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Centre for Crime,
Law & Justice

REPLACING THE YOUTH JUSTICE SYSTEM FOR CHILDREN AGED 10-13 YEARS IN NSW: A ‘BEST INTERESTS’ RESPONSE

A report completed by researchers at the Centre for Crime, Law and Justice,

Faculty of Law and Justice, UNSW

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CONTENTS

About the Centre for Crime, Law and Justice 4
Report authorship 4
Terms of Reference 4
Previous Research by CCLJ researchers 5
The Comparative Youth Penality Project (CYPP) 5
The Australian Justice Reinvestment Project (AJR Project) 5

Executive Summary 6

1. INTRODUCTION 8

1.1 Background 8
1.2 Methodology 10

2. GUIDING PRINCIPLES AND KEY STATISTICS 10

2.1 Foundations for Identifying Best Practice 10
2.1.1 Taking crime prevention and community safety seriously 10
2.1.2 International human rights standards as a primary touchstone 11
2.1.3 Addressing Aboriginal and Torres Strait Islander over-representation; respecting self-determination 12
2.1.4 Justice Reinvestment 12
2.2 Evidence on the nature and scale of justice involvement 14
2.2.1 'Offending' by 10-13 year old children 14
2.2.2 Court-ordered detention and supervision 16

3. INTERNATIONAL APPROACHES 18

3.1 Overview 18
3.2 A Guide to Best Practice? 20

4. RISK ASSESSMENT, EARLY INTERVENTION AND THERAPEUTIC RESPONSES: ARE THEY NON-CRIMINALISING? 20

4.1 The Rationale for Therapeutic Responses 22
4.2 Individual Therapeutic Interventions 23
4.2.1 Cognitive Behavioural and skills training programs 23
4.2.2 Motivational Interviewing 23
4.2.3 Mentoring 23
4.3 Family Therapeutic Interventions 24
4.3.1 Multisystemic Therapy 24
4.3.2 Functional Family Therapy 24
4.4 Our Preferred Focus: Support and Advocacy 24

5. LOCAL COMMUNITY-BASED PROGRAMS IN NSW 25

5.1 Deadly Connections 26
5.2 Weave Youth and Community Services 26
5.3 Walgett Action Plan for Children and Young People 27

5.4 Maranguka, Bourke 28
5.5 BackTrack Youth Works 30
5.6 Mt Druitt OzTag Team 30
5.7 Community Patrols 31
5.8 Optimism and Caution 32

6. TOWARDS A 'BEST INTERESTS' RESPONSE? 33

6.1 Principles for Developing a Best Interests Response 34
6.1.1 A strong network of services in communities 35
6.1.2 Improving policing practices and reducing contacts with young people 35
6.1.3 Strengthening interagency collaboration 36
6.1.4 Quality and responsivity of service provision and relationships 37
6.1.5 Connecting to 'child protection' responses 37
6.1.5.1 MCT-CAN and FFT-CW 38
6.1.6 Avoiding Care-Criminalisation 39
6.2 The Challenge of Engagement 39
6.2.1 Protecting the Human Rights of Children 41

7. INTERIM MEASURES 41

7.1 Improve Diversion 41
7.2 Addressing Racialisation 42

8. CONCLUSION 44

BIBLIOGRAPHY 46

About the Centre for Crime, Law and Justice

This report was prepared by members of the Centre for Crime, Law and Justice (CCLJ), a research centre at the University of New South Wales. CCLJ was established in 2018, building on a long tradition of criminal justice research and scholarship at UNSW. The Centre produces high quality scholarship on important topics in criminal law, criminal justice, criminology and crime prevention that are of pressing local, national and international significance. Core themes for the Centre's research are: the relationship between criminal justice administration and social justice and human rights; and the relevance of race, Aboriginality, gender, disability and socio-economic disadvantage to victimisation, criminalisation, the criminal process and punishment. CCLJ researchers have expertise in: multiple dimensions of youth contact with the criminal justice system,[1] including the impact of coercive police practice on young people,[2] the effects of detention and imprisonment,[3] and in alternatives to conventional criminalisation and criminal justice system approaches.[4]

CCLJ also has a strong focus on effective knowledge transfer and advocacy for policy and law reform outcomes that enhance social justice. Engagement and partnerships with NGO and government organisations is an important feature of our work.

Report authorship

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Research assistance for this report was also provided by CCLJ student interns, Isaac Kwong and Maddison Buchholz.

Terms of Reference

The Public Interest Advocacy Centre (PIAC) is part of a coalition of organisations supporting the *Raise the Age* campaign,[6] which advocates raising the minimum age of criminal responsibility (MACR) in NSW (and all Australian states and territories) from 10 years old to at least 14 years old in accordance with international norms and the provisions of global human rights standards. In February 2021, PIAC asked CCLJ to prepare a report on best practice for addressing the behaviours of children in NSW aged 10-13 years that are currently bringing them into contact with the criminal justice system under the existing MACR.

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[1] Goldson et al., 2020.
[2] Grewcock and Sentas, 2019; Sentas & Pandolfini, 2017.
[3] Cunneen et al., 2013.
[4] Brown et al., 2016.
[5] Others CCLJ researchers have contributed indirectly to the report through their published work.
[6] URL: https://www.raisetheage.org.au/organisations

Previous Research by CCLJ researchers

Two research projects involving CCLJ members (and their collaborators) have been especially influential in framing our approach to this report.

The Comparative Youth Penality Project (CYPP)

This project aimed to understand developments in the punishment of children and young people, and to examine changes in penal culture with respect to young people in contact with youth justice systems. It undertook a 'comprehensive overview and comparison of penal policy and practice across four Australian states (NSW, Victoria, Queensland and Western Australia) and internationally with England and Wales.'

The CYPP project involved a 'multidisciplinary approach with expertise drawn from law, social work, sociology, social policy, criminology and penology' and 'a mixed-methods research methodology including legal research, documentary analysis, qualitative interviews and quantitative analysis in order to provide an in depth overview of the key legal, policy, social and cultural dimensions of change from the 1980s to the present.'[7]

The project produced multiple publications, many of which were valuable resources for this report, especially:

- Barry Goldson, Chris Cunneen, Sophie Russell, David Brown, Eileen Baldry, Melanie Schwartz and Damon Briggs, *Youth Justice and Penality in Comparative Context.* Routledge, 2020 (hereafter Goldson et al., 2020).

The Australian Justice Reinvestment Project (AJR Project)

This project examined 'the characteristics of Justice Reinvestment programs used in other countries which reduce spending on prisons and reinvest the savings in high crime communities to reduce crime and build community services.' The primary aim of the AJR Project was to 'undertake a thorough examination of the theoretical foundations of Justice Reinvestment and its suitability to the Australian penal context.'[8]
The project produced multiple publications, and the following book was an especially valuable resource for this report:

- David Brown, Chris Cunneen, Melanie Schwartz, Julie Stubbs and Courtney Young, *Justice Reinvestment: Winding Back Imprisonment*. Palgrave Macmillan, 2016 (hereafter Brown et al., 2016).

[7] https://www.cypp.unsw.edu.au/node/128. This project was funded by an Australian Research Council Discovery Project Grant (DP130100184).
[8] https://justicereinvestment.unsw.edu.au/. This project was funded by an Australian Research Council Discovery Project Grant (DP130101121).

EXECUTIVE SUMMARY

Harm prevention and community safety are important public policy objectives. One of the ways that governments pursue these goals is by committing significant resources to state criminal justice system institutions. Recognition that child 'offenders' should not be treated in the same way as adults has a long history – hence the creation of a discrete 'youth justice system' which dates back more than a century in NSW. However, there is growing recognition that even in the modified form in which the NSW criminal justice system operates in relation to children, **criminalisation is not the best practice response** to children who engage in 'offending behaviour'.[9]

For the purpose of this report we analysed applicable international standards that set out the human rights of children and reviewed relevant cross-disciplinary research literature (in Australia and internationally). We also undertook an exploratory survey of selected youth well-being programs led by non-government organisations in NSW.

The available evidence (in Australia and internationally) shows that mechanisms based on *criminal responsibility* and *criminalisation* – holding a child criminally responsible for their conduct and engaging the authority of the criminal justice system to impose sanctions (or other consequences) – are ill-suited to meeting the goals of harm prevention and community safety.

Contact with the criminal justice system routinely does children (and the wider public) more harm than good. It is 'criminogenic': it produces rather than reduces 'offending behaviour'. **The current minimum age of criminal responsibility in NSW – 10 years of age – *facilitates* early criminalisation**. Research such as the Comparative Youth Penality Project (Goldson et al., 2020) has shown that, in pursuit of effective future crime prevention, **behaviours of children that are currently treated as 'offending' are better characterised as indications of *need*.** This is not simply a matter of semantics. An effective response to identified need will have very different characteristics than an approach based on the 'criminality' of the child.

The international knowledge base supports replacing the current youth justice system with a **new approach for 10-13 year olds, with a strong 'best interests' orientation.** 'Best interests', in this context, refers to both the best interests of young children *and* the wider public. First, it refers to the concept of 'best interests of the child', which is an internationally recognised principle for framing law, policy and action on matters affecting

[9] It is challenging to describe the behaviours which currently bring young children into contact with the youth justice system in a way that avoids labelling them 'criminal', without trivialising such behaviours. In this report we adopt the phrase 'offending behaviour' on the basis that, although imperfect, it accurately captures the transgressions for which a replacement response is required.

children. Second, it refers to the fact that **a non-criminalising response to 'offending behaviours' by young children is the most *effective* approach and, therefore, in the *best interests of the wider public*.**

Current youth justice system interventions – including those that are underpinned by damaging 'risk' assessment and 'early intervention' paradigms and a tendency towards pathologisation of child 'offenders' – should be replaced with a suite of non-criminalising responses supported by a partnership of local community organisations and multiple state agencies, across health, education, housing and child services.

The replacement response which we recommend is underpinned by a **community empowerment model of 'justice reinvestment'** of the sort supported by the research of the Australian Justice Reinvestment Project (Brown et al., 2016). Consistent with this strong concept of justice reinvestment, respect for the self-determination of Aboriginal and Torres Strait Islander peoples and communities is an essential ingredient of a genuine replacement for the current youth justice system for children aged between 10 and 13 years.

Replacing the current youth justice system with a **non-criminalising, multi-agency, best interests-oriented response** to 'offending behaviours' by young children – with a central role for local community organisations – may appear to represent a radical proposal. But it also represents the logical evidence-based extension of a long-term commitment to keeping children *out* of the youth justice system via diversion wherever possible – a policy to which the NSW Government is already committed (NSW Government 2019).

The research reviewed for this report provides a basis for confidence that replacing the current youth justice system with a non-criminalising, multi-agency, best interests-oriented response to 'offending behaviours' – supported by a community empowerment model of justice reinvestment – need not be seen as an exercise that is too big or too expensive, or starting from scratch. Services and methods of intervention that are oriented towards physical and mental well-being, education and family support (as distinct from punishment) already exist in NSW, and there is **no reason why criminalisation should be a pre-condition for accessing such constructive non-punitive solutions**. In addition, this report further shows that organisations with the commitments and expertise to support a best interests response for children under the age of 14 also already exist.

We do not underestimate the resource re-allocation and capacity enhancements that a best interests replacement approach will require. Service delivery innovation will also be required to finds way to ensure that children engage with the organisations whose support they require, without relying on the coercive power of the state's youth justice system. Despite these challenges the evidence suggests that a government with the required political will can be confident that a **replacement approach for children aged 10-13 years is both desirable and realisable**.

1. INTRODUCTION

1.1 Background

Raise The Age is a national campaign supported by a coalition of more than 70 organisations that seeks to raise the minimum age of criminal responsibility (MACR) in all Australian jurisdictions from 10 years old to at least 14 years old:

> *Children aged 10 to 13 years old are going through significant growth and development, and treating them like criminals through early contact with the criminal justice system can lead to irreparable harm and long term damage.*[10]

A major campaign driver is the disproportionate impact of the criminal justice system on Aboriginal and Torres Strait Islander children:

> *Aboriginal and Torres Strait Islander children have a right to grow up connected to culture and in a safe and healthy environment, supported to remain with their families and communities. The low age of criminal responsibility disproportionately impacts these children and is a key driver of their contact with police and the justice system. In 2019, 65 percent of children in detention in Australia aged 10 to 13 years were Aboriginal and Torres Strait Islander children. Raising the age of criminal responsibility would have an immediate and generational impact on the over-incarceration Aboriginal and Torres Strait Islander people in Australia and its consequences, including increasing the likelihood of reducing the rate of overrepresentation of Aboriginal children in the criminal legal system, which is a Closing The Gap target.*[11]

The Public Interest Advocacy Centre (PIAC) is one of the NSW-based organisations that are part of the *Raise The Age* coalition, working together with organisations including the Aboriginal Legal Service NSW/ACT, Just Reinvest NSW and the Royal Australasian College of Physicians. PIAC and its coalition partners recognised that we are at an important point in the policy reform cycle in Australia. One jurisdiction, the Australian Capital Territory, has formally announced an intention to increase the MACR from 10 to 14 years, and has commenced a consultation process.[12] At the same time, the work of the COAG Age of Criminal

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[10] URL: https://www.raisetheage.org.au/about

[11] URL: https://www.raisetheage.org.au/cag-statement

[12] The ACT Government released a discussion paper on 23 June 2021 (ACT Government 2021) which invited submissions on key questions: https://yoursayconversations.act.gov.au/raising-minimum-age-criminal-responsibility.

Responsibility Working Group has apparently come to end, having 'identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour.'[13] At the time of this statement (July 2020), the NSW Attorney-General's public position was reported as follows:

> *If there is a move to raise the age of criminal responsibility you have to identify what is the alternative for children who would otherwise be subject to the criminal justice process … And that is where further work needs to be done. What are the therapeutic interventions the behaviour interventions, the social support, the educational interventions that offending children need if they are not going to be dealt with by the criminal justice system?* (Ralston and Whitbourn, 2020)

The quote provides important information about the context in which this report was completed. The stated position tends to assume that raising the MACR will yield *deficits* and, therefore, cannot be contemplated unless 'alternative' responses are in place to do the work of the criminal justice system. While we embrace the opportunity to contribute to the conceptualisation of a suite of responses that *replace* the existing youth justice system for 10-13 year olds, our starting position is quite different: raising the MACR will yield *benefits*, including for children, their families and the wider community.

This report does not rehearse the normative arguments in favour of raising the age of criminal responsibility. These have been well ventilated elsewhere (e.g. Nowak, 2019; Cunneen, 2017)[14] and underpin the position of the United Nations Committee on the Rights of the Children that all state parties to the Convention on the Rights of the Child (including Australia) should the raise the MACR to at least 14 years of age.[15] Rather, we were invited to undertake a desktop review of the Australian and international research literature on best practice responses to 'offending behaviour' by children under 14 years, including therapeutic, educational, and community-based 'social support' alternatives to the current youth justice system in NSW.

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[13] Council of Attorneys-General, *Communique,* 27 July 2020 https://www.ag.gov.au/sites/default/files/2020-07/Council%20of%20Attorneys-General%20communiqu%C3%A9%20%E2%80%93%20July%202020.pdf. COAG has been replaced by the Meeting of Attorneys General, and the MACR is not currently on the new body's list of 2021 priorities: https://www.ag.gov.au/about-us/who-we-are/committees-and-councils/meeting-attorneys-general

[14] See also the multiple submissions to the former Council of Attorneys-General, available at: https://www.raisetheage.org.au/cag-submissions.

[15] United Nations 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. Since ratifying the UNCRC in 1990, Australia has been repeatedly questioned by the United Nations Committee on the Rights of the Child about Australia's very low MACR (see the Concluding Observations to the periodic reports of Australia dated 21 October 1997, CRC/C/15/Add.79; 20th October 2005, CRC/C/15/Add.268; 28th August 2012 CRC/C/AUS/CO/4; and 27th September 2019, CRC/C/AUS/CO/5-6.). In its last Concluding Observations on the situation of children's rights in Australia, the Committee '*urged [Australia] to raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years*'. (Committee on the Rights of the Child (2019). Concluding observations on the combined fifth and sixth periodic reports of Australia. CRC/C/AUS/CO/5-6.) The average MACR in the European Union is 14 years of age, which demonstrates that this MACR, set by international child rights standards, is achievable for Australia (Brown & Charles 2021; Weijers, 2016).

1.2 Methodology

The desktop review undertaken for this report involved collecting and analysing three main bodies of work:

a) the Australian and (English language) international peer-reviewed literature across a variety of disciplines including law, criminology, youth studies, social work, psychology and history;

b) relevant international guidelines, government reports, and non-governmental organisation reports; and

c) statistical data from the NSW Bureau of Crime Statistics and Research.[16]

We also consulted directly with a small number of stakeholders who have knowledge about non-criminalising responses and community-based programs in NSW, to gather information that is not otherwise available in the published literature.[17]

2. GUIDING PRINCIPLES AND KEY STATISTICS

2.1 Foundations for Identifying Best Practice

Drawing on our collective expertise in the fields of criminology, crime prevention, criminal law, policing youth justice, penology and human rights – and our review of the scholarly literature for the purpose of this report – we identified four foundational principles for informing research and policy making in relation to raising the MACR.

2.1.1 Taking crime prevention and community safety seriously

Resistance to raising the MACR to 14 years of age mainly lies within two main issues: i) a concern that raising the age will leave 'offending behaviours' by young children unchecked; and ii) a fear that the decriminalisation of 'offending behaviours' for children under the age of 14 years will compromise community safety, especially with regard to violent offences.

It is essential that such concerns are acknowledged. The approach adopted in this report is consistent with a long tradition, in progressive criminology and criminal justice research, of taking crime, crime fears and crime prevention seriously, while also subjecting the criminal law, and the institutions and practices of the criminal

[16] We acknowledge the assistance provided by the NSW Bureau of Crime Statistics and Research in the form of the provision of age-specific data.
[17] We acknowledge: Ken Zulumovski, Gamarada Universal Indigenous Resources and Gamarada Indigenous Healing and Life Training Pty Ltd; Jessica Brown, Sarah Hopkins, Nicole Mekler and Terleaha Williams, from Just Reinvest NSW; and Dominique Vu, NSW Youth Justice.

justice system to critical scrutiny (for example, in Australia, Hogg, 1988; Brown and Hogg, 1992; McNamara, 1992; Hogg and Brown, 1998; Lee, 2007; Lee, Jackson and Ellis, 2020).

Advocacy for a change to the MACR does not involve condoning or minimising the 'offending behaviours' of some young children. On the contrary, the goal is to adopt ways of responding to such behaviours that are *more effective* than approaches based on criminal responsibility and criminalisation have proven to be.

2.1.2 International human rights standards as a primary touchstone

'Offending behaviour' by children should be addressed in a manner that is consistent with international human rights standards and guidelines. A central principle is contained in Article 3.1 of the *United Nations Convention on the Rights of the Child* (1989) (ratified by Australia in 1990):

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,* ***the best interests of the child*** *shall be a primary consideration* (emphasis added).

The *United Nations Guidelines for the Prevention of Juvenile Delinquency* (1990) are another important touchstone. Its fundamental principles include:

> *2. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood. ...*
>
> *5. The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognized. These should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others. ...*
>
> *6. Community-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort.*

The Comparative Youth Penality Project has emphasised that an approach that embraces human rights principles and guidelines should not be seen as in tension with a desire for effective responses from a crime prevention or community safety point of view:

A common misunderstanding relating to human rights discourse and youth justice and penality is such to imply that to respect 'best interests' principles and recognise the human rights of children and young people in conflict with the law, is somehow tantamount to compromising effective practice, neglecting the public interest and undermining the imperatives of crime reduction. In actual fact, precisely the opposite obtains and there is strong correspondence between key provisions of global human rights standards and well-established messages from the inter-national and national youth justice knowledge-bases that point to vital elements of effective practice. In other words, if youth justice policy-makers are to observe, and to act in accordance with, the knowledge/evidence-bases – in order to implement effective practice and comply with 'what works' principles – they must necessarily take account of, and ensure compliance with, key provisions of global human rights standards. (Goldson et al., 2020: 195; see also Goldson, 2019)

2.1.3 Addressing Aboriginal and Torres Strait Islander over-representation; respecting self-determination

Nationally, in 2019-2020, 53% of 10-17 year old children in 'youth detention' (that is, prisons for children), and 49% of 10-17 year old children under community-based supervision, were Aboriginal or Torres Strait Islander persons. Over-representation is more pronounced for children aged 10-13 years (Australian Institute of Health and Welfare, 2021). Given the history of the criminal justice system's relationship to colonisation and the violent dispossession of Aboriginal and Torres Strait Islander peoples, and the grossly disproportionate burden of harm carried by Aboriginal and Torres Strait Islander children, families and communities under the current MACR and youth justice system, decolonisation and support for Indigenous self-determination are essential to any proposals for change to the status quo. The connection between MACR policy reform and wider Aboriginal and Torres Strait Islander peoples' political aspirations should be regarded as a strength and an opportunity, rather than a constraint or barrier.

2.1.4 Justice Reinvestment

In 2017 the Australian Law Reform Commission called for governments to embrace justice reinvestment as an opportunity to effect a paradigm shift away from chronic over-imprisonment of Aboriginal and Torres Strait Islander people (ALRC 2017 ch 4). We recognise that 'justice reinvestment' (JR) is a contested and controversial paradigm (Willis and Kapira 2018), including because it is often to applied to modest 'reforms' within the conventional criminal justice system rather than to genuine replacements for criminalisation, and a

divestment from the criminal justice system. The JR label is sometimes applied to initiatives and programs to sell or 'dress up' what are really just modest tinkerings with the conventional criminal justice system – whether adult or youth. This is not the sense in which we encourage engagement with JR. We embrace the Australian Justice Reinvestment Project's conception of justice reinvestment – one that is defined by a genuine commitment to community building and empowerment, and a redirection of justice system-allocated funds into community-based solutions:

> *… [T]here is a distinction that can be made between 'top-down' and 'bottom-up' approaches to public policy development and implementation, and considers how place-based approaches might coalesce with a social justice vision of justice reinvestment. A social justice vision includes a commitment to a process of democratisation and empowerment; the satisfaction of human physical, social and economic needs; and respect for human rights (including principles of fairness, equity and non-discrimination). We also note the danger of reframing basic government obligations to meet human needs around housing, health, education and employment within a discourse of crime prevention, rather than seeing the satisfaction of these needs as fundamental human rights. A key element of a bottom-up approach is that policy priorities, linkages and service delivery models are determined through community decision-making and negotiated with different levels of government. In contrast the state-based JRI approach has been largely top-down and the local democratic participatory focus of justice reinvestment has been lost.* (Brown et al., 2016: 243)

To be clear, in our assessment, resource-shifting *within* the youth justice system is *not* justice reinvestment. A community empowerment model is important for all children, families and communities, but it is absolutely essential for Aboriginal and Torres Strait Islander children, families and communities on whom the consequences of the current MACR fall at grossly disproportionate levels, and who continue to assert their right to self-determination. As noted above, Aboriginal and Torres Strait Islander peoples' political aspirations should be seen as productive of valuable synergies. Brown et al. (2016: 7) have noted that:

> *… in the developing interest in justice reinvestment in the Australian context, parallels were emerging between some of the key principles in the original justice reinvestment process and methodology and the ongoing criticisms by Indigenous leaders and others of the way Indigenous policies and programs were formulated and administered with little or no Indigenous involvement. The potential of justice reinvestment policies in Australia is thus*

bound up with issues of Indigenous governance, empowerment, self- determination and nation-building: what we have called in short hand, 'Indigenous democracy'.

2.2 <u>Evidence on the nature and scale of justice involvement</u>

In addition to the principles just outlined, consideration of a replacement for criminalisation for young children should occur with reference to available data on the kinds of incidents that currently bring 10-13-year-old children into contact with the police and the youth justice system. Even though 'extreme cases' and 'worst fears' can often dominate MACR reform debates, the approach we advocate focuses primarily on the most common 'offending behaviours' engaged in by young children. This is an appropriately evidence-based approach. Engaging with the data on precisely which sorts of 'offending behaviours' bring children under 14 years of age into contact with the youth system justice is vital for two related reasons. First, it reduces the risk that debate over the MACR being skewed towards forms of serious violence to which the current youth justice system is only rarely required to respond for 10-13 year old children. Secondly, it provides an evidence base from which to contest opposition to raising the age that is fuelled by populist discourses about the amorphous 'dangers' posed by 'young offenders' (Goldson et al., 2020; Muncie, 2015).

2.2.1 'Offending' by 10-13 year old children

2020 data on the offences for which police proceeded to court against children (Table 1) show that children aged 10-13 years represented less than 10% of the number of 10-17-year old proceeded against. This is relevant to appraising the (modest) scale of the change to the youth justice system that would be associated with removing children under 14 year of age from the system.

The data also shows that the large majority of offences for which children are proceeded against are not crimes that cause immediate physical harm to others: theft offences, justice procedure offences, and public order offences (including property damage and disorderly conduct) accounted for 61% of appearances. Inflicted violence interpersonal violence (assaults, sexual offences) offences accounted for 15%, noting that 2/3 of these matters involved common assault. We do not understate the seriousness of violence offences but, recognising that such harms are closely linked to community safety concerns, it is important to note their relative infrequency for 10-13 year old children. It is also important to note that the data reported in Table 1 records the number of children proceeded against – the number of 10-13 year old children found guilty of offences is lower still (NSW BOCSAR, 2021: Table 3).

Table 1: Number of young people aged 10-17 years proceeded against to court by the NSW Police by age and offence type, 2020[18]						
Offence type		**10-11 years**	**12-13 years**	**14-15 years**	**16-17 years**	**Total 10-17 years**
Homicide		**0**	**0**	3	9	12
Assault	Assault common	**6**	**104**	294	353	757
	Actual bodily harm	**0**	**39**	181	251	471
	Grievous bodily harm	**0**	**4**	34	62	100
	Assault Police	**0**	**13**	41	88	142
Sexual offences	Sexual assault	**6**	**21**	58	61	146
	Indecent assault, act of indecency etc	**2**	**8**	44	41	95
Abduction and kidnapping		**1**	**2**	2	11	16
Robbery	Without a weapon	**1**	**29**	176	160	366
	Weapon not a firearm	**0**	**28**	122	111	261
	Firearm	**0**	**0**	4	6	10
Intimidation, stalking and harassment	Riot and affray	**1**	**13**	86	123	223
	Violent disorder	**0**	**0**	1	4	5
	Telecommunications offence	**0**	**5**	6	15	26
	Bullying/harassment or intimidation	**10**	**90**	364	389	853
	Stalking	**0**	**0**	1	2	3
	Threats against police	**0**	**0**	3	2	5
Other offences against the person		**0**	**3**	5	11	19
Theft	Break and enter dwelling	**2**	**33**	185	191	411
	Break and enter non-dwelling	**3**	**31**	141	126	301
	Receiving or handling stolen goods	**2**	**17**	82	105	206
	Motor vehicle theft	**0**	**25**	210	266	501
	Steal from motor vehicle	**2**	**21**	135	136	294
	Steal from retail store	**7**	**53**	307	247	614
	Steal from dwelling	**1**	**5**	21	16	43
	Steal from person	**3**	**10**	30	22	65
	Fraud	**1**	**13**	100	129	243
	Other theft	**0**	**17**	99	75	191
Arson		**0**	**0**	15	14	29
Malicious damage to property		**9**	**62**	222	224	517
Drug offences		**0**	**2**	110	284	396
Prohibited and regulated weapons offences		**0**	**12**	32	69	113
Disorderly conduct		**2**	**68**	190	169	429
Liquor offences		**0**	**0**	0	2	2
Pornography offences		**0**	**0**	3	2	5

[18] Source: NSW Bureau of Crime Statistics and Research (format modified).

Against justice procedures	Escape custody	**0**	**0**	3	6	9
	Breach Apprehended Violence Order	**4**	**51**	206	242	503
	Breach bail conditions	**14**	**204**	657	593	1468
	Resist or hinder officer	**0**	**4**	38	72	114
	Other offences against justice procedures	**1**	**2**	7	12	22
Driving offences		**0**	**19**	121	797	937
Transport regulatory offences		**0**	**3**	17	12	32
Other offences		**0**	**13**	53	62	128

Finally, the data shows that a significant proportion of the offences that resulted in court appearances for 10-13-year-olds group were offences 'against justice procedures' (25%), including a staggering number of charges for breach of bail conditions – 1/5 of the overall total for all offences. This shows that a control orientated response that aims to improve the behaviour of children by imposing (often unrealistic) conditions on them and then proceeds to punish children's non-compliance by way of further criminalisation, is itself both counterproductive and harmful. To put in another way, the model of addressing 'offending behaviour' via conditions, surveillance and sanctions for breach, means that the youth justice system is actually *generating* a significant proportion of juvenile 'offences' (Goldson et al., 2020) and exacerbating the harmful impacts of criminalisation on young children.

2.2.2 Court-ordered detention and supervision

Another aspect of 'scale' that is relevant to the feasibility of a replacement approach is the number of 10-13 year-old children in youth prison (pursuant to a 'juvenile control order') or subject to a court-ordered supervised community sentence. To be clear, too many children are in youth prisons and serving a community sentence. In 2019-2020, 105 children aged 10-13 years (56% Indigenous) spent time in detention in NSW (Australian Institute of Health and Welfare, 2021: Table S80b). In the same period, 84 children aged 10-13 years (49% Indigenous) were under community-based supervisions (Australian Institute of Health and Welfare, 2021: Table S42b).While these numbers are unacceptable, they also suggest that 10-13 year old children represent a very small proportion of the total number of children involved in the youth justice system. In other words, the possibilities of creating a non-criminalising 'best interests'-oriented response to such children is evidenced by the hard data.

The data presented in Table 2 provides further support. It shows that the overwhelming majority of juvenile control orders and supervised community sentences in 2020 (and 2019)[19] in NSW were for children aged 14-17 years. In fact, of 1,553 control orders and supervised community sentences imposed by the courts in 2020 only 35 (2%) related to children aged 10-13 years.

Table 2: Number of proven court appearances where the defendant was 10 to 17 years and received a juvenile control order or supervised community sentence by age of defendant, 2019-2020[20]

	2019		2020	
Age	Juvenile Control Order	Supervised Community Sentence	Juvenile Control Order	Supervised Community Sentence
10	**0**	**0**	**0**	**0**
11	**0**	**1**	**0**	**1**
12	**0**	**11**	**0**	**4**
13	**2**	**54**	**2**	**28**
14	16	197	19	176
15	56	287	60	338
16	79	416	79	369
17	153	496	96	381
Total	306	1462	256	1297

It is important to recognise both the immediate and long-term effects on children who are arrested, charged, supervised and imprisoned. Evidence collected over the last twenty years or more, consistently shows that contact with the criminal justice system normally does children more harm than good; it is criminogenic and actually *produces* rather than reduces 'offending behaviour' (Goldson, 2000; McAra and McVie, 2007; Gatti et al., 2009; Smith, 2017; McAra and McVie, 2015; McAra and McVie, 2019; Goldson et al., 2020).

One of the most confronting empirical realities is that the younger a person is at the point of first contact with the criminal justice system, the more likely they are to engage in adult offending behaviour (Weatherburn and Ramsay, 2018; Goldson, 2013; Goldson et al., 2020). In this way, McAra and McVie (2019: 75) have noted that 'intensive forms of intervention are likely to be damaging, inhibiting the normal processes of desistance from offending'.

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[19] Alongside the most recent year available (2020), we have included 2019 data, recognising that the functioning of the NSW Children's Court and the order made in 2020 are likely to have been affected by public health measures associated with the Covid-19 pandemic.

[20] Source: NSW Bureau of Crime Statistics and Research.

As such, the current minimum age of criminal responsibility in NSW – 10 years of age – *facilitates* early criminalisation. It often characterises the relatively low-level transgressions of 10, 11, 12, and 13-year-old children as 'offending' behaviour as if this was a natural or inherent characterisation. It is not. A sobering illustration of this fact is the increased likelihood that a child's conduct will be so characterised if they are in out-of-home care (see discussion of 'care-criminalisation' below) (McFarlane, 2018; Colvin et al., 2018).

The international knowledge base suggests that 'offending behaviours' by young children – including the large majority of instances that do not involve direct harm to others, and the very small proportion of instances that do – are more accurately and constructively characterised as indications of need. Such behaviours *do* require a response. They require an *effective* response that prioritises the *best interests of the child* and the *best interests of the wider public*. In pursuit of both of the best interests goals, such a response will have different very characteristics to an approach based on the 'criminality' of the child.

3. INTERNATIONAL APPROACHES

Noting the global norm to set the MACR significantly higher than 10 years old (Goldson, 2013; Nowak 2019: 280), we anticipated that we would be able to draw from the (English language) scholarly literature a detailed account of international best practice for addressing 'offending behaviour' by children aged 10-13 years. However, we found that the experience of jurisdictions with higher MACRs is rarely addressed in evaluative peer-reviewed literature, so that capturing international 'best practice' is a much more challenging exercise than might otherwise be anticipated. Indeed, there is no readily available literature that explicitly articulates a singular best practice model or response framework. Notwithstanding this, in this section of the report we outline some of the features of the systems that operate in selected jurisdictions.

In most child justice systems where the MACR is 14 years or higher, when a child below the MACR is apprehended by the police, and their age is confirmed, contingent upon the seriousness and gravity of the alleged 'offence' either no further action is taken, they are rendered directly to their parents and/or referred to welfare services for 'therapeutic' intervention or supervision.

3.1 Overview

A country's official MACR is well-known (Nowak, 2019), and several jurisdiction-based models are reported in the international literature. However, comparative and best practice analysis is complicated by: different approaches to defining the MACR, including distinctions between *criminal capacity* and *criminal*

responsibility (Jacopin, 2020); and the interplay between a jurisdiction's *general rules* on the MACR and *exceptions* that may apply in a given instance (based, for example, on the nature of the child's 'offending behaviour') (Leenknecht, Put and Veeckmans, 2020). A further variable is that the boundary/relationship between criminal, civil and welfare court jurisdictions differs across countries, so the fact that a child cannot be held 'criminally responsible' does not mean that they cannot be subject to mandatory court orders (Weijers et al., 2009; De lgrange, 2015).

In Sweden, Norway, Finland and Denmark the minimum age of criminality is 15, and children below that age cannot be tried by a criminal court (Storgaard, 2005). In Belgium, however, children as young as 12 years old, may still be required to appear before a youth court from 12 years of age, and depending on maturity, may face educative measure; and children aged 14 and above may be assigned to youth care facilities (Delgrange, 2015). Argentina's official MACR is 16 years, but younger children may face detention if they are assessed to be in danger or considered to have 'behavioural problems' (Leenknecht, Put and Veeckmans, 2020).

In some other countries, the practical standard is aligned to the official minimum age of criminal responsibility, but exceptionally, for the most severe crimes, children below that age can still be prosecuted and either receive educational sentences (France) or sometimes face deprivation of liberty (Germany). In Germany, the principle is that offences committed under the age of 14 can only be dealt by civil courts focused on responsibility for harms caused. However, children between 10 and 14 who have committed serious crimes may still face imprisonment (Weijers et al., 2009).

In countries where youth court magistrates preside over both civil and criminal matters, young people aged below 13 years facing charges of criminal 'offences' are dealt with in informal chamber hearings or youth care jurisdictions (Austria, France, Netherlands) rather than in the more formal criminal courts. Criminal responsibility is not assessed, and dispositions are limited to non-custodial educative and therapeutic measures, but not criminal sanctions (Leenknecht, Put and Veeckmans, 2020; Weijers, 2016).

Another model adopted in some countries, such as Switzerland and Ireland, is to formally maintain a low MACR of 10 years of age, but to restrict the disposition options available to the court to strictly educative and protection measures, as opposed to retributive ones. Imprisonment is prohibited, regardless of the severity of the crime, but in extreme circumstances, children may be assigned to care institutions (Kuhn, 2011; Leenknecht, Put and Veeckmans, 2020).

3.2 <u>A Guide to Best Practice?</u>

In our assessment, the specific laws and practices of overseas jurisdictions have relatively limited capacity to guide the development of a replacement response to 'offending behaviours' children aged 10-13 years in NSW. There are too many variables in play – particularly when the imperative is possible 'translation' to a federation like Australia, with a colonial history and unaddressed legacies with respect to the self-determination of Aboriginal and Torres Strait Islander peoples. However, one thing is very clear and vitally important: in countries that manage their juvenile/youth justice systems where the minimum age of criminal responsibility is substantially higher than it is in NSW/Australia, 'it can be shown that there are no negative consequences to be seen in terms of crime rates' (Dünkel, 1996: 38; see also, Dünkel et al., 2010; Goldson, 2013).

At the same time, there is much that can be learned from peer-reviewed literature and the international knowledge base on which forms of intervention and engagement are best suited to addressing the 'offending behaviours' of young children.

4. RISK ASSESSMENT, EARLY INTERVENTION AND THERAPEUTIC RESPONSES: ARE THEY NON-CRIMINALISING?

While, as noted above, there is a gap in the literature regarding peer-reviewed studies on jurisdictions with higher MACRs, our review did reveal a large body of literature on ostensibly non-criminalising 'therapeutic' responses to children who had engaged in 'offending behaviour' or were considered to be 'at risk' of doing so. These include individual cognitive behavioural therapy (CBT) risk management programs as well as various family therapy programs. The Risk-Needs-Responsibility (RNR) framework is an example of a widely adopted risk assessment and treatment model (Andrews & Bonta, 2010; de Vries et al., 2018). Stop Now and Plan (SNAP®) is another 'multifaceted, cognitive-behavioral therapy (CBT) program for antisocial children' that features prominently in the literature (Koegl et al., 2008: 419; Burke and Loeber 2015).

We approached this literature with caution, mindful of the concern that so-called 'therapeutic responses' are often experienced by children (and adults) as both indeterminate and punitive, and unable to adequately meet the needs of people enmeshed in the system. Particularly in youth justice systems (where such approaches are already widely incorporated), they can open the door to substantial net-widening. Our approach and analysis has been influenced by the work of our CCLJ colleagues (and their collaborators) from the Comparative Youth Penalty Project, who have demonstrated the various ways in which 'risk management' and 'early intervention' approaches have been embraced *within* existing youth justice systems (including in NSW) with marginalising and punitive effects:

> *… [S]trategies to assess and manage risk … are underpinned by faith in actuarialism and early intervention and a tendency to conflate and merge a range of social issues, not least 'crime', 'disorder' and 'anti-social behaviour'. Further conceptual slippage is evident in the rationalisation of such strategies whereby the grounds for intervention are typically presented in ways that switch interchangeably between a benign sense of child-centredness (the child at risk) and a more austere criminogenic correctionalism (the child as risk). … [A] responsibilising discourse has the effect of rendering certain constituencies of children as an incorrigible presence, holding them to account and conceiving youth justice systems as mechanisms for protecting the public from the risk that such young people are deemed to impose. A striking bifurcation works to convey the sense that many children and young people in conflict with the law are deserving and redeemable, but others – the hard core – are undeserving and entrenched.*
>
> *Either way, the rationales for intervention are essentially defined in negative and problematic terms; in order to qualify, to be offered a service or, perhaps more accurately, to be targeted by an intervention, children and young people must first be seen either to have failed or be failing or deemed to be posing risk and representing a threat (potentially or actually). In this way, services are both rationed in accordance with a calculus of risk-based classifications, and expand and net-widen by targeting not only the 'criminal' but also the 'near criminal', the 'possibly criminal', the 'sub-criminal', the 'anti-social', the 'disorderly' or the 'potentially problematic' in some way or another (Goldson 2005). … Ultimately, risk assessment technologies and risk management logics dovetail into, and bolster, impulses directed towards substantial net-widening effects (at best), and greater punitiveness and intolerance (at worse). And, of course, it is invariably the most structurally excluded and socially marginalised children and young people – those interchangeably deemed to be both facing and posing the greatest risk – who are disproportionately swept into widening nets of regulation, control and correction …* (Goldson et al., 2020: 39)

Research by Yassine (2019) concludes that the widely used YLS/CMI-AA 2.0 risk assessment tool:

> *… produces crime as a set of specific and common characteristics such as 'deviancy', 'immorality', and various forms of 'failure', and that the risk assessment tool produces crime as fixed, static, and a phenomena that has always existed, making the imagined standards of*

> *behaviour appear to be real and wholly ahistorical. The overarching finding was that the risk assessment tool produces crime as fixed and inevitable, and as decontextualized and de-politicised and as changeable through intervention. …*
>
> *The YLS/CMI-AA 2.0 represents the juvenile offender in relation and opposite to the imagined 'non-offender', presupposing that the goal of the penal system is to produce docility and submission to authority. Through examination, the juvenile offender is rendered a subject that is 'knowable', 'predictable', and therefore controllable.* (Yassine, 2019: 163-164)

Patterns of racialised over-criminalisation can be exacerbated by risk-based assessments and interventions:

> *Given the purchase that risk assessment now imposes within contemporary youth justice and penality, and taking account of the fact that many risk indicators derive from the very structural injustices that disproportionately afflict Aboriginal and Torres Strait Islander, black and minority ethnic communities, there is an obvious danger that further disproportionate criminalisation will ensue …* (Goldson et al., 2020: 123)

See also Goddard and Myers, 2017; Kelly, 2003; Nolan, 2015; Page and Schaefer, 2011.

With these significant qualifications and lessons in mind, for the sake of completeness, we discuss a selection of the relevant literature on therapeutic programs based on risk management and early intervention. We then return to the question of whether such approaches should be embraced as a genuine alternative to criminalisation and the youth justice system.

4.1 <u>The Rationale for Therapeutic Responses</u>

Several studies (Andrews & Bonta, 2010; de Vries et al., 2018; Welsh & Farrington, 2007) suggest that criminal justice response to youth crime without therapeutic foundation are ineffective in reducing youth crime. On the basis that children who have been exposed to trauma, abuse or neglect are at greater risk of 'offending behaviours', it is posited that 'early interventions' aiming at reinforcing well-being and skill development can be instrumental in bringing about the best crime prevention and community safety outcomes.

4.2 Individual Therapeutic Interventions

Research has established support for individual based interventions in reducing re-offending for both adults and young people. We note that this research has predominately been undertaken with adults and young people on statutory orders, typically community based supervision. Here we discuss selected examples of some of these approaches reflected in the literature.

4.2.1 Cognitive Behavioural and skills training programs

There is support in the literature for programs and interventions that assist young people to develop realistic personal and social problem-solving skills (Singh & White, 2000; Trotter, 2015). These are broadly referred to as 'cognitive techniques'. Landenberger and Lipsey's (2005) meta-analysis examined the impacts of cognitive behavioural therapy (CBT) on the re-offending rates of adult and juvenile offenders, confirming previous positive findings regarding CBT from other studies.

4.2.2 Motivational Interviewing

Motivational interviewing is a therapeutic approach originally developed in the alcohol and other drug field by Miller and Rollnick (2013). Motivational interviewing (MI) is commonly employed in various criminal justice settings as a method to engage with young people and focus on developing their 'readiness to change' and address their offending behaviour. Whilst there is contention regarding the evidence base regarding the impact of MI on reoffending rates, this approach draws on a strength based perspective encouraging young people to develop their confidence and desire to address their pro-criminal behaviour (Walters et al., 2010; Young et al., 2013).

4.2.3 Mentoring

Mentoring has been identified as a strategy to engage young people with personal support and development. Positive outcomes regarding mentoring include assisting to address factors such as negative peer association, poor school attendance and lack of attachment to community. It has also been used to strengthen protective factors such as, development of living and vocational skills, pro-social attitudes and social attachments (Wilczynski, et al. 2003). A meta-analysis by Dubois et al. (2002) of 55 empirical studies of volunteer-based, youth mentoring programs in the USA concluded that mentoring programs with particular features could have

positive outcomes for young people, but that overall, there was '…evidence of only a modest or small benefit of program participation for the average youth.' (Dubois et al., 2002)

4.3 <u>Family Therapeutic Interventions</u>

The rationale for family-focused interventions is that working with families where one or more of the family members is in contact or considered to be 'at risk' of contact with the criminal justice system can lead to better outcomes including reduced offending, reduce child abuse, reduced drug use, reduced homelessness and improved family relationships (Trotter, 2013; 2015).

4.3.1 Multisystemic Therapy

Multisystemic therapy is a home-based model of service delivery, which aims to overcome barriers that families and young people may face to services access, with the purpose of increasing the chances that families will adhere to the treatment (Evans et al., 2012). It is a holistic intervention, addressing several key systems in which the individual and family are involved, including educational/vocational systems, peer and wider social groups, and neighbourhoods. Outcome studies support the efficacy of MST in treating relatively serious, psychosocial difficulties with juvenile offenders and their families (Evans et al., 2012; Perkins-Dock, 2001; Timmons-Mitchell et al., 2006; Ogden & Halliday-Boykins, 2004).

4.3.2 Functional Family Therapy

FFT is a short term '…intensive family intervention model for delinquent and substance using adolescents' (Alexander et al. 2013: 3). Working from a systems perspective, FFT aims to 'strengthen family interactions' and self-sufficiency to reduce youth reoffending (Alexander et al. 2013: 5). Whilst the aim of FFT is similar to MST, it differs in its 'strict manualisation and phasic approach to treatment' (Weisman & Montgomery 2020: 461). FFT has shown positive outcomes in reducing recidivism amongst young people with conduct or substance use disorders (Greenwood 2008; Sexton & Turner 2010).

4.4 <u>Our Preferred Focus: Support and Advocacy</u>

There is no doubt that a sizeable body of research literature has been generated on individual and family therapeutic responses to 'offending behaviour' by children. It is also the case that psychological care and therapy will surely have value for some young people and their families. Ultimately, however, it is our

assessment that such programs do not have capacity to form the basis of a genuine *replacement* for the NSW youth justice system for 10-13 year old children. Such approaches tend to employ a deficit model, and 'pathologise' children who engage in 'offending behaviours' (or are considered to be 'at risk' of so engaging). Individual psychological interventions may be especially ineffective and inappropriate for Aboriginal and Torres Strait Islander children (Baldry et al., 2015). Given that many of the children for whom we are investigating a replacement 'best interests' response are from Aboriginal and Torres Strait Islander families, this is an additional reason to eschew heavy reliance on therapeutic interventions as an 'alternative' to criminalisation.

Children and their families *should* be a focus of strategies to address 'offending behaviours'. However, we recommend approaches based on *advocacy* alongside 'mentoring', and *family support and advocacy* rather than perpetuating the heavy reliance on 'therapy' that has become a staple of the mainstream youth justice system, with which children aged 10-13 years are currently required to engage. The labelling, individualising and responsibilising tendencies of risk management and early intervention approaches are to be avoided.

5. LOCAL COMMUNITY-BASED PROGRAMS IN NSW

Earlier in this report we outlined a set of guiding principles for replacing the youth justice system for 10-13 year old children with a non-criminalising best interests multi-agency response: i) commitment to improving community safety; ii) adherence to human rights principles on the rights of the child; ii) designed to address the over-criminalisation in Aboriginal and Torres Strait Islander communities; and iv) resourced and underpinned by justice reinvestment. We foregrounded the importance of place and 'local' responses – critical ingredients of a 'ground up' community empowerment model. We recognise that there are *challenges* that sit alongside the *potential* of local innovation as a foundation for a viable replacement for the youth justice system – including the uneven availability of services and resources across NSW, an inequity that impacts disproportionately on Aboriginal communities (Goldson et al., 2020). At the same time, there is much that can be learned from community-led initiatives that are already in existence in NSW.

In setting out to complete an initial review, we encountered the limitation that few such programs are documented in the research literature. This meant that a desktop review approach would not yield the required information about NSW programs, and so we embarked on a modest program of informal consultations with selected stakeholders, as well as locating and reviewing available evaluation reports. Although a more comprehensive survey of existing programs will be necessary in the future, the result of this exercise was perhaps the most important finding of this report: community-based services and methods of intervention that

are oriented towards physical and mental well-being, education and family support – and not criminalisation and punishment – are already part of the youth services landscape. In these programs, and the non-government organisations that run them, we see the foundations for a genuine replacement for the youth justice system for children aged 10-13.

5.1 <u>Deadly Connections</u>

Deadly Connections is an Aboriginal-led not-for-profit organisation based in New South Wales. It services selected suburbs in the Sydney and Marrickville Local Government Areas. Deadly Connections runs several programs aimed at reducing the incidence of young people being placed into care or coming into contact with the justice system by focusing on the early years of a child's development. These programs include the Deadly Families and Deadly Jargums. Deadly Families programs supports struggling parents of young children and Deadly Jargums offers culturally responsive activities to children aged 7-12 who are at risk and/or disengaged in the classroom. These programs are supported by additional programs that target youth that are at immediate risk of becoming into contact with the criminal justice system. These additional programs include the Street Smarts and Breaking the Cycle programs. Street Smarts provides culturally responsive, early intervention, prevention and diversion from the justice system to children in Sydney city on a Saturday night. Breaking the Cycle provides specialist support and intervention to participants involved in the criminal justice or child protection systems.

5.2 <u>Weave Youth and Community Services</u>

Weave Youth and Community Services is a not-for-profit organisation that provides a suite of programs aimed at supporting children, young people, families and communities facing complex situations. Weave provides a range of services that include practical support, housing referral support, counselling, mental health services, drug and alcohol support, access to education and employment opportunities and assistance with referrals to other services. Weave hosts 'intake' meetings every Tuesday morning where new referrals are assessed and appropriately referred.

Weave provides three programs aimed at reducing the contact that young people have with the criminal justice system:

(a) **Creating Futures Justice Program** provides children who have been released from prison, whether on bail or after serving a prison sentence, with assistance to successfully assimilate into the community;

(b) **Weave's Kool Kids Program** is an early intervention and prevention program providing children aged 7-13 years, with opportunities to engage in recreational activities and mentoring. Focused on improving social health and wellbeing, connection to culture and promoting strength and resilience. Kool Kids works with local schools to deliver free after school and holiday activity programs for young people in Sydney; and

(c) **Speak Out Dual Diagnosis Program** offers opportunities for young people with co-existing mental health, alcohol and other drug challenges to experiences themselves differently and engage in creative projects, events and group work programs. This gives young people the chance to build relationships, and connect with themselves, and the broader community.

Weave previously ran a **Streetbeat Program**, under which the Streetbeat Bus picked up young people from across the inner west and inner-city areas of Sydney free of charge between 9pm and 2am and drove them home or to another safe place. This service also provided an opportunity for young people to make contact with Weave youth workers and be referred for assistance if the young person needed help in other ways. Unfortunately, it was defunded in 2020.

5.3 Walgett Action Plan for Children and Young People

The Walgett Action Plan for Children and Young People arose out of a partnership between the Dharriwaa Elders Group and UNSW. This partnership (called 'Yuwaya Ngarra-li', meaning 'vision' in the Yuwaalaraay/Gamilaraay languages) recognised the grave situation facing young people in the Walgett region. From the beginning of the partnership, there was a 'shared understanding between DEG and UNSW that any collaboration had to move beyond individual programs or initiatives to long-term systemic solutions to the causes of disadvantage and discrimination experienced by Aboriginal people in Walgett' (McCausland et al., 2021). The Yuwaya Ngarra-li action plan sets out the goals that the partnership wanted to achieve and local, evidence-based methods of achieving those goals. Examples of the methods of achieving those goals that are set out in the action plan include:

(a) exploring ways to work with Walgett Community College to ensure that culturally appropriate and specialist supports are provided to Aboriginal students and their families to overcome barriers to participation and learning and by supporting them to thrive in their families, community, culture and country. These could include:

- therapeutic reach-ins;
- hearing loops;

- on-country time-out programs;
- family homework supports;
- school-week hostel accommodation;
- school nurses and social workers;
- adult education initiatives incorporating literacy; and
- financial management, nutrition and other healthy lifestyle parental supports;

(b) scoping new services that children and young people (including young parents) may need, this could include after-hours programs and support, safe house and emergency temporary accommodation, and health and wellbeing promotion and education (drug and alcohol, mental health supports, and access to quality early childhood services); and

(c) working closely with families and carers to support them and their children and young people to be safe, learn, grow and work. In particular, investigating ways to support young people who are parents through working with Walgett Aboriginal Medical Service and early childhood services.

This approach is a new model of leadership named 'CommUNIty-Led development', due to the involvement of the University of New South Wales. Five core principles are the heart of the collaboration, including that it is community-led, culturally connected, strength focused, holistic and rights-based (McCausland et al., 2021). Like the Maranguka Project, discussed below, the partnership seeks to involve and utilise the existing community institutions and infrastructure already in place to support their work, such as government and non-government stakeholders including local police, justice, court and legal agency representatives along with service providers (McCausland et al., 2021).

5.4 Maranguka, Bourke

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. By addressing the underlying causes of crime, savings on criminal justice costs are reinvested in strategies that strengthen communities and prevent crime.

The first stage of Maranguka Justice Reinvestment 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 community identified early childhood and parenting, 8-18yo, the role of men, and service sector reform as priorities.

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 activities designed to create change within the community and the justice system. Those activities have included: 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.

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.

This model demonstrates how a community-led approach can operate in a specific location and yield tangible benefits (KPMG 2018).

There has been a focus on building a coordinated response to support disengaged students, starting with the Our Place Program[21] since 2018, and the development of a suspended plan that has a restorative approach. Data sharing and collaboration between agencies will be a key ingredient.

One of the reasons the school suspension framework has strong buy-in is because it is supported at senior levels of government. There is alignment between the new NSW *Student Behaviour Strategy* (NSW Department of Education, 2021) and the suspension framework.

Another key aspect of Maranguka is the *'community-led, local, collaborative framework'*.[22] The project focuses on a collaborative approach through cross-sector leadership. The cross-sector leadership executive established by Maranguka and their partners involves senior regional representatives from key government agencies, such as the justice, health and education systems, the police and senior community members.

[21] Our Place is an alternative learning program based at Bourke High School, which was co-designed in partnership with the community. The program supports disengaged students to stay at school with flexible learning and additional support. The program continues to be adapted to best support students' needs.

[22] Personal communication (Sarah Hopkins, JustReinvest NSW), 26 May 2021.

A significant component of this cross-sector leadership structure is the concept of accountability. A critical lesson from Maranguka that will be essential to the future viability of other community-based initiatives directed at 'offending behaviours' by children aged 10-13 is that the burden of accountability cannot be allowed to fall exclusively on community organisations:

> *At a senior level, government [needs to be] ensuring that the local services, local agencies, schools, are delivering on the community strategy.*[23]

5.5 BackTrack Youth Works

The three goals of BackTrack are to '*keep kids alive, keep kids out of gaol and help them chase their hopes and dreams*'.[24] The programs run by BackTrack focus on skills that can be used once the youth leaves the BackTrack program, such as agricultural and horticultural skills, welding, fabrication work and other construction skills. The programs also focus on general life skills such as cooking, cleaning and interacting as a family. BackTrack is run in the Armidale, NSW, community.

In 2012 the National Drug and Alcohol Research Centre (NDARC) from the University of New South Wales completed an empirical study on the BackTrack program, examining the program's extent to which it was associated with reductions in offences and the program's impact (Semczuk et al., 2012). The research found that there was a significant reduction from pre- to post-commencement of BackTrack for the four most common criminal offences committed by male youth aged 14 to 17 years of age in the Armidale region. Further, just as Maranguka relies on a collaborative model for its effectiveness – with a cross-sector leadership model supporting the collaboration – the study found that outcomes for the BackTrack program were optimised when key stakeholders in community programs and the criminal justice system work together.

5.6 Mt Druitt OzTag Team

The Mt Druitt OzTag Team is an example of an initiative which has successfully engaged the attention and participation of 'hard to reach' Aboriginal youth in this locality. The initiative was devised by a Just Reinvest NSW Youth Ambassador Isaiah Sines for young people in his community. The program is led by young people with lived experience of the criminal justice system who have become leaders and mentors for other young people. Team members join through referrals from the Children's Court Assistance Scheme, Youth Justice, and through self or community referrals. The young people involved in the team (and those on the waiting list

[23] Ibid.

[24] https://backtrack.org.au/

to join the team) are generally those who services have difficulty engaging with. Through the OzTag team, the participants have access to youth case workers who can assist them with court, housing, Centrelink, employment and onward referrals. Games and training are often after 5pm so young people have access to pro-social activities, youth workers and community support outside of the standard operating hours of existing services. The team has fostered positive relationships with team members outside of the OzTag games, with members meeting to train at the gym in addition to formal training sessions and using Messenger to communicate as a group.[25] While the OzTag team program is currently running with support from a corporate funder, it has not secured funding for the next season and cannot go ahead without that funding.

Aboriginal Legal Service solicitor, James Clifford, has said:

> *In my capacity representing Aboriginal young people in the Western Sydney area, I have been overwhelmed by the positive response to the OzTag Program. ... Many youth services struggle with engagement, whether court mandated or voluntary… None of these issues are present in the OzTag program. The participants are eager to attend, and fully engaged when there.*[26]

5.7 **Community Patrols**

First developed in the 1980s, primarily in Aboriginal communities, community patrols (or 'night patrols') are 'locally run initiatives with formal agendas that focus on keeping young people safe and preventing contact between Indigenous young people and the state police…' (Porter 2016: 549). Patrols take a variety of forms and pursue a range of goals, including child well-being, crime prevention and community development (Cooper et al., 2014; Blagg & Valuri, 2004; Blagg 2008; Porter, 2016). They typically involve driving a vehicle around in public places, and providing transport to young people in need – to return home or other safe place. Past and present NSW examples include Redfern Streetbeat (Porter 2016) and Safe Aboriginal Youth Patrols in various part of the state (Cooper el 2014; Porter 2016).

The organisation of community patrols and the specific tasks carried out by the controls varies from community to community. In this way, community patrols are an example of a 'bottom-up' solution (Lipsky, 1980; Porter, 2016); that is, one that is devised by the community in a culturally appropriate way. Providing communities

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[25] Personal communication (Nicole Merkler, Jessica Brown and Terleaha Williams, JustReinvest NSW), 20 May 2021.

[26] James Clifford, Solicitor, Aboriginal Legal Service NSW/ACT, Reference for Western Sydney Community Legal Centre OzTag program, 12 October 2020. https://www.parliament.nsw.gov.au/lcdocs/other/14100/Just%20Reinvest%20NSW%20-%20received%202%20December%202020.PDF

with ownership over patrols means that patrols have cultural authority to respond rapidly in a culturally appropriate way (Turner-Walker, 2012).

The responsibilities of community patrols can include safe transportation for those at risk of causing or being the victims of harm; dispute resolution and mediation; interventions to prevent self-harm, family violence, homelessness, and substance misuse (Cunneen et al., 2017). Porter highlights a distinctive feature of patrols that is directly to the concerns of this report: 'a key part of the patrols' agenda is to minimize young people's contact with the criminal justice system, primarily the state police' (2016: 550).

Community patrols are independent of State and Federal government, although some are funded through the government (Porter 2016; Sarre, 2005). Independence from the police and the youth justice system is important to the legitimacy and effectiveness of patrols. Indeed, Porter's research in a number of NSW locations found that patrol workers were disinclined to characterise their work as 'policing':

> *In short, 'policing' was understood as being synonymous with the activities of the state police or acting in support of them. The 'P word'— as one research participant put it — has such negative connotations in Indigenous communities that even the perception of collaboration with the state police could result in a lack of trust among the client group. The perceived independence from and lack of affiliation with the state police was a necessary prerequisite to enable relationships built on trust to develop. Arguably (and some workers explicitly made this point) it was what made their work possible.* (Porter 2016: 558)

5.8 **Optimism and Caution**

Although by no means comprehensive, the selection of NSW programs and initiatives discussed in Section 5 of this report provides a basis for optimism that *effective* non-criminalising responses to 'offending behaviour' by young children *are* possible. They evidence a point made earlier in this report: non-criminalising responses are entirely compatible with taking community safety seriously and prioritising effectiveness. However, our enthusiasm for a replacement response centred on initiatives devised and run by non-government community organisations comes with a note of caution. Earlier we noted the problems of *individual* responsibilisation associated with therapeutic approaches to the 'offending behaviours' of young children. Here we draw attention to the risk of *collective* responsibilisation: it is important not to inappropriately shift the burden of responsibility for responding to young children's 'offending behaviours' to local communities and community organisations alone. Government agencies (and their resources) have vital roles to play to which they are obliged by law.

The approach that we advocate, therefore, is underpinned by multi-agency co-operation and partnership – across the government and NGO sectors.

6. TOWARDS A 'BEST INTERESTS' RESPONSE?

The review completed for this report supports the conclusion that it is both desirable and possible to design an integrated system for addressing 'offending behaviours' by children aged 10-13 years that involves close and respectful co-operation between community organisations and a variety of government agencies, including education, health, child protection and housing. The NSW examples discussed above show that neither criminalisation nor the traditional institutions of the youth criminal justice system are required for effective desistance from 'offending behaviours' (see also Goldson et al., 2020).

Non-government community organisations are critical to the 'bottom-up' solutions-orientation that is a key feature of the response we recommend (Lipsky, 1980; Goldson et al., 2020; Goldson and Briggs, 2021). Solutions are created by the community, for the needs of the specific community, where cultural respect and cultural safety are prioritised. Such organisations embody principles of local community responsibility, control and self-management.

Respect for the self-determination of Aboriginal and Torres Strait Islander peoples is an essential ingredient of a viable non-criminalising best interests response if it is to be a genuine replacement for the current youth justice system for children aged between 10 and 13 years.

Research shows that community-based organisations that aim to engage in youth-focused crime prevention programs will face challenges during inception (Cherney, 2006; Clarke & Eck, 2003; Goldson et al., 2020). To address these problems, organisations need to adopt a problem-solving approach during the development phase (Ekblom, 2002; Hawkins, 1999). Further, this problem-solving approach must be applied in a flexible manner (Cherney & Sutton, 2007). For maximum effectiveness and innovation, both local (Georg & Manning, 2019) and expert knowledge should be utilised (Cherney & Sutton, 2007). Adequate government resourcing is essential, as are strong alliances and co-leadership across community and government sectors (Goldson et al., 2020).

Local knowledge is particularly important in the context of Aboriginal and Torres Strait Islander communities, with strategies for crime prevention benefiting from recognising the ongoing history of colonisation, dispossession and marginalisation of Indigenous peoples' wellbeing and socio-economic development outcomes (Capobianco, 2006; Cunneen et al., 2016; Georg & Manning, 2019; Goldson et al., 2020). Planning should include a combination of shorter-term measures and longer-term measures (Cherney & Sutton, 2007).

For Aboriginal and Torres Strait Islander children and families, culturally appropriate responses are essential (Cunneen, Russell and Schwartz, 2020; Cunneen et al., 2017).

The transformation imagined by a coordinated 'best interests' response is not as radical as it may first appear. Much can be learned from studies of best practice *within* the youth justice system, which can be adapted and deployed outside of a criminal responsibility and criminalisation framework. It has long been recognised that the optimal response to children who engage in behaviours that bring them into contact with the criminal justice system is diversion (McAra and McVie, 2015; Smith, 2017; Goldson et al., 2020; Cunneen, Russell and Schwartz, 2021). In fact, paradoxically, keeping children *out* of the youth justice system has long been a favoured strategy *of* the youth justice system – for example, as reflected in the *Young Offenders Act 1997* (NSW). There is evidence that practice has fallen short of aspiration in relation to youth diversion (NSW Parliament, Legislative Assembly Committee on Law and Safety, 2018). However, the shift to a replacement 'best interest' response can be appreciated as more incremental than seismic, when the centrality of diversion to the current youth justice system is appreciated. A non-criminalising multi-agency response is consistent with the same 'best interests of the child' principles that animate existing *intra*-youth justice system practices and the allied child 'care and protection' jurisdiction.[27] We endorse Goldson's (2013: 122) conclusion that 'The most effective diversionary strategy … is literally to remove children from the reach of the youth justice system altogether, by significantly raising the minimum age of criminal responsibility'.

6.1 Principles for Developing a Best Interests Response

In the next section of this report we propose an initial set of principles for developing a viable non-criminalising best interested response to 'offending behaviours' – to replace the youth justice system for 10-13 year old children when the MACR is raised to 14 years. It is important to emphasise that while responding to instances of 'offending behaviour' that happen 'today' will initially be prioritised, addressing the structural conditions that are known to give rise to youth offending will prove more beneficial and efficient in the longer term (Goldson and Muncie, 2015).

[27] Eg 'The principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter' (*Young Offenders Act 1997* NSW), s 7(c); 'in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount' (*Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9).

6.1.1 A strong network of services in communities

Developing a tight web of services in communities to reach young people's and their families' welfare, housing, health, educational and leisure needs is essential. A State-wide policy should be designed and reviewed, not only to address narrowly defined 'offending behaviours', but also to address child protection and safeguarding needs such as housing and mental health, as well as socio-economic exclusion. It is important that context specific policies practices, such as those on school discipline, be reviewed and improved with evidence-based child-friendly practices. For example, traditional methods of dealing with misconduct, such as school exclusion and suspension, can exacerbate 'offending behaviours' (Gerlinger et al., 2021) and have other consequences such as poor school performance, racial achievement gaps and school non-attendance. Rather than punitive and exclusionary responses, extra supervision should be offered such as education support or alternative education, socialisation-focused activities and family parenting support.

The NSW Government's new *Student Behaviour Strategy* is an example of effective review and improvement (NSW Department of Education, 2021). The Maranguka Project, discussed above, provides a positive example of how school behaviour can be approached at the local level (see also Goldson et al., 2020).

A graduated response should be developed to match the needs of young people and their families. Consistency of service provision and quality must be ensured across the State, but flexibility is required in order to enable communities to tailor the response to their needs and culture. The approach should also engage children and enable them to be involved in designing the programs so that they have the motivation to participate.

6.1.2 Improving policing practices and reducing contacts with young people

There is converging evidence that young people are excessively policed. This translates into young people, and especially Aboriginal and Torres Strait Islander children, being more likely to be subject to stop and searches, name and address check, move-on orders as well as strip-searched (Cunneen et al., 2016; Goldson et al., 2020; Cunneen, Russell and Schwartz, 2021).

In response to the evidence of the harms experienced by children as a result of their contact with police, some proponents of raising the MACR advocate for the complete removal of police from any role in responding to 'offending behaviour' by young children. We acknowledge the value of this vision as a long-term strategy for strengthening communities, and it is consistent with the wholesale replacement of the youth justice system for children aged 10-13 years that this report recommends. Optimal arrangements for a non-criminalising multi-agency best interests response will not involve police in a central initial decision-making role in relation to how best to support a child who engages in 'offending behaviour'.

However, we also acknowledge that, in the short term at least, it is likely that police will still play a role, because it can be anticipated that police will remain the first port of call for notifications by members of the wider community (or family members) about instances of 'offending behaviour'. With this in mind it will be instructive to, at least initially, provide police with a set of tools that sit outside criminal sanction when dealing with children below the age of 14 years, and that are focused on the child's 'best interests' and involve referral to appropriate support services. On this approach, police should be trained on child-friendly, trauma-informed and needs-assessment responses, with a specific focus on dealing appropriately with young children who demonstrate provocative or violent behaviour, and refer them, if appropriate, to community organisations and government services, without reliance on attribution of criminal responsibility or admission of 'guilt' (Haines et al., 2012; Pearce, 2021).

This is especially important for Aboriginal and Torres Strait Islander children, given historical and enduring tensions with police in many communities. Effective engagement with services may be difficult to achieve if police and other law enforcement agencies are involved. It could be best achieved by a system involving community-based organisations as first responders where possible, and as case managers, linking children with appropriate services delivered by other organisations and government agencies. Where circumstances are such that the police *are* the first responders, they could, immediately after determining that the child is under the age of 14 years, render the child to his or her parents/family, or alternatively, directly to a community-based organisation in charge of their 'case management'.

6.1.3 Strengthening interagency collaboration

Previous research has highlighted the importance of strong cross-agency coordination between different agencies working at community level (Semczuk et al., 2012). To be efficient, non-criminalising multi-agency responses should involve multiple agencies and organisations whose mandates are relate to the child's best interests, with coordination in the hands of an appropriately resourced local community organisation. Maranguka and the cross-sector leadership group, discussed above, provides an example where inter-agency co-operation has been successful in addressing children's behaviour and meeting their needs. Multi-agency programming involves a range of structures, protocols and integration of services.

Additionally, children with complex needs in NSW often have to deal with several agencies such as youth wellbeing programs, mental health and wellbeing services, health clinics, alcohol management programs, child wellbeing centres and local schools (Georg & Manning, 2019). These agencies often work in silos and their role is not always obvious to children and their families (Baldry et al., 2015; Baldry et al., 2018). Involving a

wide range of practitioners in the child's life can be destabilising. A lead organisation/agency, represented by a single 'case manager' interacting with the child and her/his family should coordinate the different components of support services.

6.1.4 Quality and responsivity of service provision and relationships

How supports and services are provided to children with be an important component of a successful replacement response. Although we recommend taking service provision entirely outside the youth justice system for 10-13 year old children, lessons can be taken from expert knowledge about best practice within the system. For example, studies have shown that the quality of services provided, such as individual counselling or supervision, has a direct impact on outcomes. Among the key determining factors are the adaptability of the services to the needs, learning style and motivation of the child (Andrews & Bonta, 2010). The quality of the child-supervisor relationship is also critically important to desistance from 'offending behaviour' (Goldson, 2019). McNeill (2006) has identified three key features:

> *First, relationships matter at least as much as 'tools' and 'programmes' in influencing the outcomes of supervision. Second, social contexts are at least as significant to offending and desistance as individual problems and resources. Third, in supporting desistance, social advocacy is at least as necessary as individualised responsibilisation* (2006: 135).

Maruna and Mann (2019: 7) have emphasised that supporting children to desist from offending should involve 'recognition of their worth from others, feelings of hope and self-efficacy and a sense of meaning and purpose in their lives'.

The responsivity and coordination of services should be made a priority, enabling efficient referrals between community organisations, parents, and both government and NGO service providers. This will require long-term funding certainty, especially for non-government community organisations, to ensure continuity of service over time. Ongoing co-operative evaluation of services and programs is important to assist with the steering of towards the most effective services, and those identified as in need of additional resources.

6.1.5 Connecting to 'child protection' responses

An important dimension of a replacement approach to addressing the 'offending behaviour' of children aged 10-13 years is to create *non-punitive* connection points with both state-based and NGO-run programs in the child protection space. A detailed review of existing programs is beyond the scope of this report, but an

illustrative programs is briefly described here to underscore the potential common ground between child protection programs and the replacement approach to 'offending behaviour' recommended in this report.

6.1.5.1 MCT-CAN and FFT-CW

The Multisystemic Therapy for Child Abuse and Neglect ('MST-CAN') program, and the Functional Family Therapy through Child Welfare ('FFT-CW') program, aim for preservation and restoration – that is, to reduce the number of children entering out-of-home care (preservation) and increase the number of children exiting out-of-home care (restoration).

FFT-CW is a home and community-based treatment for families with substantiated physical abuse and/or neglect of a child aged 0 to 17 years of age. The model aims to address child abuse and neglect, substance use, mental illness, school difficulties and history of out-of-home care or involvement with the NSW child protection system. The model focuses on engaging with the family's broader social environment and develops each family's social and community networks that are considered a central component of the service response.[28] MST-CAN is a home-based 24/7 intensive therapeutic treatment model for families where there has been substantiated physical abuse and/or neglect of a child or young person aged 6 to 17 years. The model provides 24/7, intensive support to a family where the therapists meet with the entire family a minimum three times a week in their home at times convenient to the family for up to nine months and provides a 24/7 on-call service for families in crisis.

The National Drug and Alcohol Research Centre at UNSW recently completed an independent outcomes evaluation of MST-CAN and FFT-CW (Shakeshaft et al., 2020). This evaluation demonstrated that:

- completion rates across both MST-CAN and FFT-CW were positive;
- entries to care were substantially lower than control groups for families who successfully completed programs;
- compared to control groups, there were lower re-report rates for families who successfully completed other programs; and
- families and districts were enthusiastic about the value of both programs.

Programs like MST-CAN and FFT-CW have the potential to play an important role as part of a non-criminalising response for young children. Given the known relationship between placement in out-of-home

[28] For more information, see the website of the National Plan to Reduce Violence against Women and their Children https://plan4womenssafety.dss.gov.au/initiative/functional-family-therapy-child-welfare-fft-cw/

care and behaviours that result in youth justice system involvement, family preservation and restoration support programs will be an important component of a non-criminalising multi-agency best interest response.

6.1.6 Avoiding Care-Criminalisation

Children who have experienced out-of-home-care are over-represented in the criminal justice system (McFarlane, 2018). This may be due, among other factors, to criminalising characterisations, poor inter-agency relationships and the criminogenic residential environment (Colvin et al., 2018). In particular, behavioural issues, often occurring as a result of multiple placements, poor matching of between carer and child, inappropriate housing, can lead to punitive responses, and subsequently to criminalisation of children in residential care.

Given what is already known about care-criminalisation, it is critical that, when the MACR is raised, children aged 10-13 years of age who engage in 'offending behaviours' are not 'displaced' into the care system. This would place them at a greater risk of becoming involved in the youth justice system from the age of 14 years. Of course, this outcome should not be regarded an inevitable, and policies like the *Joint Protocol to Reduce the Contact of Young People in Residential Care with the Criminal Justice System* (2019) provide a foundation for further improvements to policy and practice to break the nexus between care and criminalisation.

6.2 The Challenge of Engagement

One of the biggest challenges in designing a best interest multiagency response that permanently keeps 10-13-year-old children out of the youth justice system will be how to ensure that children access services from community organisations and government agencies without the influence of youth justice system compulsion. Broad consultation – of the sort currently being conducted in the Australian Capital Territory (ACT Government, 2021) – will be required to generate the required solutions.

Without underestimating the challenge, some lessons can be learned from existing community-based programs that recognise the need to engage children effectively. It is important to:

> *... bring the voices of young people to the centre of the decision-making process ... You really need to listen to what's going to make them want to come, what's in it for them, and how do you incentivise and reward that.*[29]

[29] Personal communication (Sarah Hopkins, JustReinvest NSW), 26 May 2021.

Nicole Mekler, Youth Engagement Leader at Just Reinvest NSW, stressed the need for caseworkers to be available beyond the 9 to 5 work hours within which conventional diversion programs have tended to operate, and the importance of an *'unstructured'* approach where caseworkers can have a *'genuine conversation and get to know people on their own terms at their own pace'*.[30] Technology and social media platforms such as Facebook and Instagram have an important role to play in recruiting young people to a service and engaging their attention.[31]

In addition, as noted earlier, that there is strong evidence from the literature on effective community supervision and desistance from offending that engagement is related to the quality of relationships between child and supervisors, and improved by a dual emphasis on mentoring and advocacy (McNeill, 2006; Maruna and Mann, 2019). Again, lessons on how best to support young children in a non-criminalising multi-agency support environment can be learned from the research literature on supervising children *within* the youth justice system, as the following account of 'probation' (ie community supervision) from the USA reveals:

> *Getting it right means transforming probation into a focused intervention that promotes personal growth, positive behavior change and long-term success for youth who pose significant risks for serious offending. It means dramatically reducing the size of the probation population and probation officer caseloads by diverting far more youth so they can mature without being pulled into the justice system. It means trying new interventions and letting go of outdated, ineffective ones: ditching compliance in favor of supports, sanctions in favor of incentives and court conditions in favor of individualized expectations and goals. Getting probation right means embracing families and community organizations as partners and motivating youth primarily through rewards, incentives and opportunities to explore their interests and develop skills, rather than by threats of punishment.* (Annie E. Casey Foundation, 2018: 1)

To be clear, although we believe guidance can be taken from intra-youth justice good practice models, such as the one described here, the replacement approach recommended by this report is predicated on the view (and the evidence) that the *best practice* response for 10-13 year old children is an entirely non-criminalising response *outside* the youth justice system.

[30] Personal communication (Nicole Merkler, JustReinvest NSW), 20 May 2021.

[31] Personal communication (Ken Zulumovski, Gamarada Universal Indigenous Resources and Gamarada Indigenous Healing and Life Training Pty Ltd), 29 April 2021.

6.2.1 Protecting the Human Rights of Children

The case for keeping children aged 10-13 years out of the youth justice system is overwhelming, but one of the challenges will be to ensure that the rights and due process protections that are associated with appearances and legal representation in the NSW Children's Court are mirrored in the decisions and actions all community organisations and government agencies involved in a non-criminalising best interests response to 'offending behaviours'. Article 40.3 of the UN Convention on the Rights of the Child provides that in pursuing 'measures for dealing with such children without resorting to judicial proceedings' it is important that 'human rights and legal safeguards are fully respected'. This issue should be a focus of the consultations that will be required during the design of a replacement response.

7. INTERIM MEASURES

Although this report concludes that wholesale replacement of the NSW youth justice system is required for children aged 10-13 years, two urgent and inter-related priorities pertain: i) improving diversion; and ii) addressing racialisation.

7.1 Improve Diversion

We recommend a renewed immediate commitment to effective and appropriate diversion, in line with the findings and recommendations of the NSW Parliament's Legislative Assembly Committee on Law and Safety's report on *The Adequacy of Youth Diversionary Programs in New South Wales* (2018), including that greater use be made of diversion options under the *Young Offenders Act 1997* (NSW), and that the Government 'should increase the availability of holistic, community-based programs and services in rural, regional and remote NSW that focus on diversion, early intervention and the prevention of youth offending, and address the underlying causes of crime.' (2018: 64)

Importantly, revitalising diversion is desirable not only for children aged 10-13 years until the MACR is raised, but also for young people aged 14-17 years who may still come into contact with the youth justice system.

The Comparative Youth Penality Project has identified a set of good practice principles in diverting young people from the criminal jurisdiction (Cunneen, Russell and Schwartz, 2021). Although developed specifically

to improve diversion for Aboriginal and Torres Strait Islander children – where improvement is most sorely needed – many of the principles have wider relevance:

1. *Self-determination: diversion programs should be Aboriginal and Torres Strait Islander-community developed, owned and driven, and incorporate young peoples' voices.*
2. *Consistent with the principle of self-determination, discretion to access diversionary programs should not be solely in the hands of police.*
3. *Diversionary programs should ensure cultural safety and cultural security*
4. *Programs should incorporate elements of Aboriginal and Torres Strait Islander custom and law*
5. *Programs should deliver family-centred support based on a holistic view of Aboriginal and Torres Strait Islander health and wellbeing*
6. *Diversion programs should include built-in education, training and employment pathways alongside mentoring specific to the needs of Aboriginal and Torres Strait Islander people*
7. *Approaches to diversion initiatives should be trauma-informed and involve healing plans specific to the needs of Aboriginal and Torres Strait Islander people*
8. *Diversion must be appropriately funded with strong evaluation frameworks*
9. *Minimising the reach of criminalisation of children and young people through increasing the age of criminal responsibility* (Cunneen, Russell and Schwartz, 2021).

7.2 <u>Addressing Racialisation</u>

The racialisation of youth justice – through over-policing, over-supervision and over-incarceration – has a long history in NSW and elsewhere in Australia (Goldson et al., 2020; Cunneen, 2020; Richards & Lyneham, 2010). Immediate and sustained endeavours should be made to reduce adversarial contacts between Aboriginal and Torres Strait Islander children and the police (Porter, 2016). The NSW Police Force's 'predictive policing' protocol – the Suspect Targeting Management Plan (STMP) – has attracted particular criticism for its punitive and racialised effects (Sentas & Pandolfini, 2017; Law Enforcement Conduct Commission, 2020). Much was made by STMP proponents of a recent BOCSAR study which suggested that STMP was associated with property crime reduction (Yeong, 2021). However, the study also found:

> *With regard to juveniles, I found that STMP-II is associated with a significantly higher risk of imprisonment. This finding, in combination with the possibility that early engagement with, and surveillance by police, whilst subject to STMP-II may adversely influence other outcomes relevant to a young person's development (e.g., attitudes toward authority,*

> *educational achievement and mental health), begs the question of how the program can be modified to better address the needs of young people. Increased access to social services (e.g., a dedicated caseworker, mentoring, tutoring or counselling) coupled with police supervision may generate a broader benefit than police supervision alone.* (Yeong, 2021: 19)

We do not believe that STMP, as a form of so-called 'police supervision', is appropriate as a foundation for meeting the needs of children and we recommend that it be discontinued.

STMP is a powerful illustration of the adverse effects on Aboriginal and Torres Strait Islander children of a policing and youth system preoccupation with 'risk assessment' and 'early intervention' (discussed above). As the Comparative Youth Penality Project has explained:

> *… the dominant construction of risk assessments pose profound questions with regard to their application and suitability for Aboriginal and Torres Strait Islander, black and minority ethnic children and young people … Indeed, Priday (2006: 418) has noted in relation to Aboriginal and Torres Strait Islander young people that: '[They] already have the so-called objective risk assessment stacked against them. The processes that result in higher levels of risk, do not acknowledge the specific history of colonisation and dispossession of Indigenous Australians and the associated structural barriers they face. By cloaking risk in more general terms and without reference to the above-mentioned aspects, assessments run the risk of perpetuating discourses that pathologise Indigenous young people and continue policies of removal but under the guise of the justice system.' …*
>
> *Risk is conceived as deriving from individualised characteristics that are removed from the social, economic and political relations that lie at the root of racialised marginalisation. Thus 'race' becomes intrinsically embedded as an identified (static) 'risk' factor.* (Goldson et al., 2020: 121, 124)

8. CONCLUSION

This report contends that raising the minimum age of criminal responsibility from 10 years to 14 years should be a priority for youth justice reform in NSW, and in Australia more generally. Children aged 10-13 years should not be in contact with the youth justice system because this experience is likely to compound, rather than reduce, 'offending' behaviours. That is, actions based on a child's 'criminal responsibility' actually do more harm than good. The consequences of early age *criminalisation* can include an increase in problematic behaviours and a greater risk of 'offending behaviours' in adulthood. International human rights standards and the research literature on best-practice responses to 'offending behaviour' by young children support a change to the MACR, and our survey of existing programs in NSW shows that non-punitive community-based responses outside the youth justice system are feasible and effective.

The available evidence suggest that the approach outlined in this report is well adapted to achieving the core objectives of crime prevention and community safety. A non-criminalising 'best interests' approach that keeps children under the age of 14 years out of the criminal justice system will have two key benefits. First, it will reduce the harm done to young children by contact with police and the youth justice system. Secondly, it will be qualitatively better than the criminalisation model at reducing 'offending behaviour' by young children, with demonstrable benefits for the wider public, community safety and well-being.

The evidence reviewed for the purpose of writing this report establishes that the *scale* of the 'problem' for which the current MACR (10 years old) is regarded as necessary is not large – measured by a combination of 'offence' volume and seriousness. Only a very small proportion of recorded 'offending' in NSW is attributable to children aged 10-13 years, and of the small number of offences with which children are charged, only a minority are offences of serious violence. Instances of serious violence require an appropriate and effective response. However, there is no good reason why such (rare) forms of 'offending behaviour' should dominate the design of an appropriate response to 'offending behaviours' by young children – most of which do not involve harm to others.

A non-criminalising approach for 10-13-year-old children will require different interventions and support systems than those that are currently available to police officers, youth officers and Children's Court magistrates. It will also require the involvement of different institutions, organisations, first responders and other stakeholders. Of course, government agencies that have a key role to play in advancing the best interests of children (including education, health, housing, youth services) must be involved – but, in co-operative partnership with organisations from the non-government sector and civil society that are willing and able to be part of a multi-agency response that replaces the youth justice system children aged 10-13 years.

An important component of the case for new approach to 'offending behaviours' by 10-13 year old is the potentially to effect a material reduction in the over-criminalisation of Aboriginal and Torres Strait Islander children, and to respect the self-determination of Aboriginal and Torres Strait Islander communities.

The research summarised in this report supports calls for the NSW Government to follow the lead of the ACT Government (2021) and embark on a committed process towards raising the MACR to the international benchmark of 14 years, and replacing the youth justice system for children aged 10-13 years with a response strategy that is non-criminalising and best interests-oriented, and which involves multiple agency co-operation, across the government and NGO sectors. This process should involve wide consultation, particularly with community organisations, and scoping the feasibility and cost of capacity-building and resourcing towards a replacement approach. Aboriginal and Torres Strait Islander self-determination and leadership should be central to this process.

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