

# **Council of Attorneys-General – Age of Criminal Responsibility Working Group Review**

## **About Us**

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### **Just Reinvest NSW**

Just Reinvest NSW (JRNSW) works alongside Aboriginal communities to reduce the number of Aboriginal people in the criminal justice system by supporting community-led justice reinvestment initiatives and advocating for systemic change.

JRNSW was formed in 2012, with a group of individuals and organisations coming together to take action to reduce the number of Aboriginal children and young people being locked up. JRNSW is auspiced by the ALS.

In 2013, JRNSW began working with the Bourke Aboriginal community in north-west NSW on the first major justice reinvestment initiative in Australia – Maranguka. We are currently working with community members in Moree and Mt Druitt to explore whether a justice reinvestment approach would work for their communities. There are now more than 20 organisations actively engaged in JRNSW as members or funders, with a number of individuals and organisations providing in-kind or volunteer support.

### **Maranguka**

Maranguka, meaning ‘caring for others’ in Ngemba language, is a model of Indigenous self-governance which empowers community to coordinate the right mix and timing of services through an Aboriginal community owned and led, multi-disciplinary team, working in partnership with government and non-government agencies.

The Bourke Tribal Council, the over-arching cultural and governance authority for Maranguka has asserted and applied its cultural authority to the work of Maranguka. Bourke’s community-led and place-based way of doing business is leading an approach to self-determination that goes beyond government-led approaches such as Closing the Gap, OCHRE and Local Decision-Making. Maranguka and the Bourke Tribal Council’s authority provides real definition and substance that has directly led to the successes in Bourke.

## Introduction

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We thank the Council of Attorneys-General (CAG) Working Group for the opportunity to provide a submission on this topic and we are pleased that CAG explicitly recognises the importance of the views, knowledge and expertise of interested stakeholders and individuals.<sup>1</sup>

An overview of the key points raised within our submission are outlined within the executive summary. Our responses to the questions, and other relevant material, are set out below.

## Executive Summary

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The key points raised within our submission are as follows:

- The age of criminal responsibility should be raised to at least 14 years of age.
- Aboriginal and Torres Strait Islander children and young people are significantly overrepresented in the youth justice system.
- Raising the age of criminal responsibility to 14 would bring Australia in line with most other jurisdictions across the world, and ensure Australia is consistent with the UN Convention on the Rights of the Child.
- Raising the age of criminal responsibility to 14 would render the inconsistently applied doctrine of *doli incapax* redundant.
- Compelling evidence from the fields of child development and neuroscience support the need to increase the minimum age of criminal responsibility.
- Just Reinvest NSW advocates for the voices, experiences and expertise of young people to be at the centre of policy initiatives and practice. The Youth Ambassadors who work with Just Reinvest NSW consistently refer to the harm that is done with early interactions with the criminal justice system.
- Young people in the criminal justice system have high rates of cognitive impairment, mental illness and trauma. A therapeutic and supportive response to these children and their families outside of the criminal justice system is urgently needed to provide protection not further harm for those in need.
- Reducing the contact young people and their families have with the criminal justice system would afford greater psycho-social outcomes and financial savings. These savings should be reinvested to help support young people and their families through preventative and early intervention strategies.
- Just Reinvest NSW supports communities working in a community-led, place-based and data-driven approach that supports young people and families to thrive. Lowering harmful interactions with the criminal justice system is central to our work and raising the age of criminal responsibility is a fundamental threshold that would lower the harm, allowing for better community-led initiatives to support young people at risk of harm.

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<sup>1</sup> Government of Western Australia Department of Criminal Justice, 2020, *Review of age of criminal responsibility*, <https://www.department.justice.wa.gov.au/R/review-criminal-age.aspx>

- Just Reinvest NSW supports investment into communities, not prisons.

## Question 1

*Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.*

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*“When you’re 10 you don’t even know what you’re doing. You are just trying to fit in, do what the boys are doing. 10 is ridiculous” - JRNSW Youth Ambassador*

### 1.1. Our position

The age of criminal responsibility should be raised to at least 14.

The vast majority of children and young people caught in the juvenile justice system are living with neurological, psycho-social or developmental vulnerabilities and should be provided with appropriate supports. This should include support for their families to help navigate the often fractured service system, rather than pushed into the expensive criminal justice system. Priority should be given to providing these supports and services, including in remote locations.

It currently costs over \$1414 a day to keep a young person in detention in NSW.<sup>2</sup> Every interaction with the criminal justice system from policing, bail, the Courts and juvenile detention, the process of strip searching along many of these interactions, are costly and cause psychological harm to young people. It makes far more sense to *support* young people and their families rather than propel them into the criminogenic detention system. The economic benefits alone are clear for raising the age of criminal responsibility to 14, as well as the long term social and emotional well-being outcomes for that young person and their family.

Given the overwhelming instances of over-representation of Aboriginal and Torres Strait Islander children and young people in the juvenile justice system, and the evidence of the long-term harm that early interactions with the criminal justice system can cause, we need to put in measures to lower these interactions. Raising the age of criminal responsibility to 14 is a threshold solution.

Raising the age of criminal responsibility will not mean there are no consequences for children who may have otherwise come into contact with the criminal justice system. It will mean the consequences are based on a better understanding and acceptance of their neurodevelopmental vulnerability and the underlying drivers of their behaviour, and are informed by appropriate protective and supporting responses.

Currently too many young people are in prison currently for the wrong reasons. Too many young people’s interactions with Police are negative or harmful. Aboriginal young people and

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<sup>2</sup> Productivity Commission, 2020, *Report on Government Services 2020*  
<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice>

communities have the solutions. The first step is listening, working with young people and their communities and building stronger relationships. The current approach to criminal justice and youth offending in particular, fails to address the underlying drivers of offending and incarceration. This includes intergenerational trauma, poverty, mental health challenges, care and protection issues, substance abuse, the education system. With the increasing and ineffective spend on incarceration, investment is being directed to the wrong places.

## **1.2. The children caught in our youth justice system**

As highlighted by Professor Chris Cunneen and research of the Comparative Youth Penalty Project, an examination of the minimum age of criminal responsibility must acknowledge the circumstances of children who are caught up in the criminal justice system:

*“... the needs of young people in juvenile justice are multiple and complex: they have come from communities of entrenched socio-economic disadvantage; and have fragmented experiences of education which are marked by periods of exclusion and expulsion, and result in poor educational outcomes. They have precarious living arrangements including homelessness and/or placements in Out of Home Care. They have experienced drug and alcohol related addiction; struggle with unresolved trauma; and have one or more disabilities.”*

## **1.3. The disproportionate impact on Aboriginal & Torres Strait Islander children**

Aboriginal and Torres Strait Islander children and young people are significantly overrepresented in the youth justice system. During 2018-19, the average daily detention rate for Aboriginal and Torres Strait Islander children and young people aged 10-17 years was 31.2 per 10,000 per young person, 23 times the rate for non-Indigenous young people (1.4 per 10,000). During the same period, Aboriginal and Torres Strait Islander children and young people aged 10-17 years were under community-based supervision at a rate 16 times that for non-Indigenous children and young people.<sup>3</sup>

For children under 14, the disproportionate impact on Aboriginal and Torres Strait Islander children is even greater. In 2017-18, 10 of the 14 children in detention aged 13 and under in NSW on an average day were Indigenous (75%). The equivalent figures in 2016-17 and 2015-16 were 86% and 67%.<sup>4</sup>

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<sup>3</sup> Productivity Commission, *Report on Government Services 2020*, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice>

<sup>4</sup> Australian Institute of Health and Welfare, 2019, *Youth Justice in Australia 2017-18*, <https://www.aihw.gov.au/getmedia/f80cfcb3-c058-4c1c-bda5-e37ba51fa66b/aihw-juv-129.pdf.aspx?inline=true>

The link between out-of-home care (OOHC) and involvement in the criminal justice system is well established in Australia.<sup>5</sup> In NSW, one in five participants (21.1%) in the 2015 *Young People in Custody Health Survey* reported that they had been placed in care before the age of 16 years. As highlighted by the *Family is Culture Review Report*, Aboriginal children and young people are grossly over-represented in the OOHC system in NSW.<sup>6</sup> The report identifies the additional harm suffered by a child already removed from their family as a result of the process of 'care criminalisation' through which children placed in out of home care are more likely to be involved in the juvenile justice system by virtue of their OOHC status.<sup>7</sup>

#### 1.4. Evidence from child development & neuroscience

Compelling evidence from the fields of child development and neuroscience supports the case to increase the minimum age of criminal responsibility. This is reflected in the following statement by the UN Committee on the Rights of the Child in September 2019:

*“Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses.*

*States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.”<sup>8</sup>*

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<sup>5</sup> Professor Megan Davis, Independent Review into Aboriginal and Torres Strait Islander and Young People in Out- Of-Home Care in New South Wales, 2019, *Family is Culture*, - Chapter 15 Care Criminalisation, [https://www.familyisculture.nsw.gov.au/\\_data/assets/pdf\\_file/0011/726329/Family-Is-Culture-Review-Report.pdf](https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf). p236

<sup>6</sup> *Ibid.* p235

<sup>7</sup> *Ibid.* p230

<sup>8</sup> UN Committee on the Rights of the Child, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, CRC/C/GC/24 (18 September 2019) 22.

The developmental immaturity of children and adolescents can affect cognitive functions including 'impulsivity, reasoning and consequential thinking'.<sup>9</sup> In their submission to the Council of Attorneys-General, the Royal Australasian College of Physicians (RACP) highlights the neurocognitive vulnerability of children: "Impulse control, the ability to plan and foresee the consequences of one's actions is vastly less developed in a 10 year old than an adult".<sup>10</sup>

The RACP highlights the need to bring the age of criminal responsibility in line with other areas of our society that are organised and structured to recognise the physical, neurocognitive and emotional vulnerabilities of children between the ages of 10 to 13 years, and to protect them based on those vulnerabilities.<sup>11</sup>

### **1.5. Cognitive impairment, mental health and trauma**

The RACP also, along with many academics and practitioners in this area, have called for a focus on the high rates of cognitive impairment, mental ill-health and trauma amongst children and young people in the youth justice system.<sup>12</sup> The RACP has stated that the problematic behaviours of 10 to 13 year olds that are currently criminalised, should be considered within the normal range of behaviours for the neurodevelopmental profile for their age coupled with behaviours one would expect in young children with significant neurodevelopmental impairment and / or experience of trauma.<sup>13</sup>

A therapeutic and supportive response to these children and their families is urgently needed as opposed to current justice system responses which criminalises their behaviour and causes rather than protects them from harm.

#### Cognitive impairment

The 2015 NSW Young People in Custody Health Survey found that 18% of children and young people in custody had a cognitive disability. For Aboriginal and Torres Strait Islander children, this rate was 24.5% compared to 11% for non-Indigenous children.<sup>14</sup> Other studies have found 39-46% of children and young people in custody were within the borderline range of cognitive functioning, with these rates again higher for Aboriginal and Torres Strait Islander children and young people.<sup>15</sup>

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<sup>9</sup>Nicholas Lennings and Chris Lennings 'Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study' (2014), *Psychiatry, Psychology and Law*, 21(5), 794.

<sup>10</sup>RACP submission to the Council of Attorneys-General Working group reviewing the Age of Criminal Responsibility July 2019, [https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review\\_final-gm-approved.pdf?sfvrsn=b384e61a\\_6](https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review_final-gm-approved.pdf?sfvrsn=b384e61a_6)

<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

<sup>14</sup> *Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017), 2015 Young People In Custody Health Survey: Full Report.*

<sup>15</sup> Cunneen, Chris, 2017, *Arguments for Raising the Minimum Age of Criminal Responsibility Research Report, Comparative Youth Penalty Project*, University of New South Wales, Sydney, <https://www.cypp.unsw.edu.au/node/146>.

For children and young people on community-based orders in NSW, a survey of 800 children and young people found 15% had a cognitive disability and 27% were within the borderline range of cognitive functioning (total of 42% functioning in the borderline range of cognitive functioning or lower).<sup>16</sup>

Research points to numerous other impairments often associated with cognitive disability including speech, language and communication disorders; ADHD; autism spectrum disorders; FASD; and acquired or traumatic brain injury.<sup>17</sup>

The RACP has stated that findings such as these highlight the fact that many children in the youth justice system are likely to have a functional age younger than their chronological age.<sup>18</sup>

### Mental health

The 2015 *NSW Young People in Custody Health Survey* found that 83% of respondents met the threshold criteria for at least one psychological disorder, with a higher proportion of Indigenous children than non-Indigenous children for some disorders.<sup>19</sup> Around 63% met the threshold criteria for at least two disorders.<sup>20</sup> Young people in detention are approximately six times as likely to have a psychological disorder as young people in general. Similarly, the rate of conduct disorders among respondents was more than 20 times that of the general population, and the rate of anxiety disorders was more than three times that of the general population.<sup>21</sup>

For children and young people on community-based orders in NSW, a survey of 800 children and young people found 40% experienced psychological disorders.<sup>22</sup>

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<sup>16</sup> Kenny, D.T. and Nelson, P. K. (2008). *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs*. Sydney, Australia: Sydney University Press.

<sup>17</sup> Cunneen, Chris, 2017, *Arguments for Raising the Minimum Age of Criminal Responsibility Research Report, Comparative Youth Penalty Project*, University of New South Wales, Sydney, <https://www.cypp.unsw.edu.au/node/146>

<sup>18</sup> RACP submission to the Council of Attorneys General Working group reviewing the Age of Criminal Responsibility July 2019, [https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review\\_final-gm-approved.pdf?sfvrsn=b384e61a\\_6](https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review_final-gm-approved.pdf?sfvrsn=b384e61a_6)

<sup>19</sup> NSW Health and NSW Juvenile Justice, *2015 Young People in Custody Health Survey: Key Findings for all Young People*, [https://www.justicehealth.nsw.gov.au/publications/2015YoungPeopleinCustodyHealthSurveyFactSheets.p](https://www.justicehealth.nsw.gov.au/publications/2015YoungPeopleinCustodyHealthSurveyFactSheets.pdf)

<sup>20</sup> *df*

<sup>20</sup> *Ibid.*

<sup>21</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report*, xxi, <http://www.juvenile.justice.nsw.gov.au/Documents/2015%20YPICHS.pdf>

<sup>22</sup> Kenny, D.T. and Nelson, P. K. (2008). *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs*. Sydney, Australia: Sydney University Press.



## Trauma

The impact of trauma on behaviour and development needs to be considered by CAG. The RACP has noted that children who have experienced trauma can exhibit a range of problematic behaviours as a result of that 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.”<sup>23</sup>

Further, the Australian Early Development Census advised that *‘ongoing stress factors that are not buffered by caring and positive relationships disrupt brain architecture leading to a lower threshold of activation of the stress management system, which in turn can lead to lifelong problems in learning, behaviour, and both physical and mental health. It is in situations where ongoing stress is likely, intervening as early as possible is critical to achieving the best possible outcomes for the child.’*<sup>24</sup>

The Healing Foundation notes the disproportionate impact of trauma on Aboriginal and Torres Strait Islander young people:

*‘...for our children and young people who we must recognise are hurting. They have been witness to, and experienced first-hand, the trauma that past government policies have had on their families and communities. Without adequate opportunities to overcome trauma, young people internalise their experiences and seek to find their own means of coping. This often results in negative behaviours such as high rates of drug and alcohol addiction, violence directed at themselves and others, criminal behaviour and interaction in the justice system, gang membership, homelessness and leaving school early.’*<sup>25</sup>

Almost half (47.8%) of participants in the 2015 NSW *Young People in Custody Health Survey* reported they had been exposed to at least one traumatic event and of those who reported trauma exposure, 37.5% had experienced more than one type of traumatic event.<sup>26</sup>

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<sup>23</sup> RACP Submission to the Council of Attorneys General Working group reviewing the Age of Criminal Responsibility July 2019, [https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review\\_final-gm-approved.pdf?sfvrsn=b384e61a\\_6](https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review_final-gm-approved.pdf?sfvrsn=b384e61a_6)

<sup>24</sup> Australian Early Development Census, 2015, *Brain Development in Children*, available at <https://www.aedc.gov.au/resources/detail/braindevelopment-in-children>.

<sup>25</sup> Healing Foundation, 2014, *Growing our children up strong and deadly: Healing children and young people*, <https://apo.org.au/sites/default/files/resource-files/2013/08/apo-nid35364-1186581.pdf>

<sup>26</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017), *2015 Young People In Custody Health Survey: Full Report – Chapter 7 Trauma experiences and impact of trauma* <http://www.juvenile.justice.nsw.gov.au/Documents/2015%20YPICHS.pdf>

## 1.6. The impact of contact with the criminal justice system on children & young people

### Strip Searching

When a young person enters youth justice custody they are routinely strip searched. The NSW Inspector of Custodial Services found young people may be strip searched:

- when returning to a centre after a court appearance or hospital visit
- following leave
- following contact visits with family
- in circumstances where youth officers suspect that a young person possesses contraband or an item that may be used to hurt themselves or someone else.<sup>27</sup>

The Inspector also noted: *“Despite efforts taken by Juvenile Justice staff to ensure that a young person is never fully unclothed, the practice of searching young people by asking them to partially remove their clothes may be humiliating and distressing for young people.”*<sup>28</sup>

According to the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse, survivors of sexual abuse report being subject to *“abusive, inappropriate or traumatising strip searches”* whilst in youth detention and that this had the effect of potentially re-traumatising them through sexual humiliation or abuse.<sup>29</sup>

### Being held on remand

When a young person of 10-13 is remanded, they:

- Are strip searched on entry to a juvenile justice centre and other times (see above)
- Are separated from their friends, family and support
- Have had their education or learning disrupted
- Are held in juvenile detention with other young offenders
- Are unable to access some programs.

As discussed in our response to question three, and in the submission of the Aboriginal Legal Service NSW/ACT, some young people on remand may ultimately be found not guilty as *doli incapax* has not been rebutted. This disruption and trauma has therefore occurred without

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<sup>27</sup> NSW Inspector of Custodial Services, ‘Use of force, separation, segregation and confinement in NSW juvenile justice centres’ (Report, November 2018) 20 at <http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf>

<sup>28</sup> WA Inspector of Custodial Services, ‘Report of an announced inspection of Banksia Hill Juvenile Detention Centre’ (Report, 2015) 11 as cited in NSW Inspector of Custodial Services, ‘Use of force, separation, segregation and confinement in NSW juvenile justice centres’ (Report, November 2018) 20 at <http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf>

<sup>29</sup> Commonwealth of Australia ‘Contemporary detention environments’ (Royal Commission into Institutional Responses to Child Sexual Abuse Volume No 15, 2017) 117 at [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_15\\_contemporary\\_detention\\_environments.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_15_contemporary_detention_environments.pdf) see also recommendation 15.4.

conviction and without any real support mechanisms or interventions being put in place upon release.

### Other issues

The Aboriginal Legal Service NSW/ACT outlines other issues that may arise in criminal proceedings which may mean the opportunity for a young person to get support (e.g psychosocial) is missed.

## **1.7. Reducing reoffending**

*“I cannot accept the numbers of our young people who are in custody and the way the system does nothing but prepare them to go to adult jail.” – JRNSW Youth Ambassador*

Interactions with the criminal justice system have widely acknowledged criminogenic effects on young people, such that exposure to courts and prisons at a young age increases the likelihood that they will come into contact with the adult criminal justice system.<sup>30</sup>

The Victorian Sentencing Advisory Council found that the younger children are when they receive their first sentence, the more likely they are to reoffend overall, and the more likely they are to receive a sentence for violent offending before the age of 22.<sup>31</sup> The value of deterrence in charging, convicting and incarcerating is overstated and not effective.

Young people are more likely to reoffend than adults, and the rates of young people who reoffend after receiving a non-custodial sentence is about 44% compared to 64% of those who reoffend after receiving a custodial sentence.<sup>32</sup> Children sentenced between the ages of 10 and 13 had particularly high reoffending rates, with over 80% reoffending overall, and over 60% reoffending by committing an offence against the person.<sup>33</sup>

The Queensland Productivity Commission’s survey of adult prisoners indicated that a quarter had been in formal contact with police by the age of 14.<sup>34</sup>

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<sup>30</sup> Bob Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018), 45 <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf>

<sup>31</sup> Victorian Sentencing Advisory Council 2019, [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover\\_Kids\\_Report\\_1.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf), 32 [4.8]

<sup>32</sup> NSW Bureau of Crime Statistics and Research Reoffending 2019, Re-Offending Statistics NSW, [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Re-offending.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx)

<sup>33</sup> Victorian Sentencing Advisory Council 2019, [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover\\_Kids\\_Report\\_1.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf) p33 [4.9].

<sup>34</sup> Queensland Productivity Commission 2019, *Inquiry into Imprisonment and Recidivism*,

## 1.8. Human rights obligations - protecting the rights of the child

In September 2019, the UN Committee on the Rights of the Child made the following General Comment:

*“Under article 40 (3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by States parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.”<sup>35</sup>*

In November 2019, the Committee recommended that Australia “raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies”.<sup>36</sup>

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<https://gpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>

<sup>35</sup> UN Committee on the Rights of the Child, *General Comment No. 24 (2019) on Children’s Rights in the Child Justice System*, CRC/C/GC/24 (18 September 2019), 21.

<sup>36</sup> UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 82<sup>nd</sup> session, CRC/C/AUS/CO/5-6 (1 November 2019) 14

## Question 2

*If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.*

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*"It should be 16, or 17. That's when you start to mature, you know what you are doing, you know right from wrong by then. Sometimes you might still get people by then that haven't been taught right from wrong." - JRNSW Youth Ambassador*

### 2.1. Our position

Consistent with medical research and international standards as outlined in our response to question one, the age of criminal responsibility should be increased to at least 14 years of age for all types of offences.

Raising the age to at least 14 years of age would eliminate the harmful criminogenic effects of interactions with the criminal justice system for 10-13 year olds and will not have an adverse impact on crime rates. International experience demonstrates that raising the age of criminal responsibility to 14 will not result in adverse effects on crime rates.<sup>37</sup>

### 2.2. Statement from the United Nations Committee on the Rights of the Child

As noted in section 1.4 of this submission, the UN Committee on the Rights of the Child has recommended that in light of recent scientific learnings and findings, State parties should increase the minimum age of criminal responsibility to at least 14 years of age.<sup>38</sup>

### 2.3. Experience of other jurisdictions

The minimum age of criminal responsibility in Australia is inconsistent with international norms. The minimum age in the European Union is 14 years, and in a survey of 86 countries worldwide, the median age was found to be 14 years of age.<sup>39</sup> In Denmark, Finland, Iceland, Norway, Sweden and Greece, the minimum age of criminal responsibility is 15 years of age and in Portugal it is 16 years of age.

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<sup>37</sup> Cunneen, Chris, 2017, *Arguments for Raising the Minimum Age of Criminal Responsibility Research Report, Comparative Youth Penalty Project*, University of New South Wales, Sydney, <https://www.cypp.unsw.edu.au/node/146>, p15

<sup>38</sup> UN Committee on the Rights of the Child, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, CRC/C/GC/24 (18 September 2019), 22.

<sup>39</sup> Cunneen, Chris, 2017, *Arguments for Raising the Minimum Age of Criminal Responsibility Research Report, Comparative Youth Penalty Project*, University of New South Wales, Sydney, <https://www.cypp.unsw.edu.au/node/146>

#### **2.4. Age should be raised for all types of offences**

In light of current medical research on the neurodevelopmental profile of young people, as outlined above, it would be logically inconsistent to allow for 'carve outs' from the minimum age of criminal responsibility for serious offences.

While serious criminal offending by 10-13 year olds requires a response, a more effective response lies outside the criminal justice system. This is discussed in responses below.

### Question 3

*If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of *doli incapax* differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of *doli incapax* be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.*

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#### **3.1. Our position**

If the minimum age of criminal responsibility is raised to 14 years of age, *doli incapax* would no longer have any application and would be redundant.

Along with the current minimum age of criminal responsibility, the principle of *doli incapax* fails to protect 10-13 year olds from the criminogenic effects of the youth justice system.

#### **3.2. Application of *doli incapax* is limited and inconsistent**

As demonstrated by Fitz-Gibbon and O'Brien the *doli incapax* presumption is applied inconsistently, particularly in regional areas, and contesting its application extends a child's involvement with the criminal justice system.<sup>40</sup> If the age of criminal responsibility is raised to 14, and *doli incapax* is rendered redundant, discussion of how it could be more effectively applied should not be the focus of this review.

We also refer the Committee to the submission from the Aboriginal Legal Service NSW/ACT (ALS) which outlines the inconsistent and unfair application of *doli incapax*. We particularly draw attention to the case studies in the submission of the ALS that illustrate the considerable time young people may spend in custody with respect to matters that are ultimately dismissed. We note the "default" intervention of the criminal law in these matters was to charge and detain young people. A less invasive, more effective and less costly alternative approach could have sought to address the behaviour with appropriate treatment and support, outside the criminal justice system. We further outline the harm detention causes in our response to Question 7.

Further, as outlined in the ALS submission, there are issues regarding the complexity of treatment for alleged behaviour when *doli incapax* is a live issue. Discussing the alleged behaviour may be an important aspect of a young person's treatment and rehabilitation. However, it is in a young person's legal interest to refrain from making comments that could potentially be used as evidence. The risk of criminal consequences may therefore prevent recourse to less invasive and more rehabilitative responses.

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<sup>40</sup> Fitz-Gibbon K and O'Brien W (2019) A child's capacity to commit crime: Examining the operation of *doli incapax* in Victoria (Australia). *International Journal for Crime, Justice and Social Democracy* 8(1): 18-33.

Further, the evidentiary burden of proving *doli incapax* is inconsistent and flawed. The examples referenced by the ALS show this and how damaging and invasive many of the techniques used to “prove” *doli incapax* can be in practice.



## Question 4

*Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.*

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*"Could be 14 that someone can get a conference but should be 16/17 to lock someone up"*

- JRNSW Youth Ambassador

### 4.1. Our position

The position of Just Reinvest NSW is that detention for children of any age is damaging and should only occur as a matter of last resort. Our view is that the minimum age of criminal responsibility should be raised to at least 14, and that when considering the detention of a child or young person *at any age*, alternative detention models should be explored.

The work of, and results from the Diagrama model from Spain is promising – as illustrated in the case study below from RMIT's Centre for Innovative Justice.<sup>41</sup>

### Alternative Juvenile Detention Model

*"Diagrama is an international non-profit organisation that pioneered an alternative juvenile detention model in Spain, building relatively small-scale residential facilities that they call 're-education centres'. The centres operated by Diagrama are wholly focused on educating young people and preparing them for release, supporting them to gain the social and formal skills needed to obtain employment and re-integrate into their local communities.*

*Another feature of the Diagrama approach is a reward system where young people quickly gain increasing levels of autonomy and access to the community. Contact and connection with family and community is strongly encouraged and supported, and families receive their own dedicated support. Young people on remand have equal access to facilities, programs and services.*

*Diagrama's broader ethos is explicitly non-punitive. They seek to pair strong boundaries and expectations around behaviour with genuine warmth, care and encouragement. This directly responds to the fact that many young people involved in the criminal justice system are there precisely because they have not experienced these. There is ever increasing awareness in Australia of how commonly children involved in offending have been exposed to poverty, family violence, intergenerational trauma, and formal Child Protection involvement, but also of how better early support for their families could have prevented this.*

*Diagrama has grown to become responsible for the care of 70% of young people in custody. They are now working to expand their model across Europe, focusing on the UK. There are many indicators of the success of the Diagrama model – one example given was that they employ far fewer staff than are usually required in juvenile detention centers, in a sector where staffing generally represents the greatest cost. The culture of the centres clearly plays a large part in this, but so does the staffing, which in turn shapes the culture. Most of the staff are educators who teach social skills through daily modelling in the*

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<sup>41</sup> RMIT Centre for Innovative Justice, 2018, *A European alternative approach to juvenile detention*, <https://cij.org.au/news-and-views/a-european-alternative-approach-to-juvenile-detention/>.

*context of their relationships with the young people. Staff are generally tertiary educated but, most importantly, are selected on the basis of their strong commitment to supporting young people's growth and education.*

*We were fascinated to hear about one aspect of the Spanish justice system, where Judges, lawyers and prosecutors are actively involved in monitoring the progress of a young person in juvenile detention post sentence. This is a fairly alien concept for Australian jurisdictions, but not impossible for us to implement. Where procedural fairness can be ensured for the young person, it's a practice that has the potential to foster a strong culture of accountability for the system and the service providers – something the NT Royal Commission confirmed is desperately needed.*

*The Diagrama approach to juvenile detention provides us with genuine inspiration in relation to how we can reorient juvenile justice systems away from a punitive culture that compounds young people's trauma and social exclusion. But the principles applied by Diagrama also reinforce the need to make that shift much more broadly across our education and social services sectors, to prevent children from being drawn into the system in the first place."*

## Question 5

*What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.*

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### 5.1. A justice reinvestment approach

*“JR is a heaps better way to deal with the number of our people in jail and juvie. If the money that was spent on keeping my family apart was spent on helping us out I know that the first 18 years of my life and all of my siblings lives would have been much easier.” - JRNSW Youth Ambassador*

Justice reinvestment (JR) is a way of working that is led by the community, informed by data and is economically responsible. A justice reinvestment framework aims to redirect funding away from the criminal justice system and diverts those funds into communities with high rates of contact with the criminal justice system, using both community-led initiatives and state-wide policy and legislative reform. JR is about creating safe and strong communities.

Nationally in 2018-19, the average cost per day per young person subject to detention-based supervision was \$1,579. In NSW, the average cost was \$1,414.<sup>42</sup> Juvenile detention is not only economically costly, it has devastating and long term social costs for that young person, their family and their community. There is little evidence that detention acts as a deterrent to youth offending and is not effective in reducing recidivism.<sup>43</sup> In recent times, the overall number of juveniles in custody has decreased, however the over-representation of Aboriginal and Torres Strait Islander juveniles in custody has continued. Resources must be directed towards early intervention, prevention and diversion along with strategies that strengthen communities.

By raising the age of criminal responsibility, funding otherwise used to detain young people could be reallocated away from prisons and into youth diversionary and family support initiatives to prevent and reduce offending.

#### The principles of a JR approach

The following principles underpin a JR approach and should underpin other strategies to support young people and their families.

**Community-led:** Self-determination and the application of Aboriginal and Torres Strait Islander culture, authority and knowledge are fundamental. Through community-led justice reinvestment, communities drive local responses to crime and build pathways away from the criminal justice

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<sup>42</sup> Australian Government Productivity Commission, *Report on Government Services 2020*, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice/rogs-2020-partf-section17.pdf>, Table 17A.21

<sup>43</sup> NSW Bureau of Crime Statistics and Research Reoffending 2019, Re-Offending Statistics NSW, [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Re-offending.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx)

system for children and young people - and their families. Resources are shifted from the criminal justice system into strategies determined by Aboriginal and Torres Strait Islander governance.

**Place-based:** We know that a disproportionately high number of young people going to prison come from, and return to, a small number of geographic areas. A place-based approach allows for the particular circumstances in communities that drive offending to be addressed. Service providers work in new, collaborative ways to meet goals identified by communities and co-design localised solutions. This means in each community, strategies and solutions will be tailored to that community and not an off-the-shelf program or service.

**Data-driven:** Data and evidence-based decision making is central to a justice reinvestment approach. At the community level, data is essential at every stage: to establish a baseline, set targets and goals, monitor the effectiveness of strategies and incorporate evidence-based improvements, and to calculate the savings realised for reinvestment back into the community. Justice reinvestment also relies on data analysis at the State level to make evidence-based decisions on options for criminal justice system policy and legislative reforms.

**Economically responsible:** With long-term investment in sustainable solutions, community-led justice reinvestment can build safer and stronger communities, and prevent young people from coming into contact with the criminal justice system. By investing in communities 'upstream', more costly responses requiring investment 'downstream' such as prison, are avoided. This - along with policy and legislative measures - can create a downward pressure on the prison population which means funds can be redirected away from the criminal justice system into initiatives that address the underlying drivers of offending.

### **CASE STUDIES: Economically responsible**

At a fraction of the cost of detaining a young person, a young person can be provided with access to mental health services, case workers, therapeutic and purposeful youth development programs, cultural connection, employment and training programs, education and learning support, or with rehabilitation programs in local communities.

The ALS NSW/ACT provides clear evidence of this through three short case studies with the cost of keeping 3 children in custody on remand. Each of these children was in need of support and intervention. This could have been provided using the more than \$622,160 that was instead spent on traumatising and detaining them.

On Jake's 10th birthday the police visited his house. He wasn't home so they found him, brought him home and asked him 26 questions which they recorded on a document. This was because the police assumed Jake would offend and *doli incapax* would be an issue. Over the next few years Jake was charged numerous times and the document was presented as evidence to rebut the presumption of *doli incapax*. On each occasion Jake was found to be *doli incapax* and the matters dismissed. By the time Jake was 14 he had spent 132 days in custody bail refused for matters that were then dismissed. At a cost of \$1414 per day, this comes to a total of \$186 648.

Shannon recently had her 12<sup>th</sup> birthday in custody. She is under the care of the Minister until she turns 18 and lives in a care placement but it's her mum she says she misses when she's locked up. Shannon loves swimming, fishing and horses. Shannon has been diagnosed with a Mild Intellectual Delay and features of FASD and ADHD and is very impulsive. Shannon was first charged at 10 years of age. Shannon has spent 175 days in custody bail refused for matters that were then dismissed. At a cost of \$1414 per day, this comes to a total of \$247, 450.

Juwarn is 13. He loves sport, particularly little athletics. He first went into custody when he was 11 years old and in his last year of primary school. Since then he has been charged a number of times and breached his bail 19 times. Juwarn has spent 133 days in custody bail refused for matters that were then dismissed. At a cost of \$1414 per day, this comes to a total of \$188, 062.

### Justice reinvestment in Australia

In 2013, Just Reinvest NSW began working with the Bourke Aboriginal community in north-west NSW on the first major justice reinvestment initiative in Australia – Maranguka. JRNSW is currently working with community members in Moree and Mt Druitt to explore whether a justice reinvestment approach would work for their communities.

Justice reinvestment in Australia has been driven predominantly by First Nations leaders and organisations, promoting self-determination through a move away from top down, "off the shelf" approaches in favour of locally designed, community driven, collaborative and holistic solutions.

A justice reinvestment approach has been recommended in numerous reports over the past decade, including the Aboriginal & Torres Strait Islander Social Justice Commissioner's Social Justice Report in 2009,<sup>44</sup> The Special Commission of Inquiry into crystal Methamphetamine and other amphetamine-type stimulants<sup>45</sup> and the Senate Standing Committee on Legal and

<sup>44</sup> Australian Human Rights Commission, 2009, *Introduction: Social Justice report 2009*, Chapter 2 Justice Reinvestment - a new solution to the problem of Indigenous overrepresentation in the criminal justice system,

<https://www.humanrights.gov.au/our-work/chapter-2-introduction-social-justice-report-2009>

<sup>45</sup> Professor Dan Howard SC, NSW Government, 2020, *Special Commission of Inquiry into crystal Methamphetamine and other amphetamine-type stimulants*- Volume 1

Constitutional Affairs, Value of a justice reinvestment approach to criminal justice in Australia, 2013.<sup>46</sup>

In its 2018 report Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, the Australian Law Reform Commission recommended that Commonwealth, state and territory governments provide support for justice reinvestment sites and for the establishment of an independent justice reinvestment body.

Justice reinvestment initiatives are taking place in a number of locations across the country, including Bourke (NSW), Cowra (NSW), Cherbourg (Qld), Doomadgee & Mornington Island (Qld), Katherine (NT), Port Adelaide (SA), Halls Creek (WA). The ACT Government has implemented a Justice Reinvestment Strategy to support their commitment to reduce recidivism by 25 per cent by 2025, and is funding two JR trials. Just Reinvest NSW is currently exploring justice reinvestment approaches in Moree and Mt Druitt. More information can be found on the Justice Reinvestment Network Australia website here.

### **Maranguka, Bourke NSW**

In Bourke NSW, Maranguka has adopted a life course approach to reduce young people's contact with the criminal justice system. Initiatives have been identified throughout a child's life starting with early childhood and parenting, moving into young adulthood and also looking at the role of men and families as custodians of culture.

There is growing recognition from the whole of the Bourke community that in addressing complex, intergenerational challenges there is a need to work across the individual, family, community, organisational and systems levels. This way of working in Bourke is being acknowledged and influencing practice and policy in other Aboriginal communities and the service system generally.

Maranguka's work has created a culture of relentless collaboration across government, NGOs and community. Collaboration is a feature in almost all the advances on the ground. The Maranguka Daily Check-ins and Maranguka Tactical Interagency meetings (see below) have led to far deeper service system collaboration and accountability leading to better outcomes for the community as there are informed and joined-up responses that reduced crime and create cost savings.

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<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/02-Report-Volume-1a.pdf>

<sup>46</sup> Commonwealth of Australia 2013, Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index)

Two initiatives of Maranguka are outlined below around a shift in policing practices and wrap around support for young people.

***Shift in policing practice: early support, prevention and diversion***

This has also seen a shift in policing practices that work with the whole community. Under the leadership of Maranguka and the Bourke Tribal Council, Maranguka holds daily check-ins. Police are focusing on early support and prevention and changing the ways they react to crime to attempt to address the causes of crime, which are often not addressed through the criminal justice system.

Daily 9:30am meetings between Maranguka, Bourke Police, and various frontline services identify people requiring immediate support. Attendees discuss issues from the previous 24 hours including, youth crime, ROSH reports, suspensions, children out on the street late, etc. Responses are immediate, and action updates are provided the following day. This process has created a culture of action, accountability and a connected and informed response to issues. It also breaks down silos through information sharing that in turn means young people receive the most appropriate response to issues that arise.

As the Police Force Local Area Commander Andrew Hurst said, Police

*“...have more ability to connect services to people who need them, rather than arresting people who have underlying issues”.*

***Wrap around support for young people***

The Maranguka Youth Support model is a voluntary support system for young people with multiple and complex needs. It aims to re-engage young people with education and build their capacity to lead successful lives, using a **‘whatever it takes’** approach. The Maranguka Check-in and Maranguka Tactical interagency meetings, the Maranguka Youth Support and Research Coordinator and the SOS Youth Coordinator are important elements and roles across all the components. Maranguka and SOS provide support to ensure services collaborate for better outcomes for children and young people and their families, as well as advocate for where there are gaps in support on a systemic and individual level.

The Four Support Components:

1. **Acute Response and Return to Community** – a strategy between Juvenile Justice, Police and Maranguka has been trialled. Under this strategy, an acute plan to stabilise a young person when returning from custody or care is developed and the young person is proactively engaged with wrap around support. The schools, services at the Maranguka Daily Check-In and Maranguka Tactical Interagency are also notified and engaged where relevant.
2. **Family Support** - A wrap around support for the whole family was co-designed by the 8 – 18 year old Working Group in 2017. The intent is to support the family to a place of empowerment and sustained change through a multi-agency approach and trust building.

3. **Our Place Program-** is a small alternative learning environment at Bourke High School for young people who have disengaged or are disengaging from school. It has four components: mastery, independence, generosity, and belonging.

4. **After Hours and School Holiday Support:** For every school holiday there is a coordinated youth service response (Involving Birrang, PCYC, Youth Off the Streets, Family Referral Service, FACS, the Pool, Police and Bourke High School) coordinated by Maranguka and involving daily activities, camps, family fun days, and a night patrol. A coordinated approach to identifying after school hours programming is also a key element to this.

Other examples of collaboration improving outcomes and support for children and young people include:

- Allied Health Subgroup – to broker solutions to address gaps in local allied health resourcing for early childhood development.
- Maranguka Tactical Interagency - all youth services, Juvenile Justice, school principals, the Aboriginal Employment and Prosperity Officer, health services and others as needed to be collectively responsive to youth issues as they arise.
- School holiday coordinated youth services response - Police have linked this to reduced youth offending over holiday periods.
- A collaboration agreement outlining a multi-pronged and cross-agency collaborative response to family violence
- Cross Sector Executive, Cross Sector Leadership Group and Maranguka Steering Group – involving government at all levels, corporates, funders, NGOs, the Australian Human Rights Commission, NSW Ombudsman, and others. These groups collaborate to remove blockages to the continued work at regional and state levels.

## 5.2. Investment in prevention and early intervention

Investment in strategies that aim to prevent a child from being exposed to police and other parts of the criminal justice system should be prioritised.

In their recent *Inquiry Into Imprisonment and Recidivism* the Queensland Productivity Commission (QPC) noted

*“Because prevention and early intervention programs address the root contributors of crime, they have enormous potential to reduce criminal offending and adult*



*imprisonment. There is empirical evidence both internationally and in Australia that early intervention approaches can work*".<sup>47</sup>

While the QPC Inquiry's focus was on the adult prison system, it noted the youth justice system can be an important pathway to the adult system. As such, early intervention in the youth justice system can prevent people progressing to adult imprisonment. QPC also noted there are many policy levers available to governments that have the potential to impact social and economic factors and address disadvantage, and that while these policies may not in themselves have a crime reduction focus, they may be very effective in reducing crime and imprisonment by addressing causal factors.<sup>48</sup>

This is part of a justice reinvestment approach: locally led strategies aligning with policy and practice reforms and initiatives to better support communities and families.

### **5.3. Initiatives aimed at early adolescence - Unique window of opportunity to influence behaviour**

Neuroscientific research demonstrates that early adolescence offers us a 'unique window of opportunity to influence behaviour'.<sup>49</sup>

*"Early childhood has been well established as a critical window for intervention but the neural transitions occurring in early adolescence suggest it is not too late for positive intervention, and may in fact be the best time for certain types. Patterns of experience in early adolescence can have many long-term effects on social, emotional, and motivational tendencies that extend across the life span. The neural plasticity that occurs during puberty creates a unique window of opportunity to influence positive and negative behavioural and developmental trajectories."*<sup>50</sup>

Raising the minimum age of criminal responsibility provides an opportunity to redesign responses to effectively address the issues driving the behaviour of children and young people, leading to better outcomes for children, their families and communities.

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<sup>47</sup> Queensland Productivity Commission, 2020, Inquiry into Imprisonment and Recidivism 2020 <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf> at p 129

<sup>48</sup> *Ibid*, p120

<sup>49</sup> UNICEF, 2017, *The Adolescent Brain: A second window of opportunity*, [https://www.unicef-irc.org/publications/pdf/adolescent\\_brain\\_a\\_second\\_window\\_of\\_opportunity\\_a\\_compendium.pdf](https://www.unicef-irc.org/publications/pdf/adolescent_brain_a_second_window_of_opportunity_a_compendium.pdf)

<sup>50</sup> UNICEF, 2017, *The Adolescent Brain: A second window of opportunity*, [https://www.unicef-irc.org/publications/pdf/adolescent\\_brain\\_a\\_second\\_window\\_of\\_opportunity\\_a\\_compendium.pdf](https://www.unicef-irc.org/publications/pdf/adolescent_brain_a_second_window_of_opportunity_a_compendium.pdf)

#### **5.4. Investment in Aboriginal Community Controlled Organisations**

*‘One of the key strengths of work in Bourke is that there are Aboriginal-led community level governance and steering bodies that can shift the balance of ownership and control back towards community.’<sup>51</sup>*

The Australian Centre for Social Innovation

There needs to be further investment in Aboriginal controlled organisations to work with Aboriginal young people, families and communities. Aboriginal people have the solutions and require adequate resources and supported to design, implement and monitor them. There also needs to be resourcing for professional development and capability building for Aboriginal organisations where there is an identified need by those organisations. This conforms with our view, experience and practice.

*“Aboriginal orgs are better, if you fund an Aboriginal controlled youth service vs a PCYC, young people will always go to the Koori service. There needs to be things funded that don’t include the police. You’re just exposing young people to more risk of getting in trouble.”*

Youth Ambassador, Just Reinvest NSW

In many communities, the Police often become the default service for young people after hours, as youth services are not funded to work after hours or flexibly. There needs to be investment in community controlled and based organisations so they can be more responsive to the needs of young people and the community.

#### **5.5. Safe places for young people**

*“Young people need a safe place they can go to, during the day time and in the evenings. Most guys get in trouble from 12am - early in the morning. They get in trouble because they need money, they’re bored, hungry, parents are arguing, need to find something to do. If I had a safe place to go, I wouldn’t have gotten in trouble when I was younger.” - JRNSW Youth*

Ambassador

In our experience, and in the lived experience of young people we work with, young people need a safe place to go when they feel unsafe. Young people tell us there is a lack of places for young people to be if they feel unsafe at home, on the streets or because of issues arising in their communities.

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<sup>51</sup> The Australian Centre for Social Innovation (TACSI), 2019, *Changing Lives: How Bourke is addressing family violence + working to ensure all families are safe, smart + strong*, p 15.

## Question 6

*Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future?*

*Do these approaches include mechanisms to ensure that children take responsibility for their actions?*

*Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.*

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There are many programs and approaches to support young people at risk of entering the criminal justice system. In our response to this question, we refer to approaches and work that has been designed and led by the community through Maranguka in Bourke. We also point to some key and overarching issues that should be considered to support young people at risk.

### **6.1. Whole of community collaboration: a place-based community led approach to supporting young people**

Maranguka has an overarching community strategy for change: *Growing our Kids up Safe, Smart & Strong*. This strategy is operationalised through the guidance of the Bourke Tribal Council and action-based Working Groups, community groups and forums that work on community priorities and have led to improved service collaboration. Maranguka has adopted a life-course approach that supports all young people (and their families), including under 10 year olds.

The Maranguka Youth Support Model, the Daily Check-ins and the Maranguka Tactical interagency outlined above all support this work.

### **6.2. Young people taking responsibility**

Restorative practices may support a young person to take responsibility for the harm they have caused, and to create avenues to repair the harm caused. For example, Jesuit Social Services' Youth Diversion Pilot Program resulted in more than 90% of participants successfully completing a diversion program and having their matter dismissed. Positive outcomes included:

- Young people demonstrating a better understanding of the impact of their offending
- Improved family and community relationships
- Re-engagement with education

- Improved mental health<sup>52</sup>

In NSW, more than 85% of victims had a positive experience with a youth justice conferences, both immediately following and in the four months after the conference occurred.<sup>53</sup>

In the communities that we work with there is strong interest to explore restorative conflict resolution practices in the justice system but also across the education system, and with more community conflicts generally.

### 6.3. Culture and community

*“What works is contact with your culture- it works for Koori kids, it’d work for other nationalities too.” - JRNSW Youth Ambassador*

More culturally appropriate approaches may have a deeper impact on young people’s sense of responsibility and responsiveness. For example, there have been suggestions in Moree that young people may be more responsive to a caution delivered by a respected community Elders. In Bourke, the inclusion of elements of community and culture in youth justice conferences has strengthened the importance of young peoples’ responsibility for their actions.

*“Cultural camps work, it takes the young person out of their environment, and shows you, you can have fun without drugs and alcohol. Teaches us tools to not be peer pressured. They work well with good role models who the kids like and respect, who they look up to in a good way.*

*Then they need to continue that contact and support. That’s what worked for me.”*

JRNSW Youth Ambassador

Many young people have said that camps, especially cultural camps for young Aboriginal children provide an important intervention for offending.

There is a need to fund Aboriginal controlled youth diversionary programs that adopt a holistic approach and focus on connection to community and culture, family relationships and broader social identity and recognise the strength in young people and communities.<sup>54</sup>

### CASE STUDY: To Reach Your Potential (TRYP)

TRYP is a boot camp that has a large focus on culture. TYRP takes kids on a seven day

<sup>52</sup> Jesuit Social Services, October 2019, *Raising the Age of Criminal Responsibility: There is a better way*, [https://jss.org.au/wp-content/uploads/2019/12/JSS0102\\_Raising\\_the\\_Age\\_There\\_is\\_a\\_better\\_way\\_v.5.1.pdf](https://jss.org.au/wp-content/uploads/2019/12/JSS0102_Raising_the_Age_There_is_a_better_way_v.5.1.pdf)

<sup>53</sup> NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin: Participant satisfaction with Youth Justice Conferencing, June 2013 <<https://www.bocsar.nsw.gov.au/Documents/CJB/cjb170.pdf>>

<sup>54</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>

program led by Uncle Col Watego, an Aboriginal soldier with 43 years' military experience. It is designed to get kids participating in physically and mentally challenging activities in a safe, controlled environment. Ultimately, the program is designed to promote confidence, discipline, respect, including self-respect, and develop the children's leadership skills.

*"We talk about being responsible for your own actions; going to school and learning, aspirations and what the kids want to achieve when they leave school.*

*The kids no longer look at ways to get out of things, they focus on the consequences of their actions." - James Moore, SOS Youth Coordinator.*

There is a strong cultural element to the program, which focuses on family, connection to culture, spirituality and a sense of belonging. There is a focus on identifying positive role models, as well as the participants becoming young leaders themselves.

Young people are given the opportunity to run their own community workshops in Bourke. This supports leadership and self-confidence.

There is an ongoing connection with Uncle Col and the mentors that come on TRYP.

There has been a noticeable difference in many of the children who have participated in the program, including youth related offences, way of relating, an increase in school attendance and a reduction in suspensions has also been recorded.

Training is required across the service sector to increase the benefits of restorative practice and to work in partnership with Aboriginal communities and leaders to implement cultural elements to support young people. This should include training to manage behaviours in a therapeutic, non-punitive, non-adversarial, trauma-informed and culturally responsive way.<sup>55</sup>

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<sup>55</sup> Adapted from NTRC Recommendation 19.1, *Royal Commission into the Protection and Detention of Children in the Northern Territory 2017*

## Question 7

*If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views and, if available, provide any supporting evidence.*

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*“You should be able to get help better in the community than you can in jail. Young people should be accessing youth workers in their community. You shouldn’t have to go to jail to get services and appointments. You should be able to get that easier out here. For some kids that really need help - every school should have it.”*

- JRNSW Youth Ambassador

Youth Justice Centres are not appropriate places to provide the support services needed by vulnerable children.<sup>56</sup> Receiving support through the criminal justice system, rather than in community and with family, should never be an intentional systemic response.

### **7.1. Meeting young peoples’ needs in their communities**

The money saved from not detaining young people should be invested in communities supporting young people.

Investing in youth services and family support, including health, education and housing and other practical support will make communities safer and stronger. This should not be a one-size fits all approach. Just Reinvest NSW advocates for a community-led, place-based and data-driven framework that is tailored to the needs of each community. Our approach to supporting community strengths through early support and prevention is discussed in detail earlier in this submission.

In the case of education, for example, young people who may have benefitted from a more structured style of education and learning if in detention, should have their needs met in community.<sup>57</sup> Young people should not have to enter custody in order to have a style of learning and school engagement that suits their needs, this principle applies to health including mental health, case management, cultural programs and any other “service”.

### **7.2. Shifting the focus of the criminal justice system**

There are ways in which elements of the criminal justice system can play a more proactive and supportive role in the lives of young people’s lives. Communities and police can work together to

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<sup>56</sup>Cunneen, Chris, 2017, *Arguments for Raising the Minimum Age of Criminal Responsibility Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney*, p11

<sup>57</sup> Advocate for Children & Young People, 2019, *What children and young people in juvenile justice centres have to say*, <https://cdn2.hubspot.net/hubfs/522228/docs/ACYP-Juvenile-justice-report-2019.pdf> - In this report, children made reference to the fact that they benefitted from learning in juvenile detention due to the size of the classes, the focused attention, flexibility for different styles of learning and an emphasis on practical and vocational learning to equip them for future employment.

ensure that young people and their families get the support they need at a point of risk or conflict. For example, the Daily Check-Ins (outlined above in Q5) at Maranguka in Bourke shifts police practice to support young people *outside* the criminal justice system.

## Question 11

*Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.*

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### 11.1. The Role of Young People

Involving young people in the development, design, implementation and evaluation of diversionary options, support and community-change is a central to Just Reinvest NSW's work and premised on our belief and understanding "young people are the experts of their own experiences and that not only services, but society as a whole benefits when young people are active, empowered participants."<sup>58</sup>

Having the active participation of young people with lived experience of the criminal justice system should be valued as an opportunity for the NSW government, NGOs and community in providing youth diversionary options. Young people who have faced challenges, barriers and adversity, 'are in a unique position to be able to reflect on their experiences and offer valuable insights into system reform.'<sup>59</sup>

The Northern Territory Royal Commission into Youth Diversion and Child Protection (NTRC) also highlighted this. Recommendation 2.1 called for a legislated Council of Children who have been in out of home care and the youth justice system to express views of legislation and policy affecting young people in those systems.<sup>60</sup>

#### **CASE STUDY: Maranguka Youth Advisory Council (MYAC)**

The MYAC was established in 2016. MYAC is a way for young people in Bourke to take ownership of the change they want in Bourke and have a strong voice in the community. Maranguka is informed by young people in Bourke and works with the MYAC to make sure the service sector and community are listening and taking action. The MYAC has discussed suspensions, policing, youth diversionary options, local infrastructure and youth-led projects.

*"It's all about giving them a voice . . . In the past, young people never had a say in anything."*

James Moore, SOS Youth Coordinator, Bourke

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<sup>58</sup> Jessica Crofts, Sally Beadle, Helen Cahill and Katherine Romei, October 2017, *The Y-Change Project: Innovation in youth participation, youth leadership and social change: An evaluation of the 2016 pilot phase*, Melbourne Graduate School of Education, [http://education.unimelb.edu.au/\\_data/assets/pdf\\_file/0003/2520354/y-change-berry-street-publication.pdf](http://education.unimelb.edu.au/_data/assets/pdf_file/0003/2520354/y-change-berry-street-publication.pdf), p4

<sup>59</sup> *Ibid.* p5

<sup>60</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory 2017*, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>



## 11.2. The role of education as a protective factor

Education is a well-known protective factor in a child's life. Maintaining a connection with school can ensure that a young person is learning, engaged, occupied and has more opportunities and options when leaving school.

We also know that there is a strong link between school disengagement and interactions with the juvenile justice system. School suspension is a key element of the 'school-to-prison pipeline', which sees marginalised and excluded young people at an increased risk of juvenile and, eventually, adult incarceration.<sup>61</sup>

There are multiple reports that point to the harm in school-initiated disengagement including suspensions, expulsions and partial attendance, and the strong relationship between external school suspension and a range of behaviours detrimental to the health and wellbeing of young people, including antisocial and violent behaviour.

We also know that Aboriginal and Torres Strait Islander children are almost twice as likely as non-Indigenous children to have a disability requiring assistance in school, and they are significantly more likely to be suspended<sup>62</sup> and that the highest rates of suspensions are in regional and remote areas of NSW.

The barriers for Aboriginal and Torres Strait Islander children to education in NSW are complex and multifaceted. In its recent review of the NSW OCHRE strategy's Connected Communities schools initiative, the NSW Ombudsman made the following comment:

"[F]inding solutions to better support vulnerable children and young people in high-need communities, and improve their educational outcomes, is not solely Education's responsibility. Schools can be powerful change agents, but on their own, they cannot address the complex barriers to educational participation and achievement that face vulnerable students or be expected to turn around entrenched disadvantage in a community – the broader service system must share this responsibility."<sup>63</sup>

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<sup>61</sup> See Australian Institute of Criminology: *Positive associations between school suspension and student problem behaviour: Recent Australian findings* (2017) (Sheryl A Hemphill, David J Broderick and Jessica A Heerde) at <https://aic.gov.au/publications/tandi/tandi531>. See also BOCSAR *Screening juvenile offenders for further assessment and intervention* (2007) at <https://www.bocsar.nsw.gov.au/Documents/CJB/cjb109.pdf>, Justice Health: *Young people in Custody Health Survey* (2015) <http://www.juvenile.justice.nsw.gov.au/Documents/2015%20YPICHS.pdf>, New South Wales Ombudsman, *Inquiry into Behaviour Management in Schools* (Special Report, August 2017) and New South Wales Ombudsman, October, 2019, *OCHRE Review*, [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0005/74183/OCHRE-Report\\_October-2019.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/74183/OCHRE-Report_October-2019.pdf) pp 250-252.

<sup>62</sup> New South Wales Ombudsman, *Inquiry into Behaviour Management in Schools* (Special Report, August 2017), 49-50

<sup>63</sup> New South Wales Ombudsman, October 2019, *OCHRE Review*, [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0005/74183/OCHRE-Report\\_October-2019.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/74183/OCHRE-Report_October-2019.pdf), 248.

Members of the Maranguka Youth Advisory Council in Bourke have stated that school suspensions make it difficult to catch up, leading young people to further disengage from school, and that most people would rather not have that time away from school.

Through our work with the Moree community, young people (and their families as well as many frontline services) are also asking for in-school suspension rather than being forcibly excluded from learning.

### **11.3. Better support for trauma-informed AOD and mental health services**

Justice reinvestment is about addressing the drivers of crime including alcohol and other drug (AOD) use and mental health issues. Failure to address these drivers through appropriate healing, reparation and culturally appropriate rehabilitation services for young people and their families contributes to one of the surest pathways to prison.

To support young people (and their families) in the community (rather than in the prison system), funding and resourcing of culturally safe and trauma-informed AOD and mental health services must be increased. The link between AOD misuse and the impact of colonisation on Aboriginal people is well documented. State-sanctioned practices including child removals, loss of connection of family and country and the consequential intergenerational trauma and unaddressed mental health issues are widely recognised as triggers of self-medication and substance abuse.

The work and initiatives of Maranguka in Bourke are informed by the lived experiences and expertise of community as agents. A trauma-informed approach underpins community *Safe Smart Strong* strategy. While addressing AOD and mental health issues is an ongoing focus across the Maranguka Working Groups, there is still a shortage of trauma-informed AOD and mental health services in Bourke, especially for young people. Efforts to address this gap include the provision of healing workshops, the Orana/Weigelli Hub and the funding of a child mental health nurse, and this is an ongoing focus of future work.

### **11.4. A culturally safe care and protection system**

Young people with lived experience of the care and protection system are over-represented in the juvenile and adult justice systems. Aboriginal people are additionally over-represented in this system. More involvement of Aboriginal young people and their families is required to redress this imbalance and create pathways for change.

'Care criminalisation' refers to the relationship between child welfare and justice systems and the processes by which children in out of home care (OOHC) become involved in the criminal justice system.<sup>64</sup> We need greater investment and support in the care and protection sector to reduce the contact of young people with the criminal justice system.

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<sup>64</sup> Katherine McFarlane, 2015, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system*, University of NSW, pp3-5

Care and protection workers need to be culturally aware, create culturally safe environments, but also to actively empower young people to connect to culture.<sup>65</sup>

We refer CAG to the principles of safe Aboriginal case management identified through Aboriginal Child, Family and Community Care State Secretariat which includes tailored, holistic, strengths-based, empowering, integrated, accountable and culturally competent practices to achieve positive outcomes for Aboriginal children and young people.<sup>66</sup> We also refer CAG to the significance of self-determination as a key principle.<sup>67</sup>

Raising the age of criminal responsibility should also lead to reforms in the care and protection system. As outlined several times in this submission, young people need a safe and supportive place to go, especially young children 10-13. Young people living in residential OOHC are much more likely to come into contact with the criminal justice system than their peers,<sup>68</sup> and that contact occurs earlier.<sup>69</sup>

According to Dr Katherine McFarlane:

*'The nexus between OOHC and offending behaviour highlights the importance of a coordinated response from both welfare and justice agencies to the cohort's involvement in the justice system if the accumulation of risk factors - including those peculiar to the OOHC system - are not to increase the cohort's risk of involvement in crime and chances of recidivism. However... criminalising practices operating within the OOHC system escalated children into the criminal justice system for offences that would not have led to police involvement if they had occurred at home. The two factors - being in OOHC and offending - then exacerbated each other. Agencies' failure to work effectively together in the child's best interests further contributed to their poor long-term outcomes.'*

Dr. Katherine McFarlane has referred to the 'institutional neglect and indifference' towards children in OOHC identified by Royal Commissioner Justice Wood almost 20 years ago."<sup>70</sup>

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<sup>65</sup> Aboriginal Child, Family and Community Care State Secretariat, *Aboriginal Case Management Policy, Rules and Practice Guidance Strengthening Aboriginal families, delivering outcomes for Aboriginal children and young people*, AbSec Sector Conference 22 November 2017

<sup>66</sup> Aboriginal Child, Family and Community Care State Secretariat, 2017, *Aboriginal Case Management Policy Workshop Report 5 and 6 June 2017*, [https://www.absec.org.au/images/downloads/AbSec\\_Aboriginal-CMP-Workshop-5-6-June-2017-final-report.pdf](https://www.absec.org.au/images/downloads/AbSec_Aboriginal-CMP-Workshop-5-6-June-2017-final-report.pdf) p7

<sup>67</sup> *Ibid.*

<sup>68</sup> FACS, 2017, *Fact Sheet: Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system*, [http://www.community.nsw.gov.au/\\_data/assets/file/0010/408691/Factsheet\\_JP.pdf](http://www.community.nsw.gov.au/_data/assets/file/0010/408691/Factsheet_JP.pdf)

<sup>69</sup> Katherine McFarlane, 2015, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system*, University of NSW, <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:38185/SOURCE02?view=true>, p129

<sup>70</sup> Katherine McFarlane, 2015, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system*, University of NSW, p17

## 11.5. A safe and supportive place to go

Children and young people have a right to be safe. If the age of criminal responsibility were raised, we need safe places that young people can access when they are coming into contact with the police.

His Honour Judge Mark Marien, former President of the NSW Children's Court observed the lack of bail accommodation for children has been a long-standing problem in NSW, especially in regards to children in OOHC. '[O]ften the young person will remain in custody bail refused until appropriate accommodation can be found... some argue (with justification) that these young persons remain improperly in custody essentially for welfare reasons rather than justice-related issues.' His Honour further said, 'the detention of such children (who would otherwise be released on bail) because they have no appropriate bail accommodation starkly demonstrates the 'need' v 'deed' dichotomy and how the criminal justice system may be inappropriately used for essentially welfare issues.'<sup>71</sup>

We also refer CAG to an initiative from Their Futures Matters - A place to go is<sup>72</sup>, that is trialling alternatives.

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<sup>71</sup> *Ibid.* p155

<sup>72</sup> NSW Government Communities & Justice, *A Place to Go*,  
<https://www.theirfuturesmatter.nsw.gov.au/our-initiatives/a-place-to-go>

## Appendix 1

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### **Maranguka: the first major justice reinvestment initiative in Australia**

Maranguka is a model of Indigenous self-governance guided by the Bourke Tribal Council. Maranguka partnered with Just Reinvest NSW in 2013 to develop a 'proof of concept' for justice reinvestment in Bourke. The first stage of Maranguka focused on building trust between community and service providers, data collection, identifying community priorities and 'circuit breakers'. During the next phase, a shared vision, goals and measurement system were developed as part of the community's strategy: *Growing our Kids Up Safe, Smart and Strong*. The Priorities identified included: Early Childhood and Parenting, 8-18 year olds, and the Role of Men, as well as service sector reform.

The development and the implementation of *Growing our Kids Up Safe, Smart and Strong* Strategy underpins the framework of the community-led and place-based initiative.

Quarterly Working Groups bring community, government and service providers together to deliver the community developed and led strategy, changing the way government, NGOs and community members service and support the community. A Cross Sector Executive meets quarterly to authorise and facilitate the work on the ground in Bourke.

Maranguka and the working groups have undertaken the following activities designed to create change within the community and the justice system: Aboriginal leaders inspiring a grassroots movement for change amongst local community members, facilitating collaboration and alignment across the service system, delivering new community based programs and service hubs, and partnering with justice agencies such as the police, to evolve their procedures, behaviour and operations towards a proactive and reinvestment model of justice.

KPMG calculated the savings generated in 2017 by the collaborative efforts in Bourke at \$3.1 million – 2/3 in justice savings and 1/3 broader economic impact to the region. This economic impact was five times greater than the operational costs of Maranguka in 2017. KPMG estimates that if just half the results achieved in 2017 are sustained, Bourke could deliver an additional economic impact of \$7 million over the next five years.