



Too much too young: Raise the age of criminal responsibility to 12

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**Jesuit
Social Services**
Building a Just Society

Child, compared to adolescent, onset of offending is associated with significantly greater childhood adversity and neuropsychological impairment.

(Farmer, 2011)

Introduction

Currently in all Australian jurisdictions children as young as ten are considered to be criminally responsible at law and are subject to criminal hearings and sanctions in Children’s Courts. Yet evidence about brain development shows that the brains of children under 12 are not sufficiently developed to enable them to have the necessary skills for full criminal responsibility – and that these skills do not adequately develop in many children until around 15. For this reason, the United Nations has ruled that age 12 is an absolute minimum for jurisdictions to hold children criminally responsible; currently breached by each Australian state and territory.

In Australia, less than a quarter of children in contact with the police come before the courts. These children are among the most vulnerable in the community, and generally progress on to have longer criminal careers and higher rates of offending. Many have been subject to neglect and abuse and display behaviours consistent with a history of trauma.

Despite this vulnerability, and the risk of ongoing offending, appearing in Court does not necessarily mean a child’s vulnerability is properly assessed, or appropriate welfare responses made available. Vulnerable children lose much and gain nothing in this process.

The recognition of these factors has prompted Jesuit Social Services to look more closely into the issues surrounding children in the criminal justice system in Australia. This report explores the evidence around children’s cognitive development, and considers the most appropriate and effective ways of responding to offending in children.

TABLE 1. MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN AUSTRALIAN JURISDICTIONS

Jurisdiction	Minimum age of criminal responsibility	<i>Doli Incapax</i>	Relevant legislation	History of raising the age
Commonwealth	10 years	10 to under 14 years	Crimes Act 1914; Criminal Code Act 1995	1995: to 10 years
Australian Capital Territory	10 years	10 to under 14 years	Criminal Code 2002	2000: 8 to 10 years
New South Wales	10 years	10 to under 14 years	Children (Criminal Proceedings) Act 1987; Common law <i>doli incapax</i>	1987: 8 to 10 years
Northern Territory	10 years	10 to under 14 years	Criminal Code Act	1983: to 10 years
Queensland	10 years	10 to under 14 years	Criminal Code Act 1899	1976: 7 to 10 years
South Australia	10 years	10 to under 14 years	Young Offenders Act 1993; Common law <i>doli incapax</i>	1993: 8 to 10 years
Tasmania	10 years	10 to under 14 years	Criminal Code Act 1924	2000: 7 to 10 years
Victoria	10 years	10 to under 14 years	Children and Young Persons Act 1989; Common law <i>doli incapax</i>	1989: 8 to 10 years
Western Australia	10 years	10 to under 14 years	Criminal Code Act Compilation Act 1913	1988: to 10 years

Sources: Australian Institute of Criminology 2005, Mathews 2001, and notes of relevant legislation through the Australian Legal Information Institute.

Currently, the minimum age of criminal responsibility across all Australian jurisdictions is 10 years. The minimum age is intended to be mitigated by the principle of *doli incapax*, which assumes that children aged 10 to less than 14 years are 'criminally incapable' unless proven otherwise.

According to an international study of 90 countries, 68 per cent had a minimum criminal age of 12 or higher, with the most common age being 14 years (Hazel 2008).

TABLE 2. INTERNATIONAL COMPARISON OF AGE OF CRIMINAL RESPONSIBILITY

AUS	NZ	CAN	ENG	USA**	FRA
10	10-14*	12	10	6-12	13
GER	SWE	NED	CHN	JPN	
14	15	12	14	14	

* Age varies on type and severity of crime

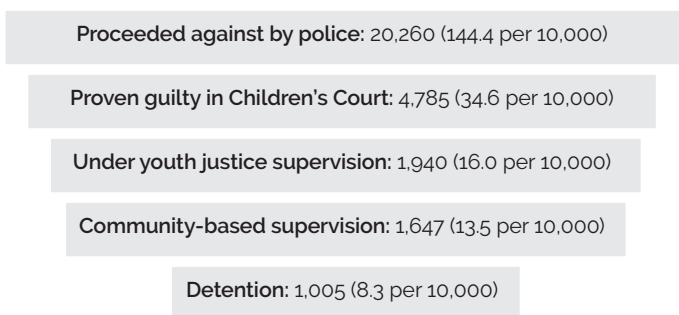
** Varies across states

10 to 14 year olds in the justice system

The number of children aged 10 and 11 years involved in the justice system is very small. In 2013–2014, 10 and 11 year old children accounted for less than 2% of children under 18 in custody across the country (ABS 4517.0).

- Girls are responsible for approximately one third of offences (AIHW 2013, ABS 4519.0)
- 10 to 14 year olds tend to commit lower level crimes, with the most common types of principal offences including theft, unlawful entry with intent and property damage (AIHW 2013).

FIGURE 1. YOUNG PEOPLE AGED 10–14 IN THE YOUTH JUSTICE SYSTEM, 2010–11



Source: AIHW 2013

The background of children in contact with the justice system

The corollaries between child poverty, social and economic inequality, youth crime and processes of criminalisation are undeniable.

(Goldson 2009)

Research shows that the causes of offending in younger children are strongly connected to their environment and its impact on their development. Jesuit Social Services' research has identified a strong correlation between child and youth offending and entrenched disadvantage.

For example, in Victoria we found that:

- 78% of children aged 10 to 12 years with youth justice orders in 2010, or those who had experienced remand at this age, were known to child protection. Of these, 60% were known before their seventh birthday (Thinking Outside 2013).
- 25% of children on youth justice orders in 2010 came from 2.6% of Victorian postcodes (Ericson & Vinson 2010).
- Children 14 years and under at their first encounter with the justice system are more likely to come from areas with higher rates of developmentally vulnerable children on the Australian Early Development Index (Thinking Outside 2013).

Progress toward completion of cognitive and moral developmental stages can be detoured or delayed by cultural, intellectual and social disadvantage.

(Grisso cited in Bradley 2003)

Children who offend are also more likely to have risk factors such as disability, mental illness, drug and alcohol abuse, exposure to crime and violence, homelessness and child abuse and neglect (Thinking Outside 2013).

It is well recognised that early experiences of child abuse and neglect have a detrimental impact on a child's brain development. Research undertaken by a number of academics has identified how hardship early in life can inhibit the development of oral language (Snow & Powell 2012), result in intense and cumulative harm (Perry and Van der Kolk cited in Miller 2007), and have long term impacts on health and social outcomes (Robinson, Silburn & Arney

2011). In these settings, a child's ability to develop important emotional, social and cognitive skills that are necessary for criminal responsibility is diminished, leading the child to be behind his or her peers in a broad range of competencies.

These risk factors have a further effect on the health and well-being of children. A NSW study looking into the health of young people in custody identified that 87% of young people were found to have at least one psychological disorder, and nearly three-quarters had two or more psychological disorders (Indig et al. 2011).

There is also a strong connection between school performance, truancy and criminal involvement. A number of studies, including Jesuit Social Services' research, have found that between 60-70% of students skipping school were involved in criminal activity (Thinking Outside 2013 and Arthur 2012). Attendance and engagement at school is important for children's development as well as for value transmission and social awareness. Therefore, not only are most children who have contact with the justice system developmentally, socially and economically vulnerable, but they also tend to be disengaged from the support and education that can support positive development.

Aboriginal Australians are also significantly over-represented amongst 10 to 14 year olds in the justice system. In the year 2010-2011, compared to the non-Indigenous population Aboriginal children aged 10-14 years were (AIHW 2013):

- 6-10 times likelier to be proceeded against by police
- 23 times more likely to be under community-based supervision (excluding WA and NT)
- 25 times more likely to be in detention (excluding WA and NT).

The impact of children encountering the justice system

Children should be deprived of liberty only as a last resort for the shortest appropriate period of time.

United Nations Convention on the Rights of the Child
Article 37b

The younger children are when they encounter the justice system, the more likely they are to have sustained contact. This is indicative both of the extreme vulnerability and complex needs of this cohort, and of

the failure of the justice system to provide an effective response. Research highlights the link between encountering the justice system at a young age and reoffending later in life:

- In Victoria, 10-12 year olds who are remanded average 5.4 remand admissions, compared with 2.9 for those first remanded after the age of 12 (Thinking Outside 2013).
- There is a small proportion of chronic offenders who commit a large proportion of all crimes. Characteristics of chronic offenders include an earlier onset of offending, a higher frequency of offending, and longer criminal careers (Dennison 2011 in Thinking Outside).
- Children first supervised at 10-14 years old were more likely to experience all types of supervision in their later teens, particularly the most serious type – sentenced detention (33% compared to 8% for those first supervised at older ages) (AIHW 2013).
- Children first supervised at 10 – 14 years old spent longer periods under supervision at older ages (half returned to supervision and spent 18 months or more there compared to only 15% of those first supervised between 15 – 17 years) (AIHW 2013).

Evidence about child development

Child offending experts, psychologists and criminologists agree that younger children have rarely developed the social, emotional and intellectual maturity necessary for criminal responsibility before the age of 14 years.

The immature moral understanding of criminal offences and the limited behaviour control capacity in younger children diminishes their culpability. Researchers in criminology and child offending, Gregor Urbas and Raymond Arthur, have highlighted that although children may be able to know the difference between right and wrong, this does not guarantee they also appreciate the seriousness of their actions (Urbas 2000 and Arthur 2012).

Ben Mathews, a specialist in children and the law, comments that:

It is now generally accepted that 'young children think about moral and social issues and relations in ways that differs qualitatively from the ways in which older children and adults think'.

(Mathews 2000)

Drawing on the expertise of psychologists Jean Piaget and Lawrence Kohlberg, Mathews details the different developmental stages that young people progress through in the way they conceptualise morality. A younger child, for example, would consider the rule to be something dictated from an external authority and would be motivated to follow the rule by fear of punishment or self-interest – both dependent on the outcome rather than the intention. An older child of 16 years, is able to consider rules based on intention and outcome and would appreciate that rules can be modified when consent is reached between individuals. This older comprehension of morality is able to take into account other groups of people and society as a whole. These stages are reached incrementally and it is impossible to conclude that an individual will have reached a certain level of cognition by a particular age. These stages of development highlight that whilst children may appear to identify right and wrong behaviour, they lack an appreciation for why rules exist and the implications of these rules for society. Younger children, therefore, need protection from the law and should not be held criminally responsible for their actions.

The lack of understanding of the severity of their actions is further reflected in conclusions drawn by clinical psychologist Elly Farmer. Three key areas, which play pivotal roles in decision-making, undergo substantial development during adolescence: executive functioning, emotional processing and social cognition (Farmer 2011). For example, during this period of brain development there is a heightened level of dopaminergic activity which is associated with reward-seeking tendencies. As a result, children are more prone to impulsivity, sensation-seeking and risk-taking behaviour.

Moreover, children of ages 10-14 are particularly vulnerable to peer influence due to the limited development of the capacity to recognise others' perspectives and mental states (Farmer 2011). As adolescent brain development experts demonstrate, the part of one's brain responsible for skills such as impulse control, planning and decision-making is the prefrontal cortex, which undergoes significant development during adolescence. The brain's architecture similarly becomes more complex, enabling greater sharing of information between cells. This flow is "critical for (the) learning and memory of such concepts as rules, laws and codes of social conduct" (Weinberger, Giedd & Elvevåg 2005). Most researchers agree that the necessary range of social and emotional skills for competent decision-making is not usually present until 15 years.

Legal experts specialising in children and the justice system also confirm that the ability to regulate one's behaviour is an important assessment of criminal responsibility (Mathews, 2000). The ability to control one's behaviour and to understand the moral gravity of one's actions are linked, such that possessing the control helps the person to appreciate the severity. However, due to their affective and motivational immaturity, children are less likely to be able to use their understanding of morality to control their behaviour. In children, the development of thought and behavioural control happens at different stages (Mathews 2000). Consequently, the moral culpability of children is impacted by the stages of their brain development. With sensation-seeking, impulsive behaviour, limited behaviour regulation and peer pressure influencing the criminal behaviour of children and teenagers, these children become less responsible for their actions compared to their adult peers.

Not only are children insufficiently mature for criminal responsibility, but they also lack the capacity to properly engage in the justice system. In order for the justice system to provide a fair and equitable means to respond to criminal behaviour, it requires certain capacities of the participant, including that they plead, effectively engage in the trial proceedings and participate appropriately in an interview. Children may fail to adequately participate in the criminal justice system for a number of reasons including suggestibility (changing one's mind due to suggestions or pressure from others), compliance (going along with other's propositions despite personal disagreement), limited attentional capacities and intellectual functioning (Farmer 2011). As a result, children may be more likely to accept a plea offer, give false confessions or fail to keep track of court proceedings. In expecting children as young as 10 years old to satisfactorily participate in criminal justice proceedings, we consequently undermine the procedural fairness and fail to guarantee a just response to their behaviour.

The UN and internationally acceptable ages

The United Nations has ruled that the minimum age of criminal responsibility should not be lower than 12 years on the grounds that children under the age of 12 years have not yet reached the necessary developmental stages in "emotional, mental and intellectual maturity" to be held responsible for criminal behaviour (United Nations 2007 and United Nations 1985). As the Beijing Rules explains, the psychological and moral components of criminal responsibility must be considered. In other words,

whether a child can be held responsible for “essentially antisocial behaviour” (United Nations 1985).¹ The Rules further indicate that the age of criminal responsibility should mirror other social rights and responsibilities (for example the ability to vote or drive a vehicle), and that should the age be too low, the “notion of responsibility would become meaningless” (United Nations 1985). Whilst recognising that there will be some variation in the minimum age due to differing histories and cultures, the absolute minimum age of 12 years recognises children’s development levels and is the lowest reasonable age limit accepted internationally (United Nations 1985).

Whilst advocating for an absolute minimum age of 12 years, the United Nations further supports minimum ages of criminal responsibility that are much higher. It argues that a higher age, such as 14 or 16 years, ensures a more suitable justice system for juveniles (United Nations 2007). A higher minimum age would ensure that responses to juvenile offending do not resort to judicial proceedings and would ensure that the child or young person’s welfare is at the forefront of a response. It would further ensure that the child or young person’s human rights and legal safeguards are “fully respected” (United Nations 2007). The low age of criminal responsibility in Australia has, therefore, been criticised by the UN Committee for the Convention on the Rights of the Child (United Nations 2012).

In response, the Australian Government (2008) justified the status quo by arguing that the increased access to technology and education in today’s society reflects more mature understandings of morality in children. This argument is not supported by evidence about children’s brain development. As the Australian Association of Child Welfare Agencies further confirms:

While many children may have access to a greater amount of information (and even this assertion is questionable for highly disadvantaged groups) than in previous centuries when the laws were conceived, information does not necessarily imply a greater maturity or discernment when it comes to matter of right and wrong.

(cited in Crofts 2003)

As the current research into children’s brain development indicates, children’s discernment of right and wrong matures not only through education and but also through the stages of their brain development. Therefore, improved access to education and technology cannot directly result in a

more mature understanding of morality. Moreover, the research in children’s brain development is recent and is a study of children’s brains when they can access education and technology.

In practice, children coming into early contact with the justice system are children who have been excluded from education and access to technology. The strong links between criminal involvement and truancy also mean that children who may be able to access education and technology, which could help them develop their social skills and behaviour control, are failing to engage in those opportunities. Therefore, this century’s advances in education and technology cannot guarantee the necessary maturity in morality necessary for criminal responsibility in children.

A framework for change

Australia’s current response to children who display antisocial behaviour breaches children’s rights by failing to engage with them in ways that are developmentally appropriate. The current response is also a missed opportunity to address often serious issues contributing to their problematic behaviour, and to avoid their entrenched involvement in the justice system.

A renewed understanding of the needs of these children and the most effective way to manage their antisocial behaviour is now needed. This understanding should recognise that:

- children involved in the criminal justice system often come from disadvantaged backgrounds and have complex needs
- children aged 10 to 12 years lack developmental maturity in the skills and capacities necessary for criminal responsibility, and this developmental immaturity is often exacerbated in children who have experienced abuse or neglect
- involvement in the criminal justice system at a young age often causes further harm and furthers criminal behaviour, and that
- engaging in developmentally appropriate restorative justice processes can help children to understand the effects of their behaviour on others.

States and territories should, therefore, aim to:

- respond to the developmental and welfare needs of young offenders
- ensure responses to problematic behaviour seek to foster the behavioural development of the child, and

¹ ‘The Beijing Rules’ is the commonly referred to name for United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

- engage children in a way that prevents further harm and that enables them to actively participate in responses to their problematic behaviour

Reforms for children aged 11 years and below

Ensure the age of criminal responsibility reflects children's developmental capacities

Children should not be held criminally responsible when they do not have the maturity to engage in the judicial proceedings or the ability to properly comprehend the criminal nature of their behaviour. The impact of children's brain development stages sees children under the age of 12 years lacking the necessary components of criminal responsibility, both in terms of behaviour control and moral awareness. Australia should raise the age of criminal responsibility to an internationally accepted standard.

Recommendation 1: Raise the age of criminal responsibility from 10 to 12 years across all jurisdictions.

Strengthen efforts to support the needs of children with serious antisocial behaviour

As the research above highlights, children under 12 involved in serious antisocial behaviour are likely to have complex needs requiring heightened support. Many are likely to already be clients of child protection, and may need support from a program such as Intensive Case Management Services in Victoria, currently restricted to children over 12. However, for others antisocial behaviour may be the first indication that they face serious issues requiring proper assessment.

Recommendation 2: Each state and territory to develop a mechanism to assess the needs of children under 12 exhibiting serious antisocial behaviour and ensure they receive appropriate support.

Reforms for children aged 12 to 15 years

It is important to maintain a transitional period for children from criminal incapacity to full criminal responsibility. Between the ages of 12 and 15 years, children undergo a substantial amount of development both cognitively, intellectually and behaviourally. It is important to maintain a graduated response to both reflect these stages of development and also recognise the variation in rates of development between individual children.

Ensure children aged 12 to 15 years are protected from the law

Children should not be expected to graduate to full criminal responsibility on the day of their twelfth birthday. As highlighted in the literature, adolescent brain development continues between the ages of 12 and 15 years. Not only do children mature at different rates to one another, but factors that contribute to disadvantaged circumstances also affect a child's growth. During this important period of development, children must be protected by the law when necessary. The *doli incapax* principle offers protection to those children who are not developmentally ready to face the full force of the law. Ensuring the *doli incapax* principle remains for children aged 12, 13 and 14 years would ensure a graduated response to full criminal responsibility which is reflective of their developmental stages.

Recommendation 3: Maintain *doli incapax* for 12 and 13 year olds and extend its applicability to 14 year olds across all jurisdictions.

Strengthen diversion strategies in the current youth justice system

Diversion has an important role to play supporting children to understand the impact and consequences of their behaviour and address issues driving their offending. While options in some states have prevented many children from further progressing in the justice system, the lack of a legislative framework for diversion and presence of programs in only some courts has meant the application of diversion has been uneven. Consequently many children have been denied important opportunities.

Recommendation 4: Include a framework for diversion of children in legislation in all jurisdictions.

Recommendation 5: Invest in pre-plea diversion programs in all Courts.

Recommendation 6: Invest in specialist Children's Courts, such as the Koori Children's Court, in each jurisdiction.

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