



Law Council
OF AUSTRALIA

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

Age of Criminal Responsibility Working Group

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia gratefully acknowledges the assistance of its Indigenous Incarceration Working Group, Indigenous Legal Issues Committee, National Human Rights Committee, National Criminal Law Committee, the Law Society of New South Wales, the Law Society of South Australia, and the Queensland Law Society, in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide input to the Council of Attorneys-General (**CAG**) Age of Criminal Responsibility Working Group (**the Working Group**) Review (**the Review**).
2. Raising the minimum age of criminal responsibility is an issue of acute national importance. Across Australia, children as young as 10 years old are currently at risk of being incarcerated.
3. In the opinion of the Law Council, this is damaging and unacceptable. The current low minimum age of criminal responsibility is out of step with international human rights standards and the most recent medical evidence on child cognitive development. It also ignores the large body of social research highlighting the harmful effects of early contact with the criminal justice system, including entrenchment and recidivism, and a correlation with being less likely to complete education or find employment. Further, it ignores the social determinants that lead to certain cohorts, such as First Nations children, children in out-of-home care, and children with significant health issues, being disproportionately represented in the criminal justice system.
4. Accordingly, the Law Council provides the following key responses to the matters raised by the Review:
 - The age of criminal responsibility should be increased to at least 14 years old in all Australian jurisdictions, in all circumstances, for all types of offences. There should be no 'carve outs' or exceptions.
 - The rebuttable legal presumption known as *doli incapax* is in practice complex and problematic. Increasing the minimum age of criminal responsibility to at least 14 years old will successfully render it redundant.
 - All children, regardless of their age, should only be detained in conformity with the law, as a measure of last resort, and for the shortest appropriate period of time.
 - The low minimum age of criminal responsibility is not in the public interest and does not make our communities safer.
 - Federal, state and territory governments should provide long-term, stable investment in and implementation of therapeutic programs and strategies that seek to address the root causes rather than symptoms of disadvantage and problematic behaviour and prevent children coming into contact with the criminal justice system later in their lives. These approaches should also inform rehabilitative responses when children engage in problematic behaviour that would otherwise be classified as offending.
 - The Law Council is not in a position to agree to a need for any new criminal offences for persons who exploit or incite children under the minimum age of criminal responsibility to conduct that would otherwise be an offence, without seeing a robust evidence base that the proposed offending conduct needs to be addressed by the criminal law.
5. In the strongest possible terms, the Law Council urges the federal, state and territory governments to raise the age of criminal responsibility to at least 14 years old without

exception, and to fund effective therapeutic responses. Australia should embrace the opportunity to ensure that all children in Australia are provided with open futures.

Minimum Age of Criminal Responsibility

Introduction

6. In Australia, the states and territories have responsibility for their own juvenile criminal justice systems, with the main pieces of legislation regulating these systems being the: *Young Offenders Act 1997* (NSW) and *Children (Criminal Proceedings) Act 1987* (NSW); *Children, Youth and Families Act 2005* (Vic); *Youth Justice Act 1992* (Qld); *Young Offenders Act 1994* (WA); *Young Offenders Act 1993* (SA); *Youth Justice Act 1997* (Tas); *Youth Justice Act 2005* (NT); and *Children and Young People Act 2008* (ACT).¹ Each statute provides a framework for dealing with children in contact with the criminal justice system, outlining, for example, procedures for how police respond to young people, how courts deal with young people and how youth detention centres are operated. There are many variances; for example, in whether children are afforded the benefit of warnings or youth justice conferences. These major pieces of legislation interact with other pieces of legislation, such as those regulating police powers, children's courts and bail procedures, as well as – of course – those that create or codify criminal offences, such as: the *Crimes Act 1900* (NSW); *Criminal Code Act 1899* (Qld); *Crimes Act 1958* (Vic); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Compilation Act 1913* (WA); *Criminal Code Act 1924* (Tas); *Crimes Act 1900* (ACT) and *Criminal Code 2002* (ACT); and *Criminal Code Act 1983* (NT). The *Crimes Act 1914* (Cth) deals with federal offenders, including children.
7. The type of government department responsible for the juvenile criminal justice system also varies across jurisdictions. In Western Australia, New South Wales, and – since 2017 – Victoria, the juvenile criminal justice system is administered by the same department responsible for adult offenders: the Department of Justice,² Department of Communities and Justice,³ and Department of Justice and Community Safety,⁴ respectively. Queensland has a separate Department of Youth Justice.⁵ By comparison, in Tasmania, the Department of Health and Human Services manages the Ashley Youth Detention Centre, the state's only juvenile criminal justice centre, through its operational unit of Children and Youth Services.⁶ Similarly, in South Australia, the Department of Human Services,⁷ and, in the Australian Capital Territory, the Community Services Directorate,⁸ which also manage child protection services, assume responsibility. In the Northern Territory, the Don Dale Youth Detention Centre and Alice Springs Youth Detention Centre, previously managed by the Department of

¹ See, eg, Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 6. See also Queensland Government, *How the youth justice system works* (Website, 12 July 2018) <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-in-queensland/how-the-youth-justice-system-works>>.

² Government of Western Australia, Department of Justice, *Youth Justice* (Website, 17 October 2016) <<https://www.correctiveservices.wa.gov.au/youth-justice/>>. See also Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 135.

³ NSW Government, Communities and Justice, *Youth Justice* (Website, 7 November 2019) <<http://www.juvenile.justice.nsw.gov.au/>>.

⁴ Victoria State Government, Justice and Community Safety, *Justice System: Youth Justice* (Website, 4 November 2019) <<https://www.justice.vic.gov.au/justice-system/youth-justice>>.

⁵ Queensland Government, *Department of Youth Justice* (Website) <<https://www.youthjustice.qld.gov.au/>>.

⁶ Tasmanian Government, Department of Health, *Young People: Youth Justice Services* (Website) <https://www.dhhs.tas.gov.au/youth/youth_justice/aydc>.

⁷ Government of South Australia, *Youth Justice* (Website, 7 March 2018) <<https://www.sa.gov.au/topics/rights-and-law/young-people-and-the-law/youth-justice>>. See also Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 135.

⁸ ACT Government, *Community Services* (Website) <<https://www.communityservices.act.gov.au/>>.

Correctional Services, are now managed by the Youth Justice division of Territory Families.⁹

8. Despite this federalised framework, the minimum age of criminal responsibility is currently set at 10 years old across all Australian federal, state and territory jurisdictions.¹⁰ The actual provisions establishing this minimum age of criminal responsibility are found in a mix of the abovementioned statutes: that is, the law that a child under the age of 10 years old cannot commit a criminal offence is pursuant to section 5 of the *Children (Criminal Proceedings) Act 1987* (NSW); section 5 of the *Young Offenders Act 1993* (SA); subsection 29(1) of the *Criminal Code Act 1899* (Qld); section 344 of the *Children, Youth and Families Act 2005* (Vic); section 29 of the *Criminal Code Act Compilation Act 1913* (WA); subsection 18(1) of the *Criminal Code Act 1924* (Tas); subsection 38(1) of the *Criminal Code Act 1983* (NT); section 25 of the *Criminal Code 2002* (ACT); and section 24M of the *Crimes Act 1914* (Cth). This means that, when a child reaches their tenth birthday, they may be at risk of being arrested, placed in handcuffs, transported in the back of a paddy wagon, held in watchhouses, subjected to strip searches, interviewed by police, charged with criminal offences, made subject to bail conditions, held in custody, made to stand trial, and incarcerated.¹¹
9. The Law Council considers that this must change. The average 10-year-old child is 31.5 kilograms in weight and 138 centimetres tall,¹² and physically and mentally immature.¹³ To put this young age into perspective at the outset: Facebook requires all users 'to be at least 13 years old before they can create an account';¹⁴ Victorian Roads warns parents that 'children under age 12 do not have the skills and experience to be safe in traffic';¹⁵ Qantas declares 'a child under 12 years to be an unaccompanied minor ... [who] may not be accepted for travel alone';¹⁶ and the New South Wales Centre for Road Safety states that a person should be '145 centimetres or taller' to use a seatbelt in a motor vehicle without a booster seat.¹⁷
10. This grossly low age ignores legal, medical and social standards, evidence and research, which coalesce into a strong consensus that children of this age should not be criminalised. The Law Council calls for the minimum age of criminal responsibility to be raised to at least 14 years old, without exception. In reaching this position, the Law Council considers a number of factors, including community safety, criminogenic effect, developmental and cognitive considerations, the disproportionate impact of the

⁹ Northern Territory Government, Territory Families, *Youth Justice* (Website) <<https://territoryfamilies.nt.gov.au/youth-justice>>.

¹⁰ See also Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 138; Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 1; Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 791.

¹¹ See, eg, Amy Dale, 'How Old is Old Enough to Be a Criminal?', *Law Society of New South Wales Journal* (online, 7 February 2020) <<https://lsj.com.au/articles/how-old-is-old-enough-to-be-a-criminal/>>.

¹² See, eg, Family Practice Notebook, *Weight Measurement in Children* (Website, 22 February 2015) <<https://fpnotebook.com/endo/exam/wghtmsrmntinchildrn.htm>>.

¹³ See, eg, Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 143.

¹⁴ Facebook, Help Centre, *How do I report a child under the age of 13 on Facebook?* (Website) <<https://www.facebook.com/help/157793540954833>>.

¹⁵ Vic Roads, Victoria State Government, *Children and Pedestrian Safety* (Website, 2 May 2017) <<https://www.vicroads.vic.gov.au/safety-and-road-rules/pedestrian-safety/children-and-pedestrian-safety>>.

¹⁶ Qantas, *Unaccompanied minors* (Website) <<https://www.qantas.com/au/en/travel-info/children/unaccompanied.html>>.

¹⁷ Centre for Road Safety, New South Wales Government, *Child Car Seats* (Website, 6 November 2019) <<https://roadsafety.transport.nsw.gov.au/stayingsafe/children/childcarseats/index.html>>.

present age of criminal responsibility on vulnerable cohorts, international human rights standards, the limitations of *doli incapax*, alternatives to criminal justice responses, and the need for other offences, all of which are drawn out in further detail below.

Question 1. Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.

Question 2. If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.

Response: The age of criminal responsibility should be increased to at least 14 years old in all Australian jurisdictions, in all circumstances, for all types of offences. There should be no ‘carve outs’ or exceptions.

Community Safety

11. The Law Council recognises concerns held amongst some parts of the community that raising the minimum age of criminal responsibility may undermine community safety. Community safety is a critical imperative which deserves careful consideration. However, based on the evidence, the Law Council contends that the best interests of the child and the best interests of the public align more closely than is commonly recognised.
12. The evidence strongly suggests that a low minimum age of 10 years old does not make our communities safer. Instead, it is likely to entrench criminality and creates cycles of disadvantage that heighten reoffending rates. Contact with the criminal justice system is criminogenic for children.¹⁸ The earlier a child comes into contact with the criminal justice system, the more prolonged their involvement will be, and the less positive their life choices will be.¹⁹ Children who come into contact with the criminal justice system are less likely to complete their education or find employment and are seven times more likely to become adult offenders.²⁰ Barry Goldson summarises this criminogenic pathway as follows:

By introducing children to the youth justice system from the age of 10 years the ‘normal’ or ‘natural’ processes of ‘growing out of crime’ are impeded, labelling and

¹⁸ See, eg, Wendy O’Brien and Kate Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice* 134, 135; Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 6.

¹⁹ See, eg, Barry Goldson, “‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) *Youth Justice* 111, 122; Wendy O’Brien and Kate Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice* 134, 135;

²⁰ See, eg, Raymond Arthur, ‘Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: the Age of Criminal Responsibility in England and Wales’ (2016) 67(3) *Northern Ireland Legal Quarterly* 269, 271; Barry Goldson, “‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) *Youth Justice* 111, 122; Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 7, citing U Gatti, R Tremblay and F Vitaro, ‘Iatrogenic Effect of Juvenile Justice’ (2009) 50(8) *Journal of Child Psychology and Psychiatry* 991.

*negative social reaction is likely to lead to further offending, education and employment prospects are undermined, the likelihood of entering penal custody increases, children are damaged and harmed, and the public interest in respect or crime prevention and community safety is profoundly compromised.*²¹

13. Similarly, the Australian Government's Australian Institute of Criminology warns that:

It is widely recognised that some criminal justice responses to offending, such as incarceration are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are 'universities of crime' that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks. This may be particularly the case for juveniles, who, due to their immaturity, are especially susceptible to being influenced by their peers. ...

*... young people who are labelled 'criminal' by the criminal justice system are likely to live up to this label and become career criminals, rather than growing out of crime, as would normally occur. The stigmatisation engendered by the criminal justice system therefore creates a self-fulfilling prophecy – young people labelled criminals assume the identity of a criminal. Labelling and stigmatisation are widely considered to play a role in the formation of young people's offending trajectories – whether young people persist with, or desist from, crime.*²²

14. The Australian Bureau of Statistics has published data on the principal offences that children between the ages of 10 and 14 were proceeded against by police during the period from 1 July 2016 to 30 June 2017.²³ These statistics show that children between the ages of 10 and 14 tend to commit minor offences.²⁴ 'Since the beginning of the time series in 2008-09, the predominant principal offence committed by youth offenders has been theft'.²⁵ Of the 6,554 children aged between 10 and 14 that were finalised in Children's Courts in 2016-17, the majority (4,747 or 72 percent) committed: theft (1,547); break and enter (1,473); property damage and environmental pollution (685); public order offences (462); robbery, extortion and related offences (207); offences against justice procedures (105); traffic offences (102); illicit drug offences (93); fraud offences (70); or miscellaneous offences (3).²⁶ The minority (1,807 or 28 percent) committed: acts intended to cause injury (1,380); acts endangering persons (133); prohibited and regulated weapons offences (130); sexual assault and related offences (108); or harassment and other offences (56).²⁷ No children in this cohort committed homicide or related offences.²⁸

15. As the Australian Institute of Criminology has published:

²¹ Barry Goldson, "'Unsafe, Unjust and Harmful to Wider Society": Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13(2) *Youth Justice* 111, 122.

²² Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 6.

²³ Australian Bureau of Statistics, 'Youth Offenders', 4519.0 – *Recorded Crime – Offenders, 2016-17* (Web Page, February 2018) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2016-17~Main%20Features~Youth%20Offenders-4>>.

²⁴ Australian Bureau of Statistics, 'Data Cubes', 4513.0 – *Criminal Courts, Australia, 2016-17* (Web Page, February 2018) Table 5, 'Defendants finalised: sex and age by principal offence and court level' <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02016-17?OpenDocument>>.

²⁵ Australian Bureau of Statistics, 'Youth Offenders', 4519.0 – *Recorded Crime – Offenders, 2016-17* (Web Page, 2018) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2016-17~Main%20Features~Youth%20Offenders-4>>.

²⁶ Australian Bureau of Statistics, 'Data Cubes', 4513.0 – *Criminal Courts, Australia, 2016-17* (Web Page, February 2018) Table 5, 'Defendants finalised: sex and age by principal offence and court level' <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02016-17?OpenDocument>>.

²⁷ *Ibid.*

²⁸ *Ibid.*

*Certain types of offences (such as graffiti, vandalism, shoplifting and fare evasion) are committed disproportionately by young people. Conversely, very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles. ... On the whole, juveniles are more frequently apprehended by police in relation to offences against property than offences against the person.*²⁹

16. The Law Council recognises that there are rare instances in which very young people commit serious offences, and that the consequences of these actions can be frightening and harmful, particularly if their victims are also vulnerable members of the community. The Law Council also considers that children aged 10 to 13 years should be held accountable for their actions. However, this should occur outside the criminal justice system.
17. Careful planning is necessary, having regard to existing examples of alternative, health and welfare-based responses, to introduce policies and programs which maximise the chances of rehabilitating the child, and uphold community safety in both the immediate and longer-term. The Law Council is concerned that early criminalisation may only serve to reinforce the child's pathway to committing even more serious offences which hurt or harm other community members. In the discussion below, under 'Prevention, Intervention and Rehabilitation' at paragraphs [100] to [105], some possible alternative examples are discussed in the above regard.

Child Development

18. The following presents the Law Council's interpretation of the medical and scientific evidence on child development. However, the Law Council recognises that other organisations, such as the Australian Medical Association (**AMA**) are in an expert position to comment on this evidence, and, should questions arise, the Law Council would defer to these organisations.³⁰
19. The present age of 10 years old ignores robust evidence about children's neurological, cognitive, behavioural, emotional and moral functioning. Legal, medical, psychological and social researchers and stakeholders have long spoken out on the importance of ensuring that legal responses to children are informed by developmental age. While the development of each child takes place at a different rate, there is widespread recognition of the developmental immaturity of children compared to adults.
20. A person's brain is still developing at the age of 18. Science shows that 'neural pathways remain incomplete until early adulthood', meaning children 'do not possess adult cognitive functioning'.³¹ Evidence indicates the early adolescent brain is malleable as it transitions from childhood, gradually increasing its ability for adult level reasoning. Developmental immaturity can affect a number of areas of cognitive functioning including impulsivity, reasoning and consequential thinking.³²
21. Children's behaviour is affected by the anatomy and biochemistry of the brain that limits their 'ability to perceive risks, control impulses, understand consequences and control

²⁹ Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 3.

³⁰ Law Council, 'LCA and AMA call on Australian governments to raise the age of criminal responsibility to 14' (Media Release, 17 December 2019) <<https://www.lawcouncil.asn.au/media/media-releases/lca-and-ama-call-on-australian-governments-to-raise-the-age-of-criminal-responsibility-to-14>>.

³¹ Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 143.

³² Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

emotion'.³³ The prefrontal lobe 'is the last area to mature'.³⁴ This is the area of the brain involved in much of the behaviour common to criminal offending, including 'the control of aggression and other impulses'.³⁵ These 'parts of the brain that deal with judgment, impulsive behaviour and foresight develop in the twenties rather than the teen years', making children 'almost inevitably over-emotional, more prone to risk-taking and subject to wide mood swings, immature judgment, decreased risk perception and impaired future-time perspective'.³⁶ During the early adolescent phase of brain development, children are apt to make decisions using the amygdala, the part of the brain connected to impulses, emotions and aggression.³⁷

22. Similarly, research studies have found that 'law and order' morality is generally not achieved until mid-teens,³⁸ and logical thinking and problem-solving abilities develop considerably between the ages of 11 and 15.³⁹

23. In addition, children aged 10 to 13 years are particularly vulnerable to peer pressure.⁴⁰ As Raymond Arthur explains:

*... their functioning in respect of considering issues emphatically from the perspective of others, capacity for autonomy and resisting pressure from others and their ability to experience guilt and shame are under-developed. This contributes to the tendency to make choices that are harmful to themselves and others.*⁴¹

24. The Australian Institute of Criminology elaborates further on this complex interaction with age, biology, sociology and criminology:

*It has been recognised that young people are more at risk of a range of problems conducive to offending – including mental health problems, alcohol and other drug use and peer pressure – than adults, due to their immaturity and heavy reliance on peer networks.*⁴²

Childhood Disadvantage

25. Normal child development can be profoundly impacted by psychosocial factors, for which no child can be said to bear responsibility. That is, 'the environment in which a child is raised has a considerable impact on their development and outcomes at every life stage'.⁴³ It is a known fact that 'children in conflict with the law are significantly more likely to have experienced compounding forms of childhood adversity, and that childhood trauma of this kind interferes with a child's cognitive development'.⁴⁴ Such

³³ Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: the Age of Criminal Responsibility in England and Wales' (2016) 67(3) *Northern Ireland Legal Quarterly* 269, 276.

³⁴ Ibid 277.

³⁵ Ibid.

³⁶ Ibid 276.

³⁷ Australian Government, *The Amazing, Turbulent Teenage Brain* (Website, 20 February 2017) <<https://www.learningpotential.gov.au/the-amazing-turbulent-teenage-brain>>.

³⁸ UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018) 3.

³⁹ Michael Lamb and Megan Sim, 'Developmental Factors Affecting Children in Legal Contexts' (2013) 13(2) *Youth Justice* 131.

⁴⁰ Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 3.

⁴¹ Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: the Age of Criminal Responsibility in England and Wales' (2016) 67(3) *Northern Ireland Legal Quarterly* 269, 276.

⁴² Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 4.

⁴³ Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 148.

⁴⁴ Ibid.

adversity might take the form of histories of neglect, physical and sexual abuse, family disruption, and significant economic, social and medical disadvantage, including deprivation, poor educational experiences and supports, and inadequate medical care, all of which might contribute in turn to poor health, cognitive disabilities, learning difficulties, mental health issues, and substance misuse in children.⁴⁵

*Research shows that children and young people who have been abused or neglected are at greater risk of engaging in criminal activity and entering the youth justice system. For example, one study found that being maltreated as a child roughly doubles the probability of committing a crime. ... A survey of young people in detention in New South Wales found that 64% of young women and 68% of young men had been abused or neglected, while 46% and 27%, respectively, had suffered severe abuse or neglect.*⁴⁶

26. As part of the Law Council's recent Justice Project, consultations with stakeholders identified disengagement from the education system as a significant pathway into the criminal juvenile justice system. Stakeholders in Bourke referred to the fact that children who exhibit difficult behaviour are often suspended or expelled from school.⁴⁷ Out of school, there are often insufficient alternative education programs, and many children turn to crime, drugs and alcohol out of boredom.⁴⁸ Stakeholders in Mildura described a similar pattern of disadvantage, disengagement from education, engagement in crime, drugs and alcohol and entry into the criminal juvenile justice system amongst at-risk children.⁴⁹

Children in the Child Protection System

27. In its *Young People in Child Protection and under Youth Justice Supervision: 1 July 2014 to 30 June 2018* report published in 2019, the Australian Institute of Health and Welfare (AIHW) found that 55 percent of young people in detention had also received child protection services, which was 'almost 10 times the rate for child protection service use for the general population'.⁵⁰ Comparatively, First Nations children were '17 times as likely [as their non-Indigenous counterparts] to have had contact with both'.⁵¹ Of the young people who experienced both child protection and youth justice supervision, 81 percent experienced child protection first.⁵² Further, 'the younger people were at their first youth justice supervision, the more likely they were to have also received child protection services'.⁵³

⁴⁵ See, eg, Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: the Age of Criminal Responsibility in England and Wales' (2016) 67(3) *Northern Ireland Legal Quarterly* 269, 277; Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 139.

⁴⁶ Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision: 1 July 2014 to 30 June 2018* (Report, 2019) 1.

⁴⁷ Law Council of Australia, 'Children and Young People' (Justice Project: Final Report, August 2018) 8, quoting Consultation, 13/09/2017, Bourke (Mission Australia); Consultation, 14/09/2017, Bourke (Aboriginal Legal Service of New South Wales and the Australian Capital Territory); Consultation, 15/09/2017, Bourke (Police Citizens Youth Club).

⁴⁸ Ibid, quoting Consultation, 13/09/2017, Bourke (Mission Australia); Consultation, 14/09/2017, Bourke (Aboriginal Legal Service of New South Wales and the Australian Capital Territory); Consultation, 15/09/2017, Bourke (Police Citizens Youth Club).

⁴⁹ Ibid, quoting Consultation, 26/09/2017, Mildura (Private Practitioners).

⁵⁰ Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018* (Report, 2019) 19.

⁵¹ Ibid 17.

⁵² Ibid 6.

⁵³ Ibid 17.

28. In 2013, Legal Aid New South Wales observed a ‘tendency for a child’s interaction with the criminal justice system to escalate’ upon their removal from family or kinship care into out-of-home care.⁵⁴
29. The ‘drift from care to crime is a complex issue with multiple causes’.⁵⁵ The ‘risk factors that precipitated a young person’s entry into care’, such as abuse, mistreatment, neglect, or substance misuse, are usually ‘similar to those that predicated their contact with the criminal justice system’.⁵⁶ In 2017, Katherine McFarlane emphasised several issues in the management of out-of-home care including ‘badly trained and poorly supported staff, inadequate matching of children of different ages, experiences and background (offenders and victims of abuse are often placed together) and a readiness to call police to manage children’s behaviour’.⁵⁷
30. Based on an examination of New South Wales Children’s Court files, McFarlane concluded that there remains a practice in residential care facilities of ‘relying on police and the justice system in lieu of adequate behavioural management’, including a tendency for young people to be charged for relatively minor property damage offences that occur in residential care.⁵⁸ The mandatory reporting to police for any property damage to care premises increases interactions with the criminal justice system and can potentially have severe consequences including incarceration.⁵⁹ McFarlane noted that the ‘criminal activities of young people in state care’ leads to ‘the almost inevitable progression to the adult corrections system’.⁶⁰ McFarlane argued that ‘despite abundant research showing children become involved in crime through the processes of the care environment itself’, ‘policymakers are reluctant to acknowledge the care system is producing criminals’.⁶¹
31. Several contributors to the Law Council’s recent Justice Project also drew attention to this ‘care to crime’ link. Victoria Aboriginal Legal Service described the child protection system as ‘criminalising kids’.⁶² Similar observations were made by the Western Australian Commissioner for Children and Young People:

*There is evidence to suggest that there is a ‘criminalising’ of behaviour for children and young people in out-of-home care, where challenging behaviours which would normally be managed within the home (for example, smashing a plate or damaging furniture in anger) are reported to police and young people are charged with offences such as property damage. There is a clear need for the effective implementation of trauma-informed approaches in out-of-home care in responses to such scenarios.*⁶³

⁵⁴ Pia van Zandt and Tristan Webb, Legal Aid New South Wales, *High service users at Legal Aid New South Wales: Profiling the 50 highest users of legal services* (Report, 2013) 16.

⁵⁵ Legal Aid New South Wales, *The Drift from Care to Crime* (Issues Paper, 2011) 7.

⁵⁶ *Ibid* 3.

⁵⁷ Katherine McFarlane, ‘The faulty child welfare system is the real issue behind our youth justice crisis’, *The Conversation* (online, 13 February 2017) <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

⁵⁸ Katherine McFarlane, ‘From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System’ (2010) 22(2) *Current Issues in Criminal Justice* 345, 348.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ Katherine McFarlane, ‘The faulty child welfare system is the real issue behind our youth justice crisis’, *The Conversation* (online, 13 February 2017) <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

⁶² Law Council of Australia, ‘Children and Young People’ (Justice Project: Final Report, August 2018) 57, quoting Consultation, 14/09/2017, Melbourne (Victoria Aboriginal Legal Service).

⁶³ *Ibid*, quoting Western Australia Commissioner for Children and Young People, Submission No 37.

32. Lawyers interviewed as part of a qualitative research project examining legal responses to children in conflict with the law in Victoria in 2016 made similar statements, including the following:

... the amount of children I've had who have come from extremely impoverished ... backgrounds – many of them raised in state care, who end up being charged with criminal offences that have occurred in state care – and they won't understand that they're not allowed to punch a hole in their wall, and that they get charged with criminal damage, yet another kid who lives with their parents is made to plaster it up. I think there are different approaches to different situations, and I don't think that it's appropriate when you might get one psychologist who says, 'well, no, they understand that it's wrong to break a wall, therefore they can be charged', and the reality is that, well, why should they be, for starters? What good does it serve society to criminalise them?⁶⁴

Children with Health Issues

33. The Law Council is aware that there is also a strong association between poor health and contact with the criminal justice system. The health needs of young people in the juvenile criminal justice system are particularly striking. In a 2017 publication, Professor Chris Cunneen of the University of New South Wales reviewed relevant research and found that:

Young people within youth justice systems have significantly higher rates of mental health disorders and cognitive disabilities when compared with general youth populations. They are also likely to experience co-morbidity, that is co-occurring mental health disorders and/or cognitive disability, usually with a drug or alcohol disorder. Australian research suggests that these multiple factors, when not addressed early in life, compound and interlock to create complex support needs.⁶⁵

34. Professor Cunneen also referred to the 2015 New South Wales Young People in Custody Health Survey, which found that 83 percent of young people in detention were assessed as having a psychological disorder, with a higher proportion for Indigenous children than non-Indigenous children, depending on the type of disorder.⁶⁶ This figure is several times greater than the rate for children living in the community: while the age range is broader, the 2015 Australian Child and Adolescent Survey of Mental Health and Wellbeing found 14 percent of 4 to 17-year-olds assessed as having a mental disorder.⁶⁷ In addition, some 18 percent of young people in custody in New South Wales have cognitive functioning in the low range (IQ < 70), indicating cognitive disability, and various studies have shown that between 39 percent and 46 percent of young people in custody in New South Wales fall into the borderline range of cognitive functioning (IQ 70-79).⁶⁸
35. There is also evidence to suggest that young people in the youth justice system have a range of other impairments often associated with cognitive disability, including:

⁶⁴ Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 27.

⁶⁵ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (Research Report, Comparative Youth Penalty Project UNSW, 2017) <<http://cypw.unsw.edu.au/node/146>>.

⁶⁶ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report* (2017).

⁶⁷ Lawrence et al, *The Mental Health of Children and Adolescents: Report on the Second Australian Child and Adolescent Survey of Mental Health and Wellbeing* (Commonwealth of Australia, Report, 2015).

⁶⁸ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (Research Report, Comparative Youth Penalty Project UNSW, 2017) <<http://cypw.unsw.edu.au/node/146>>.

speech, language and communication disorders; Attention Deficit Hyperactivity Disorder (**ADHD**); autism spectrum disorders; Fetal Alcohol Spectrum Disorder (**FASD**); and acquired/traumatic brain injury.⁶⁹ Research suggests that many First Nations children in detention have hearing and language impairments that are not diagnosed and their behaviour is misinterpreted as non-compliance, rudeness, defiance or indifference.⁷⁰

36. The link between cognitive disability and associated impairments and vulnerability to the juvenile criminal justice system was highlighted in a prevalence study with respect to children at Banksia Hill Detention Centre in Western Australia, conducted by the Telethon Kids Institute. The study revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth'.⁷¹ It found, among other concerning statistics, that 89 percent of children had at least one form of severe neurodevelopmental impairment, while 67 per cent had at least three forms and 23 per cent had five or more forms.⁷² 36 percent had FASD and 25 percent had an intellectual disability.⁷³ The Western Australian Commissioner for Children and Young People similarly identified cognitive disability and associated impairments as driving factors of children's involvement with the juvenile criminal justice system, submitting to the Justice Project that 'these cognitive issues impact an individual's capacity to understand the consequences of their actions and regulate their behaviour as well as to participate in the legal system in an informed and equal manner'.⁷⁴
37. Understanding the impact of these conditions on offending (and re-offending) and the importance of early assessment, diagnosis and treatment is an essential aspect of this Review.

First Nations Children

38. The low minimum age of criminal responsibility disproportionately impacts First Nations children. In 2018, the AIHW reported that 'Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night'.⁷⁵ 'Over the 4-year period [from the June quarter 2014 to the June quarter 2018], this fluctuated between 21 times and 28 times the non-Indigenous rate'.⁷⁶ At times, this figure has been much higher in certain states and territories. In May 2019, for example, all the children in detention in the Northern Territory were First Nations children.⁷⁷
39. Data from the New South Wales Bureau of Crime Statistics and Research (**BOCSAR**) illustrates that between the ages of 10 and 12, the proportion of Aboriginal Australians making their first contact with the New South Wales criminal justice system is between 30 and 56 times higher than that of non-Aboriginal Australians. For children aged 13,

⁶⁹ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (Research Report, Comparative Youth Penalty Project UNSW, 2017) <<http://cyp.unsw.edu.au/node/146>>.

⁷⁰ Ibid.

⁷¹ Law Council of Australia, 'Children and Young People' (Justice Project: Final Report, August 2018) 8, quoting Telethon Kids Institute, 'Nine out of ten young people in detention found to have severe neuro-disability' (Media Release, 13 February 2018).

⁷² Ibid. See also Carol Bower, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1.

⁷³ Ibid.

⁷⁴ Law Council of Australia, 'Children and Young People' (Justice Project: Final Report, August 2018) 8, quoting Submission No 37 (Western Australia Commissioner for Children and Young People).

⁷⁵ Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2018* (Bulletin 145, December 2018) 2.

⁷⁶ Ibid.

⁷⁷ Lorena Allam, "'System is Broken": all children in NT detention are Aboriginal, officials say', *The Guardian* (online, 31 May 2019) <<https://www.theguardian.com/australia-news/2019/may/31/system-is-broken-all-children-in-nt-detention-are-aboriginal-officials-say>>.

the ratio of Aboriginal to non-Aboriginal criminal justice system contact is around 7:1.⁷⁸ The AIHW *Youth Justice in Australia 2017-18* report found that of the 49 children aged 10-13 either in detention or under community supervision in New South Wales on an average day during the year under review, a total of 31 – or 63 percent – were Indigenous.⁷⁹ The equivalent figures in 2016-17 and 2015-16 were 59 percent and 62 percent respectively.⁸⁰

40. The reasons for the high rates of First Nations children in contact with the juvenile criminal justice system are complex and multifaceted. A legacy of dispossession, intergenerational trauma and grief, leading to cycles of poverty, as well as experiences of injustice that accumulate over a lifetime, and find expression in discriminatory or culturally incompetent mainstream institutions and systems, are major causal factors.
41. A 2011 report by the Parliamentary Standing Committee on Aboriginal and Torres Strait Islander Affairs found that ‘contact with the criminal justice system represents a symptom of the broader social and economic disadvantage faced by many Indigenous people in Australia’.⁸¹
42. Practices and policies in the realm of health, education, social welfare, accommodation, child protection and juvenile justice contribute to the criminalisation of First Nations children.
43. For example, First Nations children who commit minor offences often receive harsh sentences including imprisonment, setting them on a future path of crime and imprisonment, when they should be diverted into First Nations community-led programs.⁸² The Australian Law Reform Commission (**ALRC**) has referred to studies, which have found that First Nations children receive limited and inconsistent access to diversionary options, and are more likely to be processed through the courts than non-Indigenous children.⁸³ This is particularly alarming when one considers the harm that imprisonment has on First Nations children, due to factors such as discriminatory and culturally incompetent practices as well as the location of juvenile detention centres away from their land and mob.
44. The fault lies in a system that has never worked ‘for’ First Nations peoples. As Barry Goldson, along with many scholars, have pointed out:

*... ‘justice’ is routinely mediated through the structural relations of class, ethnicity and race, and gender and, wherever we may care to look, youth ‘justice’ systems characteristically process (and punish) the children of the poor ... the corollaries between child poverty, social and economic inequality, youth crime and processes of criminalization are undeniable.*⁸⁴

⁷⁸ Don Weatherburn and Stephanie Ramsey, New South Wales Bureau of Crime Statistics and Research Bureau Brief, ‘Offending over the life course: Contact with the New South Wales criminal justice system between age 10 and age 33’ (Issue Paper No 132, April 2018) 5.

⁷⁹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (Report, 2019) 9, Table 3.1.

⁸⁰ Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (Report, 2018) 8, Table 3.1; Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-16* (Report, 2017) 9, Table 3.

⁸¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (Report, June 2011) 7 <<https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf>> .

⁸² Law Council of Australia, ‘Aboriginal and Torres Strait Islander People’ (Justice Project: Final Report, August 2018) 72, referencing Consultation, 13/09/2017, Bourke (Mission Australia) and Consultation, 15/09/2017, Bourke (Police Citizens Youth Club).

⁸³ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2018) 453.

⁸⁴ Barry Goldson, ‘“Unsafe, Unjust and Harmful to Wider Society”: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) *Youth Justice* 111, 123.

International Human Rights Standards

45. The low age of criminal responsibility is out of step with international human rights standards. The *United Nations Convention on the Rights of the Child (the Convention)*, under which Australia has binding obligations, requires States parties to establish a minimum age of criminal responsibility. While this international instrument does not specify a particular age, the United Nations Committee on the Rights of the Child (**the Committee**) has sought to provide robust guidance on the issue. In its General Comment No 24, the Committee wrote:

*States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicated that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.*⁸⁵

46. This follows the July 2019 report of the Independent Expert leading the UN global study on children deprived of liberty, Professor Manfred Nowak, which recommended that 'States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age'.⁸⁶
47. In November 2019 the Committee adopted concluding observations in relation to Australia's compliance with the Convention. The Committee recommended Australia 'raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies'.⁸⁷ The previous two times that the Committee reviewed Australia's compliance with the Convention – in 2005 and 2012 – it similarly recommended that Australia raise its minimum age of criminal responsibility 'to an internationally acceptable level'.⁸⁸ The Committee also expressed serious concerns about the 'enduring overrepresentation of Aboriginal and Torres Strait Islander children and their parents and carers in the justice system'.⁸⁹
48. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (**the Beijing Rules**) state that the age of criminal responsibility 'shall not be fixed at too low an age level' and emphasise the need to consider the emotional, mental and intellectual maturity of children.⁹⁰ Similarly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (**the Guidelines**) provide that conduct contravening 'overall social norms and values is often part of the maturation and growth process' and will abate as children transition into adulthood. The Guidelines note that

⁸⁵ 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).

⁸⁶ UN General Assembly, *Global study on children deprived of liberty: Note by the Secretary-General*, 74th session, A/74/136 (11 July 2019) 20.

⁸⁷ UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 82nd session, CRC/C/AUS/CO/5-6 (1 November 2019) 14.

⁸⁸ UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* CRC/C/15/Add.268 (20 October 2005); UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* CRC/C/AUS/CO/4 (28 August 2012).

⁸⁹ UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 82nd session, CRC/C/AUS/CO/5-6 (1 November 2019).

⁹⁰ *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985) r 4.1.

labelling young persons as ‘deviants’ or ‘delinquents’ will often increase the development of a pattern of undesirable behaviour in young people.⁹¹

Comparable Overseas Jurisdictions

49. Countries around the world have different approaches to the minimum age of criminal responsibility, both through statute and the common law. However, the minimum age in Australia ‘stands apart from that adopted by comparable international jurisdictions, several of which have raised the age in recent decades in recognition of international guidelines and best practice’.⁹² General Comment No 24 states that ‘over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14’.⁹³ An earlier study of 90 countries found that 68 had a minimum age of criminal responsibility of 12 or higher, with the most common age being 14 years.⁹⁴
50. To cite some specific examples: the minimum age is 12 years in Canada, the Netherlands and the Republic of Ireland; 13 years in France and Poland; 14 years in Austria, Germany, Italy, the Russian Federation and many Eastern European countries; 15 years in Denmark, Finland, Iceland, Norway and Sweden; and 16 years in Portugal.⁹⁵ In Belgium, the age of criminal responsibility corresponds with the age of majority (18 years):⁹⁶

*A child does not commit ‘crimes’ under the Belgian system; rather they commit ‘acts qualified as an offence’, for which a specialised jurisdiction, the Youth Tribunal, is competent to apply measures of protection, care, education and restorative justice. Children who were younger than 18 years at the time of committing the offence may thus face protection measures. Such measures can however extend to a deprivation of liberty in a closed educational centre or institution of youth protection. There is no minimum age to which the juvenile protection system applies.*⁹⁷

51. England, Wales and Northern Ireland have set the minimum age at 10 years of age,⁹⁸ and abolished the *doli incapax* presumption in 1998. A range of stakeholders – including the Equality and Human Rights Commission and the United Nations Committee on the Rights of the Child – have criticised this and called for the minimum

⁹¹ *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985) r 5(e).

⁹² Wendy O’Brien and Kate Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice* 134, 137.

⁹³ UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6.

⁹⁴ Nean Hazel, Young Justice Board for England and Wales, *Cross-national comparison of youth justice* (website, 2008), <http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf>.

⁹⁵ Marcelo F Aebi and Melanie M Tiago, *SPACE Council of Europe Annual Penal Statistics* (Report, Strasbourg, 20 December 2018, Update 11 June 2019) 35, Table 5 <http://wp.unil.ch/space/files/2019/06/FinalReportSPACEI2018_190611-1.pdf>.

⁹⁶ Nathalie Meurens, European Commission, ‘Study on children’s involvement in judicial proceedings: Contextual overview for the criminal justice phase – Belgium’ (Report, June 2013) 19-20 <<http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Belgium.pdf>>, citing *Youth Protection Act*, art 37.

⁹⁷ Nathalie Meurens, European Commission, ‘Study on children’s involvement in judicial proceedings: Contextual overview for the criminal justice phase – Belgium’ (Report, June 2013) 19-20 <<http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Belgium.pdf>>.

⁹⁸ Australian Institute of Health and Welfare, *Comparisons between Australian and International Youth Justice Systems: 2015-2016* (Youth Justice Fact Sheet No 93) 1.

age to be raised.⁹⁹ The approach in the United States – the only United Nations Member State that is not a party to the Convention – differs by state.¹⁰⁰

Presumption of *Doli Incapax*

Question 3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of *doli incapax* differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of *doli incapax* be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.

Response: Increasing the minimum age of criminal responsibility to at least 14 years will render the complex rebuttable legal presumption known as *doli incapax* redundant.

52. In Australia, children aged between 10 and 14 are subject to a rebuttable legal presumption known as *doli incapax*.
53. *Doli incapax*, or the idea that children are incapable of crime because they do not necessarily have the ability to discern between right and wrong, and should therefore be treated differently to adults, is an ancient principle.¹⁰¹ It became part of English common law in the thirteenth century,¹⁰² and then was further broken down in common law and statute in Australia into an absolute presumption for children aged from 0 to 10 and a rebuttable presumption for children aged from 10 to 14. Today in Australia, the absolute presumption for children aged from 0 to 10 is reflected in the minimum age of criminal responsibility. The rebuttable presumption remains a common law principle in New South Wales, South Australia and Victoria, but has been placed on a statutory footing in all other states and territories.¹⁰³
54. The rebuttable 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.¹⁰⁴ If children cannot be said capable of formulating the *mens rea* or mental

⁹⁹ Helen Pidd et al, 'Age of criminal responsibility must be raised, say experts', *The Guardian* (online, 5 November 2019) <<https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts>>.

¹⁰⁰ Juvenile Justice Geography, Policy, Practice & Statistics, 'Jurisdictional Boundaries' (2020) <<http://www.ijgps.org/jurisdictional-boundaries>>.

¹⁰¹ See, eg, Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 Sydney Law Review 339, 339; Terry Bartholomew, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in the Supreme Court of Victoria, Australia' (1998) 5(1) *Psychiatry, Psychology and Law* 95, 98.

¹⁰² See, eg, Barry Goldson, "'Unsafe, Unjust and Harmful to Wider Society": Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13(2) *Youth Justice* 111, 113.

¹⁰³ Brittany Armstrong, 'Why the presumption of *doli incapax* should be the first consideration in Youth Court matters' (2019) [August] *The Bulletin* 8; Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 20; Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 Sydney Law Review 339, 341.

¹⁰⁴ *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). The presumption is legislatively embedded in all the 'code' criminal jurisdictions of Australia: *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.

element of a criminal offence, then they cannot be found guilty of a criminal offence, and it is logical that they be spared prosecution.¹⁰⁵ However, while the court hearing begins with this presumption, the prosecution can introduce evidence in order to prove beyond a reasonable doubt that the child in question knew their act was seriously wrong as opposed to naughty or mischievous, and if the presumption is successfully rebutted, the child will face trial and be able to be found guilty of a criminal offence.¹⁰⁶

55. The test for rebutting the presumption is well established in the case law. Its main elements are as follows:

- the prosecution, not the defence, bears the onus of proof for raising and rebutting the presumption;
- the prosecution must satisfy the court that the child knew the act was 'seriously wrong' as opposed to merely 'naughty' or 'mischievous';
- the prosecution cannot rely solely on evidence of the act itself to prove the child's knowledge;
- the evidence must be relevant at the time of the act; and
- the evidence must be strong and clear beyond all doubt or contradiction.

56. The rebuttable presumption has been criticised as being both over-protective and under-protective of children. Thomas Crofts suggests that these apparently contradictory views 'are largely a product of the lack of clarity and coherency ... over how the presumption should operate and what evidence should be sufficient to rebut it'.¹⁰⁷ Multiple other legal and psychological scholars agree on this point.¹⁰⁸ There are increasing concerns that the complexity of the rebuttable presumption of *doli incapax*, and the inconsistencies in practice in applying it, both substantively and procedurally, undermine the extent to which it can be said to provide a sufficient safeguard for children as young as 10 years old from the full rigours of the criminal justice system.¹⁰⁹ The position of the Law Council is also that the rebuttable presumption is difficult to apply in practice. Raising the minimum age of criminal responsibility to at least 14 years would therefore have the added benefit of making this confusing and complex area of the law redundant.

57. Moreover, its existence means that these children – even if eventually found incapable of crime and not incarcerated – are subjected to damaging criminal procedures, including detention, while they wait to have the presumption upheld in a court hearing. As Wendy O'Brien and Kate Fitz-Gibbon articulate, the effect of these deficiencies in

¹⁰⁵ Ibid. See, specifically, *C v DPP* (1995) 2 All ER 43, 48 (Lord Lowry).

¹⁰⁶ Ibid.

¹⁰⁷ Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 Sydney Law Review 339, 341.

¹⁰⁸ See, eg, Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18; Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791.

¹⁰⁹ See, eg, Terry Bartholomew, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in the Supreme Court of Victoria, Australia' (1998) 5(1) *Psychiatry, Psychology and Law* 95, 99; Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 135; Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 31; Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 Sydney Law Review 339, 364.

the presumption is that 10 years old becomes Australia's informal minimum age of criminal responsibility.¹¹⁰ In a 2019 publication, these scholars reviewed the anecdotal evidence of judicial officers, legal counsel, support service personnel, youth conferencing practitioners, and magistrates from a wider qualitative research project examining legal responses to children in conflict with the law in Victoria in 2016.¹¹¹ The Law Council draws on these comments from the legal profession throughout the analysis below and maintains its position that the current legal framework does not work well.

Complexity

58. The rebuttable presumption of *doli incapax* is frequently criticised for its complexity, which leads to errors in its application in practice. Fitz-Gibbon and O'Brien note that those involved in the juvenile criminal justice system have:

... a general view ... that the presumption has been falling into disuse in recent years and that, where used, it is done in an ad hoc and procedurally questionable way. Several participants attributed inconsistencies in practice to the complexities present in the process of rebutting the presumption or proving that the child is doli incapax. Participants described it as 'very confusing', 'a bit convoluted', 'impractical' and as a very challenging and complex area ... [that] we still don't always get it right'. Reflecting this complexity, many participants discussed the ad hoc implementation and operation of doli incapax in practice.¹¹²

59. It should be clear that the onus of proof for raising and rebutting the presumption rests with the prosecution. In *RP v The Queen*, the High Court of Australia stated:

The appellant is presumed in law to be incapable of bearing criminal responsibility for his acts. The onus was upon the prosecution to adduce evidence to rebut that presumption to the criminal standard.¹¹³

60. As Brittany Armstrong helpfully summarises and as Crofts affirms:

Unlike a criminal defence, the onus is on the prosecution to rebut the presumption of doli incapax. If the prosecution fails to adduce evidence capable of proving that the child actually knew what they were doing was seriously wrong, the child is incapable at law of committing the charged offence and must be acquitted.¹¹⁴

It is important to note that the presumption of doli incapax (and its statutory equivalents) is not a defence in the sense that it must neither be raised nor proven by the accused. Since early times, it has been established that the burden of rebutting the presumption is on the prosecution ... the prosecution must bring

¹¹⁰ Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 142.

¹¹¹ Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 20.

¹¹² Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 21-22.

¹¹³ *RP v The Queen* [2016] HCA 53, [32].

¹¹⁴ Brittany Armstrong, 'Why the presumption of doli incapax should be the first consideration in Youth Court matters' (2019) [August] *The Bulletin* 8, 8.

*evidence to rebut the presumption ... to the criminal standard of beyond reasonable doubt.*¹¹⁵

61. However, interviews with legal practitioners and magistrates have revealed that in practice ‘*doli incapax* is not engaged as a matter of course for all children aged 10-13’, leaving the defence to informally initiate adherence to the presumption by providing a psychological assessment of a child’s (in)capability in cases where they think it appropriate.¹¹⁶ Fitz-Gibbon and O’Brien share illustrative explanations of this state of affairs from two legal practitioners, one metropolitan and one regional, involved in the juvenile criminal justice system:

You may as well not call it a presumption frankly because the way it works in the Children’s Court here is that you have to raise it, as in the defence has to raise it, the defence has to commission or produce a report confirming it, and then the defence has to argue that it applies sometimes right through to contests. So you can’t just say the presumption applies ... you have to do all the work of getting it up and going. It may as well be a defence, not a presumption because that’s how the law operates in practice.

*In practice it seems to be the defence getting reports and trying to make the argument – so it’s sort of like we’re proving that they don’t understand that something was seriously wrong as opposed to police proving that they did ... I just don’t think it’s what the system envisaged when the legislation was written.*¹¹⁷

62. As explored below, this informal reverse onus exposes children to a number of risks and places significant pressures, including added expenses, on state and territory legal and clinical services.
63. The threshold of ‘seriously wrong’ is discussed in case law. In *R v Gorrie*, Lord Justice Goff emphasised that successfully rebutting the presumption of *doli incapax* requires proving that the child has a knowledge of wrongness as a matter of morality, and conceptualised this as the child understanding their act as ‘seriously wrong’ as distinct from ‘naughty or mischievous’:

*It is not enough that the child realised that what he or she was doing was naughty or mischievous. It must go beyond childish things of that kind ... It would not be right for a child under that age to be convicted of a crime, even if they had committed the relevant actus reus and had the relevant mens rea specified in the statute, unless they appreciated that what they were doing was seriously wrong.*¹¹⁸

64. In Australia, ‘seriously wrong’ has been interpreted as meaning ‘wrong according to the ordinary standards of reasonable men’ or ‘seriously wrong by normal adult standards’, rather than wrong as ‘against the law’.¹¹⁹ In *R v M*, Chief Justice Bray of the Supreme Court of South Australia clarified that understanding the act was seriously wrong by normal adult standards is not the same as ‘understanding that it was something that adults disapprove of’, because ‘adults frequently disapprove of breaches of decorum

¹¹⁵ Thomas Crofts, ‘Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*’ (2018) 40 Sydney Law Review 339, 346.

¹¹⁶ Wendy O’Brien and Kate Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice* 134, 140-143.

¹¹⁷ Kate Fitz-Gibbon and Wendy O’Brien, ‘A Child’s Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)’ (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 22.

¹¹⁸ *R v Gorrie* (1919) 83 JP 136, 260 (Goff LJ).

¹¹⁹ See, eg, Thomas Crofts, ‘Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*’ (2018) 40 Sydney Law Review 339, 342; Brittany Armstrong, ‘Why the presumption of *doli incapax* should be the first consideration in Youth Court matters’ (2019) [August] *The Bulletin* 8, 8.

and good manners in children' and other such trivial matters.¹²⁰ This language was updated in *R v JA*, where the Supreme Court of the Australian Capital Territory held that it is 'not sufficient that the child knows there would be disapproval of the act by a parent or even police'.¹²¹

65. In the New South Wales Court of Appeal decision of *RP v The Queen*, Justice Hamill elaborated further on the threshold of 'seriously wrong', noting it cannot be defined solely in opposition to 'naughty or mischievous' in the binary sense as adults understand it:

*There is a vast chasm between something that is 'naughty' or 'mischievous' and something that is gravely or seriously wrong. The trouble with introducing the comparison is that it is easy to fall into the trap of thinking that if something is more than naughty, it must therefore satisfy the test. It does not.*¹²²

66. To this end, Crofts also points out that it is important to be clear that the adjective 'seriously' in the test is describing the child's understanding of the act, not the nature of the act:

*In making the contrast, the courts are aiming to explain, in clear terms, what sort of understanding the child must have in order to rebut the presumption. The term 'seriously' wrong does not mean that the offence itself must be one of a serious nature. Rather, the term serious relates to the nature and degree of the child's understanding. What the court is looking for is that the child knows what they have done is not just something naughty that will be dealt with in the home or at school, but rather something that is so wrong, hence the use of the term seriously wrong, that it will be dealt with outside the home.*¹²³

67. Assessing and proving knowledge of wrongness as a matter of morality is complex. It involves 'more than a child-like knowledge of right and wrong, or a simple contradiction'.¹²⁴ Instead, the test of 'seriously wrong' as opposed to 'naughty or mischievous' as it has developed requires proof in the child of:

*... more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge ...*¹²⁵

*[or, in other words] some understanding of conventional social attitudes about such behaviour (moral knowledge), some understanding of the consequences of that behaviour for the alleged victim (empathy) and some understanding of the knowledge of the consequences for the self if caught (consequential reasoning).*¹²⁶

¹²⁰ *R v M* (1977) 16 SASR 589, 591.

¹²¹ *R v AJ* (2007) 161 ACTR 1, 11 [69].

¹²² *RP v The Queen* (2015) 90 NSWLR 234, 256.

¹²³ Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 Sydney Law Review 339, 344.

¹²⁴ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 792.

¹²⁵ *Ibid.* See also Helen Howard and Michael Bowen, 'Unfitness to Plead and the Overlap with *Doli Incapax*: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 380, 382.

¹²⁶ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 797.

68. That is, it is not enough for the child to have a 'rote learning' of the difference between right and wrong.¹²⁷
69. Problems arise when this requirement of proving morality comes up against what is known about child development. As Nicholas and Chris Lennings note, moral reasoning 'necessarily imports with it a consideration of the concept of maturity' but 'maturity remains an undefined concept in studies of child psychology', involving, as recognised above at paragraphs [18] to [24], 'a number of areas of cognitive functioning, such as impulsivity, reasoning and consequential thinking'.¹²⁸
70. Moreover, the test is subjective. That is, the court must be satisfied that the actual child in question at the actual time of the act had the requisite knowledge. It is not enough to assume that the child had the general level of understanding of other children his or her age or to suppose that the child ought to have known the act was seriously wrong.¹²⁹ This means that the test relies not only on nomothetic approaches but idiographic assessments of child development: 'without an understanding of the specific developmental circumstances of the child, nomothetic approaches ... are inadequate'.¹³⁰ Research shows, for example, that the interpretive systems involved in moral reasoning 'are influenced by social factors' such as 'modelling'.¹³¹
71. The complexity in understanding and proving the test gives rise to the problem of 'an increasingly liberal interpretation' of what evidence constitutes 'sufficient rebuttal' of the presumption.¹³² Terry Bartholomew worries that, 'in the absence of clearly defined criteria and thresholds', this 'has the potential to limit the power of this legal protection, and to result in more young offenders being found to have criminal capacity'.¹³³ As Helen Howard and Michael Bowen assert, 'how many children will be protected may depend upon how broadly the courts are prepared to interpret the criteria'.¹³⁴
72. In a review of children in the legal process, the ALRC found in 1997 that '*doli incapax* can be problematic for a number of reasons', including that:
- For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.*¹³⁵
73. It also means that reasonable minds might differ as to the conclusion to be reached on the evidence provided. In the recent case of *KG v Firth*, the Northern Territory Court of Appeal reinstated the original verdict of the trial judge, setting aside the decision of the intermediate court to quash the original verdict, on the basis that although the

¹²⁷ Helen Howard and Michael Bowen, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 380, 382 and 386.

¹²⁸ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 792-4.

¹²⁹ *Ibid* 791-2.

¹³⁰ *Ibid* 795, 797.

¹³¹ *Ibid* 792.

¹³² Terry Bartholomew, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in the Supreme Court of Victoria, Australia' (1998) 5(1) *Psychiatry, Psychology and Law* 95, 99.

¹³³ *Ibid*.

¹³⁴ Helen Howard and Michael Bowen, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 380, 382 and 386, 390.

¹³⁵ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* (Report No 84, November 1997).

intermediate court came to the opposite conclusion as the trial judge on whether the *doli incapax* presumption was rebutted, the finding of the trial judge was not so unreasonable as to make his conclusion irrational and arbitrary, and therefore wrong in fact.¹³⁶

Pressure on Clinical Resources and Courts

74. Difficulties in rebutting the presumption of *doli incapax* – or, as often occurs in practice, proving that a child is *doli incapax* – create a need for expert psychological assessments as evidence, and therefore place a greater cost on the party bringing that evidence and an increased burden on forensic mental health professionals. The Justice Project highlighted the critical pressures on legal assistance providers and court systems, including with respect to children’s lawyers, children’s courts and specialist responses, demonstrating the very real pressures which are likely to undermine the operation in practice of *doli incapax*.

75. As O’Brien and Fitz-Gibbon note:

*... ordering psychological assessments is resource dependent, yet public defence funds are limited. ... Furthermore the practice whereby doli incapax is established by a psychological assessment introduces a range of demands with respect to the availability, quality and resourcing of qualified child psychologists who can provide timely, accurate and fulsome assessments. Stakeholders interviewed indicated that there is a shortage of appropriate psychologists who can provide quality doli incapax assessments in both metropolitan and regional [areas] ... These kinds of deficits in the psychological services workforce have a detrimental impact on the extent to which the doli incapax safeguard can be fully and effectively engaged in order to divert children aged 10-13 from the criminal justice system.*¹³⁷

76. The United Nations Committee on the Rights of the Child has expressed concern about juvenile criminal justice systems that require finding that a child had knowledge of the wrongness of their actions in a moral or criminal sense, but do not require expert evidence. However, expert evidence must be available for all children, or it creates an inconsistent application of the presumption, violating the principle of equality before the law.¹³⁸ Moreover, as Crofts notes, ‘the preparation of a report has the potential to prolong proceedings, which can impact negatively on the child’, and will not necessarily be of utility.¹³⁹

Damage to the Child is Already Done

77. In each criminal proceeding, the potential rebuttal of the presumption of *doli incapax* is not considered until the court hearing. Due to the processes and delays in our criminal justice system, a determination by a court on this issue can take weeks, and often months. As a result, many children aged 10 to 14 are enmeshed in the criminal justice system for lengthy periods of time – including in custody, if bail is denied – for matters that are ultimately dismissed by the court or withdrawn by police at the time of hearing.

¹³⁶ *KG v Firth* [2019] NTCA 5, 20.

¹³⁷ Wendy O’Brien and Kate Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice* 134, 140-1.

¹³⁸ *Ibid* 143; Thomas Crofts, ‘Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*’ (2018) 40 *Sydney Law Review* 339, 355.

¹³⁹ Thomas Crofts, ‘Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*’ (2018) 40 *Sydney Law Review* 339, 355.

78. Recent statistics from the AIHW show very high proportions of children in detention who are unsentenced (being detained by police (pre-court) or by a court (remand)).¹⁴⁰ 'On an average day in 2017-18, more than half of all young people in detention were unsentenced (60 percent) ... ranging from 38 percent in Victoria to 87 percent in Queensland'.¹⁴¹ This has serious implications for the adequacy of *doli incapax* as a protection mechanism for children. As one Victorian legal practitioner told Fitz-Gibbon and O'Brien:

*While on paper it looks like there's some level of safeguard there, there's a whole lot of kids that are being held on remand before those questions have even been answered. ... You can be charged as a 10-year-old and may not ultimately be found guilty ... [but] because they might not have got to those questions before someone's being held on remand, possibly, or being held in police watch houses, having been charged ... the damage has already been done.*¹⁴²

79. The Law Society of New South Wales provided the Law Council with the following case study, based on the experience of Law Society members. All names have been changed.

Zac is first charged by the police at 10 years of age. He is charged on a number of occasions over the next few years and placed on bail. Zac spends 132 days in custody in relation to these charges. All charges are dismissed on the basis of doli incapax.

80. Often, despite the relevance of *doli incapax*, a young person will not defend a matter to avoid the court process. In Fitz-Gibbon and O'Brien's research:

*... several participants identified that prolonged processes associated with the presumption highlight an inherent tension between a child defendant's instructions and their own view, as legal counsel, that an assessment of doli incapax is in a child's best interests. Practitioners explained that, in some cases, young clients seek the fastest outcome, regardless of whether that results in a conviction ... This reflection highlights important issues surrounding the protection of children before the law, including the difficulty in ensuring the best interests of the child, and the (often) competing need to ensure that child can exercise their agency.*¹⁴³

81. As outlined above at paragraphs [12] to [13] and [25] to [26], contact with the criminal justice system in early adolescence can have long-term negative effects on a child's education and development. Studies also show that the younger a child is when they have their first contact with the criminal justice system, the higher the chance of future offending.¹⁴⁴ This is a critical consideration with respect to the Working Group's review of long-term community safety.

Minimum Age of Detention

Question 4. Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention

¹⁴⁰ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (Report, 2019) 16.

¹⁴¹ Ibid.

¹⁴² Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 25.

¹⁴³ Ibid 27.

¹⁴⁴ Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2014-15* (2016), Juvenile Justice Series No. 20. Cat. No. JUV 84.

be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

Response: All children, regardless of their age, should only be detained in conformity with the law, as a measure of last resort, and for the shortest appropriate period of time.

82. The United Nations Committee on the Rights of the Child General Comment 24 makes it clear that certain forms of detention (for example, incommunicado detention) should not be permitted for anyone under 18 years old. It also contains a range of other relevant principles to help guide policy makers in this area, including:

- imprisonment of the child shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time;
- every child arrested and deprived of his or her liberty should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours; and
- every child deprived of liberty shall be separated from adults. A child deprived of his or her liberty shall not be placed in a centre of prison for adults.

83. The Law Council supports a comprehensive review of all Australian jurisdictions' laws and policies relating to the detention of children, informed by the principles of General Comment 24. Given the robust guidance provided by General Comment 24, as well as Australia's obligations pertaining to children's interaction with the justice system under the Convention, the Law Council suggests consideration may be given to the development of a legislative presumption that no child should be deprived of his or her liberty.

Prevention, Intervention and Rehabilitation

84. The development of long-term and sufficient funding for prevention, early intervention, and rehabilitation programs for children is as important as raising the minimum age of criminal responsibility to at least 14 years old.

Question 4. What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

Question 5. Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

Question 6. If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views

and, if available, provide any supporting evidence.

Question 7. If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold?

Response: A low minimum age of criminal responsibility is not in the public interest and does not make our communities safer. Whether the age of criminal responsibility is raised or not, the Law Council considers that increased investment in and implementation of therapeutic programs and strategies that seek to address the root causes rather than symptoms of disadvantage and prevent children coming into contact with the criminal justice system once they reach the age of criminal responsibility is required. Such programs and strategies should be aimed at the particularly vulnerable groups discussed above. These approaches should also inform rehabilitative responses when children engage in problematic behaviour that would otherwise be classified as offending.

85. The Law Council recommends that the behaviour of children under an increased age of criminal responsibility of at least 14 years old be addressed through support services and appropriate and targeted therapeutic interventions that are proved to be in their best interests.
86. These should not be provided through the criminal justice system.¹⁴⁵ As argued above at paragraphs [25] to [44], criminal intervention unfairly targets the most disadvantaged children in our society. It therefore ‘amounts to the criminalisation of social need’, which is not only ‘ethically unsustainable’ but ‘spectacularly ineffective’.¹⁴⁶
87. As discussed at the outset of this submission at paragraphs [11] to [17], juvenile criminal justice systems ‘fail the public interest in respect of crime prevention and community safety’.¹⁴⁷ There is much longitudinal research concluding that ‘the deeper that children and young people penetrate youth justice systems the more damaged they are likely to become and the less likely they are to desist from offending’.¹⁴⁸ For example, a longitudinal study of 1,037 boys born in Canada found that ‘contact with the juvenile justice system increased the cohort’s odds of adult judicial intervention by a factor of seven’.¹⁴⁹
88. Juvenile offenders require a higher duty of care than adult offenders, and, for this reason, the incarceration of children is ‘highly resource intensive’ and can rightly cost more than the incarceration of adults.¹⁵⁰ In 2017-2018, youth detention saw total

¹⁴⁵ Penal Reform International, ‘The minimum age of criminal responsibility’ (Justice for Children Briefing No 4, 2013) 4 <https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf>.

¹⁴⁶ Barry Goldson, ‘“Unsafe, Unjust and Harmful to Wider Society”: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) *Youth Justice* 111, 123.

¹⁴⁷ *Ibid* 122.

¹⁴⁸ *Ibid*, citing L McAra and S McVie ‘Youth Justice? The impact of system contact on patterns of desistance from offending’ (2007) 4(3) *European Journal of Criminology* 315, 336.

¹⁴⁹ See, eg, Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 7, citing U Gatti, R Tremblay and F Vitaro, ‘Iatrogenic Effect of Juvenile Justice’ (2009) 50(8) *Journal of Child Psychology and Psychiatry* 991. See also Barry Goldson, ‘“Unsafe, Unjust and Harmful to Wider Society”: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) *Youth Justice* 111, 122.

¹⁵⁰ Kelly Richards, Australian Institute of Criminology, Australian Government, *What Makes Juvenile Offenders Different From Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409, February 2011) 5.

government spending of more than \$509 million.¹⁵¹ It costs approximately \$531,075 to keep one young person in detention per year.¹⁵²

89. The Law Council recommends governments increase capacity for needs-based, non-criminal law responses to behaviour that currently constitutes 'offending' for children aged 10 to 14.¹⁵³ It calls for a commitment by federal, state and territory governments to long-term, stable investment in specialist, joined-up, wrap-around services for children and their families, especially for vulnerable cohorts. These alternatives to incarceration and non-custodial sentences serve a vital purpose, as research has shown that children who first encounter the justice system by the age of 14 are more likely to experience all types of supervision in their later teens, particularly the most serious type – a sentence of detention (33 percent compared to 8 percent for those first supervised at older ages).¹⁵⁴ The Law Council notes that if the minimum age of criminal responsibility is increased, there should be cost savings in the criminal justice system, which could be used to scale up evidence-based alternatives to incarceration and non-custodial sentences for all children.
90. In a 2017 report entitled *The sky is the limit: keeping young children out of prison by raising the age of criminal responsibility*, Amnesty International observed that, as an alternative to imprisonment, 'children should be given the support they need for the issues that are affecting their offending behaviours ... an educational, medical, psychological, social and cultural response that deals with the underlying causes is more effective and appropriate than a justice response'.¹⁵⁵ As such, 'services may need to address experiences of physical, emotional or mental abuse, trauma (including intergenerational trauma), cognitive impairment, family or drug and alcohol issues'.¹⁵⁶
91. The Queensland Productivity Commission's Inquiry into Imprisonment and Recidivism Final Report, released on 31 January 2020, also emphasised the causal factors behind offending such as 'cognitive impairments, mental health issues, exposure to trauma and childhood maltreatment' and the essential role of targeted prevention and early intervention to achieve long term outcomes in reducing prison populations.¹⁵⁷
92. Particular regard should be had to measures that prioritise early intervention, adopt trauma-informed and culturally competent practice, and are developed in consultation with people with lived experience of the child protection and juvenile criminal justice systems. There should be strong referral pathways for children, as well as specialised training for service providers who come into contact with children. Existing systems, such the health system and educational system, should be better utilised and resourced in breaking cycles of disadvantage and potentially problematic behaviours:

¹⁵¹ Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, ch 17, table 17 A.8.

¹⁵² Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, ch 17, table 17.25: 'Nationally in 2017-18, the average cost per day per young person subject to detention-based supervision was \$1455'.

¹⁵³ Bob Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (8 June 2018), Queensland Government, 105.

¹⁵⁴ Youth Justice Coalition, 'Policing Young People in NSW: A Study of Suspect Targeting Management Plan' (25 October 2017), 11 <<https://www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/>>.

¹⁵⁵ Amnesty International, *The sky is the limit: keeping young children out of prison by raising the age of criminal responsibility* (2017) 13 <<https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>>.

¹⁵⁶ Ibid.

¹⁵⁷ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Summary Report, January 2020) 30.

'It is crucial that there be referral pathways to age-appropriate therapeutic services that provide non-stigmatising supports for children with welfare needs'.¹⁵⁸

93. It is also crucial that such therapeutic supports are put in place as early in a child's life as possible. Research has found that 'failure to intervene early is likely to make intervention more difficult and less likely to be successful'.¹⁵⁹ Early intervention also ensures 'that children in contexts of risk are not ignored until they reach an age where they are eligible for criminal conviction'.¹⁶⁰ As well as being a time of developmental vulnerability, early adolescence presents a unique window of opportunity for prevention and early intervention to address spirals of negative behavioural and emotional patterns.¹⁶¹ The fact that an adolescent's brain is still developing creates the conditions to leverage change for an enduring impact. As a result, prevention and intervention methods are especially significant in this transition period. It is critical, therefore, that children in early adolescence are steered away from the criminal justice system and instead integrated into positive programs to shape social, emotional, psychological, and neurodevelopmental behaviours. Rehabilitation and intervention – rather than incarceration – are instrumental to creating positive trajectories in early adolescence.¹⁶² A range of critical support services is needed to combat likely pathways into the justice system – such as family support, mental health, disability support, youth engagement, and rehabilitation, services.
94. It is the longstanding position of the Law Council that First Nations community-controlled organisations are most appropriately placed to provide services and speak on behalf of First Nations peoples. Federal, state and territory levels of government should provide ongoing resourcing for First Nations community-controlled organisations to ensure, as Change the Record has stated, that 'policy solutions are underpinned by the principle of self-determination, respect for Aboriginal and Torres Strait Islander people's culture and identity, and recognition of the history of dispossession and trauma experienced by many communities'.¹⁶³
95. As highlighted by the Justice Project consultations, many First Nations peoples have intergenerational and personal experiences of mainstream services working 'against them' instead of 'for them'. This lack of trust affects all aspects of interaction with mainstream services and therefore the effectiveness of these services in delivering support for individuals or positive change for communities. Culture is a protective factor and a great source of strength for First Nations peoples. Distrust, communication barriers and trauma are increased when mainstream institutions and services ignore cultural background.
96. The Law Council highlights Change the Record's call, for example, that:

... all appropriate supports are provided to enable Aboriginal and Torres Strait Islander children and young people to succeed at school. This should include the

¹⁵⁸ Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 140.

¹⁵⁹ Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 29, citing D Weatherburn, A McGrath and L Bartels, 'Three Dogmas of Juvenile Justice' (2012) 35(3) *University of New South Wales Law Journal* 779, 806.

¹⁶⁰ Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 142.

¹⁶¹ UNICEF Office of Research – Innocenti, *The Adolescent Brain: A second window of opportunity* (2017) 15.

¹⁶² *Ibid* 33.

¹⁶³ Change the Record, *Blueprint for Change* (2016) 5.

*provision of restorative justice initiatives and healing programmes within school to enable the early resolution of issues.*¹⁶⁴

97. The Justice Project highlighted that, where communities are empowered to lead on the issues that affect them, culturally competent solutions are more likely to be identified and implemented. At a service-delivery level, community-controlled organisations build strength and resilience in communities and provide local solutions to local problems.
98. This is particularly important to First Nations peoples, where, as Change the Record articulates, community-controlled organisations ‘have the unique capacity to provide culturally appropriate services, and are able to provide localised, tailored solutions that have the support of the community’.¹⁶⁵ Successful programs are developed by First Nations peoples, or in consultation and partnership with them, rather than imposed from the top down. As the Justice Project remarked, ‘there is no shortage of ideas and solutions, which have been identified and progressed consistently’ by Aboriginal and Torres Strait Islander led community organisations.¹⁶⁶ However, the underlying need for such culturally competent, appropriate or sensitive solutions must first be acknowledged and then the solutions adequately funded.
99. Regarding children between 10 and 13 who are currently in prison, Amnesty International Australia, noting the recommendations of the Royal Commission into the Protection and Detention of Young People in the Northern Territory, proposed that governments create a ‘transition plan to shift these children out of detention and place them into programs designed to address their underlying issues and keep them out of the justice system in the future’.¹⁶⁷ It added that ‘the transition should take no longer than one year, and due to the longstanding impacts imprisonment has on children, it is recommended that the transition of children with FASD [Fetal Alcohol Spectrum Disorder] and other mental impairments or vulnerabilities be prioritised’.¹⁶⁸
100. There are a range of evidence-based programs already being employed in Australia to divert early adolescent children from the criminal justice system. These programs often help children and families to work together to address the underlying risk factors that lead to offending behaviour, and include:
 - New Street Adolescent Services, an early intervention program delivered by NSW Health targeted to address harmful sexual behaviours displayed by children aged 10-17 years.¹⁶⁹ This program has an evidence-informed model of operation that involves working with the entire family unit. A 2014 evaluation of New Street Services by KPMG found that the service has achieved significant outcomes with young people and their families, with positive impacts for both individuals and the child protection system as a whole.¹⁷⁰ The evaluation included a cost benefit analysis, which identified a

¹⁶⁴ Ibid 13.

¹⁶⁵ Change the Record, *Blueprint for Change* (2016) 6.

¹⁶⁶ Law Council of Australia, ‘Aboriginal and Torres Strait Islander People’ (Justice Project: Final Report, August 2018) 4.

¹⁶⁷ Amnesty International, *The sky is the limit: keeping young children out of prison by raising the age of criminal responsibility* (2017) 14 <<https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>>. See Royal Commission into the Protection and Detention of Children in the Northern Territory, Chapter 7 - Community Engagement, and Recommendations 7.1, 7.2, 7.3.

¹⁶⁸ Ibid 14.

¹⁶⁹ New South Wales Health, ‘New Street Services’ (September 2018) <<https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>>.

¹⁷⁰ KPMG, *Evaluation of New Street Adolescent Services Health and Human Services Advisory* (March 2014) <<https://www.health.nsw.gov.au/parvan/hsb/Documents/new-street-evaluation-report.pdf>>.

'significant net [economic] benefit attached to the completion of New Street compared to all alternative scenarios'.¹⁷¹

- Youth on Track, a program delivered by the NSW Department of Communities and Justice, is an early intervention scheme for children aged 10-17 years that identifies and responds to young people at risk of long-term involvement with the criminal justice system. Through the program, the Department of Justice funds non-government organisations (Mission Australia, Social Futures and Centacare) to deliver the scheme in six locations across NSW. A 2017 review of Youth on Track prepared by Cultural & Indigenous Research Centre Australia the Department of Justice found that 'Youth on Track is contributing to enhanced social outcomes for many clients. The success of the scheme appears to relate to the application of strong evidence of 'what works' in interventions to address the individual criminogenic risk factors of the young person.'¹⁷²

101. There are a number of other programs specifically tailored to meet the needs of Indigenous children, including:

- The Junaa Buwa! Centre for Youth Wellbeing and Mac River Centre, which are residential rehabilitation centres for young people who have entered, or are at risk of entering, the juvenile criminal justice system and have a history of alcohol and other drug use. These services take a holistic approach including case management addressing mental, physical, social, and inter and intra-personal challenges. At Junaa Buwa! more than 80 percent of clients are Aboriginal and Torres Strait Islander young people, and there is a similar client profile at Mac River. The Centres are based on the evidence base of Mission Australia's Triple Care Farm service model, which is a residential youth rehabilitation program located near Wollongong, which won significant awards in 2009 and 2010.¹⁷³
- The Maranguka Justice Reinvestment project in Bourke is an example of a community-led system of working across communities and sectors and is delivering promising results across many domains in young people's lives including justice, education and health. An impact assessment of the project by KPMG in 2018 found that the project had led to a 38 percent reduction in charges across the top five juvenile offence categories, among other benefits.¹⁷⁴
- The Tiwi Islands Youth Development and Diversion Unit offers young people aged 10-17 the opportunity to forgo a criminal record in exchange for agreeing to comply with beneficial voluntary conditions such as participating in a youth justice conference, issuing apologies to the victim, attending school, and undertaking community service. Qualitative data has showed that this program is useful in reconnecting young people to cultural norms and the nature of the program was seen to be culturally 'competent' and directly addressed the factors that contribute to offending behaviour, such as

¹⁷¹ Ibid 64.

¹⁷² Circa, *Youth on Track Social Outcomes Evaluation* (April 2017)

<<http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf>>.

¹⁷³ Mission Australia, Submission to the Inquiry into Drug and Alcohol Treatment (March 2013); Mission Australia, *The Social and Economic Benefits of Improving Mental Health* (2019).

¹⁷⁴ KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment* (27 November 2018)

<<http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>>.

substance misuse, boredom and disengagement from work or education.¹⁷⁵ Young people who engaged in the program credited it for helping them recognise wrongdoing and adopt strategies to stay out of the criminal justice system.¹⁷⁶

- Panyappi Indigenous Youth Mentoring Program (from South Australia) is an early intervention program targeting Indigenous youths aged between 10 to 18 years old who are at risk or are in the early stages of contact with the youth justice system. The program employs full-time mentors with low caseloads to allow mentors to engage intensively and comprehensively with the youths and build voluntary relationships of trust.¹⁷⁷ These mentors help to facilitate the transition of youths into the community and enable them to move towards independence by developing or providing them with access to educational, training and recreational services.¹⁷⁸ An evaluation of the program found the frequency and severity of the offending by participants in the program had significantly decreased, and there were a range of other benefits to participants, including stronger family relationships and better connections with school.¹⁷⁹

102. Australia can also look beyond its borders in developing alternatives to incarceration for early adolescent children. In Finland, the youth justice system is premised on the belief that crime is a social problem that cannot be resolved by restricting the liberty of individuals.¹⁸⁰ Young offender intervention occurs through the child welfare system, which prioritises the best interests of the child.¹⁸¹ A wide range of measures are available depending on the seriousness of the issue and the underlying problems in the child's life. This may include a series of discussions with the child offender and their family. In cases of greater seriousness, more extensive open care measures may be required such as economic and social support for the parents, or psychological, psychiatric, substance abuse and educational support programs for the child.¹⁸²

103. If the age of criminal responsibility were to be raised to 14, there may be a very small cohort of children below that age who engage in anti-social behaviour, causing injury to themselves or unacceptable adverse consequences to others in the community, and for whom programs of the nature outlined above are insufficient. For these rare cases, a specialised service and treatment-based approach should be available, in the community where possible, but only on a compulsory basis as a last resort.

104. The Law Society notes that in Portugal, a range of educational measures are available for children under the age of criminal responsibility (which is set at 16) who commit an offence qualified by the penal law as a crime. The criteria for the educational measures

¹⁷⁵ Bodean Hedwards et al, 'Indigenous Youth Justice Programs Evaluation' (Special report, Australian Institute of Criminology, 2014) 37 <<https://aic.gov.au/publications/special/005>>.

¹⁷⁶ Ibid.

¹⁷⁷ Viciki-Ann Ware, 'Mentoring programs for Indigenous youth at risk' (Resource Sheet No 22, Closing the Gap Clearinghouse, Australian Institute of Health and Welfare, 2013) 12.

¹⁷⁸ Tom Calma, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Australian Human Rights Commission, 2008) 29.

¹⁷⁹ Just Reinvest, 'Examples of promising interventions for reducing offending, in particular Indigenous juvenile offending' (2013).

¹⁸⁰ Laura S Abrams, Sif P Jordan and Laura A Montero, 'What is a Juvenile? A Cross-National Comparison of Youth Justice Systems' (2018) 18(2) *Youth Justice* 119.

¹⁸¹ Tapio Lappi-Seppälä, International Juvenile Justice Observatory, *Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends (Finland)* (2011) 1-2.

¹⁸² Ibid 18.

rely on the young person's needs and the seriousness of the offence.¹⁸³ Options available under the country's Educational Guardianship Law include an admonition, reparations, educational supervision, and attendance of training programs. For the most serious cases, residential measures are available, where the child attends educational, training, employment, sports and leisure activities, and receives psychological assessment if required. The residential facilities are classified as 'open', 'semi-open' or 'closed'; only children aged 14 and over can be placed in closed facilities.¹⁸⁴

105. The Law Council has also been informally advised by UNICEF staff that the Child Rights Taskforce is also exploring intensive, care based residential programs as a potential option to address serious criminal behaviour by children in Australia. Such a model would employ trained, specialised carers and be health-based. It would also require a system of safeguards around issues including parental consent, and deprivation of liberty in the absence of a judicial process.

Need for Further Offences

Question 9. Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered *doli incapax*) to participate in activities or behaviours which may otherwise attract a criminal offence?

Response: The Law Council is not in a position to agree to a need for any new criminal offences, without seeing a robust evidence base that the proposed offending conduct needs to be addressed by the criminal law.

106. There are no specific criminal offences in Australian jurisdictions for the prosecution of persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered *doli incapax*) to participate in activities or behaviours which may otherwise attract a criminal offence.

107. However, given the wide range of offences in place across the different Australian jurisdictions, and the wide range of possible behaviours encompassed by the above question of the Review, certain existing offences might apply in certain situations.¹⁸⁵

108. The Law Council recommends that the Working Group conduct a further review into existing laws that may apply across all Australian jurisdictions to identify any gaps that might need to be addressed and consult further with stakeholders on this issue.

109. The Law Council notes that there should be a robust evidence base to demonstrate the need for the creation of any new offence provision.

Conclusion

110. When it comes to our children, our policy making must take an evidence-based approach and align Australian laws with the scientific and social research on community safety, criminogenic effect, offending and child development. Locking up

¹⁸³ Maria Joao Leote de Carvalho, International Juvenile Justice Observatory, *Alternatives To Custody For Young Offenders: National Report On Juvenile Justice Trends (Portugal)* (2013) <http://www.oijj.org/sites/default/files/baaf_portugal1.pdf>.

¹⁸⁴ *Ibid* 18.

¹⁸⁵ See, eg, *Criminal Code Act 1995* (Cth), pt 2.4, ss 11.2 and 11.3.

children as young as 10 years old in the criminal justice system perpetuates, rather than resolves, a problem. It is in neither the best interests of the child nor the best interests of the public in terms of crime prevention and community safety.