantiated notification for abuse or neglect
- approximately a quarter of those children in detention in 2018-2019 had been in out-of-home care in the five years from 1 June 2014 – 30 July 2019. Of these, 84 per cent (more than 4 in 5) had been in residential care
- of those in detention who had been in out-of-home care, 44 per cent had unstable care experiences of five or more placements
- the younger a person was when they entered youth justice, the more likely they were to have also received child protection services. Over 7 in 10 (71%) young people aged 10 to 13 at their first contact with youth justice supervision had received child protection services in the 5-year period.

The standout messages are that those involved in the youth justice system at a very young age (10-13 years) are very likely to have had child protection involvement. For those children with out-of-home care experiences, residential care and/or placement instability are closely correlated, rather than causally linked, with youth justice involvement. There is a further close correlation between those children with less desirable experiences of out-of-home care and children with complex needs and significant trauma histories. These overlapping experiences are confirmed in the *2015 Young People in Custody Health Survey*.

### **2015 Young People in Custody Health Survey**

The *Young People in Custody Health Survey* was conducted between September and December 2015 across seven Juvenile Justice Centres in New South Wales, within the time frame of the child protection data used by AIHW in the report referred to above. A total of 227 young people participated in the survey. The survey confirms that:

young people in custody come from highly disadvantaged backgrounds, with family disruption and experiences of trauma, neglect and abuse commonplace and levels of education low.<sup>7</sup>

Included among the Key Findings, are the following:

- One in five participants (21.1%) reported that they had been placed in out-of-home care before the age of 16 years and 38.1% had been placed in care three or more times. Rates of out-of-home care among young people in custody far exceed those among the general population, especially for young females.

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<sup>7</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW 2017, *2015 Young People in Custody Health Survey: Full Report*. Justice Health NSW. pxvii

- Levels of educational attainment were low. Only one quarter (27.0%) of participants were in school prior to custody and the median age of leaving school was 15 years, with female and Aboriginal participants leaving school earlier than other participants.
- The overwhelming majority (96.7%) of participants who had ever consumed alcohol had experienced being “drunk”. The average age of first getting drunk was 13.6 years, with Aboriginal participants’ first experience of becoming drunk occurring earlier than for non-Aboriginal participants (13.3 vs. 13.9 years). Over two fifths (41.8%) of those who had consumed alcohol in the year before custody reported being drunk at least weekly, and 51.6% admitted that their alcohol consumption had caused them problems with school, friends, health, police, and/or parents.
- More than three quarters (77.6%) of participants reported that they were intoxicated at the time of their offence, and 65.4% reported committing crime to obtain alcohol or drugs.
- Mental health concerns are among the most essential needs of young people in contact with the juvenile justice system, especially for those entering custody. An average of 2.5 psychological disorders occurred in the past 12 months for each participant. Most participants (83.3%) met the threshold criteria for at least one psychological disorder, and 63.0% for two or more. The population prevalence of psychological disorders for young people is estimated to be 13.9%, so young people in the YPICHS sample were nearly six times as likely to experience them.
- The data on suicide ideation, suicide attempts and suicide attempts requiring medical intervention indicate that YPICHS participants are less likely to report self-harm and ideation and more likely to perform serious suicidal acts.
- Overall, 68.2% of young people in the 2015 YPICHS reported experiencing at least one form of childhood abuse or neglect, with over one-quarter (28.1%) experiencing some form of severe abuse or neglect. (The study also found that approximately 49 per cent of study participants were likely to be under-reporting their experience of abuse and neglect.
- Close to a third of participants (29.8%) reported at least one clinically significant trauma symptom and 18.0% reported experiencing two or more symptoms.

In commenting on the very high levels of childhood abuse and the impact of trauma, the report concludes that:

The experience of abuse, trauma or neglect during childhood may disrupt a child’s developmental pathway, resulting in pervasive and long-lasting outcomes which may adversely affect various aspects of functioning. The evidence suggests a relationship between childhood trauma and poor emotional and mental health, and the development of antisocial behavioural problems such as aggression, juvenile delinquency, adult criminality, abusive or violent behaviour.<sup>8</sup>

Given the average age at which the young people entered custody is 15 years, there must have been a significant proportion who were younger than 14 years to result in this average figure, with the average age of Indigenous children being even younger. It therefore seems likely that a substantial number of under 14-year-olds would have experienced significant trauma and be affected by mental

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<sup>8</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW 2017, *2015 Young People in Custody Health Survey: Full Report*. Justice Health NSW. P95

health disorders and cognitive impairments. Since research confirms that the younger a child is when they first have contact with juvenile justice the more likely they will become entrenched in the system (see Cunneen 2017 for citations), there is a strong argument for considering how best to respond to the needs of these young people in the community, rather than in the justice system.

It is worth highlighting here that the most common first offence type committed was graffiti, at 11.8 years of age.

The high levels of abuse experienced by children who commit a criminal offence is once again confirmed in the Pathways of Care Longitudinal Study report on *Offending among young people in contact with the out-of-home care system*.

### **Offending among young people in contact with the out-of-home care system**

The analyses in this study are based on Department of Communities and Justice administrative data and linked offending data as at January 2018, so the timeframe is not quite consistent but likely to be comparable. The study investigates the likelihood and timing of the first offence among young people in out-of-home care, focusing on 863 young people who had no history of contact with the criminal justice system at the time of their entry into care – of whom, 240 (27.9%) were criminally charged following their entry into care.

The average age of these young people at first offence was 14 years (ranging from 11 to 20 years old). Once again, it is likely that a substantial proportion of offences were committed by those younger than 14 years.

The study found that:

- young people who were older at placement (i.e., 12-14 years of age) are more likely to offend as are young males and Aboriginal young people
- young people who were exposed to neglect or who had a history of risk behaviour (e.g., drug and alcohol misuse) prior to entry to out-of-home care also had an increased risk of offending, particularly those with a larger number of Risk of Significant Harm (ROSH) reports and a longer period of time between the first ROSH report and entry into care
- being placed in residential care or ‘other’ types of placement (e.g., supported accommodation) is significantly associated with offending.<sup>9</sup>

A history of neglect or risk behaviour was found to be the most significant predictor of first-time offending. The study also found that a longer stay in out-of-home care was significantly related to a decreased risk of offending, indicating the importance of stability and safety for vulnerable young people.

## **CONCLUSIONS**

The correlation between childhood experience of abuse and neglect, complex trauma leading to mental health disorders and cognitive impairments and socio-economic disadvantage is clearly evident. The need of these children for care and protection rather than criminalisation is ironically

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<sup>9</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW 2017, *2015 Young People in Custody Health Survey: Full Report*. Justice Health NSW. P1

shown by the positive effect of being taken into care into stable and safe family environments. This is not to argue for increased rates of children being placed in out-of-home care, but a recognition that vulnerable children up to the age of 14 years, who do not have the capacity to otherwise respond, should be supported and not criminalised for behaviours that are responses to prior trauma.

The Children in Care Collective strongly supports increasing the minimum age of criminal responsibility to 14 years and urges the NSW Attorney General to lend his voice to this decision.