

**Submission regarding the  
“*Criminal Law (Raising the Age of Responsibility)*  
*Amendment Bill 2021 (Bill)*”**

**Introduction**

Australian Red Cross (Red Cross) is committed to improving the wellbeing of those experiencing extreme vulnerability and we understand that children and children encountering the justice system, are amongst some of the most vulnerable people in our community.

As such we are pleased that the Community Support and Services Committee are giving detailed consideration to the Member’s Bill “*Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (Bill)*” and how to raise the age of criminal responsibility.

As a matter of course, all children should be diverted away from the justice system as much as possible. However, where diversion is not possible, we believe based on international evidence and best practice that only children aged 14 or over should be held criminally responsible for their offending.

Children under this age lack the cognitive and neurological capabilities to be held fully and criminally accountable for the consequences of their actions and further, those who offend are often found to have experienced trauma and complex disadvantage with compounding intellectual or mental health issues which affect their behaviour. For such a cohort, a criminal justice led response causes more harm than good. Instead, an integrated education, health and child protection system led response is far more suitable.

Red Cross is proposing in this submission a new path is needed in Queensland when responding to children aged 10 to 13 years-old who’s behaviour is bringing them into contact with the law. The research and statistics show that this group of early on-set offenders will continue to offend, often well into adulthood. The cost to Government and the community of these types of offending trajectory is high. The challenge is to develop responses that both address the identification of children who are at early risk of entering the criminal justice system and supplying age appropriate, child focused interventions when they do encounter Youth Justice.

The causes of children offending and contacting the criminal justice system is covered extensively elsewhere and there is no intention to repeat the details of those arguments for raising the age here. Instead, the argument for raising the age of criminal responsibility will focus on a child first, offender second approach.

Throughout this submission a person under the age of 18 years old has been referred to as a child. The Child Justice Act 1992 does not refer to youth or young people. The proper term used entirely in the Act is child and children. This nomenclature is right given both the age of these children in the justice system and due to the special considerations, needing to be given to their needs and vulnerability.

We hope that our submission is of value to the Committee and would be pleased to discuss the submission further or work with government and other stakeholders to realise this important reform.

### **Red Cross proposes a new path to responding to 10 to 13 year-olds who are justice involved**

Red Cross holds that the age of criminal responsibility should be raised to 14 years old. However, whether the age of criminal responsibility is raised or not, the number of vulnerable 10 to 13 years in the criminal justice system must be reduced to the greatest extension possible. Raising the age is only one step, in many steps, that need to be taken to ensure this group of children receive the supports and help they need.

The criminal justice system is locked into a strict structure and responses to 10 to 13 year-olds. An innovative approach to these children must be implemented to reduce their numbers on youth justice orders. The ability to raise the age of criminal responsibility in Queensland will be dependent on the development of an innovative approach to working with this most vulnerable group. The restrictions on the youth justice structure and processes, therefore, requires this response to be developed, designed, and implemented outside of the confines of the current criminal justice system.

Red Cross proposes the following key elements of any innovative approach with the aim of reducing 10 to 13 year-olds who are justice involved and provides the necessary supports to address these children's complex needs.

1. A Child First, Offender Second approach is needed to reduce the number of children in the 10 to 13 year-old group in contact with the criminal justice system and prevent offending into late adolescence and adulthood.
2. A 10 to 13 year-old child is a child first and how their needs are met shouldn't be decided by their life circumstances. Children's needs can't be defined or confined by the government system with which they have contact.
3. There are specific issues that drive some 10 to 13 year-olds toward contact with the police and the criminal justice system. The key factors are:
  - Impulsivity and Dependence
  - Peer offending
  - Childhood trauma
  - Child protection involvement
  - Aboriginal and Torres Strait Islander children's disproportionate representation
4. The criminal justice system applies adult criminogenic goals to children. Factors that are more relevant to the child are rarely considered. An alternative process could be distilled as the police, courts, legislative bodies, and institutions needing to consider the best interests of the child as paramount above other matters.
5. Considerations of the age of criminal responsibility are contingent on achieving the best interests of the child and the child's reliance on adults who should take responsibility for them and their behaviour. Within the criminal justice system all the weight of responsibility rests with 10 to 13 year-olds and almost none is balanced toward adults and the community taking responsibility for and care of vulnerable children.
6. Alternate responses for a child who has experienced trauma is crucial. For 10 to 13 year-olds who have experienced trauma, criminogenic responses may add to the child's trauma. Contact with police, courts and detention are threatening and overwhelming. These responses are unlikely to achieve the stated goals of criminal justice of creating dissonance, behaviour change and community safety.

7. Children should be responded to by the child protection and youth justice system in the same way. Frequently, they are the same children and yet are treated differently depending which government office they are in. Children in both systems share the same needs. They are vulnerable, dependent on adults and have significant social, psychological, and developmental needs.
8. Evidence has proven the criminal justice system's inability to meet the complex needs of children who have experienced trauma. Children 10 to 13 years-old must be responded to outside the criminal justice system.
9. Responses to 10 to 13 year-old Aboriginal and Torres Strait Islander children must be culturally safe, delivered in culturally competent ways, and consider the strengths within the Aboriginal and Torres Strait Islander communities.
10. Even if not increasing the age of criminal responsibility, the Queensland Government should be considering how to reduce the number of 10 to 13 year-old in the system. The increase in the age of criminal responsibility will become a natural consequence when 10 to 13 year-olds justice involvement is reduced to the greatest extent possible.
11. The needs of 10 to 13 year-olds are not being met by the correctional risk paradigm that seeks to manage the behaviour of children who offend by identifying and targeting 'risk factors' for future offending. Improved responses will include prioritising children's needs in youth justice processes and the pursuit of positive behaviours and outcomes.
12. An innovative positive approach involves a child-friendly approach that importantly moves away from offence/offender-focused and deficit-facing youth justice, by emphasising that all responses should prioritise the central principle of 'Children First, Offenders Second'.
13. Approaches must be developed that respond to the child's needs and simultaneously develops acute responses to high-risk behaviour. The current criminal justice system's focus on high-risk behaviour and inadequately addresses the child's needs for social and psychological supports.

Children aged 10 to 13 year-olds are dependent on adults for their needs and care. They rely on at least one adult to advocate for them and to support them when things aren't going well. In the justice system 10 to 13 year-olds are a group of children that have had few adult supports. This lack of care and supervision has brought them, time and again, in contact with the police because of being unsupervised in the community, vulnerable to the influence of peers, their own risk-taking behaviour, and immaturity.

Through the range of depravations these children have suffered poor educational attainment, developmental delay, trauma related behaviours, and functioning below chronological age. Their involvement in the criminal justice system has come at the end of a range of life experiences. Rather than the first point of challenge for the child, their offending behaviour is the result of an accumulation of negative events over many years. For the 10 to 13 year-olds age group this means events in their life well before they begin offending.

The research and statistics show that this group of early on-set offenders will continue to offend, often well into adulthood. The cost to Government and the community of these types of offending trajectory is high. The challenge is to develop responses that both address the identification of children who are at early risk of entering the criminal justice system and supplying age appropriate, child focused interventions when they do encounter Child Justice.



## **Child First, Offender Second**

Red Cross has proposed in this submission that a new path should be taken in Queensland when responding to children aged 10 to 13 years-old who's behaviour is bringing them into contact with the law. A Child First, Offender Second approach is needed to reduce the number of children in the 10 to 13 year-old group in contact with the criminal justice system and prevent offending into late adolescence and adulthood.

Children aged between 10 and 13 years-old are responsible for just 3% of all offences committed in Queensland in 2019-20. With adjustments to the way this cohort is supported and responded to this figure can be reduced even further. The result being so few children in this age group left in the youth justice system that alternate paths for meeting their needs must be implemented.

Offending by children (often transitory and non-serious) must be brought into its proper perspective as simply one element of a much more complex identity of the child (Drakeford, 2010). The child first, offender second approach emphasises the child's needs as the most crucial factor to address if they are to not be involved in the criminal justice system. A vulnerable child whether justice involved or not, is a child who has specific unmet needs. The label of offender should not alter the way that we would support any child in the community that was struggling with a range of social problems. A child cannot meet these needs on their own. Their age and vulnerability mean they do not have the personal ability to address the fundamental causes of their situation that lead them to the criminal justice system.

Responding to children as children, rather than from a criminogenic perspective of offenders, allows responses to be developed and implemented that go directly to the core of the issues that led the child into contact with the law in the first place. The over-emphasis on the prevention of negative risk outcomes is not proper for young children who are justice involved. They lack their own agency and decision-making ability, prevents them from addressing their own offending behaviour. In contrast the child first, offending second approach is based on a series of inter-related and reciprocal positive practice principles. This approach is child-friendly and child-appropriate, ensuring that work with children at all stages is developmentally appropriate and acknowledges their inherent 'child' status and ability. The responses should prioritise the promotion of positive behaviours and outcomes. Focusing on facilitating positive behaviours (e.g. involvement with pro-social peers and mentors) and positive outcomes (e.g. attendance at education), rather than primarily focusing retrospectively on the prevention of negative behaviours (e.g. offending behaviour) and outcomes (e.g. exposure to risk).

The criminal justice system is primarily taking a retrospective view of children's behaviour. It examines in detail past wrong behaviour and applies punishment and an expectation of personal responsibility on the child. In the most part it doesn't consider what the child's needs are, how those needs can be met, and what supports the vulnerable child needs. There have been many critiques of the criminal justice system's treatment of children as counter-productive and harmful to children through excessive punitiveness and by actively worsening the very circumstances they look to address. Responses to the child's behaviour is disproportionate to the child's age, severity of behaviour and its duration.

The failures of the criminal justice system to respond in an age-appropriate way to children, is made worse by its cost, resources, and the poor outcomes experienced by the children exposed to it. The system is negative toward children through labelling, failure to deliver child focused responses, excessively punitive interventions, exacerbates the child's needs, alienating them from their community and separating them from family and culture.

Consideration of the age of criminal responsibility must include a discussion about what are the capabilities of a 10 to 13 year-olds, can they be held to the same criminal accountability as older children or adults, and should all children be treated equally whether they have contact with the criminal justice system or not.

### **Age of criminal responsibility**

Evidence has shown there is a wide range of causes for child offending, related to many layers of loss associated with negative socioeconomic, political, cultural, and historical disadvantage (Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017; Royal Commission into Aboriginal Deaths in Custody, 1998; Bringing Them Home Report, 1997; Doing time – Time for Doing – Indigenous child in the criminal justice system, 2011). For Aboriginal and Torres Strait Islander children contact with police, courts and child justice can result in social disconnection, loss of cultural identity, breakdown in important family relationships, and a disassociation from the positive influencing aspects of their community and culture (Price and Dalgleish, 2013).

This all increases the likelihood that when a child begins offending at age 10 to 13 year-olds, they will experience damaging impact on their psychological and social development. This impact will persistently keep them within an offending pattern of behaviour and be unable to achieve personal growth and achievement (Livingston et al, 2008).

This information has been used for the case in favour of a higher age of criminal responsibility extensively elsewhere and there is no intention to repeat the details of the argument here. Instead, the argument for raising the age of criminal responsibility will focus on a child first, offender second approach. This is a fundamental argument for the raising of the age of criminal responsibility. Consideration of the inherent nature of a child who is 10 to 13 year-olds is the core reason for raising the age of criminal responsibility.

A system that uses criminal justice and criminal sanctions to strengthen personal responsibility is particularly dependent on age limits that allow an individual to make choices about their behaviour and control the circumstances that lead to that behaviour. This is exactly why the age of criminal responsibility is of vital importance.

Criminal responsibility should therefore be based on two elements: First, a cognitive element, the ability to behave within legal norms, to understand the legal requirements placed on behaviour and to understand the impact of the behaviour and its consequences on others. Secondly, it requires a voluntary element, the ability to limit and adapt one's actions and therefore act according to the legal norms.

To their detriment, the justice system treats children differently to other children. A child first approach envisages responses to children's needs no matter which government system they fall into; homelessness, child safety, child justice, education, or health. A 10 to 13 year-old child is a child first and how their needs are met shouldn't be decided by their life circumstances. Children's needs can't be defined or confined by the government system with which they have contact. A child in contact with the justice system should have the expectation that they will be provided with all the supports they need and that the system itself will not worsen or lengthen the difficulties they face.

Lennings (2003) suggests that before the age of 13 children do not have the capacity to understand their own behaviour or to have the ability to justify their behaviour. This differs to someone older who might use emotion, reasoning, rational thinking, and social competence to give an understanding for internalised motivations for offending. Younger children are just behaving. Compared to adults, children have less ability to reason the motivation for their offending.

In recent times the doctrine of *doli incapax* has been outweighed by the needs of the community to be protected from the consequences of child offending behaviour. The view has been that most children aged between 10 and 14 could determine right from wrong. Therefore, this argument makes children in grade four at school equally criminally responsible as an adult. The criminal justice system is poor at making fine distinctions in levels of criminal responsibility and a one-size-fits-all approach is applied to both children and adults.

There are instruments of international law that attempt to enshrine protection to people under the age of 18 years of age and the need for the community to provide extra supports, protections and considerations to children as compared to adults. They advocate that the criminal justice system should take a broader view of children's involvement in offending beyond that of the community interests but also to consider carefully the social and contextual factors involved in the reasons for a child meeting the courts.

In Queensland leaving a child unsupervised for an unreasonable length of time is considered by law as a misdemeanour – maximum penalty three years imprisonment. At what age would it be considered appropriate and safe to allow a child to walk to school unsupervised? Except responsibility for their offending, at 10 to 13 years-old, a child isn't given legal responsibility for any aspect of their lives.

At what age is it legitimate to impute criminal culpability, which despite simplistic assertions, requires more than knowing the difference between right and wrong (Arthur, 2012). Whereas children know that, for instance, stealing is wrong from an early age, (even toddlers know that to take another child's toy can be wrong) – in most cases well before the current age of criminal responsibility – this is different to a “self-generated understanding of what it means to do wrong”. The latter involves a moral and ethical standpoint which the former does not. The age at which criminal liability can be properly ascribed should be informed by developing cognitive ability. (Bateman, T. 2014)

Kathryn Hollingsworth (2014) has developed a rights-based view for increasing the age of criminal responsibility that distinguishes between the autonomy of children and adults. Within the legal system children do not have adult autonomy. Childhood is a developmental stage during which the skills and maturity of full autonomy are obtained (Hollingsworth, 2014). This stage requires, as a fundamental or “foundational” right, protection from any policies that prevent the child from achieving full autonomy. The criminal justice system, by a variety of measures, impedes a child's ability to achieve full autonomy. The punitive and punishing criminal justice system is considered by many as criminogenic, holding children in the system and preventing autonomy. This impact alone shows that the age of criminal responsibility should be higher.

The age of 10 for the commencement of criminal responsibility would appear to be low given the other areas of responsibility and rights given by society to children this age. Barry Goldson (2009) points to what he terms the problem of “intra-jurisdictional integrity” as a reason for a heightened age of criminal responsibility. This highlights the tension between the age at which children are considered capable of criminal intent and the thresholds at which other rights and safeguards are applied incrementally in the transition to adulthood. (Bateman, T. 2014) To take a few examples:

- the age of marriage is 16 with parental consent;
- children are precluded from any form of paid employment until the age of 13, and then only with parental consent;
- they cannot consent to sex until they are 16;

and before attaining the age of majority – 18 years;

- children are not permitted to apply for a credit card or a mortgage;
- go on active service in the armed forces;
- vote;
- buy alcohol or tobacco; or
- sit on a jury.

Furthermore, in recent years, the underlying trend has been to increase these age limits to a higher age, while correspondingly delaying the age at which adult type rights are allowed. Batman (2014) says, “There is an obvious conceptual strain with attribution of adult-type responsibility from the age of ten years to children who infringe the criminal law.”

Goldson (2009) contends that this strain poses a logical challenge for those who would keep the status quo of the criminal age of responsibility. The “adultification” of 10 to 13 year-olds children in the criminal justice system can’t be continued when in every other area of law, social rights, and responsibilities are restricted to adults only.

### **Causes of 10 to 13 year-old’s contact with criminal justice system**

There are specific issues to drive some 10 to 13 year-olds toward contact with the police and the criminal justice system. Each of these demonstrate influences on a child’s behaviour that are connected to their life circumstances or their cognitive development level. Further to this each shows the reason why 10 to 13 year-olds should be dealt with on the basis of their presenting needs rather than from a criminogenic perspective. The key factors are:

- a) Impulsivity and Dependence
- b) Peer offending
- c) Childhood trauma
- d) Child protection involvement
- e) Aboriginal and Torres Strait Islander children’s disproportionate representation

#### *a) Impulsivity and Dependence*

It would not be surprising to characterise children between the ages of 10 to 13 as being immature. These children are still in Primary school; at 10 years of age a child is normally in grade 4, while at 13 they are in grade 7. In the community these children would not be expected to make their own decisions, take part in independent activities, or sign legal documents. Under most circumstances the community would expect them to behave as children, displaying impulsive behaviour and showing extremes in emotional reactions. These children would be unable to make plans, keep track of appointments or understand social responsibilities (Moore et al, 2008).

Scientific discoveries about brain development and cognitive function have shown that children in this age bracket are many years away from developing full executive decision-making. The brain continues to develop right through adolescents and modern theories of cognitive development have shown that cognitive development is not finalised until early adulthood and even as late as the mid-20s (Best & Miller, 2010).

*The Declaration of the Rights of the Child* states that “by reason of his physical and mental maturity, needs special safeguards and care, including appropriate legal protection”. Children have not yet developed a full knowledge and understanding of the community, social structures, and their place in it. They will make decisions based on incomplete understanding of what is expected of individuals. Their internalised awareness of socially acceptable behaviour or at least the ability to

manage their own behaviour in every social circumstance is not yet fully developed.

The community accepts that 10 to 13 year-olds require adult care, supervision, direction, and guidance. All contact that a child of this age has with the wider world is controlled and supported through adult involvement in everything they do.

Parents would not expect their child in grade four to be sent on a school excursion without considerable adult supervision to watch their child's behaviour and to keep them from doing anything that might be harmful. This type of social control is premised on children's inability at this age to make safe decisions act responsibly on their own or not to involve themselves in inappropriate action or behaviour.

It is also well understood that children 10 to 13 year-olds are not able to arrange for their own personal needs. Their access to housing, transport, and money is controlled by adults. It would be difficult for a child to independently arrange a dentist appointment, for example, they would not necessarily have access to a MediCare Card, let alone even know what one was. A child who is disengaged from their family and who has no adult advocate or carer will struggle to access services that are controlled by adults and require a complex understanding of the social structures that govern how they work.

A child's interdependence on adults poses a problem within the legal system. A child bailed with conditions to reside at home and to comply with a curfew is dependent on adults to provide a safe home and assist the child to appear at court on a specific date at a specific time (Wong et al, 2009).

It is reasonable to expect that a 10 to 13 year-old child may have difficulty remaining in a household where there is domestic violence, child abuse, drug use or where they generally feel unsafe. The child may still not follow bail conditions even if the adults in the household provide a safe environment, but they do not provide adequate supervision or do not instruct the child on the importance of following a legal order.

If an adult is unable or unwilling to arrange for a child to attend their court appearance, the community would not think a 10 to 13 year-old child would be able to either remember the exact date, time, and location of the appearance or to be able to access transportation to the court (Richards & Renshaw, 2013). However, it is the child who feels the full force of the law when they breach bail or fail to appear in court. It will be the child that may find themselves remanded into custody and spending time in a child detention centre for circumstances that are beyond their control or full understanding (Weatherby-Fell, 2013).

The failure of a child to have adequate supervision, support and guidance in the home can also lead to their first contact with the police. A child has impulsive behaviour, a lack of judgement, an inability to plan or have sufficient foresight. As well as this, the child may have a lack of adult support and supervision. This combined set of circumstances may lead the child to be in the community unsupervised, vulnerable to older children or adult influence, and displaying behaviour that is driven by underdeveloped cognitive reasoning. This behaviour in turn can result in the child meeting the police for offending. This child again feels the full force of the law, as if they were in complete, considered, and reasonable control of their behaviour, their circumstances, and their decisions.

Police and the legal system in general may consider a child's vulnerability and reduced ability to fully participate in the legal process, however, this same child may lack the adult advocate necessary to ensure they are dealt with to the minimum extent required to ensure justice is served and the child's needs are considered (Richards & Renshaw, 2013). This is the same lack of adult support that resulted in the contact with the police in the first instance. The system itself doesn't consider



the limited capabilities a child may have.

A child who placed on bail must sign their own bail undertaking. A 10 year-old is required to understand the full implications of what they are signing and must understand the often complex and lengthy bail conditions. Yet, as detailed above, this same child is not required or expected in any other walk of life to take legal responsibility and accountability for themselves. However, under the criminal justice system a child is held personally responsible if they breach bail and is the person punished for not being compliant. These 10 to 13 year-olds are treated as if they had adult functioning, capabilities, understanding and choices.

This type of “adulterizing” of children in the criminal justice system needs to end. Child first offender second should be the focus of a complete review of all legislation and policies associated with children’s processes. The raising of the age of criminal responsibility should be part of a broader examination of how the response to children offending can be made more responsive to their needs and more effective.

The criminal justice system is focused on the need to redress harm to the individual victim and community. The community expects to have protection from criminal behaviour of individuals in society and if they are victims of crime to achieve some redress and justice. It is accepted that there are children in the criminal justice system who are at odds with the societal expectations of their behaviour and the risk that these behaviours place to others in the community.

A child in the criminal justice system will have a range of factors considered when deciding what should happen to them, such as,

- which punishment is needed,
- the seriousness and persistence of offending,
- public protection,
- prevention of offending,
- restoration by the child to victims of crime,
- preventing reoffending, and
- punishment satisfying the need for retribution and deterrence.

These are adult criminogenic goals, applied to children. Factors that are more relevant to the child are rarely considered.

An alternative process could be distilled to police, courts, legislative bodies, and institutions needing to consider the best interests of the child as paramount above other matters. A child’s experiences should be where they receive support and supervision from adults and where their circumstances are defined and determined by others who have responsibilities for them. Issues such as poverty, housing, education, and health are all matters that the child relies on adults to provide and when these are lacking can have a significant impact on their likelihood of offending. Considerations of the age of criminal responsibility are contingent on achieving the best interests of the child and the child’s reliance on adults who should take responsibility for them and their behaviour. Within the criminal justice system all the weight of responsibility rests with 10 to 13 year-olds and almost none is balanced toward adults and the community taking responsibility for and care of vulnerable children. The underlying difficulty of the lack of responsibility is that the child justice system is itself “criminogenic” and contact with it tends to impede the process of desistance that occurs naturally with maturity. (McAra and McVie, 2007).

*b) Peer Offending*

Children 10 to 13 year-olds are more likely to offend with older adolescents and to offend with peers (Forrest & Edwards, 2014). This is particularly true if the child is homeless or unable to remain at home for safety reasons. Their time spent independently, without adult supervision, in the community is highly likely to bring them into contact with peers. Sometimes these peers will be older siblings, older adolescence, or non-familiar adults.

Where children have experienced chronic trauma their ability to form trusting relationships with adults may be negatively impacted. In these circumstances the child may seek the company of other similar age peers who are also experiencing difficult home and life situations. Multiple children with no adequate adult supervision play an important role in the spread of offending amongst the peer group through shared anti-social behaviours, encouragement of risk taking and an increase in impulsive behaviour due to peer pressure.

Risk taking behaviour in adolescents is well understood. This trait is exacerbated in younger children and then multiplied again when peer pressure is added to the mix. These two factors also interact with each other (Richards, 2011). Children seeking sensations associated with risk taking attract other children who want to participate in similar behaviour, the connection with other children then encourages the further risk-taking behaviour.

Older adolescent offenders may act as a contagion to younger children who have not commenced offending. Many 10 to 13 year-olds may not commence offending if it were not for the negative influence of older adolescent offenders on their behaviour. The child may be too immature to understand the consequences of the offending, too open to the influence of an older person or just too willing to receive the perceived friendship that they lack in other areas of their life.

Older siblings may have equally poor social development and attachment difficulties resulting in them being absent from home and receiving poor adult supervision. The younger child may seek the support and supervision of older siblings to increase their feelings of safety. If the older sibling is risk taking, involved in anti-social behaviour or already in contact with the criminal justice system a contagion of this behaviour to the younger child is most likely to follow.

Children are more likely to offend in peer groups and take part in opportunistic, impulsive, and unplanned criminal behaviour, in visible and public spaces, closer to their homes. This makes their offending more likely to come to the attention of the community and the police. This offending pattern, different to usual adult crime, explains some of the community anxiety about children on the streets and child offending (Maschi & Bradley, 2008).

Young children who are involved with the child justice system are often missing appropriate role models and familial supports at a point in their lives where they are negotiating the turbulence of adolescents marked by rapidly developing identity, independence and belonging. Their impulsivity and susceptibility to negative peer influence that influences behaviour often toward anti-social and offending behaviour.

*c) Childhood Trauma*

Research has substantiated the association between childhood trauma (child maltreatment, abuse, and neglect) and various social problems affecting these children including homelessness, substance abuse and suicide. There is a link between child abuse and neglect and later offending behaviour and involvement with the child justice system (Baglivio and Epp, 2014, Honorato et al, 2016). Trauma may be experienced by children in a range of ways including domestic violence, community violence, and exposure to events such as parental separation.

Research into the effects of trauma on children has adopted the term “complex trauma” where over years the child experiences multiple, chronic, and sustained traumatic events (Hema, 2013). This trauma is most often interpersonal in nature and is perpetrated by those adults in the child’s life who should have been trusted and caring. This trauma occurs early in life and includes sexual or physical abuse, family violence and chronic neglect. It is the failure of the child’s caregiving system, the one place the child should have felt safety and care, and includes physical, emotional, and educational neglect and child maltreatment beginning in early childhood (Kleithernes et al, 2014).

Children who have progressed furthest into the criminal justice system are more likely to have experienced prolonged periods of trauma, to be diagnosed with mental health and development delays. These children have experienced complex trauma which has impacts on every aspect of their life, their functioning, and their interactions with people. (Ardino, 2012).

Some behaviours of a child who has experienced significant trauma are maladapted attempts to cope with situations in their environment that they are ill equipped to deal with. When in contact with the broader community the child can be overwhelmed by many social situations and may respond in unpredictable and unexpected ways including with aggressive, violent outbursts, and emotional dysregulation. In the community this behaviour can lead to contact with authoritative consequences including involvement of the police (Dudley, 2015).

Children who experience chronic trauma early in life will not have normal brain development, reducing the likelihood the child will form attachments to significant adults or be able to interact with their world in a way that provides positive health and psychological outcomes (Elite & Turner, 2001). The child’s experience of trauma also effects their level of resilience and ability to develop protective factors that allow them to cope with life transitions. These impacts leave the child vulnerable and reactions to normal childhood experiences can include hyper-vigilance, loss of feelings of safety and distrust of most adults. These reactions in turn result in behaviours that can be interpreted by schools, carers, and authority figures as disruptive, dis-obedient, anti-social, aggressive and criminal.

As children age, they increase their ability to develop strategies to avoid further trauma in the home including exercising autonomy, self-decision making and mobility. If levels of family disruption, violence and poor supervision remain the child will make their own attempts to avoid and escape the traumatic situations. This means of escape often leads the child into further degrees of loss of safety and brings them into contact with negative peer influence, public violence, access to alcohol and drugs, and opportunistic offending. These behaviours are seen negatively within the community but mask and prevent attention to the child’s underlying trauma and maltreatment. Instead of effective mental health, support and child focused responses, attention from police and the criminal justice system follows. (Pearce, 2016; Pickens et al, 2016).

A child who has experienced trauma and subsequently is involved with the criminal justice system and the child protection system can experience the negative impacts of further trauma through multiple placements, lack of significant, ongoing adult relationships, disrupted schooling, and generally unstable lifestyles. For a child who offends, this disrupted life leads to courts unwillingness to provide bail due to the lack of stable accommodation, the child’s lack of community ties, and poor levels of supervision in the community (Wong et al, 2009; Richards & Renshaw, 2013).

A child who has cognitive development impacts due to trauma, has multiple difficulties if they meet police and the criminal justice system. They will have difficulty trusting adults, particularly adults in authority, they will have problems communicating their needs and feelings, they may respond to stresses in ways that are seen as aggressive or confronting, and they are unlikely to have a supportive adult who can advocate for them (Ardino, 2012). Alternate responses for a child who has

experienced trauma is crucial. For 10 to 13 year-olds who have experienced trauma, criminogenic responses may add to the child's trauma. Contact with police, courts and detention are threatening and overwhelming. These responses are unlikely to achieve the stated goals of criminal justice of creating dissonance, behaviour change and community safety.

*d) Child protection and child offending*

In Queensland, children on a Child Protection Order are 29 times more likely to be placed in detention than any other child in the community and 20 times more likely to be ordered to a community based supervised child justice orders. These children who the State has decided is the better parent and yet involvement in child protection services results in a massive risk to children, particularly those 10 to 13 years of age of contact with the criminal justice system.

On the evidence the vulnerability of children in the child protection system often transfers to a higher likelihood of the child being involved in the child justice system. The factors that lead to a child being subject to child protection intervention are also factors which lead to probable future offending behaviour (Stewart et al, 2002).

In most circumstances the contact with the child protection system comes before the contact with criminal justice. By the time the child is offending and appearing before the courts a narrow justice-based response fails to adequately address the needs of the child. The separation of the juvenile justice response from the child protection response inadequately responds to either needs or the risks that the child is experiencing.

The challenge is that the same child who in the criminal justice process is considered a "young offender" and is held accountable for their behaviour, in the child protection system is vulnerable and in need of protection. In both circumstances it is important to have joined-up responses between both the criminal justice and child protection systems. This dichotomy of response to the child's needs is no starker than the response to children's needs in Queensland. A child who is involved with both the justice system and the child protection system will find themselves treated differently depending on which government office they are in. Child Safety's public website uses the terms harm, protection and wellbeing when talking about the services it provides children. While Youth Justice's website uses the terms detention, accountability, community safety and children putting things right. Yet they are the same children and their needs have not changed depending on which departmental office they are in. A single unified approach for aiding children is needed. The continuation of 10 to 13 year-olds in the criminal justice system confuses and diminishes the services these children can and should receive.

The pathway between child maltreatment and offending is a clear one, particularly for children aged between 10 and 13 years (Teague & Mazerolle, 2007). Early intervention within the child justice system for these children requires responses that prevents abuse or responds to the child's needs for safety, attachment and addresses the impacts of trauma. A child who has experienced child abuse and trauma will increasingly act autonomously as they age and even by 10 or 11 may be using a means to escape adversity. This includes leaving the home and interacting with peers and others on the street and in other environments.

Some of the child's behaviour in the community will be survival activities as the child attempts to meet their own needs in the absence of adult carers or advocates. This contact with public situations and increasingly oppositional behaviours may place them in contact with the police and the courts instead of child protection services and responses. This leads the child into criminalization and progressively further contact with justice responses. The criminalisation of the child's behaviour masks and prevents attention to the maltreatment that underlies and reinforces the behaviour.



Transitions for children who have been maltreated and lack resilience can represent important events that exacerbate the likelihood of future offending behaviour. Placement in out-of-home care has been shown to increase the risk for a child becoming involved in the justice system. Multiple placements or placement instability that results in many different school enrolments is associated with increased difficult behaviour and later offending (Malvaso, 2016). The nature of this connection is complex though, as the factors and risks that led to the changes in placement may drive the child's negative responses to trauma and abuse (Pawagi et al, 1999). Both schools and carers struggle to cope with anti-social behaviour, aggressive outbursts, and the child's inability to form positive relationships with adults.

Placement breakdown and instability may leave the child more likely to be refused bail due to a lack of appropriately supervised accommodation (Cashmore, 2011). Lack of community services and family support may leave an impression with courts that the child is safer in custody than on the streets.

All these issues are relevant for 10 to 13 year-olds and is further demonstration of the inability of the criminal justice system to meet the complex needs of children who have experienced trauma.

*e) Aboriginal and Torres Strait Islander children*

Over-representation in the child justice system of 10 to 13 year-old Aboriginal and Torres Strait Islander children is significant. In 2019 – 20, 83% of 10 to 13 year-olds on youth justice orders were Aboriginal and Torres Strait Islander children.

Children who are in the 10 to 13 year-old age group are particularly vulnerable to responses in criminal justice that do not support or respond to their need and risks (Forrest and Edwards, 2014; Livingston, 2008). This is particularly true for Aboriginal and Torres Strait Islander children when responses provided aren't culturally safe, aren't delivered in culturally competent ways, are designed to meet only the needs of non-Indigenous children, and do not consider the strengths within the Aboriginal and Torres Strait Islander communities (Amnesty, 2015).

The data from Queensland Youth Justice demonstrates that Aboriginal and Torres Strait Islander children encounter the criminal justice system at a younger age, which is associated with an increased risk of reoffending, longer periods in detention, offending behaviour that extends through-out adolescence and for most into adulthood. These children have a higher risk of becoming entrenched in the child justice system, with multiple contacts over many years, resulting in long term dis-benefits for them, their families, and the community (Stewart et al, 2005).

Dislocation from cultural constancy and loss of cultural identity impacts on how Aboriginal and Torres Strait Islander children experience the world and their place in it (Marsella, 2010). They lack a bedrock of cultural strength on which they could increase their personal resilience. Intergenerational trauma experienced by these children is often the first of many trauma events they endure in early life. Without the resiliency that would come from a strong sense of place, a cultural understanding and family Elders as mentors, the negative impacts of further trauma (such as child abuse and neglect) often have lasting detrimental outcomes on the child's wellbeing. This further increases their likelihood of offending and being drawn into a justice system that worsens the trauma further (Baglivio et al, 2014; Atkinson, 2013; Atkinson, 2015).

Culturally competent programs and policies work to prioritize the responses that strengthen Aboriginal and Torres Strait Islander social and emotional wellbeing including connection to cultural identity, kinship connections, and a child's understanding of their culture. Moreover, they required services to be delivered by Aboriginal and Torres Strait Islander run and controlled organisations and for staff numbers to mirror the percentage of Indigenous clients more closely.

### **An Alternative Model of Practice for responding to the needs of 10 to 13 year-olds in the justice system**

Even if not increasing the age of criminal responsibility, the Queensland Government should be considering how to reduce the number of 10 to 13 year-olds in the system. The increase in the age of criminal responsibility will become a natural consequence when 10 to 13 year-olds justice involvement is reduced to the greatest extent possible. The current framework used by the criminal justice system will not be able to achieve this without implementing strategies that focus explicitly on the social needs of the 10 to 13 year-olds. The strong connection between childhood maltreatment and early on-set offending indicates the goal of responses to 10 to 13 year-olds in the criminal justice system need to:

- Be in the best interest of the child,
- address a life experience of trauma,
- be child-focused,
- provide safe environments, and
- deliver learning in positive behaviours.

The needs of 10 to 13 year-olds are not being met by the correctional risk paradigm that seeks to manage the behaviour of children who offend by identifying and targeting 'risk factors' for future offending. Improved responses will include prioritising children's engagement in youth justice processes and the pursuit of positive behaviours and outcomes.

The risk paradigm places personal responsibility on children for offending behaviour by framing risk factors as personal 'deficits' (flaws, weaknesses) in psychosocial domains of children's lives (psychological, family, education, peer group, neighbourhood) that children somehow fail or refuse to resist or negotiate (Bateman, 2020; Case and Haines, 2018). It attempts to correct the perceived faults in the children who offend and apply a punishment for non-compliance or non-engagement with harsh, controlling and punitive interventions (Smith and Gray, 2019; Dunkel, 2014; Hazel 2008). This is a flawed strategy for reducing the number of 10 to 13 year-olds who are justice involved. These children have suffered poor educational attainment, developmental delay, trauma related behaviours, and functioning below chronological age. Their involvement in the criminal justice system has come at the end of a range of life experiences. Rather than the first point of challenge for the child, their offending behaviour is the result of an accumulation of negative events over many years. For the 10 to 13 year-old age group this means events in their life, well before they begin offending. Life experiences, deprivations and trauma are the core components needing to be considered for any response to 10 to 13 year-olds who are justice involved.

The most coherent challenge to the risk paradigm in youth justice has come from the 'Positive Youth Justice' model (Haines and Case, 2015; Butts, 2011) - an engaging and positive child-friendly approach that importantly moves away from offence/offender-focused and deficit-facing youth justice, by emphasising that all responses should prioritise the central principle of 'Children First, Offenders Second'. Positive Youth Justice conceives of offending as only one element of the child's broader social status (see Drakeford 2010), rather than as their defining master status. (Case, S., & Haines, K. 2014) Through this model, all youth justice practice for 10 to 13 year-olds should be:

- child-friendly,
- child-appropriate,
- focused on the whole child,
- examining the full complexity of their lives and
- multi-faceted, context-specific interactions.

The Centre for Innovative Justice noted in their submission to the Inquiry into Victoria's Criminal Justice System, "Innovative and community-based approaches such as restorative justice, justice reinvestment, and evidence-based programs offer a practical, more cost-effective response to offending behaviour and prevent children from being exposed to the harmful effects of the justice system. These types of therapeutic responses are also likely to be far more effective at addressing those factors which appear to be most strongly associated with serious and persistent child crime, like disadvantaged neighbourhood of residence, poverty, early childhood abuse, rejection, and illiteracy."

Evidence clearly shows the value to children of safety through connection with family and community. This connection supports the child's positive identity and self-worth. A sense of 'belonging' is a basic human need. Disengaged 10 to 13 year-old children are vulnerable to mental and physical health needs and have a range of negative issues into adulthood.

Children who are justice involved require the security of reliable guidance and boundaries. This approach supports a child's positive growth, development and community participation. These children need a service which recognises their vulnerabilities due to their stage of development and due to the impacts of past experiences, and which acts in their interests in guiding them while not dictating to them. Only in this way can the number of children in the 10 to 13 year-old group be reduced in the justice system. Then the inevitable raise in the age of criminal responsibility will be achieved.

### **Eight Key practice imperatives needed to innovate a Positive Child approach**

The following eight imperatives support effective work with children aged 10 to 13 years-old who are justice involved:

#### *1. Holistic*

Multiple factors affect a child's functioning and life. The work with children must focus on finding the factors most responsible for their current situation. Strategies need to be developed which target these factors through the provision of holistic services. Vulnerable children are served by coordinated and integrated services responding to all the factors affecting their life. (Brown, & Charles, A. 2021)

#### *2. Child-centred*

The needs and well-being of each child should be the primary focus of all youth justice interventions. Children must be engaged in the decisions that affect them. This means workers supplying individualized programs of services that meet the child's needs as the primary driver of decision-making. (Coles, Cheyne, H., Rankin, J., & Daniel, B. 2016)

#### *3. Family focused*

Children 10 to 13 years-old should have the support of families. Their families in turn have the right to be supported in this role. Where parents cannot provide safe care for children, children benefit from connections with other significant adults in their lives, for safe and caring attachments. (Nisbet, Graham, A., & Newell, S. 2012)

#### *4. Culturally safe*

Child support workers should be sensitive to the diverse cultural beliefs and practices of children and families. This includes knowledge of cultural and linguistic diversity.

In particular, the way in which youth justice workers support Aboriginal and Torres Strait Islander

children should include knowledge of the long-term impacts of the discrimination experienced by Aboriginal people and Torres Strait Islander people. The disruption of traditional kinship arrangements, separation from country and removal of children are just some of the considerations. Services supporting First Nations children should be Aboriginal and Torres Strait Islander-community developed, owned, and driven, and incorporate young peoples' voices. (Cunneen, Russell, S., & Schwartz, M. 2021)

#### *5. Accessible*

Children and families have the right to be directed to an appropriate service for their presenting need. This should always occur in the first instance and prior to consideration of services that address criminogenic risk. A focus on criminogenic risk often delays or prevents a child from being referred to or accessing the services and support they require to meet underlying needs.

#### *6. Integrated networks*

Integrated networks of services, including non-government, government, and other community supports recognises the principle of collaborative service delivery. Collaboration is enhanced through multi-disciplinary service responses.

#### *7. Relational*

Developing a trusting relationship is fundamental to working effectively with children. This can only be successfully achieved when there is a positive approach to meeting the child's needs. Punitive, punishing, and retributive responses to offending behaviour in young children will hinder and diminish positive outcomes. Foundations for positive work with children in youth justice is dependent on treating children with respect and ensuring consistent and reliable communication and interaction.

#### *8. Connecting children*

Children exist within the context of their families, support networks and communities. Current youth justice practices often respond to children as lone individuals, with complete autonomy and control over their lives. Developing positive connections for the child with peers and community structures (schools, social groups, positive adult relationships) increase children's well-being.

### **Six Principles needed to supply a Child First, Offender Second response**

#### *1. Children have needs*

Youth justice workers may be able to recognise the vulnerability and needs of a child who is "on the streets" or associating with older offenders. However, youth justice's focus on offending behaviour distracts it from recognising the emotional trauma being experienced by the child in such settings. The youth justice workers predominant concern will be on the child's risk to others and their offending behaviour particularly where the child's behaviour is consistently challenging.

A child's level of vulnerability may not be assessed and instead assessment emphasises the child's risk to others alone. A vulnerable child, even a child who is offending, needs protection, care, to feel loved and a sense of belonging, like any other child. Justice involved 10 to 13 year-old children are the most vulnerable children in our community. Their developmental tasks, when combined with the impacts of trauma suffered earlier in childhood and current adverse circumstances, make childhood a very vulnerable time for justice involved children.



## *2. Children have a history*

In planning interventions, youth justice workers will focus on the child's most recent offences. This obscures consideration of their history, including relationships and life experiences. This interacts with an overwhelming justice system responding to current circumstances and behaviour and does not consider how the child's history of life circumstances could be addressed to stop them from further future offending behaviour.

Children in the justice system have a past, a present, and a future, which is likely to have family relationships irrespective of current dislocation (Mason & Prior 2008). They exist outside of their contact with youth justice workers and from the child protection system. Understanding this context is important throughout the period of working with young children in contact with youth justice. (Bronfenbrenner 1986)

## *3. Focus on needs first and offending second*

All children have core needs for a secure base and a sense of belonging. Identity and self-esteem are based on this sense of belonging and connectedness (Bacon & Richardson 2001). The need to belong is universal and therefore when working with children, we need to remember how important it was, and is, to connect with others and feel like we belong. Youth justice interventions often contribute to the break-down of children's sense of belonging and worth. Youth justice's punitive approaches only alienate children from the community, teaches them to not trust government institutions and through detention separates them from their family, community, and culture. (Myers, Goddard, T., & Davidtz, J. 2021).

Harm minimisation responses must be tailored to the individual child. A child whose behaviours are closely related to the need to belong can often only find this belonging through offending as a 'bonding ritual' with other like peers. The child's need for inter-personal connection drives them away from abusive and traumatic scenarios toward peer relationships that supply the type of self-worth they can't obtain anywhere else. Responses to this behaviour must focus on re-establishing family connections, cultural understanding, and positive community participation as alternatives to offending peer bonding and belonging.

It is necessary to identify each child's needs across a range of core domains (Craig & Daniel 2020) with reference to their cultural identity needs, family connection needs, educational and learning needs, social skills, and not just in relation to managing difficult offending behaviour. The youth justice system does not adequately consider children's estrangement with schooling, their culture, and family. An innovative approach must consider the whole child and how different dimensions of need are inter-related (Joughin & Morley 2007).

## *4. Respond to behaviour and wellbeing together*

The challenge in accepting an innovative approach to working with 10 to 13 year-olds will be their continued behaviour resulting in contact with the criminal justice system. It will be necessary to respond to both behaviour and the child's well-being together. The child's behaviour must be considered in a harm minimisation context. Efforts to prevent the escalation of the behaviour can't occur without, at the same time, addressing the circumstances that brought on the behaviour. In fact, it is not possible to reduce the offending behaviour without simultaneously responding to trauma and providing support to the child. However, a focus on identifying and addressing needs cannot wait until the offending behaviour is stabilised. (Joughin & Morley 2007) Indeed, they must be integrated as the same work – even when a paramount need for harm reduction for the child,

their family and the community is crucial. (Cairns 2002). (Australian Government May 2015)

*5. Aim for unconditional engagement*

To respond the needs arising from loss and trauma, building trust with the child is essential. Unconditional commitment is needed if children in the youth justice system are to be supported to achieve improved well-being (Cairns 2002; Bacon & Richardson 2001). Workers must give children a clear message that ‘whatever it takes, for as long as it takes, we are here for you’. An unconditional, ongoing commitment and engagement to the child is required to provide positive responses and gain a child’s trust, where they have trusted no others.

*6. Build resilience and hope*

Youth justice workers are in danger of losing hope in children, particularly where their behaviour has been on-going and challenging. When faced with the complex high needs of a justice involved child, workers can believe that nothing will work and will support more punitive action as the only response available. This inevitably affects how a worker engages, interacts, and plans with a child. When the system gives up, the child will give up too.

Contemporary thinking in the areas of child development, resilience theory and positive youth justice strongly suggests that workers should always maintain hope. A child always has a ‘second chance’ to develop, form positive relationships, connect with their community, and have their well-being needs met. This is true even where a child has experienced significant disruptive and traumatising experiences in early life. (Cashmore 2011; Daniel Wassell & Gilligan 2002). Resilience theorists argue that things can still change positively late in childhood, even for children who have had the type of experiences necessary to bring them in contact with government systems (Gilligan 2001). A child is lost in the system when seen only as an offender and not the child. In turn, workers must deliver the message that “I, we, won’t give up on you, even if you give up on yourself”.

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