

SUBMISSION

TO

STANDING COMMITTEE

JUSTICE, LAW AND HUMAN RIGHTS

CHILD JUSTICE BILL

(BILL No 4 of 2024)

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Australia

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Relevant Technical Expertise and Experience

- Paediatrician / Adolescent Physician, Royal Australasian College of Physicians
- Consultant Adolescent Physician, Department of Adolescent Medicine, Royal Children's Hospital: 2000-2022
- Head of Clinical Services, Parkville Youth Justice Precinct, Melbourne 2010-2012
- Spokesperson, Royal Australasian College Of Physicians, Raising the Minimum Age of Criminal Responsibility
- Member, National Raise the Age Steering Committee, Australia
- Expert witness
 - Royal Commission: The Protection and Detention of Children in the Northern Territory
 - Yoorook Justice Commission, Victoria
- Currently,
 - Clinical Lead, Wadja Aboriginal Family Place, Royal Children's Hospital, Melbourne
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Preamble

This Submission:

- Is most relevant to the following sections of the Bill:
 - Part 4: Children and the Police Section 17: Children under the Age of Criminal Responsibility
 - Part 7: Methods of Dealing with Children
- Presents the latest evidence regarding child health and neurodevelopment
- Presents evidence around to what we now know to be the neurodevelopmental and socio-economic profile of children involved in the Youth Justice System
- Argues that criminalization of children is associated with adverse outcomes
- Based on the evidence presented, this Submission
 - Presents an alternate way of conceptualising behaviour that currently brings young children in contact with the Justice System
 - Argues for a bio-psycho-social and culturally appropriate approach to support children at risk of coming into contact with the Youth Justice System
 - Argues that a Minimum Age of Criminal Responsibility of 10 years is inappropriate and should be raised to at least 14 years of age

Context:

While the science relating to childhood neurodevelopment is largely universal, it is recognised that much of the data presented in the Submission arises from the Australian context. It is hoped that this data is illustrative and can be used in the Fijian context.

Focus:

This Submission deliberately focuses on bio-psycho-social cultural approaches appropriate for young children whose behaviour may bring them in contact with the Youth Justice System. It does not discuss alternate approaches to sentencing within the legal framework which is beyond the technical expertise of the author.

Executive Summary

Children in contact with the Youth Justice System are typically amongst the most vulnerable children in our community and most likely to be further disadvantaged and traumatised by criminalisation and incarceration.

Advances in neuroimaging, as well as an improved understanding of normal childhood neurodevelopment, now provide us with a much clearer understanding of the biological drivers of behaviours bringing children into contact with the Youth Justice System.

Key to any consideration regarding the Minimum Age of Criminal Responsibility is the recognition that 10-13 year old children are not only physically immature, they are also neurodevelopmentally immature, and as such will exhibit poor impulse control and limited understanding of the consequences of their decisions and behaviours.

Research also now provides us with a better understanding of the profile of the children who are actually coming into contact with the Youth Justice System: Importantly, *in addition* to their neurodevelopmental and physical immaturity, children in contact with the Justice System have extra vulnerabilities including:

- High rates of intellectual disability and other developmental disability
- High rates of diagnosable mental health disorder
- High rates of early childhood trauma
- High rates of child protection involvement and Out of Home Care
- High rates of school disengagement
- Over representation of First Nations people (Australia) and other ethnic minorities
- Being amongst of the most socio-economically disadvantaged in our community

Based on our better understanding of the neurodevelopment, and what research now tells us about the profile of children in the Justice System, we understand that:

Behaviours in young children, in particular 10 to 13 year old children, that have up to now been considered acts of criminality, can now better be understood as behaviours attributable to the typical neurodevelopmental immaturity of young children, often compounded by additional disability and vulnerabilities.

Evidence shows a clear association between involvement in the Youth Justice System and adverse outcomes later in life.

This evidence gives us a clear choice. Does one:

- Address a young child's needs and vulnerabilities through developmentally appropriate trauma informed assessment, support and treatment knowing that this will provide children with the best chance for better outcomes

or

- Criminalise children whose behaviour is driven by their neurodevelopmental immaturity, disability and vulnerabilities, knowing that the evidence shows that criminalisation results in an increased likelihood of adverse outcomes later in life.

The following peak health bodies in Australia all currently support raising the Minimum Age of Criminal Responsibility to at least 14 years of age:

- The Royal Australasian College of Physicians (RACP),
- Australian Medical Association (AMA)
- Australian Indigenous Doctors' Association (AIDA)
- Public Health Association Australia (PHAA)

Physical Vulnerability of Children under 14 Years of Age

Children under the age of 14 years of age are usually small and physically immature and vulnerable children.

All the children pictured in the photograph to the right are old enough to

- be arrested
- be held in a police cell
- be taken before a magistrate
- have a criminal record
- be incarcerated

without their parents necessarily being present in most states Australia.



Figure 1: Small children old enough to be incarcerated if MACR is 10 years of age

To further demonstrate the physical vulnerability of 10 – 13 year old children, it is noteworthy that the Royal Children Hospital (RCH), Melbourne, recommends the use of child booster seats in cars till children reach a height of 145 cm. At the same time, the average height of a 10 year old boy is 138 cm, and 10 year old girl is 136 cm (CDC charts). As such, if one was to follow RCH recommendations, if an average 10 year old child was to be safely transported to a police station or prison, to do so safely the child should be transported in a child booster seat.

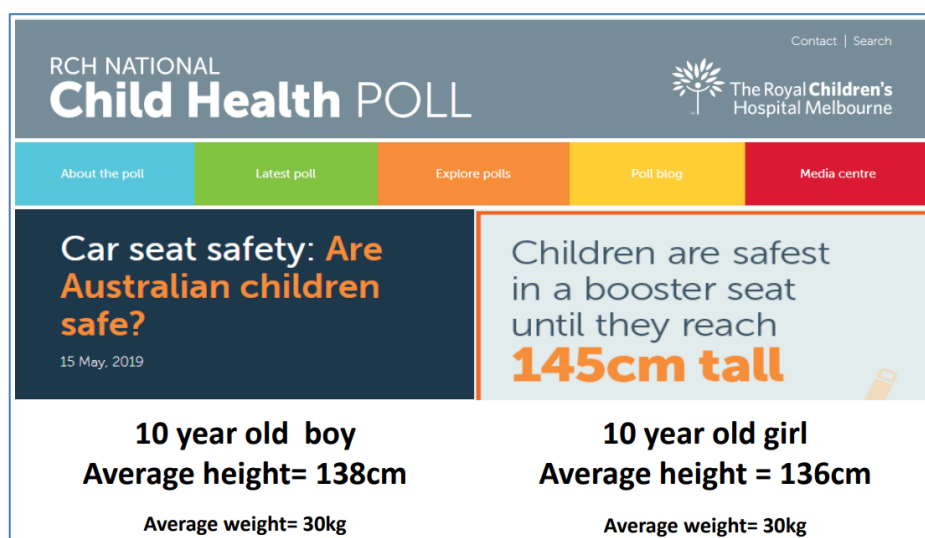


Figure 2: Many young children involved in the Justice System are still small enough to need a car booster seat to be transported safely in a car

Ref: [RCH National Child Health Poll \(rchpoll.org.au\)](http://rchpoll.org.au)

Neurocognitive Development

Functional neuroimaging now has the capacity to show different parts of the brain in great detail.

The prefrontal is the part of the brain that controls “executive functions”, i.e. the functions of impulse control, planning and weighing up long term consequences of one’s actions, important in the context of considering whether a young child is actually responsible for their behaviour in a criminal sense. Impulse control, the ability to plan and foresee the consequences of one’s actions is vastly less developed in a 10 year old than in an adult.

Functional neuroimaging now tells us that the pre-frontal cortex is not fully developed until the age of around 25 years.

It is not hard to imagine how this neurocognitive immaturity may bring a child into contact with the Youth Justice System. As an example, a 10 year old faced with a choice of jumping into a stolen car with peers or being left on the side of the road alone, may jump into the stolen car without anticipating the consequences of their action. As the car has been stolen, they can be charged as accessory to a crime, through an action that is completely explainable by brain development which is normal for their age.

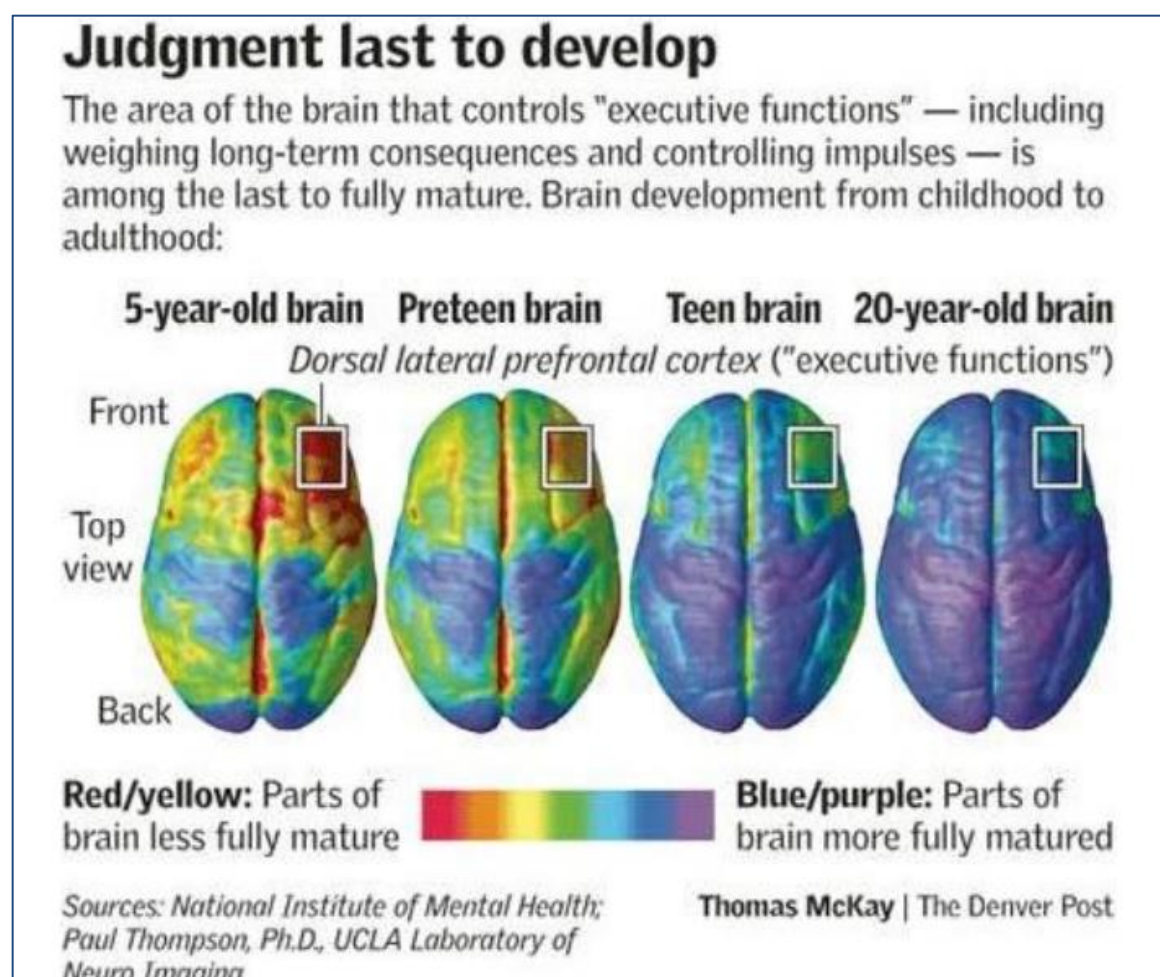


Figure 3: Functional MRI images depicting changes of prefrontal cortex of the brain (boxed), by age. The prefrontal cortex is the part of the brain responsible for impulse control and planning, it is amongst the least developed part of the teenage brain and is not fully developed until after 20 years of age

Refs: [Research points to changing teen brain – The Denver Post](#)
[Center for Multimodal Neuroimaging \(nih.gov\)](#)

Society Protects Children with Neurodevelopmental Immaturity

A safe society puts in place regulations and recommendations to protect neurodevelopmentally immature children. The neurocognitive immaturity of normal 10 – 13 year old children, and their lack of capacity to plan and make informed and safe decisions, is implicit in many day to day recommendations and regulations that a safe society puts in place to protect young children (see some examples in the Figure below).

To hold a 10 – 13 year old child to be criminally responsible for actions that are a consequence of their neurodevelopmental immaturity is at odds with the many recommendations and regulations aimed to protect children at this age.

Essentially, if the Minimum Age of Criminal Responsibility is not raised to 14 years of age, 10 year old children are too young for Facebook but old enough for prison.

	Children under 12 years of age do not have the skills and experience to be safe in traffic
	A child under 12 years of age travelling without supervision is considered to be an unaccompanied minor.. your child may be denied travel
	Facebook requires everyone to be at least 13 years old before they can create an account

Figure 4: Examples of generally accepted recommendations and regulations that recognise the neurodevelopmental immaturity of 10 – 13 year old children

Ref: [Children & pedestrian safety : VicRoads](#)

www.qantas.com/au/en/travel-info/children/unaccompanied.html

The Additional Vulnerabilities of Children in Contact with the Justice System

The narrative above describes the typical neurocognitive development of an average child.

We now have evidence that children in contact with the Justice System almost universally have *additional* vulnerabilities above and beyond the typical neurocognitive development of an average child described above.

Evidence now tells us children in contact with the Youth Justice System have:

- High rates of intellectual disability and other developmental disability
- High rates of diagnosable mental health disorder
- High rates of early childhood trauma
- High rates of child protection involvement and Out of Home Care
- High rates of school disengagement
- Over representation of First Nations people (Australia) and other ethnic minorities
- Being amongst of the most socio-economically disadvantaged in our community

Disability and Mental Health Profile of Children in Custody

Evidence from the “Banksia Hill” Study, Western Australia, published in the British Medical Journal *BMJ Open* in 2018, reports alarmingly high rates of severe diagnosable neurodevelopmental disability amongst sentenced young people in custody in Western Australia’s only Juvenile Justice facility.

This large multidisciplinary study of 99 young people aged between 10–17 years 11 months and sentenced in detention, from May 2015 to December 2016, showed: ***Of 99 children in detention in Western Australia, 89% had at least one severe neurodevelopmental impairment.***

These impairments included:

Foetal Alcohol Spectrum Disorder	Intellectual Disability
ADHD	Trauma / Attachment
Depression	Anxiety
Learning Difficulties	Speech and Language Disorders

This included 36 children who were diagnosed with Foetal Alcohol Spectrum Disorder.

Ref: [Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia | BMJ Open](#)

These findings highlight that many, if not most children, in contact with the Youth Justice System are likely to have a developmental age that is actually less than their chronological age. As such, amongst the youngest of this cohort, many are likely to have a *developmental age younger than 10 years of age*, adding further to the argument that a Minimum Age of Criminal Responsibility of 10 years old is inappropriate.

It can be argued that the neurodevelopmental impairments seen in this cohort were likely to be a significant contributing factor to the behaviours which led these children into the custodial system. Notably, almost all of children diagnosed with neurodevelopmental disorders in this study had NOT been previously diagnosed before they were incarcerated. It is easy to argue that if these children’s developmental disorders had been assessed and appropriate supports put in place on first contact with the Youth Justice System i.e. well before incarceration, the trajectory of these children may have been altered and they could have avoided incarceration.

Child Protection and the Trauma Profile of Children in the Youth Justice System

Children who are or have had involvement with the Child Protection system are over-represented in Youth Justice System.

Children in the Child Protection and Out of Home Care systems have almost by default experienced some form of physical or mental health trauma. The trauma of being in the Out of Home Care system could be characterised as a “Triple Trauma”, namely:

- Trauma related to the reason why a child may have been removed from their parents in the first place
- Trauma of being removed from one’s parents
- Trauma often inherent in the Out of Home Care system (multiple short placements leading and related insecure attachment)

The “Crossover Kids: Vulnerable Children In The Youth Justice System” report published by the Sentencing Advisory Council of Victoria, clearly highlights the over-representation of children in the Child Protection/Out of Home Care Systems in the Youth Justice system.

Of the 438 children aged 10 to 13 years at age of first sentence or diversion:

- 1 in 2 were the subject of a report to child protection
- 1 in 3 were the subject of a child protection order
- 1 in 3 experienced Out of Home Care
- 1 in 4 experienced residential care

Ref: [Crossover Kids Report 1.PDF \(sentencingcouncil.vic.gov.au\)](#)

Expressed as a relative risk: **10 – 13 year old children who had been or were currently in Out of Home Care, are 50 – 60 times more likely to be involved in the Youth Justice System**

Children who have experienced trauma can exhibit a range of problematic behaviours as a result of this trauma, including being in a persistent heightened state, or dissociation due to misreading cues and being quickly triggered into a fear response. This often presents as aggression and disobedience. Such trauma triggered responses (i.e. aggression and disobedience) can result in behaviours that bring young children in contact with police, as well as contributing to more heightened interactions when they do come in contact with police.

Ref: Literature review – a trauma-sensitive approach for children aged 0-8year
[Microsoft Word - Final Literature review .docx \(whealth.com.au\)](#)

School Disengagement / Expulsion and Involvement in the Youth Justice System

Data from Australia is consistent with data from other countries in relation to children involved in Justice System having high rates of disengagement and expulsion from the formal education system.

The 2018 Atkinson Report on Youth Justice in Queensland showed

- 70% of children involved in the Youth Justice System were not attending school regularly
- 30% of children involved in the Youth Justice System were not enrolled

The 2017 Youth Justice Review and Strategy: Victoria (Armytage, Ogloff) showed

- Amongst 181 children in a custody, there had been 145 recorded instances of school expulsion

Refs: [Atkinson Report on Youth Justice \(dcssds.qld.gov.au\)](#)

[Youth Justice Review and Strategy meeting needs and reducing offending | Department of Justice and Community Safety Victoria](#)

Over-representation in the Youth Justice System of First Nations Children and those from Culturally and Linguistically Diverse Groups

Aboriginal and Torres Strait Islander children are shamefully over-represented in the Youth Justice System in Australia. The younger the cohort in custody, the higher the proportion of Aboriginal or Torres Strait Islander within the cohort.

Australian Bureau of Statistics and AIHW data show:

Population	Percentage
Percentage of Australian Population who identify as Aboriginal and or Torres Strait Islander	3.8%
Percentage of Australian adult prison population who identify as Aboriginal and or Torres Strait Islander	35%
Percentage of 10 – 13 year olds in custody in Australia who are Aboriginal and or Torres Strait Islander	60-70 %

Refs: <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/30-june-2021>
<https://www.indigenoushpf.gov.au/measures/2-11-contact-with-the-criminal-justice-system#:~:text=Rates%20of%20youth%20detention,AIHW%202023d%3A%20Table%20S76a>).

In the State of Victoria, Australia, young people from culturally and linguistically diverse (CALD) groups are overrepresented in Youth Justice, particularly those from Sudanese, Maori and Pacific Islander backgrounds

Any policy that attempts to support children at risk or coming into contact with the Youth Justice System must have a culturally specific focus, particularly in regards to those from culturally and linguistically diverse groups that may be overrepresented in the Youth Justice System.

<https://www.justice.vic.gov.au/youth-justice-strategic-plan-2020-2030-delivering-culturally-appropriate-interventions-and-supports#:~:text=Young%20people%20from%20culturally%20and,Maori%20and%20Pacific%20Islander%20backgrounds>.

We are Criminalising the Most Socio-Economic Disadvantaged Children

Evidence collated by the Australian Institute of Health and Welfare (AIHW) is consistent with the global evidence. Children from the lowest socio-economic communities are over-represented in the Youth Justice System.

In this instance, children from in the lowest socio-economic quintile (bottom 20%) are 8 to 10 times more likely to be involved in the Youth Justice System than those from the highest socio-economic quintile (top 20%)

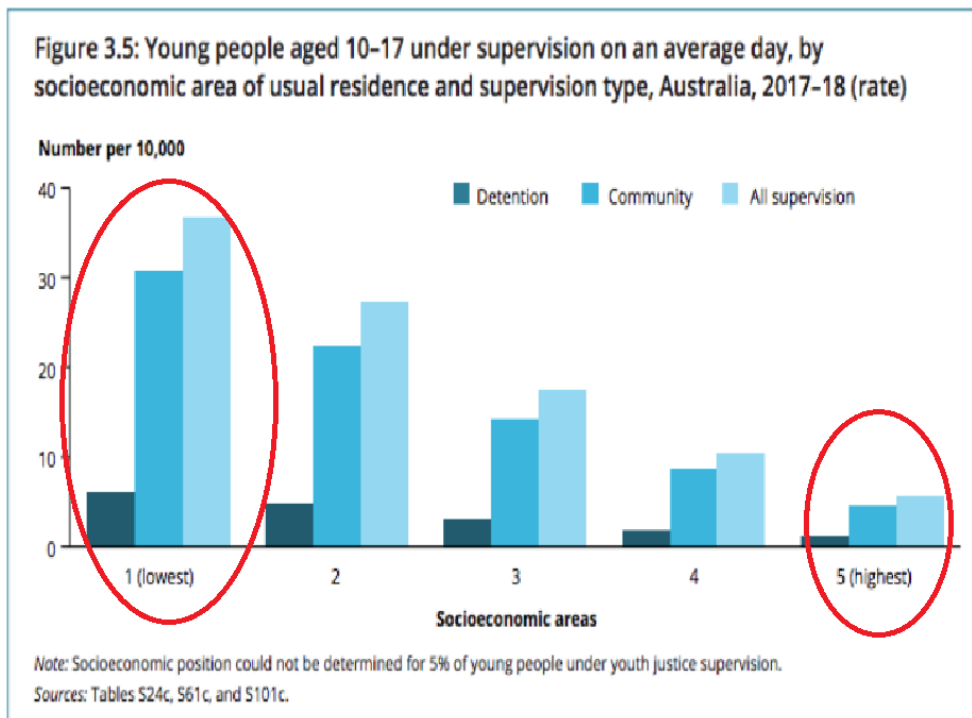


Figure 5: Youth Justice Involvement by Socioeconomic quintile

Ref: [Youth justice in Australia 2021-22 \(aihw.gov.au\)](https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2021-22)

Incarceration of Children is Associated with Adverse Outcomes Later in Life



Fig 6: RCH Hospital Staff protesting against offshore detention of children

Conditions in custody do not meet the standards of care and protection we would normally apply to children. It is clearly incongruous that:

- on one hand the Australian Council on Child and the Media recommends Parental Guidance till the age of 13 years for children watching a movie such as Lassie,
- while
- at the same time we have laws that allow 10 year old children to be detained in isolation for up to 23 hours per day, without any contact or support from their parents.



Figure 7: Lassie Movie Rating Ref: [Movie review of Lassie - Children and Media Australia](#)

As such:

- Incarceration further traumatises children who are amongst those who are already the most traumatised
- Childhood trauma further affects brain development, which has further impacts on emotions, behaviour and cognitive development

Ref: Literature review – a trauma-sensitive approach for children aged 0-8year: [Microsoft Word - Final Literature review .docx \(whealth.com.au\)](#)

- Incarceration dislocates children from protective factors vital for children as they transition through adolescence from childhood to adulthood, namely
 - Connection with community and Culture
 - Connection with family
 - Engagement with education
 - Positive peer experiences
- Incarceration is associated with
 - higher rates of mental health issues such as anxiety, depression and self-harm
 - higher rates of drug use
 - poorer educational outcomes
 - unemployment
 - lower life expectancy

Ref: [Rates and causes of death after release from incarceration among 1 471 526 people in eight high-income and middle-income countries: an individual participant data meta-analysis - The Lancet](#)

- The younger a child enters the justice system the more likely they are to be involved in the adult prison system

Ref: [Reoffending by Children and Young People in Victoria \(sentencingcouncil.vic.gov.au\)](#)

We need to conceptualise the issue differently

Based on our better understanding of the neurodevelopment, and what research now tells us about the profile of children in the Justice System we are now better able to conceptualize the reasons behind behaviours of young children coming into contact with the Youth Justice System

Behaviours in young children, in particular 10 to 13 year old children, that have up to now been considered acts of criminality, can now better be understood as behaviours attributable to:

- ***the typical neurodevelopmental immaturity of young children,***
Often coupled with
- ***disability***
- ***mental illness***
- ***childhood trauma***
- ***other vulnerabilities including disengagement from school and socio-economic disadvantage***

As such, one has a clear choice. Does one:

- Address a young child's needs and vulnerabilities through developmentally appropriate trauma informed assessment, support and treatment knowing that this will provide children with the best chance of better outcomes

or

- Criminalise children whose behaviour is driven by their neurodevelopmental needs and social disadvantage knowing that the evidence shows that criminalisation results in an increased likelihood of adverse outcomes later in life

A Evidence Based Approach

Effective approaches to support children whose behaviours bring them into contact with the Youth Justice System needs to be based on the evidence presented, i.e. the neuroscience, our understanding of the childhood development, as well as our knowledge of the profile of children in the Youth Justice System. It needs to be trauma informed and culturally appropriate.

Importantly, any approach needs to avoid harming children and sending them down the trajectory of adverse outcomes and an increased risk of crossing over from the Youth Justice System to the Adult Criminal System.

Services often exist to address the drivers of the behaviours bringing children into contact with the Youth Justice System.

- Children with intellectual disability, developmental delay, mental health disorders and early childhood trauma should be linked with appropriate medical, paediatric, mental health and other support services and programs
- The Education system should be strengthened so children with challenging behaviours don't disengage or are not excluded
- Communities and families should be strengthened to reduce the number of children entering Out of Home Care, and if going into Out of Home Care, placements are stable and children are linked with therapeutic services

- The most socio-economically disadvantaged children and families need to be linked with appropriate services and support

Unfortunately, the most disadvantaged children often have the least access to these services.

Assessments and interventions also need to be timely if there is any chance of altering trajectories. First entry in the Out of Home Care and / or Youth Justice Systems should be seen an opportunity for comprehensive assessment of a child's developmental and mental health needs.

(Note: The Victorian State Government is currently rolling out the Pathway to Good Health Program to provide comprehensive multidisciplinary assessments by General Practitioner, Paediatrician, Mental Health Clinician and Speech Pathologist for children entering the Out of Home Care System).

Conclusion

Criminalisation of young children for behaviours that are consequences of their neurodevelopmental immaturity and / or their disability, mental illness and trauma is inappropriate.

Based on all the evidence provided above relating to the neuroscience, our understanding of the childhood development, and our knowledge of the profile of children in the Youth Justice System, it is recommended:

- **Behaviour of young children currently considered to be criminal is better understood to be behaviour better explained by the neurocognitive immaturity of young children often with co-existing developmental disability, mental illness and/ or early childhood trauma.**
- **The Minimum Age of Criminal Responsibility should be raised to at least 14 years of age**
- **An appropriate bio-psycho-social, trauma informed and culturally appropriate approach be implemented to support both children currently within the Youth Justice System as well as those at risk of entering the Youth Justice System**