



Law Council
OF AUSTRALIA

Responses to Children under the Minimum Age of Criminal Responsibility

Position Paper

Addendum to the Policy Statement on the Minimum Age of Criminal Responsibility

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Introduction

Purpose of this paper

1. This paper is an addendum to the Law Council's existing policy on raising the minimum age of criminal responsibility, which was published jointly with the Australian Medical Association in December 2019 and is available [here](#).¹ It must be read in conjunction with the existing policy and its resolutions, which are summarised as follows:
 - The age of criminal responsibility in Australia should be increased to 14.
 - Prison should not be seen as a rite of passage for Aboriginal and Torres Strait Islander children.
 - Communities and society will not be safer or healthier if children are in prison.
 - Early intervention, prevention and rehabilitation solutions should be prioritised.
 - In Aboriginal and Torres Strait Islander communities, health and justice solutions should be community-led.
 - Investment in critical support services for children and families must be increased.
 - Children belong in their communities.
 - Australia should abide by its international obligations, particularly regarding the rights of the child.
 - The arrest, detention or imprisonment of a child should always be a last resort for children and should only occur for the shortest appropriate period of time.²
2. Under the Law Council's policy, the minimum age of criminal responsibility would be raised from 10 years old to 14 years old without exception. This would mean that children aged 10, 11, 12 and 13 years old would no longer be charged with a criminal offence in Australia.
3. There have accordingly been calls from governments for guidance from stakeholders on what should replace the current criminal justice response to these children.
4. The purpose of this additional paper to the existing policy is to provide overarching model guidance on responses to children under the minimum age of criminal responsibility.
5. As children aged 10, 11, 12 and 13 years old would no longer be held criminally responsible for their actions, such responses must take place outside the criminal justice system.

The cohort in question: children aged 10, 11, 12 and 13

6. It is important to keep in mind at the outset that these are relatively small numbers of children. The Australian Bureau of Statistics (**ABS**) records the numbers of Australian adults and children, aged 10 years and over, who have been proceeded against by police, with the latest publication in this series (at time of writing this introduction)

¹ Law Council of Australia and Australian Medical Association, *Minimum Age of Criminal Responsibility Policy Statement* (December 2019) <<https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-11-9403-005056be13b5>>.

² Ibid.

relating to the reference period of 1 July 2019 to 30 June 2020.³ Of 374,645 total persons, 15,278 were aged 10-14 (in other words, only 4 per cent). This compares, for example, to 56,568 aged 20-24 (15 per cent). The average person proceeded against by police is in their early thirties, with the mean age being 32 and the median being 30.

7. Children under 14 years of age had significantly lower rates of prevalence in this ABS dataset than any other age cohort, with the exception of adults over 55 years of age.⁴ For example, the rate of alleged offending for children aged 10-14 was 969 per 100,000 persons. This was slightly lower than adults aged 50-54, whose rate was 1,141 per 100,000 persons, and slightly higher than adults aged 55-59, at 674 per 100,000 persons. It was significantly less than any of those within the intervening age groups, which ranged from 15-19-year-olds recording rates of 3,774 per 100,000 persons to 30-34-year-olds at 2,484 and 45-49-year-olds at 1,657 per 100,000 persons.
8. The ABS dataset does not record how many of these police proceedings actually resulted in a conviction nor does it capture the circumstances surrounding the alleged offending.
9. It is also well known that 'the involvement of children in the criminal justice system centres on less serious crimes, such as property crimes'.⁵ It is rarer for children to commit serious offences against the person.
10. For example, only three (or 0.415 per cent) of 723 instances in the ABS dataset where police proceeded against a person for 'homicide and related offences' related to children under 14 years of age.⁶ As noted, the dataset is limited in that it does not include contextual information for these three instances such as whether the child was allegedly acting alone or in a group, whether the child was charged with murder or a lesser offence, and whether the child was ultimately convicted of any offence with which they were charged.
11. Similarly, the 2021 independent report commissioned by the Australian Capital Territory (ACT) Justice and Community Safety Directorate, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory*, states that 'ACT data reported by the [Australian Institute of Health and Welfare] shows that 10- to 13-year-olds consistently make up a small proportion of the total number of children and young people in the ACT youth justice system'⁷ and 'the data demonstrate that 10 – 13-year-olds' offending is generally less serious than that of older children or adults, with no offences such as murder, manslaughter or sexual assault recorded over the five years of the review period'.⁸
12. It is furthermore important to emphasise that the responses discussed below are neither new nor novel. Children below the current minimum age of criminal

³ Australian Bureau of Statistics, *Recorded Crime – Offenders, 2019-2020* (11 February 2021).

⁴ Ibid.

⁵ Mark Nolan and Jane Goodman-Delahunty, *Legal Psychology in Australia* (Thomson Reuters, 2015) 222.

⁶ Australian Bureau of Statistics, *Recorded Crime – Offenders, 2019-2020* (11 February 2021), 'Table 21 Youth offenders, Sex and principal offence by age, 2019-2020'.

⁷ Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 26 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

⁸ Ibid, 27.

responsibility (ie, children under 10) or who are considered *doli incapax*⁹ (ie, children between 10 and 14 where the legal presumption of moral innocence is upheld) are already dealt with outside the criminal justice system, and there are existing early intervention, diversionary, rehabilitative and therapeutic programs and services that might be utilised or expanded.

Policy Position

13. The Law Council endorses the following policy position as an addendum to its existing policy on the minimum age of criminal responsibility.

Overarching Principles

14. When developing responses to children under the minimum age of criminal responsibility, the following overarching principles should be adhered to.
 - In all responses to children under the minimum age of criminal responsibility, the best interests of the child should be a primary consideration.¹⁰
 - Responses should be aimed at attending to the core needs of the child and their family unit through the provision of wraparound, multidisciplinary, therapeutically led services.¹¹
 - Responses should draw on and build upon the existing evidence base across the medical, legal and social sectors as to what works in supporting children with complex needs, including operating from a place of strength, empowerment and wellbeing.
 - All levels of government should provide long-term, stable investment in early intervention, diversionary, rehabilitative and therapeutic programs and services for children under the minimum age of criminal responsibility. This includes the development of a range of support services directed at both addressing existing needs and at combatting pathways into the justice system at an older age, such as family, mental health, disability and substance abuse support, and access to safe, secure housing.
 - Particular regard should be had to the availability of services in regional, rural

⁹ The legal presumption of *doli incapax* holds that children between the ages of 10 and 14 lack the capacity to know that an act is seriously wrong in the criminal or moral sense. If children cannot be said capable of formulating the *mens rea* or mental element of a criminal offence, then they cannot be found guilty of a criminal offence. However, the presumption is rebuttable, meaning the prosecution can introduce evidence in order to prove beyond a reasonable doubt that the child in question knew their act was seriously wrong. Where the prosecution is successful, the child can be found guilty of a criminal offence. *Doli incapax* currently applies in all Australian jurisdictions, placed on a statutory footing in all states and territories except New South Wales, South Australia and Victoria, where it remains a common law principle: *C v DPP* (1995) 2 All ER 43; *R v Gorrie* (1918) 83 JP 136; *R v ALH* (2003) 6 VR 276; *R v M* (1977) 16 SASR 589; *R v CRH* unreported NSWCA 1996); *Criminal Code 2002* (ACT) s 26; *Criminal Code Act 1995* (Cth) sch 1 s 7.2; *Criminal Code Act 1983* (NT) sch 1 s 38(2); *Criminal Code Act 1899* (Qld) sch 1 s 29(2); *Criminal Code Act 1924* (Tas) sch 1 s 18(2); *Criminal Code Act Compilation Act 1913* (WA) s 29. For detailed criticisms of the presumption, see Law Council of Australia, Submission to the Age of Criminal Responsibility Working Group, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 20-27 <<https://www.lawcouncil.asn.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>>. The position of the Law Council is that the presumption is a problematic area of the law and difficult to apply in practice. Raising the minimum age of criminal responsibility would therefore have the added benefit of making the presumption redundant.

¹⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 3.

¹¹ See, eg, United Nations Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [9]-[12]. See also *United Nations Minimum Rules for the Administration of Juvenile Justice*, GA res 40/33 (29 November 1985); *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA res 45/112 (14 December 1990).

and remote areas, and of generally ensuring services are reasonably accessible from the child's home.

- Children under the minimum age of criminal responsibility should not be primarily dealt with by police.
- Children under the minimum age of criminal responsibility should primarily be engaged with on a voluntary basis.¹²
- Responses to children under the minimum age of criminal responsibility should avoid an over-reliance on child protection frameworks. In particular, the principle of keeping Aboriginal and Torres Strait Islander children safe within their families, communities and kinship systems should be observed.
- All sectors involved in responses to children should be required to meet certain minimum standards of training and practice, which are child-centred, trauma-informed and culturally safe.
- Services, programs, training and procedures should be designed, developed, implemented and reviewed in consultation with children, their families and communities, and in particular Aboriginal and Torres Strait Islander children, families and communities.
- There should be widespread recognition that children are distinct from adults in terms of their brain development, cognitive functioning and capacity for impulse control, reasoning and comprehension, and the processes and procedures of institutions, services and programs adjusted accordingly.¹³
- Institutions, services and programs responding to children under the minimum age of criminal responsibility must avoid, at all costs, effectively resembling the juvenile criminal justice system.
- Institutions, services and programs responding to children under the minimum age of criminal responsibility should as far as possible be administratively and geographically separate from those responding to adults and children over the minimum age of criminal responsibility.
- Jurisdictions should develop clear legislation, guidelines, protocols and procedures related to the above principles, as well as the additional principles below, and have in place strong child-friendly complaints processes and independent oversight mechanisms.
- Responses to children under the minimum age of criminal responsibility should accord with Australia's international obligations and international standards with respect to children.¹⁴

Practical Approach

15. The following provides an outline of what responses to children under the minimum age of criminal responsibility, which are in line with the overarching principles and

¹² See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 9-10, 64, 70-71 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

¹³ See, eg, United Nations Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [2].

¹⁴ See *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) ('**CRC**'). See also United Nations Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019); *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA res 45/112 (14 December 1990) ('**The Riyadh Guidelines**'); *United Nations Minimum Rules for the Administration of Juvenile Justice*, GA res 40/33 (29 November 1985) ('**The Beijing Rules**'); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN Doc A/RES/45/113 (14 December 1990) ('**The Havana Rules**').

based on the best available evidence and consensus views of legal, medical and social experts, might look like in practice.

16. This model guidance is intended to allow flexibility within certain parameters, recognising that jurisdictions approach legal and policy implementation in different ways, and have different existing institutions, programs and services that might be utilised or expanded.
17. The detailed aspects of the responses to children that are contained in this model guidance will require further consultation with local stakeholders, however the basic frameworks set out attempt to provide a strong basis for reform.
18. This model guidance illustrates in a broad manner what the Law Council would support, outlining a graded approach wherein the provision of wraparound, multidisciplinary services aimed at attending to the core health and wellbeing needs of the child and their family unit is the primary focus.

First Response

19. In addition to the overarching principles discussed above, key components of a first response to children under the minimum age of criminal responsibility might also include:
 - First responders to incidents involving children should be trained and supported to assess incidents appropriately and to act in ways that avoid or minimise harm to the child.
 - Referrals from first responders to secondary support services should occur within the shortest appropriate period of time.
20. As the overarching principles make clear, children under the minimum age of criminal responsibility should not be primarily dealt with by police. It is recognised, however, that it will often be police that are first on the scene in crisis situations and regard may need to be had to outlining an alternative police response.¹⁵
21. Should policing form part of a first response to children under the minimum age of criminal responsibility, the following additional principles should be observed:
 - Police should be highly skilled, specially trained and accompanied by experienced child support/advocacy service/social workers in their dealings with children under the minimum age of criminal responsibility.¹⁶ Their response to children should be an outreach, health- and welfare-based model.
 - Appropriately strict legislative thresholds and safeguards must be in place around the exercise of police powers.
 - Deprivation of liberty should be in conformity with the law, used only as a measure of last resort, be limited to exceptional cases, and for the shortest

¹⁵ See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 64 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

¹⁶ See, eg, *United Nations Minimum Rules for the Administration of Juvenile Justice*, GA res 40/33 (29 November 1985) rule 12; Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 53 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>; Jesuit Social Services, *Raising the Age of Criminal Responsibility: There is a Better Way* (October 2019) 9 <https://jss.org.au/wp-content/uploads/2019/12/JSS0102_Raising_the_Age_There_is_a_better_way_v.5.1.pdf>.

appropriate time.¹⁷

- That is, for example, police may only detain a child under the minimum age of criminal responsibility where there is an immediate, serious risk of harm to the child or others,¹⁸ and only until the specialist worker arrives, using the least restrictive means possible, using no more force than is reasonably necessary.
- Children under the minimum age of criminal responsibility should not be transported or accommodated in police vehicles, police watchhouses or other types of police facilities alongside adults.¹⁹
- Police should not use spit hoods or chair restraints on children under the minimum age of criminal responsibility.²⁰
- Police should not strip-search children under the minimum age of criminal responsibility.²¹
- Police should seek to divert children towards health, social and community support services at the earliest reasonable opportunity.
- Specialist crisis accommodation should be available to children as a voluntary option where it is not safe for children to return to their usual place of residence or where children need accommodation at short notice or after hours.²² This must be provided outside of policing or corrective services and must be separate from that provided to adults or children over the minimum age of criminal responsibility.

Secondary Response

22. In addition to the first response that would occur in crisis situations, there must be a longer-term approach to respond to the needs of children under the minimum age of criminal responsibility, as anticipated in the overarching principles. This secondary response might involve several tiers.

TIER 1 – Children under the minimum age of criminal responsibility with complex needs

23. This would be the default response to children under the minimum age of criminal

¹⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 37(b).

¹⁸ See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 53 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>, which suggests that police might detain a child in situations where a child is using violence, is acting in an unsafe manner, or is unsafe by circumstance.

¹⁹ See, eg, Law Council of Australia, *Adult watch houses no place for children* (Media Release, 14 May 2019) <<https://www.lawcouncil.asn.au/media/media-releases/adult-watch-houses-no-place-for-children-law-council>>. See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 3, 37(c), 40; United Nations Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [85].

²⁰ See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 3, 37(c), 40. See also *United Nations Minimum Rules for the Administration of Juvenile Justice*, GA res 40/33 (29 November 1985) rule 10.3.

²¹ See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 3, 37(c), 40. See also *United Nations Minimum Rules for the Administration of Juvenile Justice*, GA res 40/33 (29 November 1985) rule 10.3; Australian Human Rights Commission, *Policing Juveniles Consistently with the UN Convention on the Rights of the Child* (online, 2 December 2001) <<https://humanrights.gov.au/our-work/policing-juveniles-consistently-un-convention-rights-child#3>>; *Thompson v Minogue* [2021] VSCA 358.

²² See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 54 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

responsibility.

24. It is normal for many children as they develop to engage in what is often referred to as minor anti-social behaviour.²³
25. It is important to recognise that such behaviour in children of all ages is generally dealt with by existing means, other than through the exercise of the criminal law – such as the child’s parents or school.
26. Where children do not have the support of a family unit or are disengaged from other protective environments such as schools, their behaviour is currently more likely to come to the attention of, and be dealt with by, authorities such as police and magistrates.
27. Many of these children have overlapping complex needs in the areas of mental and physical health and disability, poverty, insecure housing, abuse and neglect.²⁴
28. Implicit in arguments for raising the minimum age of criminal responsibility is the recognition that such children should not face harsher consequences than other children because of their social disadvantage. Wraparound support services, which are locally accessible and designed to help them and their families address underlying issues, should be the primary response.

²³ As the Australian Institute of Criminology notes, '[t]here are a number of different definitions of antisocial behaviour'. Essentially, it may be defined as anything a particular community perceives to be a problem. That is, actions – ranging from minor impolite behaviour such as swearing and noisy disruption to major behaviour causing risk, harm or damage such as theft and assault – that create community concern. See Amanda McAtamney and Anthony Morgan, *Key Issues in Antisocial Behaviour* (Research in Practice No 5, Australian Institute of Criminology, 1 December 2009) <<https://www.aic.gov.au/publications/rip/rip5>>. Accordingly, this level of response might be applied to children engaging in actions ranging from minor behaviour creating community concern such as public nuisance to major behaviour causing risk, harm or damage such as theft and assault. This is because the focus of this response model is not on the criminal or moral culpability of the child but on their unmet complex social and health needs (see fn 24).

²⁴ Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 18 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>:

'Complex needs' is a term usually used about individuals who have a combination of: mental health problems; cognitive disability, including intellectual and developmental disability; physical disability; behavioural difficulties; precarious housing; social isolation; family dysfunction; and problematic drug or alcohol use (Baldry et al., 2013; Carney, 2006; Draine et al., 2002; Hamilton, 2010). Further factors identified as specific to children include the risk of harmful behaviours in early life and early educational disengagement (Archer, 2009; AIHW, 2021; Baldry & Dowse, 2012). In addition, a large number of children in the justice system have at least one disability: cognitive or neurodisabilities, including intellectual disability; other specific learning disabilities (e.g., dyslexia); communication disorders (e.g., language and speech disorders); attention deficit hyperactivity disorder (ADHD); autism spectrum disorder; and foetal alcohol spectrum disorder that often go unnoticed and unassessed prior to entry to youth justice services (Baidawi & Piquero, 2021).'

The backgrounds of children in contact with the criminal justice system have also been explored by the Law Council in the following pieces of published work: Law Council of Australia, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, *Age of Criminal Responsibility Working Group Review* (2 March 2020) <<https://www.lawcouncil.asn.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>>; Law Council of Australia and Australian Medical Association, *Minimum Age of Criminal Responsibility Policy Statement* (December 2019) <<https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-11-9403-005056be13b5>>; Law Council of Australia, *Justice Project* (Final Report, August 2018) <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20-%20Final%20Report%20in%20full.pdf>>.

29. Key components of this stage of the secondary response might include:

- The critical, basic needs of children and their families are met, such as the provision of accommodation, from affordable housing and community housing to appropriate alternative supported accommodation for children.²⁵
- Children and their families are referred to support services, such as parental support, child behavioural support, alternative education programs, substance abuse programs, and family violence prevention services.
- Children and their families are referred to health services and able to access assessment and treatment in a low-cost, timely manner for any physical or mental health issues that may be contributing to behaviours and outcomes.²⁶
- Engagement by the child and their family with services should be encouraged and supported by authorities through holistic responses, but should not be mandated.²⁷
- It is emphasised that access to wraparound support services must be provided to all children, including those who are, or who are at high risk of coming, in contact with the child protection system.²⁸

²⁵ See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 27(3).

²⁶ For example, children in at-risk categories might be screened for health conditions which may be contributing to behaviours, such as Attention Deficit Hyperactivity Disorder, Autism Spectrum Disorder, Foetal Alcohol Spectrum Disorder, acquired brain injury, communications difficulties, or hearing impairments. Beyond treatment of diagnosed mental health disorders, mental health intervention might include for example, if a child is displaying aggressive behaviour, engaging them in interventions provided by psychologists, including treatments such as anger management, impulse control, problem solving, coping skills, and social skills training. It might also include programs such as Functional Family Therapy and Multisystemic Therapy: see, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 47 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>. See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 24, 27.

²⁷ See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 70 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

²⁸ The care to crime pathway is well documented: see, eg, Law Council of Australia, Submission to the Department of Social Services, *Implementing the Successor Plan to the National Framework for Protecting Australia's Children* (26 July 2021) <<https://www.lawcouncil.asn.au/resources/submissions/implementing-the-successor-plan-to-the-national-framework-for-protecting-australias-children>>; Law Council of Australia, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, *Age of Criminal Responsibility Working Group Review* (2 March 2020) <<https://www.lawcouncil.asn.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>>; Law Council of Australia, *Justice Project* (Final Report, August 2018) <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20-%20Final%20Report%20in%20full.pdf>>. See also South Australian Office of the Guardian for Children and Young People, *Six Month Snapshot of the South Australian Dual Involved Project: Children and Young People in South Australia's Child Protection and Youth Justice Systems* (September 2021) <<https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2021/10/OGCYP-South-Australian-Dual-Involved-Project-Interim-Report-September-2021.pdf>>. Any response to children under the minimum age of criminal responsibility must consider the issue of the child protection system and its shortcomings, and invest strategically in wraparound support services and programs that will reduce reliance on it, while at the same time improving its oversight mechanisms, its standards implementation and compliance, and its staff training and resourcing: Law Council of Australia, Submission to the Department of Social Services, *Implementing the Successor Plan to the National Framework for Protecting Australia's Children* (26 July 2021) <<https://www.lawcouncil.asn.au/resources/submissions/implementing-the-successor-plan-to-the-national-framework-for-protecting-australias-children>>. Investment in preventative, early intervention and therapeutic services and infrastructure is critical, both for reducing the numbers of children entering the system and ensuring the welfare of children already in it. Emphasis should be placed on the provision of infrastructure, services and programs to build the capabilities, skills and resilience of families and

- More broadly, a significant and sustained increase in funding wraparound services outside the criminal justice system and child protection system is a necessary part of any response to children under the minimum age of criminal responsibility, if it is to be successful in reducing incarceration and removal rates and improving child and community safety long term.

TIER 2 – Children under the minimum age of criminal responsibility with serious complex needs

30. Where children under the minimum age of criminal responsibility have more serious complex needs, the secondary response might be more intensive within the parameters of the overarching principles identified above.

Threshold for Involvement

31. There should be a threshold, criteria or other assessment of suitability to determine whether this stage of the secondary response should apply to a particular child's circumstances.²⁹
32. It is important to emphasise that the method of delineating between different tiers of a secondary response should not correspond to categories of criminal offending. It is the individual needs and circumstances of the particular child that should guide the response, rather than the category of offending into which the behaviour would fall were the child over the minimum age of criminal responsibility.³⁰
33. The threshold, criteria or assessment should be sufficiently narrow in order that it does not become the default to bring children within this elevated response, and the demands on the system can be managed and resources directed towards children most in need.
34. The seriousness of behaviour in causing risk, harm or damage might be one in a list of indicators used in identifying a child's complex needs as requiring intensive intervention.

communities. There should in the first instance be engagement with family support services, including programs to develop parenting skills and address maltreatment, and then investment in local kinship and community networks, rather than implementing or continuing an out-of-home care placement on insufficient grounds or in a manner that does not comply with basic best practice such as the Aboriginal Child Placement Principle. This aligns with the future direction of the National Framework for Protecting Australia's Children, which has emphasised a public wellbeing framework, expanding responsibility for the welfare of children beyond child protection services to broader services.

²⁹ Different stakeholders have proposed different options in this respect. Jesuit Social Services posited that a more intensive model of response might apply when children engage in 'serious anti-social behaviour', which would encompass 'children who use violence or cause serious harm': Jesuit Social Services, *Raising the Age of Criminal Responsibility: There is a Better Way* (October 2019) 9 <https://jss.org.au/wp-content/uploads/2019/12/JSS0102_Raising_the_Age_There_is_a_better_way_v.5.1.pdf>. More recently, the ACT's independent review suggested that children might be referred to a more intensive response when their complex needs cannot be met by the usual range of services or where there have been repeated interactions with police and other first responders: Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 65 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

³⁰ Cf the Youth Koori Court, which has 'a high threshold for entry into the court – the young person needs to be facing a serious penalty': Melissa Williams, David Tait, Louise Crabtree, Mythily Meher, *Youth Koori Court Review of Parramatta Pilot Project* (Western Sydney University) <https://www.westernsydney.edu.au/_data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf> 16. This court falls within the criminal jurisdiction of the Children's Court in Victoria, and would not be appropriate for children under the minimum age of criminal responsibility. However, structural and procedural aspects of the Youth Koori Court that could usefully inform the present context are discussed below.

35. For example, one possible threshold, criterion or assessment for this level of response to apply to a child might be that:
- (a) the child has engaged in, or attempted to engage in, conduct which is reasonably considered to be seriously harmful to the child or the community; and
 - (b) the child is more likely than not to place either:
 - (i) the child at significant risk of serious harm to their person; or
 - (ii) members of the community at significant risk of serious harm to their person or property.
36. The evidence used to establish this threshold should be required to satisfy the civil standard of proof ('on the balance of probabilities').

Decision-Making Body or Panel

37. The key component in this stage of the secondary response to children under the minimum age of criminal responsibility would be a decision-making body, which would review in detail the situation of a child referred to it and develop, through the input of advice and assessment from children's experts across different fields, a coordinated, individualised response plan for that child.
38. There is a preliminary issue as to whether such a body should be judicial, quasi-judicial or administrative. The Law Council notes there are advantages and disadvantages associated with each type of body, including the functions and powers that might be exercised by the body.
39. Examples of each type of body exist, some of which could serve as partial models in responding to children under the minimum age of criminal responsibility, such as the Youth Koori Court, as well as proposals more directly related to the present context such as the ACT independent report's Multidisciplinary Therapeutic Panel.
40. The Youth Koori Court is an example of an innovative judicial process that attempts to respond more fully to the needs of certain Aboriginal and Torres Strait Islander children who come into contact with the youth justice system in NSW. While it exists in the criminal jurisdiction, and would not be appropriate in the current context of children under the minimum age of criminal responsibility, several of its structural and procedural aspects might be helpfully drawn upon. For example, a number of legal, cultural and social experts and supports are brought together with the judicial officer as chair;³¹ the regular courtroom is modified;³² processes are conducted informally

³¹ The Youth Koori Court is chaired by a judicial officer, and generally also includes Elders and other respected persons from the Aboriginal and Torres Strait Islander community; a police prosecutor; a civil lawyer; the child; the child's legal representative; and a range of support people, such as a relative or friend, a social worker, an employer, or a Juvenile Justice officer. See Melissa Williams, David Tait, Louise Crabtree, Mythily Meher, *Youth Koori Court Review of Parramatta Pilot Project* (Western Sydney University) <https://www.westernsydney.edu.au/data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf> 8-16. See also See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 56 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

³² The regular courtroom is modified to allow all participants to sit at an oval table and to reflect cultural aspects. Cultural aspects include, for example, rituals such as a welcome to country and symbols such as flags and artworks. See Melissa Williams, David Tait, Louise Crabtree, Mythily Meher, *Youth Koori Court Review of Parramatta Pilot Project* (Western Sydney University) <https://www.westernsydney.edu.au/data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf> 8-16.

with a minimum of hierarchy, in plain language and with all participants having the opportunity to speak; with the purpose being to identify the risk factors and issues associated with the child's circumstance and develop and monitor an 'Action and Support plan' for the child.³³

41. In the Rangatahi court in Aotearoa New Zealand, which is similar in cohort, purpose and structure to the Youth Koori Court, the child takes an active role in developing the plan, which the court, again chaired by a judicial officer, monitors.³⁴
42. The 2021 ACT independent report proposes a Multidisciplinary Therapeutic Panel, which would assess and work with children and families with complex needs as well as monitor systemic issues and provide trend analysis to inform options for building capacity within existing service providers and broadening options to better serve the needs of this cohort. It would be a 'legislated' body, with a 'statutorily appointed, independent Chair' and include 'senior decision makers from across key directorates and community organisations', including police, child protection services, disability, mental health and education, as well as Aboriginal and Torres Strait Islander members, and may also include independent community members and experts.³⁵
43. Drawing on such models, the key components of this stage of the secondary response might at minimum include that:
 - Responses to children under the minimum age of criminal responsibility must not fall within the criminal jurisdiction of a court, even where these responses are diversionary.³⁶

³³ Melissa Williams, David Tait, Louise Crabtree, Mythily Meher, *Youth Koori Court Review of Parramatta Pilot Project* (Western Sydney University) <https://www.westernsydney.edu.au/_data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf> 8-16:

'The team that comes together in a hearing develops and monitors what are known as 'Action and Support plans'. These plans are the key document of the court's operations. They provide a comprehensive list of the young person's needs in the areas of accommodation, health (including mental health), drugs, education and employment, civil law issues (such as identity documents and unpaid fines) and cultural connection (creating opportunities for young people to be with their family clan and connect with country). The Action and Support plans are developed and endorsed at an initial hearing, reviewed regularly in review hearings and then finally at the time of graduation used to judge the progress made over the course of the journey as a Youth Koori Court participant. ... If the Action and Support plans provide the roadmap, it is the support network of Aboriginal and Torres Strait Islander Elders, court workers, lawyers and service agencies that move the plan forward. ... the hearings follow well-established practices of special-purpose courts. The process is informal, participants speak in plain English not legalese, everyone gets a chance to have their say and there is a minimum of hierarchy. Every hearing begins with a welcome to country, and participants in the room introduce themselves. In review hearings, the Magistrate invites the young person to report on how they are, the police prosecutor reports on whether any new offences have been recorded, and other professional participants provide an update on progress in relation to the Action and Support plan, and future steps are identified to achieve the objectives of the plan. ... The young person is given the opportunity to speak freely, define their own preferred options and address any comments made about them.'

³⁴ *Ibid*, 9-10. There are also some significant differences between the Rangatahi court and the Youth Koori court, such as that the Rangatahi court hearings are held outside the usual courtroom in a marae or traditional Māori meeting place, and victims participate in the process.

³⁵ The ACT independent report's proposal further states: 'The powers of the panel will need to be clearly articulated. They may include powers to compel information and service responses.' See Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 65-66 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

³⁶ Cf, eg, Children's Court of Victoria, *Youth Diversion Service* (website, 2021) <<https://www.childrenscourt.vic.gov.au/criminal-division/youth-diversion-service>>.

- Responses to children under the minimum age of criminal responsibility should not involve formal court proceedings.
- Special-purpose forums that are child centred, trauma informed and culturally safe should be created and used instead.
- Proceedings should be conducted with as little hierarchy, formality and technicality as possible, while affording procedural fairness to the child.
- Where this is to occur at a Children’s Court, the usual court proceedings and settings must be modified. For example, all participants in the process should sit at a round table.
- In addition, these types of matters must be kept separate from the other business of the Children’s Court, particularly its criminal matters, in terms of divisions, timings and listings.³⁷
- The decision-making body or panel should be chaired by a judicial officer, and include independent children’s experts in the legal, medical and social work fields, as well as the child and their support system, including their legal representative.
- Where the child is Aboriginal or Torres Strait Islander, the decision-making body or panel must include Elders or other respected community leaders who are well-placed to advise on culturally safe responses. This practice can extend beyond Aboriginal or Torres Strait Islander children, involving other culturally appropriate panel members for such children.
- The outcome of the proceedings is not a sentence or order, but rather the development of a response plan for the child, conceived in conversation between the child, their support system, and the independent children’s experts.
- There should be recognition that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.
- The independent children’s experts should assess the child and their circumstances, including any relevant information such as social and health assessments and reports, and make recommendations and referrals suited to them.
- The response plan might include elements such as attending specific intervention programs, health and other services appointments, and agreeing to certain living arrangements, as well as engaging in restorative processes, such as meeting with victims.³⁸ Day-to-day, a child’s participation in the response plan should be facilitated through the support of a dedicated and specially trained caseworker and with wraparound services.
- Parts of this assessment, recommendation and referral process might trigger the involvement of the child with other non-criminal legal systems existing in the jurisdiction, including those involving mandatory responses, such as under mental health legislation, child protection legislation, or other legislation allowing for civil orders to be made. The settings for the involvement of children under

³⁷ Evidence-based best practice to this end should be incorporated into the processes and procedures of a Children’s Court. For example, where magistrates and court staff operate across divisions within a Children’s Court, an appropriate temporal and procedural distance should be maintained between the hearing of a criminal matter and the response to a child under the minimum age of criminal responsibility. See, eg, Mark Nolan and Jane Goodman-Delahunty, *Legal Psychology in Australia* (Thomson Reuters, 2015) for fatigue and unconscious bias in judges’ decision-making. In order that such best practice does not have the unintended consequences of pushing out wait times, courts must be adequately resourced.

³⁸ See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 69 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

the minimum age of criminal responsibility with these other non-criminal legal systems should be carefully considered, and occur within the overarching principles outlined above as well as the additional principles relating to coercive powers discussed below (and where necessary relevant existing legislation amended).

- There should be regular timeframes for reviews of the response plan and the progress being made under it.
- There should be recognition that, particularly in situations involving disadvantaged cohorts of children, backsliding can be a normal part of the learning process and complex issues may not be resolved at first pass. A response plan may take several attempts to design in order to effectively meet and address the needs of the child and their circumstances.
- The identity of the child should be suppressed from the media.
- Information shared under the response plan, such as records about the child, should not be made public and should automatically be deleted after a certain period. When the child reaches the minimum age of criminal responsibility, the fact of their engagement with the decision-making body should not be able to be used in criminal proceedings, including bail or sentencing hearings.³⁹

Coercive Powers

44. As noted above, other non-criminal legal frameworks applicable to children under the minimum age of criminal responsibility exist in jurisdictions, and, unless broader reforms of these frameworks are envisaged, will continue to operate alongside the responses outlined above.
45. Parts of these non-criminal legal frameworks incorporate coercive options including involuntary admission to secure facilities, compulsory treatment in the community, or other civil orders (ie. mental health orders, care orders).
46. It will be a matter for each jurisdiction as to whether these existing non-criminal legal frameworks are fit for purpose and might be utilised within the principles identified above and below, or might be amended or abolished.⁴⁰

³⁹ That is, prosecutors should not be able to use the information to argue in favour of harsher sentencing conditions or bail conditions or otherwise as evidence of criminality in any way; it must not become a de facto criminal record.

⁴⁰ See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 54-55, 70-71 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>. This report recommended amending existing legislation under the ACT civil scheme such as the Children and Young People Act 2008, which allows for the Children's Court to issue Therapeutic Protection Orders (TPO) in certain circumstances. It suggested, among other things, at page 71 that 'there is no need for a TPO to require residence at a particular place. An order may be for treatment which can take place in the community, with the child residing at home.' It also noted 'The other two existing mechanisms that allow for mandatory, non-criminal responses are the Senior Practitioner Act 2018 and the Mental Health Act 2015.' On this basis, the report ultimately concluded: 'There appears to be no need for new or additional mechanisms; however, there may be a need for a modification of existing facilities to enable a child to reside in a hospital setting (for example) if they require mental health treatment.' It emphasised: 'If a mandated response is required, invoking a TPO and the Children's Court, children must be provided with the option of a legal advocate. Because TPOs have yet to be used in this context, funding for training and extra children's lawyers may be required.'

As another example of consideration of the appropriateness of existing civil schemes, see Law Society of South Australia, Submission to Attorney-General of South Australia, *Controlled Substances (Youth Treatment Orders) Amendment Bill 2018* (29 June 2018); Law Society of South Australia, Submission to Drug and Alcohol Services South Australia, *Consultation on the draft Model of Care for Phase 1 of Youth Treatment Orders* (18 December 2020); Law Society of South Australia, Submission to Attorney-General of South

47. It may be the case that jurisdictions will develop different schemes for how the responses outlined above should overlap with existing coercive options, such as to allow the decision-making panel or body to either exercise these coercive powers itself (noting that this may impact the type of body and its functions and powers) or to refer a child as part of their response plan to these other non-criminal legal frameworks that may in turn exercise these coercive powers. Certain referral pathways may already be in existence, or existing laws may even mandate that referrals have to occur in certain scenarios.⁴¹
48. As noted above, careful regard must always be had to the precise settings of coercive powers.
49. Should coercive powers apply to children under the minimum age of criminal responsibility, then the following basic minimum safeguards must be in place, in addition to the overarching principles outlined above.
50. In all cases, coercive options applied to children must at minimum adhere to the following principles:
 - Coercive options such as civil orders should only be available to authorities where all options to secure a child's voluntary participation have been attempted and completely exhausted.⁴²
 - Coercive options such as civil orders must occur in conformity with the law, apply in the least restrictive manner possible, be used only in exceptional circumstances as a measure of last resort, be time-limited and for the shortest appropriate period of time, and be subject to merits and judicial review.
 - Any coercive power exercised (such as any civil order made) in relation to a child must be in the best interests of the child and must be directed towards protecting or achieving their health and welfare.
 - Specialist legal advice and representation should be provided to a child in all circumstances where authorities are exercising coercive powers or making decisions that will affect the rights or responsibilities of the child. Where a child lacks the means to afford legal advice or representation, these services should be free of charge.
51. In all cases, any deprivation of liberty of a child must at minimum adhere to the

Australia, *Consultation on draft Controlled Substances (Youth Treatment Orders) Regulations* (21 October 2021); Office of the Guardian for Children and Young People (SA), Submission to Drug and Alcohol Services South Australia, Feedback on the Draft Model of care for Phase 1 of Youth Treatment Orders (18 December 2020). These stakeholders expressed significant concern at the implications of the amendments to South Australia's *Controlled Substances Act 1984* (SA), as effected by the *Controlled Substances (Youth Treatment Orders) Amendment Act 2019* (SA) The South Australian Youth Treatment Orders proposed in 2021 and the accompanying draft model of care contemplated non-consensual, compulsory therapeutic treatment.

⁴¹ For example, sections 18 and 19 of the *Mental Health Act 2007* (NSW) allow for a person to be detained in a declared mental health facility on a mental health certificate given by a medical practitioner provided the statutory criteria are met and certain statutory procedures and safeguards are followed. Under section 51 of the *Mental Health Act 2007* (NSW), a medical practitioner who is familiar with the clinical history of the affected person, or any other person prescribed by the regulations, may apply for a community treatment order for the affected person, which the Mental Health Review Tribunal could then make. It is also the case that there are existing laws requiring certain professionals to make a report to a Department or certain Departments to make an application to a Children's Court such as in the area of child protection, which can trigger a variety of orders including an order to attend therapeutic or treatment program or an order for contact.

⁴² See, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 9-10, 62, 70-71 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

following principles:⁴³

- Deprivation of liberty must occur in conformity with the law, be used only in exceptional circumstances as a measure of last resort,⁴⁴ be time-limited and for the shortest appropriate period of time, and be subject to independent oversight and reporting.
- Children deprived of their liberty must be guaranteed the right to maintain contact with their family, kin and trusted networks, including through regular face-to-face visits.
- Children deprived of their liberty must at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of persons of their age. No child should ever be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- Secure facilities for children under the minimum age of criminal responsibility must be institutionally, administratively and geographically separate from secure facilities used for adults and children over the minimum age of criminal responsibility, including adult prisons, youth detention centres, and adult secure psychiatric wards.
- Authorities must in general ensure that children deprived of their liberty are never placed near or alongside adults who are deprived of their liberty, including when accessing or utilising health, education or social services, regardless of circumstance such as remote location.

TIER 3 – Children under the minimum age of criminal responsibility with extreme complex needs

52. A Third Tier of response, additional to the responses outlined above, might be allowed to apply in the very rare circumstance that the system is faced with a child under the minimum age of criminal responsibility with extreme complex needs.
53. Children falling within this category might include children who have been demonstrated to have killed, tortured or seriously sexually abused others, depending on the circumstances of the behaviour. Expert scholars from the United Kingdom, reflecting on cases such as the killing of James Bulger,⁴⁵ have written that ‘homicide committed by children remains rare’, ‘all these children are seriously disturbed, with high rates of neuropsychological abnormalities’, ‘all have experienced severe family adversities: domestic violence, neglect, child abuse’, and ‘the evidence, though limited, is that with good care and psychiatric treatment the children do well and do

⁴³ See *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) art 37. See also *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN Doc A/RES/45/113 (14 December 1990).

⁴⁴ For background as to considerations of whether and when secure welfare facilities are appropriate for children under the minimum age of criminal responsibility, see, eg, Morag McArthur, Aino Suomi and Belinda Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 39, 54-55, 70-71 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

⁴⁵ In 1993, two 10-year-old boys abducted and murdered two-year-old James Bulger. They led him away from a shopping centre while his mother was waiting in a nearby store, walking for two and a half miles. After torturing and murdering him, they left his body on a nearby railway line where it was discovered two days later. They were convicted of murder and sentenced to life with a recommendation they serve at least eight years in secure youth detention. In 2001, they were released on life licence under an injunction that protected their new identities from being made public: Paul Coslett, ‘Murder of James Bulger’, *BBC* (online, 24 September 2014) <http://www.bbc.co.uk/liverpool/content/articles/2006/12/04/local_history_bulger_feature.shtml>.

not reoffend in later life'.⁴⁶

54. Given the rarity of such events, it may be unnecessary to develop this third tier of the policy response at this time.
55. However, should governments wish to plan for such extreme complex needs, the medical and social evidence may support a response with additional components, such as highly specialised psychiatric care, treatment and rehabilitation, possibly provided under time-limited residential supervision. For the sake of clarity, this proposed third tier of response is not underpinned by any suggestion of elevated moral culpability. It is because these children would appear to have elevated needs.
56. This response must only be applied in extremely rare cases where no other responses are suitable, because an extremely high threshold such as the one following has been reached.
57. One possible threshold for this level of response to apply to child would be:
 - (a) the child has engaged in violent conduct, including serious sexual violence, which is reasonably considered to be gravely harmful to the community, and falling within the most exceptional categories of such behaviour; and
 - (b) the child is more likely than not to place members of the community at significant risk of grave harm to their person; and
 - (c) existing responses under the relevant mental health legislation are not applicable to the child;⁴⁷ and
 - (d) in the opinion of a medical practitioner existing community health and social service options are inadequate to respond to the child's extreme complex needs.
58. Applying this threshold must also require an appropriate Children's Court or Children's Tribunal to have regard to certain statutory criteria, such as:
 - the interests of the child;
 - the seriousness of the conduct;
 - the degree of violence involved in the conduct;
 - the harm caused to any victim; and
 - the number and nature of any such incidents and the number of times the child has been dealt with under this Act.
59. The key components of a response triggered by such a threshold may then include:
 - in situations where it is established that there is no alternative, some form of mandated residential supervision – eg, small scale, 4-8 bed, intensively therapeutic facility;⁴⁸

⁴⁶ Sula Wolff and Alexander McCall Smith, 'Children Who Kill: They Can and Should Be Reclaimed' (2001) 322 *British Medical Journal* 61. See also Mark Nolan and Jane Goodman-Delahunty, *Legal Psychology in Australia* (Thomson Reuters, 2015) 255, citing DP Farrington, 'The Importance of Child and Adolescent Psychopathy' (2005) 33 *Journal of Abnormal Child Psychology* 489, 256.

⁴⁷ I.e., the child does not meet criteria for involuntary admission to a psychiatric facility (e.g., no diagnosable mental illness).

⁴⁸ For background as to considerations of whether and when secure welfare facilities are appropriate for children under the minimum age of criminal responsibility, see, eg, Morag McArthur, Aino Suomi and Belinda

- the child would, as required, receive intensive psychiatric care, treatment and rehabilitation, with frequent reassessment of the child's progress and the ongoing necessity of the mandated residential supervision;
 - this must avoid, at all costs, being 'juvenile detention' under another name; and
 - this must comply with the principles set out above regarding the deprivation of liberty of a child.
60. Again, however, it is expected that Tier Three would rarely if ever be reached when responding to children under the minimum age of criminal responsibility in Australia.

Kendall, *The Final Report of the Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (August 2021) 39, 54-55, 70-71 <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.