

Council of Attorneys-General - Age of Criminal Responsibility Working Group review

Submission from National Legal Aid

28 February 2020



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Introduction

National Legal Aid welcomes the opportunity to make a submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group's review of the minimum age of criminal responsibility (MACR) in Australia.

About National Legal Aid and Australia's legal aid commissions

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by Commonwealth and respective state or territory governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

NLA brings together the practice experience of the eight Australian state and territory LACs.

LAC services

In the 2018-19 financial year LACs provided in excess of 2 million legal services in all law types.

LAC services include:

- legal advice and information;
- legally assisted family dispute resolution (FDR);
- 'at court' duty lawyer and social support services;
- representation in contested proceedings and as Independent Children's Lawyers and separate representatives for children;
- referrals to other legal and non-legal service providers where appropriate;
- community legal education (CLE);
- training for community service providers; and
- specialist training for legal practitioners.

LAC services are provided pursuant to the National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA)¹ and respective state and territory enabling legislation. The NPA states that services must be “integrated, efficient and effective” and “focused on improving access to justice for disadvantaged people.”² The NPA also requires that LACs prioritise certain client groups including children.

In 2018-19, LACs provided 100,578 grants of legal aid for legal representation in criminal law matters; 11,714 of these were grants of aid for legal representation in criminal law matters to children under the age of 18. Many more less intensive services, such as legal advice, legal information, duty lawyer, and community legal education, were also provided to children.

Provided with this submission is an NLA publication containing further information about NLA and LAC service delivery including a map illustrating the locations of LAC offices from which services are delivered, and information about the type and the intensity of services delivered by LACs.

Executive summary

Across Australia the MACR is set at 10 years.³ NLA strongly supports raising the MACR to at least 14 years old. There are a number of compelling reasons for raising the MACR to at least 14 years old. They include:

1. the cognitive and emotional development of children, including underdeveloped consequential thinking and impulse control, and the impact of trauma;
2. the stigmatising and criminogenic impact of the criminal justice system and custody on young children;
3. the over representation of children experiencing mental health issues and with cognitive disabilities under 14 years old in the criminal justice system;
4. the over representation of Aboriginal children under 14 years old in the criminal justice system;
5. the over representation of children in out of home care under 14 years old in the criminal justice system;
6. the limitations of the presumption of doli incapax;
7. recommendations from numerous organisations and inquiries in Australia;
8. compliance with international standards; and

¹ Council of Australian Governments *National Partnership Agreement on Legal Assistance Services 2015-2020*.

² Ibid 3.

³ *Crimes Act 1914* (Cth), s 4M; *Criminal Code Act 1995* (Cth), s 7.1; *Criminal Code Act 2002* (ACT), s 25; *Criminal Code* (NT), s 38(1) and 42AP; *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Children, Youth and Families Act 2005* (Vic), s 344; *Young Offenders Act 1993* (SA), s 5; *Criminal Code Act Compilation Act 1913* (WA), s 29; *Criminal Code Act 1899* (Qld), s 29(1); *Criminal Code 1924* (Tas), s 18(1).

9. the availability of alternatives to criminal law responses for children under 14 years old. These reasons are addressed in more detail below.

Alternatives to criminal law responses for children under 14 years old could include additional services as well as utilisation of existing services, delivered through existing frameworks (e.g. education, welfare and health). Responses embedded in an Outcomes Framework could provide integrated support to children broader than the limitations of the criminal justice system. Savings to the criminal justice system which are diverted to Justice Reinvest initiatives have already provided a model that is proven to be highly effective in the rehabilitation of children and supporting communities.

This submission shares the stories of some of the children LACs have assisted.⁴ Because this submission is adapted from an earlier submission by Legal Aid NSW, many of the case studies and programs relate to Legal Aid NSW. However, in the experience of LACs, the lessons from these case studies are applicable to all Australian jurisdictions.

1. Cognitive and emotional development

Greater understanding of developmental maturity and the impact of trauma

There are many examples of how society recognises the physical, cognitive and emotional vulnerabilities of children under 14 years old and seeks to protect such children. Children under 13 years old cannot register as Facebook users; Qantas considers children under 12 years old as unaccompanied minors;⁵ the average 10 year old requires a booster seat to travel safely in a car;⁶ and in Queensland it is a criminal offence for a parent or guardian to leave a 12 year old alone.⁷ Yet, despite this, across Australia, 10 year old children can be arrested and detained in custody for alleged criminal offences.

Various Australian jurisdictions have adopted the MACR of 10 (via common law and/or statute) over many years. However, there have since been significant increases in our understanding of the brain development of children, especially via advances in neurodevelopment science.

There is now widespread recognition of the developmental immaturity of children compared to adults. It is understood that developmental immaturity affects a number of

⁴ Unless otherwise stated, this submission has removed identifying information from our client stories to protect our clients' confidentiality and anonymity.

⁵ See Qantas, Unaccompanied minors,

<https://www.qantas.com/au/en/travelinfo/children/unaccompanied.html>> referred to in Law Council of Australia, *Minimum age of Criminal responsibility: speech delivered by Arthur Moses SC, President, to Australian Human Rights Commission Forum, Canberra* (10 December 2019).

⁶ Royal Australasian College of Physicians (RACP) submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility (July 2019)

⁷ *Criminal Code Act 1899* (Qld), s 364A.

areas of cognitive functioning including impulsivity, reasoning and consequential thinking.⁸ In particular, during early adolescence, children tend to make decisions using the part of the brain connected to impulses, emotions and aggression.⁹ In addition, children aged 10 to 13 years are particularly vulnerable to peer pressure.¹⁰ Research also shows that ‘law and order’ morality is generally not achieved until the mid-teens.¹¹

In the experience of LACs, the majority of crimes committed by children (especially those who are aged 10 to 13 years old) are impulsive, emotional, committed in a peer group, with little appreciation or understanding of consequences and little understanding of why, and to what extent, the offence is wrong.

This greater understanding of developmental immaturity, reflected in the experience of children in the criminal justice system, supports a raising of the MACR. Arguments that ‘increased access to education and information technology’¹² justifies the current MACR are flawed. The rise of social media and the ubiquitous nature of online computer gaming for children offers little guidance for the moral development of children.¹³ Research suggests that violent video games, popular amongst young adolescents, may delay or stunt the development of moral reasoning.¹⁴ In relation to education, a defining feature of children in the criminal justice system is their history of poor education attendance.¹⁵

Consistent with the medical evidence, we note the support of the Royal Australasian College of Physicians,¹⁶ the Australian Medical Association,¹⁷ and the Australian Indigenous Doctors’ Association¹⁸ for raising the MACR to 14.

The Royal Australasian College of Physicians (RACP) notes that the range of problematic behaviours in 10 to 13 year old children that are currently criminal under existing Australian

⁸ Nicholas Lennings and Chris Lennings ‘Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study’ (2014), *Psychiatry, Psychology and Law*, 21(5), 794.

⁹ Australian Government, ‘The amazing, turbulent, teenage brain’ (20 February 2017). Available at: <https://www.learningpotential.gov.au/the-amazing-turbulent-teenage-brain>

¹⁰ Amnesty International, *The sky is the limit: Keeping young children out of prison by raising the age of criminal responsibility* (2018).

¹¹ UK Houses of Parliament - Parliamentary Office of Science and Technology, ‘Postnote: Age of Criminal Responsibility’ (June 2018), 3.

¹² Australian Government Report to the UN Committee on the Rights of the Child (2009).

¹³ Chris Cunneen, ‘Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report’ (2017), *Comparative Youth Penalty Project UNSW*. Available at <http://cypp.unsw.edu.au/node/146>

¹⁴ Ibid.

¹⁵ See Cunneen, op cit; and Legal Aid NSW, High Service users at Legal Aid NSW (2013), 14 available at https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf. Legal Aid NSW’s High Service User’s report found that 90% of high service users were not enrolled in education.

¹⁶ Royal Australasian College of Physicians (RACP), Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility (July 2019).

¹⁷ Australian Medical Association, ‘AMA Calls for Age of Criminal Responsibility to be raised to 14 years of age’ (media release, 25 March 2019). Available at <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>.

¹⁸ Joint media release, *Doctors, lawyers, experts unite in call to raise the age of criminal responsibility*. Available at: <https://www.aida.org.au/mediareleases/doctors-lawyers-experts-unite-in-call-to-raise-the-age-of-criminal-responsibility/>.

law, are better understood as behaviours one would expect in the context of a normal neurodevelopmental profile of 10-13 year olds. This is especially so when coupled with the behaviours one would expect from most children in our criminal justice system who have additional significant neurodevelopmental impairments and pre-existing trauma.¹⁹

Victoria Legal Aid observes that the majority of children in the youth justice system have experienced significant pre-existing trauma and early life stresses, as well as mental health issues and cognitive impairment. The Victorian Youth Parole Board has reported the following demographic and background characteristics of children in custody in Victoria:

- 70% are victims of trauma, abuse and neglect
- 65% had previously been expelled from school
- 60% are from 'disadvantaged, dislocated and excluded' parts of our community including Aboriginal and Torres Strait Islander children, Maori children, Pacific children, East African children, and children with a child protection history
- 53% presented with mental health issues
- 41% presented with cognitive difficulties that affect their everyday functioning
- 45.5% had offended while under the influence of both alcohol and drugs
- 24% spoke English as a second language.

Victoria Legal Aid sees that many of these children have had complex and difficult childhoods. A number have grown up with real disadvantage, often with families in crisis, and have experienced abuse or neglect.

In their *Review of the Victorian Youth Justice System* in 2017, Ogloff and Armytage found that over-representation of specific groups is not causally related to ethnicity, but rather to the range of sociodemographic factors and social disadvantage that can better explain criminality. These factors include economic and social exclusion, intergenerational trauma, a lack of pro-social supports for families establishing in Australia, and a feeling of exclusion from both family and mainstream communities.²⁰

Children under 14 years old in the criminal justice system are developmentally immature, and the majority suffer cognitive impairments and other disadvantages, are impacted by trauma, and have complex needs. They are not suitable to be dealt with by the criminal justice system.

¹⁹ Royal Australasian College of Physicians (RACP), Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility (July 2019), 3 and 5.

²⁰ J Ogloff AM and P Armytage, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (2017), 176.

2. Greater prospects of rehabilitation

Despite the above mentioned difficulties, early adolescence presents an opportunity for early intervention to prevent negative behavioural and emotional patterns.²¹ The growing adolescent brain is particularly susceptible to such behaviours and patterns. Entrenching a young child in the criminal justice system can have deleterious effects on their mental, emotional and social development. On the other hand, rehabilitation and diversion is vital for positive and effective neurodevelopment.²²

3. The stigmatising and criminogenic impact of the criminal justice system and custody on children

3.1 Impact of custody

One of the most negative effects of subjecting young children to the criminal justice system is that children end up in custody. Most of these children are in custody not on a sentence but on remand. On an average night in the June quarter of 2018, 3 in 5 (60%) young people in detention in Australia were unsentenced.²³ In Queensland, 86% of children in custody are on remand, with Indigenous children spending an average of 71 days on remand.²⁴ The number of children in Victorian custody who have not been sentenced has almost doubled, from an average of 37 children per day in the period from 2010-11 to 2013-14 to an average of 69 children per day in the period from 2014-15 to 2017-18.²⁵

Short periods on remand are particularly detrimental for vulnerable young children. They are a barrier to rehabilitation because they disrupt continuity of mental health treatment, disability supports, peer and family relationships, education, training and employment opportunities, and community housing and supports. This entrenches criminogenic patterns.

Furthermore, children held on remand have limited access to therapeutic and rehabilitation services or supports, and are often released into the community at the finalisation of court proceedings.²⁶ High remand rates and overcrowding in youth justice centres contribute to

²¹ UNICEF Office of Research – Innocenti, *The Adolescent Brain: A second window of opportunity* (2017), 15.

²² Ibid 33.

²³ Australian Institute of Health and Welfare (December 2018), Bulletin 145: *Youth Detention Population in Australia*. <https://www.aihw.gov.au/getmedia/55f8ff82-9091-420d-a75e-37799af96943/aihw-juv-128-youth-detention-population-in-Australia-2018-bulletin-145-dec-2018.pdf.aspx?inline=true>

²⁴ Amnesty International (2019), *Human Rights Abuse against kids in the Brisbane City Police Watchhouse*: <https://www.amnesty.org.au/watch-houses/>.

²⁵ Victorian Sentencing Advisory Council (August 2019) *Remand and Sentencing*: <https://www.sentencingcouncil.vic.gov.au/projects/remand-and-sentencing>

²⁶ P Armytage and Prof J Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending*, (July 2017), Part 2, 305-306.

behavioural issues and conflict between staff and children, further exacerbated by the stress of uncertain outcomes and unresolved court proceedings.²⁷

Human rights groups have been critical of the conditions in which children are remanded. Amnesty International noted that, as of 10 May 2019, there were 89 children in the Brisbane City Watch House, a facility designed to hold adults. At least half of these children were Indigenous and at least three were just 10 years of age. One of the boys had been there for 43 days, despite Queensland law dictating that no child may stay even one night in the Brisbane City Watch House. Four young girls were being held in isolation to protect them from other inmates.²⁸

Most children spend significant periods of time on remand whilst their matters progress. Many of these matters are ultimately withdrawn. In 2017-18, 23% of matters in the NSW Children's Court involving children under 14 years old were withdrawn by the prosecution.²⁹ For the same period, the rate of withdrawal of charges in the Local Court was 5%³⁰ and the overall withdrawal rate in the Children's Court was 11%.³¹ Twenty one children found not guilty in 2018 waited on remand for an average of 124 days.³²

Children are frequently remanded in circumstances where they are unlikely to receive a term of imprisonment. Of those matters that progress to a sentence, the majority of children are sentenced to non-custodial penalties. In 2018-19, 67% of NSW children aged 10-13 years old who were in custody on their sentence date were sentenced to a penalty other than custody.³³ In Victoria, 80% of children who have had bail refused do not go on to attract a term of detention for that offending.³⁴ This means that most very young children who are in custody are there despite the fact that, ultimately, the criminal justice system does not consider custody the appropriate outcome in their case.

Many children spend several short periods on remand.³⁵ Typically, children (especially younger children under 14) will be placed on onerous police bail conditions, which may include welfare type conditions (e.g. a curfew) that might not otherwise be given to an adult accused. Children who breach these conditions are placed in custody for 24-48 hours before being released by courts on bail. However, during the course of their criminal proceedings, children may go in and out of custody for several breaches of bail and, cumulatively, spend significant periods of time in custody.

²⁷ Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into youth justice centres in Victoria* (2018), Ch 5.

²⁸ Amnesty International (2019), *Human Rights Abuse against kids in the Brisbane City Police Watchhouse*: <https://www.amnesty.org.au/watch-houses/>.

²⁹ New South Wales Bureau of Statistics and Research.

³⁰ Australian Bureau of Statistics, *Criminal Courts, Australia, 2017-2018 dataset*. Available from: <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02017-18?OpenDocument>. Accessed 5 October 2019.

³¹ Ibid.

³² Sydney Morning Herald, Rawsthorne, S and Gladstone, N, (2 June 2019), *Children refused bail and held in prison for months, then found not guilty*, citing NSW BOCSAR.

³³ Source: NSW Bureau of Crime Statistics and Research (2019). 18 of the 27 children aged 10-13 recorded as having been in custody between April 2018 and March 2019 were sentenced otherwise than to control.

³⁴ The Hon Paul Coghlan QC, *Bail Review: First Advice to the Victorian Government*, 3 April 2017, at [5.115].

³⁵ This issue was recognised by the *Their Futures Matter – Short Term Remand project*.

Allowing children younger than 14 years old to be charged with criminal offences not only exposes them to a risk of being remanded in custody at an early age. It also exposes them to a higher risk of being remanded over the course of their lives, because of the development of a bail history which may include frequent breaches of bail conditions. It can also encourage children to plead guilty in order to secure release from custody, without testing the prosecution case or issues of capacity.

3.2 Impact on re-offending and other disadvantages

Contact with the criminal justice system at a young age is itself criminogenic. That is, involving children in the criminal justice system at an early age is likely to get them entrenched in the system.

The Victorian Sentencing Advisory Council's 2016 Report, *Reoffending by Children and Young People in Victoria*,³⁶ found that the likelihood of a child progressing from the Children's Court to the adult criminal jurisdiction was associated with their age at 'entry' into the criminal courts. The younger the child was at their first sentence, the more likely they were to reoffend generally, reoffend more frequently, reoffend violently, continue offending and be sentenced to an adult sentence of imprisonment before their twenty-second birthday. In this study, 75 per cent of offenders aged 10 to 12 at first sentence went on to reoffend and be sentenced in an adult court, whereas the rate was 42 per cent for those who received their first sentence at the age of 18. The Sentencing Advisory Council found that, after accounting for the effect of other factors, each additional year in age at entry into the criminal courts was associated with an 18 per cent decline in the likelihood of reoffending.³⁷

Research in NSW has shown similar results: 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% compared to 8% for those first supervised at older ages).³⁸ These results are consistent with the findings of Legal Aid NSW's High Service Users Report, discussed in more detail below.

On the other hand, the Royal Commission into the Protection and Detention of Children in the Northern Territory noted that the vast majority of children who are dealt with outside the formal criminal justice system do not reoffend.³⁹ Hence, raising the MACR to at least 14 will have a positive impact on reducing reoffending.

³⁶ Victorian Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (15 December 2016). Available at: https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending_by_Children_and_Young_People_in_Victoria.pdf.

³⁷ See also the Victorian Sentencing Advisory Council's recent report, *Rethinking Sentencing for Young Adult Offenders* (Dec 2019), paras 2.34-2.42.

³⁸ Youth Justice Coalition, 'Policing Young People in NSW: A Study of Suspect Targeting Management Plan' (25 October 2017), 11. Available at: <https://www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/>

³⁹ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 27, 413.

The impact of the criminal justice system on children leads to a cycle of disadvantage that extends beyond increased reoffending. Children who are forced into contact with the criminal justice system at a young age are less likely to complete their education or find employment, and are more likely to die an early death.⁴⁰ The cycle of disadvantage can be intergenerational and lead to untold financial and social costs. Hence, raising the MACR to at least 14 will have a positive impact not only for the justice system but also for health, education and other sectors.

Jane's story

Jane's life experience demonstrates the results of early involvement in the criminal justice system and its intergenerational impact. Her story illustrates how children who enter the criminal justice system at a young age can become entrenched in the criminal justice system and often continue their involvement into adulthood. This was particularly pronounced for Jane, who like many children, presented in the youth justice system with a history of childhood trauma and complex mental health needs.

Jane's involvement with child protection services started when she was aged 2. Her childhood had been marred by a chronic history of physical abuse, emotional abuse, neglect and unstable accommodation.

Her engagement with mental health services commenced at the age of 12. Between the ages of 13 and 17, Jane was subjected to numerous short admissions to out-of-home care placement, residential units, foster care placement and Secure Welfare Services. Jane was diagnosed with having an intellectual disability, Post-traumatic Stress Disorder, Reactive Attachment Disorder, Generalised Anxiety and Borderline Personality Disorder. Jane also had physical impairments which were compounded by self-harming behaviour, suicidal ideation and substance use.

Jane's interaction with the criminal justice system started at aged 13, predominantly related to property damage in residential units, threats and assaults on staff. Ultimately however, this offending resulted in serving a custodial sentence.

Jane is now 25 years old. She is no longer in custody but continues to struggle to maintain a stable life. She aspires to be a hairdresser, values her two young children and the time she spends with them, and attends her church on Saturdays to assist in their weekly barbeque. Her eldest child resides interstate with the paternal grandparents. This is difficult for Jane; she has contact with her eldest child only four times a year. Her second child was placed in out-of-home care from birth. Jane has been involved in custody proceedings involving her youngest son. In culmination with other related matters, this has caused Jane great distress and unpredictability in her life. These stressful life circumstances contributed to her most recent offending of assault upon a former disability case worker.

Jane's story is regrettably not unique. Children known to the child protection system are disproportionately over-represented in the criminal justice system. They are referred to as 'crossover kids'. Regrettably, the disadvantages faced by crossover kids have the capacity to

⁴⁰ Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be raised to 14 years of age' (media release, 25 March 2019). Available at <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>.

spill over to the next generation.

Curtailing children's involvement in the criminal justice system, through raising the minimum age of criminal responsibility and properly resourcing alternative therapeutic services has the capacity to break the cycle of re-offending.

4. Disproportionate representation of children with mental health disorders and cognitive impairments

In 2017, Professor Chris Cunneen of UNSW 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.⁴¹

The 2015 NSW Young People in Custody Health Survey found that 83% of young people in detention were assessed as having a psychological disorder, with a higher proportion for Indigenous children than non-Indigenous children for some disorders.⁴² This is a much greater rate than children living in the community.⁴³ The NSW Young People on Community Orders Health Survey 2003-2006 also found a high prevalence of psychological disorders for children on community based orders at 40% of those surveyed.⁴⁴ Mental health diversion appears to be widely underutilised and applied inconsistently.⁴⁵

Various studies have shown that between 39 to 46% of young people in custody in NSW fall into the borderline range of cognitive functioning (IQ 70 to 79).⁴⁶ Children in the NSW youth justice system have a range of other impairments, including ADHD, autism spectrum disorder, Foetal Alcohol Spectrum Disorder (FASD), and acquired/traumatic brain injury.⁴⁷ The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with

⁴¹ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (2017), *Comparative Youth Penalty Project UNSW*. Available at <http://cypp.unsw.edu.au/node/146>

⁴² Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report* (2017).

⁴³ 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, (2015).

⁴⁴ Kenny et al, (2006), *Young People on Community Orders Health Survey 2003-2006*, University of Sydney, Sydney.

⁴⁵ Ibid.

⁴⁶ Cunneen, above n 19.

⁴⁷ Ibid.

Disability has stated that people with disability, including young people and First Nations people, are over-represented across the criminal justice systems in Australia.⁴⁸

Children with cognitive impairments are particularly vulnerable to criminalisation and to extended and repeated incarceration. They are also more likely to be refused bail and held on remand because of an inability to understand or comprehend bail conditions or due to lack of support in the community to comply with conditions. Of particular concern, Indigenous people with cognitive impairments have contact with police over two years earlier than non-Indigenous people with a cognitive disability.⁴⁹

Furthermore, research suggests that many children, especially Indigenous children, have hearing and language impairments which may or may not be diagnosed.⁵⁰ Such physical disabilities can compound children's mental health disorders and cognitive impairments.

The RACP position statement on the Health and Wellbeing of Incarcerated Adolescents provides further details on the health issues of children in contact with the criminal justice system.

Professor Cunneen has argued:

*Raising the minimum age of criminal responsibility will in itself not solve all the problems associated with the criminalisation of people with mental health disorders and/or cognitive impairments. However, it will open a door to firstly, not criminalising young children with mental health disorders and/or cognitive impairments and entrenching them at an early age in the juvenile justice system; and, secondly, provide the space for a considered response as to how these young people should be responded to in the community.*⁵¹

The case studies of Kelly and Mina (see following), and many others, illustrate the negative impact of dealing with children with mental health issues under the criminal justice system rather than via mental health diversion. Although diversion is available under the *Mental Health (Forensic Provisions) Act 1990* (NSW), before a child can access such diversion, they may have suffered the trauma of arrest, charge, time in custody and/or on strict bail conditions and a spiral of potentially adverse dealings with the police and criminal justice system. The child's interactions with the criminal justice system are adverse to their mental health recovery.

Raising the MACR to 14 would facilitate children like Kelly and Mina to be dealt with via the health system rather than the criminal justice system.

⁴⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Criminal Justice System Issues Paper*, January 2020.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

Kelly's story

Kelly has FASD. When she was 13, she had over \$500 in fines and a lengthy criminal history. She lived in a very impoverished community. She had no ability to pay her fines until Legal Aid NSW assisted with setting up a Work and Development Order.

Kelly received her first caution shortly after her 10th birthday for a very minor offence of offensive language. She was placed on an NSW Police Suspect Targeted Management Plan (STMP) when she was 10 years old. Before she turned 11 years old, she was no longer able to receive cautions, having been given three cautions. She was either fined or sent to court.

When Kelly was 13 she was before the court for various minor charges where *doli incapax* was in issue. Her matters were before the court for approximately 15 months, during which time she breached bail conditions, including a curfew condition, and was in and out of detention centres.

Ultimately a psychologist report found that Kelly was not fit to be tried. Her matters were discharged under mental health legislation.

Kelly's case study also illustrates how children are disproportionately impacted by fines. This can lead to further criminalisation when unpaid fines lead to suspension of driver's licences, and in turn, traffic offences.

Mina's story

Legal Aid NSW assisted Mina, a 12 year old girl, who came to a regional town in NSW with her family from Iraq as refugees. Mina has significant trauma-related mental health issues after witnessing family members being murdered by ISIS, and being sexually abused while in a refugee camp in Turkey.

Mina assaulted her parents and they said she could not stay at home. She had no other family or community network in the area and has been in and out of juvenile detention because of a lack of suitable accommodation.

5. Overrepresentation of Aboriginal children in the criminal justice system

In her 2017 visit to Australia, the United Nations Special Rapporteur on the Rights of Indigenous People noted she was most disconcerted by 'the alarming rate of incarceration of Aboriginal and Torres Strait Islander youth'.⁵² She visited Cleveland Youth Detention Centre in Townsville, Queensland, where Aboriginal and Torres Strait Islander children constituted 95% of the children detained there.⁵³ She noted that 'detention of Aboriginal and Torres Strait Islander children has become so prevalent in certain communities that

⁵² Tauli-Corpuz, V, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia' (2017), 10.

⁵³ Ibid.

some parents see it as an achievement that none of their children has been taken into custody so far'.⁵⁴

Statistics across Australia and its various States/Territories consistently show the gross over-representation of young Aboriginal and Torres Strait Islander children in the criminal justice system and in custody. In 2017, nationally, Aboriginal children aged 10 to 12 made up 73% of those placed in detention and 74% placed on community-based supervision.⁵⁵ The Australian Institute of Health and Welfare *Youth Justice in Australia 2017-18* report found that:

- two in five (39%) Aboriginal and Torres Strait Islander young people under supervision in 2017-18 were first supervised when aged 10 to 13, compared with about one in seven (15%) non-Indigenous young people;
- the indigenous supervision rate rose from 16-17 times the non-Indigenous rate between 2013-14 to 2017-18;
- of the 14 children in detention aged 13 and under in NSW on an average day during 2017-18, a total of 10 (75%) were Indigenous. The equivalent figures in 2016-17 and 2015-16 were 86% and 67%.⁵⁶

Other State based research supports this data. In 2018, data from the NSW Bureau of Crime Statistics and Research (NSW BOCSAR) found that of the 424 finalised court appearances involving a juvenile defendant aged 10 to 13 years, 63% of the cases involved an Aboriginal child. As of June 2019, the average age of a child refused bail by NSW Police was 14 years old. The average age of an Aboriginal and Torres Strait Islander child refused bail by NSW Police was 13 years old.⁵⁷

In Legal Aid NSW's experience, Aboriginal children are disproportionately represented in the criminal justice system (and in custody) in the 10 to 14-year-old age group. Their offences tend to be minor and result from over policing. Legal Aid NSW notes the disproportionate impact of the NSW Police Suspect Targeted Management Plan (STMP) on Aboriginal children.⁵⁸ Aboriginal children in regional, rural or remote areas are particularly vulnerable and over-represented.

⁵⁴ Ibid.

⁵⁵ Cunneen, C. 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report, Comparative Youth Penalty Project', University of New South Wales, Sydney (2017). Available at <http://cypp.unsw.edu.au/node/146>.

⁵⁶ Australian Institute of Health and Welfare, *Youth justice in Australia 2017-18*, (2019). Available at: <https://www.aihw.gov.au/getmedia/f80cfc3b-c058-4c1c-bda5-e37ba51fa66b/aihw-juv-129.pdf.aspx?inline=true>.

⁵⁷ NSW Bureau of Crime Statistics and Research, 'New South Wales Custody Statistics, Quarterly Report June 2019. Available at: https://www.bocsar.nsw.gov.au/Documents/custody/NSW_Custody_Statistics_Jun2019.pdf.

⁵⁸ Youth Justice Coalition, 'Policing Young People in NSW: A Study of Suspect Targeting Management Plan' (25 October 2017), 11. Available at: <https://www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/>

Tyler's story

Tyler is Aboriginal and diagnosed with FASD. He comes from a poor social economic background. He was arrested by police when he was 11 years old for stealing a kebab after he had not eaten for two days. He was referred to a youth justice conference.

Tyler was placed on a STMP and frequently stopped and searched by police. He would regularly be arrested and charged for offensive language and resist arrest.

When Tyler was 13 years and 10 months he was charged with being a lookout for a shoplifting. He was granted bail conditions which prevented him from entering any shop in his small town. The police sought to use the youth justice conference he received when he was 11 to rebut *doli incapax*.

The case study of Wendy further illustrates the increased need for a robust understanding of the minimum age of criminal responsibility and the need for the age to be increased.

Wendy's story

Wendy is Aboriginal. She was represented by Legal Aid NSW when she came to court on her 10th birthday. She presented at court with a sticker from her mum saying 'Happy 10th birthday'.

Police had charged Wendy and brought her to court for a break and enter and a forensic procedure application to obtain her fingerprints.

The charge related to an offence that had occurred a year ago when Wendy was under the MACR. As such, the charge was illegal and was withdrawn. The forensic procedure application was also withdrawn.

Charlie's story

Charlie was a 13 year old Aboriginal boy who had travelled to NSW from Queensland with his mother. Charlie was mucking around with his friend in a shop. They were throwing a basketball to each other. Staff contacted police who charged Charlie with offensive behaviour and, when Charlie argued with them, resist arrest. Charlie was granted bail with a condition to not enter any shops and an overnight curfew unless he was with his mum.

Charlie's mum frequently abandoned him so that he was left homeless and he was arrested for breaching his curfew and spent time in custody.

Ultimately, his mum returned to Queensland and Charlie was left at risk of homelessness.

As illustrated by these case studies, the criminalisation of young children often involves the imposition of onerous bail conditions (e.g. a curfew) which are frequently breached and lead to a cycle of children going in and out of custody. Raising the MACR to 14 would facilitate these matters being dealt with more appropriately as health and/or welfare concerns.

We note that the refresh of the Closing the Gap targets, to which all Australian Governments are party, is considering criminal justice targets to address the high rates of Aboriginal and Torres Strait Islander incarceration. In particular, we note the youth justice target of reducing the rate of Aboriginal and Torres Strait Islander children in detention by 11-19% by 2028.⁵⁹ Raising the MACR would be a significant step towards ‘closing the gap’.

6. Over-representation of children in out of home care in the criminal justice system

The Australian Institute of Criminology (AIC) recently released a report about the care to custody pipeline and ‘crossover kids’.⁶⁰ The AIC report, and a report by the Sentencing Advisory Council of Victoria,⁶¹ clearly highlights the over representation of children in the child protection/out of home care (OOHC) systems in the criminal justice system. The reports show that the younger a child is at first sentence, the more likely it is that they will be known to child protection. They also show that there is a significant increase in the number of charges a young person faces if the first charge against them is recorded before they turn 14.

These ‘cross over kids’ experience higher rates of violent physical and sexual victimisation, neglect, cognitive and mental health difficulties, educational and social exclusion compared to the broader youth justice population. There is also a high proportion of Indigenous cross over kids.⁶²

In particular, children in residential OOHC are most vulnerable. Research from the United Kingdom and Australia has identified that such children regularly face police contact as a result of minor incidents in the placement environment, for instance smashing a mug or making threats, that are unlikely to incur legal sanctions in a family home.⁶³

This research is consistent with the experience of LACs. Legal Aid NSW conducted a survey of its highest users between 2005 and 2010, across its civil, family and criminal law services.⁶⁴ The survey found that 80% of high users were children and young people who were 19 years and under, and 82% had their first contact with Legal Aid NSW by the time they were 14 years old. The mean age at first contact with Legal Aid NSW was 13.2 years.

⁵⁹ Council of Australian Governments, ‘COAG statement on the closing the gap refresh’ (12 December 2018). Available at: <https://www.coag.gov.au/sites/default/files/communique/coag-statement-closing-the-gap-refresh.pdf>

⁶⁰ Australian Institute of Criminology, (December 2019), *Crossover Kids: Offending by Child Protection Involved Youth*.

⁶¹ State of Victoria, Sentencing Advisory Council, (2019), *Crossover Kids: Vulnerable Children in the Youth Justice System*.

⁶² Australian Institute of Criminology, (December 2019), *Crossover Kids: Offending by Child Protection Involved Youth*, 2

⁶³ *Ibid*, 3.

⁶⁴ Legal Aid NSW, *High Service users at Legal Aid NSW* (2013).

Three quarters of those surveyed had used drugs or alcohol. Nearly half (45%) had received a mental health diagnosis. 72% had experienced abuse or neglect at home or witnessed violence at home. 94% had spent time in a juvenile detention centre. These children and young people had complex needs.

Many children were involved in both care and protection and criminal proceedings, and there was a clear nexus between the jurisdictions, illustrating a 'drift from care to crime'. Nearly half (46%) had spent time in OOHC.

Victoria Legal Aid's study *Care not custody: A new approach to keep kids in residential care out of the criminal justice system* had similar findings.⁶⁵ More than one in three of its clients aged 11-17 who were placed in OOHC required help with a criminal matter. In 2018-19, 51% of child protection clients required legal help with criminal charges within 12 months of placement and 32% were charged with criminal damage, including property damage.⁶⁶

LACs have been at the forefront of addressing this problem. As a result of the Legal Aid NSW study, it established both a high services user's position within its Children's Legal Service (CLS) and the Children's Civil Law Service (CCLS), with the aim of providing holistic service provision to young children with complex needs and halting their cycle into care and criminal proceedings.

Legal Aid NSW was also instrumental in developing the NSW Ombudsman's *Joint Protocol to reduce the contact of young people in residential out of home care with the criminal justice system*⁶⁷ – a protocol between residential and intensive therapeutic care (ITC) service staff and the NSW Police Force, to reduce the frequency of police involvement in responding to behaviour by children living in residential OOHC. Victoria, Queensland and the Northern Territory now have similar joint agreements to reduce the criminalisation of young people in residential care.⁶⁸

The effective implementation of these agreements is an essential preventative measure for reducing the criminalisation of highly vulnerable young people. Where there has been successful implementation of the Joint Protocol in NSW, Legal Aid NSW solicitors report a

⁶⁵ Victoria Legal Aid, *Care not custody: A new approach to keep kids in residential care out of the criminal justice system*, (2016). Available at: <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-care-not-custody-report.pdf>

⁶⁶ <http://www.legalaid.vic.gov.au/about-us/research-and-evaluation/evaluation-projects/care-not-custody-report>.

⁶⁷ NSW Ombudsman's *Joint Protocol to reduce the contact of young people in residential out of home care with the criminal justice system* (updated 2019).

⁶⁸ Victorian Department of Health and Human Services, *Framework to reduce criminalisation of young people in residential care* (February 2020). Available at: <https://providers.dhhs.vic.gov.au/sites/default/files/2020-02/A%20Framework%20to%20reduce%20criminalization%20of%20young%20people%20in%20residential%20care.PDF>.

Queensland Family and Child Commission, *Joint Agency Protocol to reduce preventable police call outs to residential care services* (2018). Available at:

<https://www.qfcc.qld.gov.au/sites/default/files/Joint%20agency%20protocol%20to%20reduce%20preventable%20police%20call-outs%20to%20residential%20care%20services.pdf>.

Territory Families and Northern Territory Police, *Protocol for Police Contact with Children Living in Therapeutic Residential Care*, (September 2019).

noticeable reduction of children being arrested or charged, increased behavioural management, and better collaboration between NSW Police, Family and Community Services, Health and Education.

Legal Aid NSW's High Service User's report demonstrates the need to understand trauma and the way in which it can affect a young person's development and behaviour, and the need to treat this rather than respond to incidental behaviours by punishment. The behaviour of children between 10 to 14 should be addressed with holistic, preventative approaches rather than through criminal proceedings. Police involvement should be a last resort and only where safety is a concern. Providing the necessary supports for these children and young people can make a significant impact on the trajectory of their lives and can lead to savings in both the criminal justice system and the care and protection system.

The below case studies⁶⁹ are examples of children in OOHC in the criminal justice system. They further demonstrate the need to raise the MACR to 14 as one important measure to address the complex needs of this vulnerable cohort.

Ali's story

Ali is a 12-year-old boy residing in OOHC in a group home. Ali had a traumatic childhood. Both Ali's parents are in custody, charged with a serious crime.

Ali was arrested by police and charged with the intimidation of an OOHC worker. The allegation was that Ali said to the carer, 'leave me alone or I'll kick you'. Ali spent a night in detention before being released by the court to return to the group home. Within hours Ali was arrested for pushing a worker and damaging the windscreen of a staff car. He was refused bail and spent 10 days in custody.

Legal Aid NSW arranged for a psychological assessment. Ali was diagnosed with FASD and assessed to have the cognitive ability of an 8-year-old. He was found to be unfit to be tried.

Ultimately, Ali's matters were dealt with via an unconditional order under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Melissa's story

Legal Aid NSW's Children's Civil Law Service (CCLS) assisted 11 year old Melissa who had recently been removed from her family and was under the temporary care of NSW Family and Community Services (FACS). She was living in a hotel paid by FACS with a full-time carer. Melissa was not attending school, was not associating with any peers and had limited access to recreational activities.

Melissa allegedly splattered nail polish on the wall and tiles of her temporary accommodation. NSW Police attended and arrested and charged her. Melissa's criminal lawyer referred her to CCLS as it appeared that both FACS and NSW Police had not

⁶⁹ These case studies are from Legal Aid NSW and Victoria Legal Aid. For more Victoria Legal Aid case studies, see <https://www.legalaid.vic.gov.au/about-us/research-and-evaluation/evaluation-projects/care-not-custody-report>.

followed the Joint Protocol to reduce the contact of young people in OOHC with the criminal justice system.

Melissa gave instructions to CCLS to talk to FACS and the carers about how she was being treated whilst in temporary care, and about the amount of times that carers were contacting police. CCLS raised awareness of the Joint Protocol and negotiated measures for Melissa's carers to use alternatives to contacting police, including improved behavioural management and support for Melissa.

Ultimately, through advocacy with the police, the charges against Melissa were withdrawn.

Mei's story

Mei was a 13-year-old girl residing with her mother and younger siblings. Mei suffered from complex trauma syndrome, Oppositional Defiant Disorder (ODD), Attention Deficit Hyperactivity Disorder (ADHD), anxiety and depression from serious domestic violence incidents committed by her father. Mei had not previously been in trouble with the police. She was arrested and charged with common assault for allegedly grabbing her mum's hand and property damage (punching the wall at home). She was refused bail and her mum relinquished care. After two days, FACS attended court. The court granted bail and FACS arranged emergency accommodation.

Ultimately after several months, Mei was restored to her mum's care. She was found not guilty due to doli incapax.

If the matter had initially been dealt with via FACS assistance, Mei could have avoided the time spent in custody and she and her family could have received proper mental health and family support.

Jon's story

Jon was born with multiple difficulties, including autism, an intellectual disability and ADHD. From an early age, he displayed a range of challenging behaviours. When Jon was 11, his mother was obliged to put him in care on a temporary basis due to doctors' concerns about his escalating behaviour. Due to his special needs, he was placed in a residential care unit over an hour's drive from where his family lived, and case managed from the department's regional office over 200km away. Workers in the unit were ill-equipped to deal with his behavioural problems and constantly called police when he acted out.

On one occasion during his time in residential care, his mother was dropping him off at school after a weekend visit. When she tried to leave, Jon clung on and refused to move. Teachers tried to disengage him but were unsuccessful. Despite his mother's protests that she was happy to stay with him until he calmed down, the care worker called police to have him removed. They pulled him off his mother, kicking and screaming throughout. He was charged with assaulting police and resisting arrest.

On another occasion, Jon was playing Monopoly with an 18-year old staff member from

the unit. When the staff member won the game, Jon became very distressed about losing and took off one of his thongs and threw it at her, hitting her in the arm. He then followed her into the next room and picked up the nearest objects, a sink plug and a whisk and threw them at the wall. Jon then went back to his bedroom.

Police were called and Jon was charged with assault on the worker, discharging a missile and criminal damage. Police sought to remand him into custody, but the magistrate refused and decided to take a case management approach, including ordering a Victorian Children's Court Clinic assessment – in particular to have Jon's medication reviewed because a doctor had said this might be contributing to his behavioural problems. Because Jon was in a rural area, the process of arranging an assessment took months. In the meantime, the residential unit continued to report him when he misbehaved, and police continued to charge him.

Jon ended up receiving twenty-five charges during the few months he was in care. He was ultimately returned to his family and has not received any charges since.

Gary's story

Gary is a 13-year-old boy with Asperger's syndrome and experiencing mental health issues. Gary is in the care of his foster mum but attends an OOHC service that provides respite care.

While in care, Gary is supervised by a carer who is a casual staff member. Gary asks the carer for his medication. The medication is new medication and, because of an administrative error, the carer does not have the proper signed form from Gary's foster mum authorising the administration of the medication. The carer tells Gary that he cannot give him the medication because of the error.

Gary breaks into the staff office to get the medication and when the carer grabs him, Gary struggles. The police are called for malicious damage of the office door and assault of the carer.

Gary apologises. Utilising the Joint Protocol, the police decide to not arrest Gary but to instead defer the matter for two weeks. Gary's case manager is contacted and talks with Gary, his foster mum, and the OOHC staff. They resolve the medication issue and develop a plan to manage Gary's behaviour and for staff to better manage any future incidents, without having to contact police. The police liaise with the case manager and decide to take no further action.

7. Limitations of the presumption of doli incapax

The presumption of doli incapax is available in all Australian states and territories. The presumption of doli incapax recognises that where a child is unable to comprehend the distinction between naughty behaviour and seriously wrong criminal acts, they should not be held criminally responsible.

Some have argued against raising the MACR, citing the availability of the presumption of *doli incapax* at common law for children aged between 10 and 14.⁷⁰ However, in the experience of LACs, the presumption of *doli incapax* is not a suitable substitute for an increased minimum age of criminal responsibility for several reasons:

1. A child to whom *doli incapax* applies is subjected to criminal justice processes. The presumption of *doli incapax* is typically applied when such processes are well underway. The child may spend many months in the criminal justice system, even in custody, before the charges can be withdrawn or dismissed. This period in the system permanently impacts the development and rehabilitation of children and is in itself criminogenic.
2. The presumption of *doli incapax* does not address any underlying behavioural issues which may have brought children into contact with the criminal justice system.
3. The presumption of *doli incapax* relies on the exercise of prosecutorial and/or judicial discretion and may result in inconsistent application and discriminatory practices.
4. There is a *de facto* reversal of the onus of proof when child defendants must obtain psychological evidence of their incapacity. There are difficulties obtaining such psychological assessments.
5. The prosecution may rely on prejudicial evidence and may adversely impact a child's relationships and rehabilitation by seeking evidence from teachers, parents and others.

These concerns with *doli incapax* apply across Australia and have been raised by the United Nations, doctors, lawyers and other relevant stakeholders. The RACP states:

*through the doli incapax presumption, the current law recognises that children below 14 years are in need of protection from the criminal justice system. However, this old, common law presumption is failing to safeguard children. This is because of inconsistent application, inability to access expert evidence and judicial discretion and because it does not reflect contemporary medical knowledge of childhood brain development, social science, long term health effects, or human rights law. The RACP strongly opposes such a low age of criminal responsibility and has advocated previously to raise the age of criminal responsibility from 10 to 14 years of age.*⁷¹

⁷⁰ Wendy O'Brien and Kate Fitz-Gibbon, 'The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform' (2017) *Youth Justice*, 17(2),12.

⁷¹ Royal Australian College of Physicians, *RACP submission to National Children's Commissioner report: Australia's progress in implementing the United Nations Convention on the Rights of Children* (page 2). May 2018. Available from: <https://www.racp.edu.au/docs/default-source/advocacy-library/racp-submission-to-national-childrens-commissioner-report-australias-progress-implementing-the-united-nations-convention-on-the-rights-of-the-child.pdf>. Accessed 5 October 2019.

The United Nations Committee on the Rights of the Child's General Comment⁷² similarly noted that problems with *doli incapax*, including its discretionary application may result in discriminatory practices.⁷³ It also noted the system of two minimum ages (a MACR and an age range for *doli incapax*) is confusing and, 'in practice, results in the use of the lower minimum age in cases of serious crimes'.⁷⁴

The Committee's recent Concluding Observations⁷⁵ recommended that the MACR be raised to 14, specifically noting that it is the upper age of *doli incapax*. If the MACR is raised to any age lower than 14, *doli incapax* should continue to apply to at least 14.

7.1 *Doli incapax* applies once the criminal justice process is already underway

Children to whom *doli incapax* applies are subject to the adverse impacts of the criminal justice system, including contact with police, courts, bail conditions or remand, and the potential for a criminal record.

The following case study illustrates how poorly the *doli incapax* presumption can work in practice and how it fails to avert children from entering the criminal justice system in the first place.

Ricki's story

Ricki was about 12 years old when he first presented to Victoria Legal Aid (VLA). He had been removed from his parents' care during infancy and was living in a 'therapeutic' residential care unit in a Victorian regional centre, having recently been moved from a small country town.

Ricki's early offending involved low-level criminal damage at the residential care unit, charges which the prosecution was unwilling to withdraw on public policy grounds. There were delays in finalising these charges because of the 'reverse onus' culture created by the practice of defence lawyers obtaining a report to 'prove' *doli incapax* applies to their client. Before the matters were finalised, Ricki had committed other low-level dishonesty offences with friends in the community. There were ultimately a dozen police matters, with the earliest offending occurring when Ricki was 12 and the latest when Ricki had not yet turned 14.

A psychological report assessing *doli incapax* was received in respect of more than half of the matters, approximately two months after Ricki first presented to VLA. The assessor concluded that Ricki was *doli incapax* for some of the charges but not all. By the time the prosecution reached a position as to how it intended to proceed, a number of other criminal matters were pending and the prosecution suggested a further *doli incapax* report be obtained. Approximately four months later, a second *doli incapax* assessment was conducted. The report found that *doli incapax* applied for all of the offending.

⁷² The UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ UN Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth period reports of Australia*, 30 September 2019, at 48 (a).

The prosecution was unwilling to withdraw all charges on the basis of doli incapax, given the discrepant findings of the two psychologists, and requested a 'tie breaker' doli incapax report from the Children's Court Clinic on all matters. This third report was received 12-months after Ricki's first contact with VLA. The report found that doli incapax applied for some but not all of the remaining offences. The prosecution eventually agreed to withdraw the charges to which the Clinic had found that doli incapax applied.

Thus, there were about three 'non-doli' matters remaining; Ricki still hadn't turned 14. Further months passed due to the prosecution not wishing to transfer the remaining outstanding matters to one court. VLA sought diversion in respect of the outstanding matters. The presiding magistrate agreed to have Ricki assessed by the Diversion Co-ordinator. Ricki was found to be suitable for diversion, but when his matters were recalled to court after lunch, Ricki had left court and so the magistrate formally refused diversion.

The matters finalised with a probation order, after Ricki had already spent 15 months in the system, despite Ricki's youth, his traumatic early life, the out-of-home-care setting of the initial offending, and the minor nature of the offences.

Ricki was on and off bail intermittently throughout the months that his matters were pending, with one to two nights on remand.

During the time that Ricki's matters were in the criminal justice system, he was not receiving the support he needed to address the causes of his offending.

Ricki was referred to an intervention program shortly after he started acting out at a young age. However, he declined the service and was then never formally accepted into the program; there appears to have been no follow up attempts to link Ricki into support programs. Despite longstanding involvement in child protection and placement at a therapeutic residential unit, it appears that Ricki was not supported by sufficient early intervention, either before he started offending or once he entered the criminal justice system.

Jay's experience highlights the detrimental and traumatic impacts that bail conditions can have on a young person and their family.

Jay's story

Jay is Aboriginal. He was 12 years old when charged with attempted robbery in company. It was alleged that he was present when a co-accused demanded a scooter from another child in a park in the afternoon.

Jay was placed on strict bail conditions which included a curfew. He and his family were subjected to frequent checks on his bail by police, including police regularly knocking on his front door at 1:00am and 2:00am.

After 7 months on bail, his matter was dismissed because there was no evidence rebutting doli incapax.

His co-accused, a child in OOHC, was diagnosed with Foetal Alcohol Spectrum Disorder and found to have the mental age of a 7 year old.

7.2 The presumption of doli incapax does not address the behaviour which has brought children into contact with the criminal justice system

Adam's story illustrates how relying on doli incapax does not avoid entrenchment in the criminal justice system nor disruptive periods on remand. It also prevents the pursuit of supports the young person may need to address issues of concern and to break a cycle of behaviour. For example, to avoid jeopardising ongoing criminal proceedings, a child is unable to fully participate in counselling which they might otherwise have done as an alternative to the criminal justice process. Those who are found not guilty due to doli incapax may be left without any avenue for treatment of concerning behaviour.

Adam's story

Adam is a young Aboriginal teenager. Adam was removed from his mother's care at less than 6 months old, and he had been placed in foster care before he had turned three. At a young age Adam was diagnosed with an intellectual disability and, as a teenager, he was diagnosed with multiple complex mental health issues, including Attention Deficit Hyperactivity Disorder, anxiety and depression. An expert found he had mental age of a child less than half his biological age.

Adam was able to be placed with a relative after he had already spent his early childhood years in foster care. However, his relative found it increasingly difficult to care for him. By the time Adam was a young teenager, he had started using alcohol and drugs and was often running away from home. At around the same time he started offending, mostly in the company of his peers, and soon became involved in the youth justice system, amassing a string of charges.

A psychologist was asked to examine Adam to determine the underlying medical issues that may have contributed to his offending. The psychologist concluded that Adam's disrupted early attachment, complex psychosocial situation, intellectual disability, mental health issues, harmful influence of his peer group, hormonal changes and the impact of drugs on his developing brain, had all contributed to his behaviour.

Adam's offending commenced prior to him turning 14, so the majority of his matters were eventually withdrawn due to doli incapax. However, Adam was in and out of custody during this period, having been granted bail a total of nine times and having served approximately six months on remand, which is the sum of the various periods on remand.

Furthermore, Adam did not receive sufficient community led and culturally appropriate support or treatment during this time, and this period only further entrenched his anger towards the mainstream criminal justice system.

7.3 Inconsistent application of doli incapax due to police, legal and judicial discretion

In a 2017 article,⁷⁶ Wendy O'Brien and Kate Fitz-Gibbon of Deakin University presented findings from a study informed by surveys with 48 youth justice professionals in Victoria. The study found 'a general view among those interviewed that the presumption has been falling into disuse in Victoria in recent years and that, where used, it is done so in an ad hoc and procedurally questionable way.'⁷⁷

Whilst there appears to be an absence of quantitative data about the application of doli incapax across Australia, qualitative data from the above mentioned study and the experiences of LACs indicate that there is inconsistent application of doli incapax. This inconsistent application is due to the different application of discretion and/or lack of understanding of the presumption by police, lawyers and the judiciary.

The reliance on discretion enables discriminatory application.⁷⁸ As discussed above, some data shows that a greater proportion of Aboriginal children are prosecuted for offences at a younger age. This may be indicative of an inconsistent and discriminatory operation of doli incapax.

Stakeholders interviewed for the abovementioned Victorian study expressed concern about inconsistencies in the use of police, legal and judicial discretion regarding the use of doli incapax.⁷⁹ Some participants in the study noted that the prosecution often does not give full consideration to doli incapax. One example cited concerned the continued prosecution of a child sneaking into a cinema.

Mohammad's experience also demonstrates how children can be subjected to charges and detrimental criminal justice processes where there is little consideration by the police (both before charge and after) of whether the presumption of doli incapax can be rebutted.

Mohammad's story

Mohammad was aged 13 and 2 months at the time of his alleged offending. The police had arranged for Mohammad's dad to bring him to the police station the morning after the alleged offending. However, that morning, three police attended Mohammad's address, woke him and arrested him. Mohammad's dad was intoxicated and taken to the

⁷⁶ O'Brien, W. and Fitz-Gibbon, K, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, Vol.17, No.2.

⁷⁷ Fitz-Gibbon K and O'Brien W (2019) 'A child's capacity to commit crime: Examining the operation of doli incapax in Victoria (Australia)'. *International Journal for Crime, Justice and Social Democracy* 8(1): 18-33 at 21. DOI: 10.5204/ijcjsd.v8i1.1047

⁷⁸ The UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*.

⁷⁹ Fitz-Gibbon K and O'Brien W (2019) A child's capacity to commit crime: Examining the operation of doli incapax in Victoria (Australia). *International Journal for Crime, Justice and Social Democracy* 8(1): 18-33. DOI: 10.5204/ijcjsd.v8i1.1047.

station to be his support person. Mohammad participated in an interview without legal advice. He did not make any admissions about *doli incapax* but his intoxicated father indicated that he knew right from wrong. Relying on this interview, the police charged Mohammad and placed him on bail.

Shortly afterwards, Mohammad was accused of stealing a box of matches worth \$2.40. Police attended his school where he was in class. Police chased him around the school and he hid under a desk and begged teachers to help him. Mohammad was arrested whilst crying in front of a classroom of students. Without accommodation, he was kept in custody for three days.

He remained on bail for eight months until the hearing date, when the prosecution conceded that they had no evidence to rebut *doli incapax*. After Mohammad's arrest and detention in custody, he was fearful of returning to school and did not attend again for seven months.

In *RP v The Queen* (2016) 259 CLR 641 (RP's Case), the High Court of Australia examined *doli incapax*. The Court made it clear that the prosecution bore the onus of rebutting the presumption of *doli incapax* as an element of the offence. In *RP*, the prosecution principally relied upon inferences derived from the circumstances surrounding the sexual offence to rebut the presumption. Even where there were suggestions that RP may have had intellectual deficits and been subject to abuse himself, the prosecution did not explore this further. For example, they did not make further inquiries with family members. The High Court also commented that the prosecution's submissions were 'apt to overlook' the fact that the starting point is the presumption that children lack sufficient intellectual and moral capacity.⁸⁰

RP's Case also raised questions about the prosecution just relying on inferences from the circumstances surrounding the offence. On this issue, the Court stated that the prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised.⁸¹

Even after RP's Case, there is experience of lack of awareness or certainty about the application of *doli incapax* by police, prosecutors, legal practitioners and some judicial officers. Police and prosecutors may not properly assess whether there is sufficient admissible evidence to rebut *doli incapax* before making a decision to charge or to continue proceedings. In some instances, police appear to prosecute children regardless of whether there is evidence to rebut *doli incapax*.

⁸⁰ *RP v The Queen* [2016] 259 CLR 641 at 657 [32] per Kiefel, Bell, Keane and Gordon JJ.

⁸¹ *RP v The Queen* [2016] 259 CLR 641, 649. Citing: *B v R* (1958) 44 Crim App R 1 at 3-4 per Lord Parker CJ; *C (A Minor) v Director of Public Prosecutions* [1995] UKHL 15; [1996] AC 1 at 8 citing *F v Padwick* [1959] Crim L R 439 per Lord Parker CJ.

Police and prosecutors may have differing views about what is sufficient to rebut *doli incapax*. There is experience of police regarding a prior caution for a trespass as evidence rebutting *doli incapax* for a larceny charge, even though the nature of those offences is different. Similarly, there is also experience of police regarding evidence of flight to be sufficient to rebut *doli incapax*, even though it may simply show that the child knew they had done something naughty as opposed to something seriously wrong.

In our experience, police may sometimes seek to gain admissions from a child to rebut *doli incapax*. However, even where they are obtained, such admissions may be problematic. In our experience, police sometimes misapprehend the test to rebut *doli incapax*. Problems also exist where police ask a child in a police interview, at the police station following arrest, if they knew what they did was seriously wrong at the time of the commission of the offence. Given the context of the child's answers, it is often difficult to distinguish whether the child knew what they did was wrong at the time of the offence as opposed to becoming aware at the time of arrest and/or interview. Moreover, research suggests that children who are questioned by police may often be characterised by deficits in cognitive capacity, poor communication skills, and elevated suggestibility which have profound implications on their answers. Also, children are more likely than older suspects to confess and to confess falsely.⁸²

For more minor offences, police can offer a caution or a diversion.⁸³ Because this avoids court, this can be a tempting option for a child (even one who is adamant that they were *doli incapax*). However, cautions, conferences and diversions become permanent records which can be used against the child as police intelligence, in subsequent court matters and in a range of job applications.⁸⁴ While these are diversionary measures and substantially better for the child than attending court, these options are still part of the criminal justice system.

Furthermore, a practice has developed where cautions and *doli incapax* are incorrectly treated as alternatives. Cautions and diversions are based on the child's acceptance of responsibility for the offending, contrary to the firm legal principle that they are presumed to not be able to form the requisite mental state. Thus, many children are accepting responsibility for offences which they lack the capacity to commit.

The low utilisation of *doli incapax* is of concern. In NSW, data from NSW BOCSAR indicates that from 2010 to March 2019 *doli incapax* was applied by NSW courts in only 130 cases.⁸⁵ BOCSAR notes that its statistics do not include instances where *doli incapax* was raised by

⁸² Lamb, M and Sim, M (2013) Developmental factors affecting children in legal contexts, *Youth Justice* 13(2): 131-144.

⁸³ For example, in NSW under the *Young Offenders Act 1997* (NSW). In Victoria, the police can offer a pre-charge caution which does not have a legislative basis, or diversion can be offered post-charge under the *Children Youth and Families Act 2005* (Vic), which requires the approval of a magistrate.

⁸⁴ including as a lawyer, judge, police, teacher's aide, or working with children.

⁸⁵ Unpublished statistics provided by BOCSAR to the NSW Legal Assistance Forum meeting, July 2019.

the defence but not accepted. In the three calendar years from 2016 to 2018, *doli incapax* was applied in only 48 cases. Over the same period, 736 children aged 10 to 13 were found guilty of their principal offence in court in NSW. As such, the number of cases where *doli incapax* was successfully applied in NSW for a child aged 10 to 13 were outnumbered by successful convictions of children in this age group by a factor of over 15.

The application of *doli incapax* in courts can also be problematic. In LAC experience, in regions which are often not serviced by specialist children's courts or practitioners, *doli incapax* may not be well understood. There is LAC experience of unfavourable reaction to an indication by a legal aid lawyer that *doli incapax* may be raised as a defence for a child under 14, despite the fact that in all such matters the presumption in favour of incapacity applies. Running a *doli incapax* hearing imposes a significant burden on over-stretched courts, prosecution and legal aid services. More importantly, as detailed elsewhere in this submission, it imposes a significant burden on the child concerned, who will usually be either remanded for a substantial period in detention or on onerous bail conditions which the child risks breaching.

The following story from regional Victoria highlights the precarious protection provided by a presumption which relies on a good understanding of the youth legal system by defence lawyers, police and prosecutors and the judiciary.

Simon's story

Simon was aged 16 years when he first met his VLA lawyer in 2019. Attached to his police brief was a history detailing an appearance from a regional town four years prior, when Simon was aged 13 years old.

The lawyer's investigation of how this relatively minor offence came to appear on his history revealed that Simon's prior legal representatives had pleaded guilty without adequate exploration of whether Simon was *doli incapax* and whether *doli incapax* could be rebutted. The matter was heard before a magistrate who ordinarily did not sit in the Children's Court. Rather than a caution, Simon received two 9-month probation orders as well as a criminal history.

Simon's previous legal representatives also failed to give him appeal advice so he was not aware that the sentence imposed was excessive and that he may have been able to avoid the matter appearing on his criminal history. Further investigation found that Youth Justice did not direct Simon to seek a second opinion.

Simon's VLA lawyer filed an appeal against conviction out of time. The application for leave to appeal out of time was granted and on the prosecution's application, the charges were withdrawn based on *doli incapax*.

For the 2019 offending, Simon was granted diversion with conditions to participate in Children's Court Youth Diversion Service. Simon now has no criminal history and has been successfully diverted away from the criminal justice system.

Legal Aid NSW and Legal Aid Queensland have been involved in working with other stakeholders (such as police, lawyers and the judiciary), to increase understanding about doli incapax. However, these efforts to improve the application of doli incapax should not be seen as an alternative to raising the MACR; they will not address the inherent difficulties with doli incapax, including the fact that children will still be subjected to the criminal justice system and its above mentioned disadvantages.

7.4 Doli incapax assessments

In theory, a doli incapax presumption may be rebutted with any kind of evidence, including psychological assessment of the child; a police interview transcript or recording; the child's prior criminal history; evidence from parents, teachers, psychologists or psychiatrists; as well as evidence of the child's behaviour before and after the alleged criminal act assessment.⁸⁶ However, in some jurisdictions a practice has developed where, if the defence wishes to rely on the presumption, a psychological assessment is sought by the prosecution and can be requested by the court.

The above mentioned Victorian study found that, despite clear statements from the High Court that the onus to rebut the presumption sits with the prosecution, in practice, the onus is more commonly on the defence, who bear the unofficial burden of providing a report (at their own cost) to prove that the defendant is doli incapax.⁸⁷ This effectively operates as a reversal of the onus of proof.

The Victorian study found that it was often left to the discretion of the defence lawyer whether to order an assessment. This discretion could be influenced by costs and the fact that lawyers may not have expertise to determine whether mental health issues exist which warrant assessments. Stakeholders interviewed in the study also indicated concerns about a shortage of appropriate psychologists who could provide quality doli incapax assessments in both metropolitan and regional/rural Victoria. Also, some assessments would not be ordered because clients were unwilling to participate in them, especially where they lengthened proceedings or the assessment process was perceived as traumatic.

Victoria Legal Aid also reports that parents do not always support children to maintain their rights to the presumption of doli incapax, because they also wish matters to be resolved quickly, particularly where onerous bail conditions affect the entire family, or where it is difficult for the family to attend court hearings due to work or other commitments

The experiences in Victoria are also reflected in other jurisdictions.

⁸⁶ Fitz-Gibbon K and O'Brien W (2019) A child's capacity to commit crime: Examining the operation of doli incapax in Victoria (Australia). *International Journal for Crime, Justice and Social Democracy* 8(1): 18-33. DOI: 10.5204/ijcjsd.v8i1.1047.

⁸⁷ Ibid.

7.5 Prejudicial evidence

The prosecution may rely on evidence of prior records and uncharged acts to rebut *doli incapax*. Such evidence may be prejudicial and would not ordinarily be admissible. In its review of children in the legal process, the Australian Law Reform Commission noted that this use of prejudicial evidence means that the principle of *doli incapax* may not protect children but may act to their disadvantage.⁸⁸

Further, the prosecution will sometimes obtain evidence from a child's teachers, youth workers, counsellors and family. This can also have adverse impacts upon the child's relationships, their education and their rehabilitation. In our experience, parents are often unaware that they may choose to not make a statement about their child and unaware of their right to object to giving evidence against their child.⁸⁹ Furthermore, the concern that the prosecution may subpoena the case notes of youth workers and counsellors can have a chilling effect on the provision of these services, as well as on the sharing of information between non-government organisations and government agencies involved in the care, support and control of the child.

NLA strongly supports the use of a collaborative case management approach to assist children and young people. However, for this approach to be successful, it is essential that participating service providers not be inhibited from sharing sensitive information by a concern that it may subsequently be used by prosecuting authorities in an attempt to rebut the presumption of *doli incapax*.

7.6 Inconsistency between States/Territories application of *doli incapax*

Inconsistency also arises from the fact that some states have a common law presumption of *doli incapax* and others have codified *doli incapax*. Section 29 of the *Criminal Code Act Compilation Act 1913 (WA)* and section 29 of the *Criminal Code Act 1899 (Qld)* are worded in almost identical terms and place the burden on the prosecution to prove, *that at the time of doing the act of making the omission, the child had capacity to know that he ought not to do the act or make the omission*. Case law in both Western Australia and Queensland suggests that the test in those jurisdictions is significantly lower than the presumption of *doli incapax* in common law states.⁹⁰ For further discussion about this see the submission by Legal Aid Western Australia to this Council of Attorneys-General Review.⁹¹ That submission suggests that the discrepancy between the codified tests and the common law

⁸⁸ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process (ALRC Report 84)* (November 1997).

⁸⁹ *Evidence Act 1995 (NSW)*, s 18.

⁹⁰ See *HS v Lawford* [2018] WASC 257, *Hayman v Cartwright* [2018] WASCA 116, *R v F; ex parte Attorney General* [1999] 2 Qld R 157.

⁹¹ Legal Aid Western Australia, *Review of the age of criminal responsibility: Review by the Council of Attorneys-General – submission by Legal Aid Western Australia* (24 February 2020), 14-21.

presumption may contribute to the fact that Queensland and Western Australia have significantly more children aged 10-13 whose matters are finalised.⁹²

The Australian Capital Territory has also codified *doli incapax* in s 26 of the *Criminal Code 2002 (ACT)* and the Commonwealth has codified *doli incapax* in cl 7.2 of the *Criminal Code (Cth)*. The burden of proving that the child knew that their conduct was wrong rests with the prosecution. However, there is an evidential burden on the child. Chief Justice Murrell in the recent case of *Williams v IM* [2019] ACTSC 234 stated:

Nevertheless, it is clear that under both the Criminal Code and the Commonwealth Code, the prosecution's burden of proof arises only after defence has discharged its evidential burden.

This results in a situation where there is a *de facto* reversal of the onus of proof. There may be a greater need for the defence to obtain psychological assessments and a child can remain in the criminal justice system for a significant period of time awaiting such assessments.

The additional difficulties that arise in relation to *doli incapax* in these States/Territories further highlight the need to raise the MACR to at least 14.

Moreover, the inconsistency of the test of *doli incapax* across Australian jurisdictions is undesirable. This is especially problematic if a child in a jurisdiction with a common law presumption (e.g. NSW) is charged with State offences as well as Commonwealth offences. The different tests that would apply may cause confusion and would compound the other difficulties with *doli incapax* already discussed. Hence, all jurisdictions should have a common MACR of at least 14.

8. Recommendations from organisations and inquiries

There is broad based support for the raising of the MACR to 14. This support comes from a number of inquiries and numerous organisations representing a variety of professions.

A number of recent inquiries/reviews have examined the MACR and either recommended raising the MACR or further consideration of raising the MACR. These inquiries include:

- The Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017
- Queensland Government's Review of Youth Justice, 2018
- The NSW Legislative Assembly's Inquiry into the Adequacy of Youth Diversionary Programs in NSW, 2018.

⁹² Ibid 17-18.

Organisations that support raising the MACR to 14, include:

Legal

- Law Council of Australia⁹³
- Law Society of NSW
- Queensland Law Society⁹⁴
- Law Society of South Australia⁹⁵
- Office of the NSW Advocate for Children and Young People
- Federation of Community Legal Centres

Medical

- Royal Australasian College of Physicians⁹⁶
- Australian Medical Association⁹⁷
- Australian Indigenous Doctors' Association⁹⁸

Aboriginal

- National Aboriginal and Torres Strait Islander Legal Services
- Lowitja Institute
- Change the Record⁹⁹

⁹³ The Law Council of Australia: 'Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax' (media release, 26 June 2019). Available at: <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>

⁹⁴ Queensland Parliament Legal Affairs and Community Safety Committee, 'Public Hearing—Inquiry Into The Youth Justice And Other Legislation Amendment Bill: Transcript Of Proceedings' (19 July 2019), 5. Available at: <https://www.parliament.qld.gov.au/documents/committees/LACSC/2019/YouthJustice2019/trns-19Jul2019-ph.pdf>

⁹⁵ Law Society of South Australia, 'Age of criminal responsibility should be increased' (media release). Available at: <https://www.lawsocietysa.asn.au/pdf/AdvocacyNotes/Issue27.html>

⁹⁶ Royal Australasian College of Physicians, 'Physicians say age of criminal responsibility must be raised to help end abuse in custody' (media release, 19 May 2019). Available at: <https://www.racp.edu.au/news-and-events/media-releases/physicians-say-age-of-criminal-responsibility-must-be-raised-to-help-end-abuse-in-custody>.

⁹⁷ Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be raised to 14 years of age' (media release, 25 March 2019). Available at <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>.

⁹⁸ Joint media release, *Doctors, lawyers, experts unite in call to raise the age of criminal responsibility*. Available at: <https://www.aida.org.au/mediareleases/doctors-lawyers-experts-unite-in-call-to-raise-the-age-of-criminal-responsibility/>.

⁹⁹ <https://changetherecord.org.au/blog/news/New%20statistics%20show%20urgency%20to%20raise%20the%20age%20of%20criminal%20responsibility%20to%20at%20least%2014%20to%20end%20Indigenous%20over-incarceration>

Human Rights/Children's Rights

- Australian Human Rights Commission¹⁰⁰
- Australian and New Zealand Children's Commissioners and Guardians¹⁰¹
- Amnesty International¹⁰²
- UNICEF Australia
- Save the Children¹⁰³
- Human Rights Law Centre¹⁰⁴
- Jesuit Social Services¹⁰⁵ and the Smart Justice for Young People coalition.

A range of other experts, organisations and inquiries have recommended the MACR be adjusted to either 12 years, or 'at least 12 years', with retention of doli incapax. These include:

- National Children's Commissioner
- NSW Bar Association (with a minimum age of children in detention to 14)¹⁰⁶
- NSW Children's Court
- Law Society of Western Australia
- Law Institute of Victoria¹⁰⁷
- Bob Atkinson AO, APM, in a 2018 report to the Queensland government's review of youth justice¹⁰⁸
- Queensland Family and Child Commission
- Law Society of the Northern Territory¹⁰⁹
- The Royal Commission into the Protection and Detention of Children in the Northern Territory.

¹⁰⁰ Australian Human Rights Commission, Report to the UN Committee on the Rights of the Child (2018), 53.

¹⁰¹ <https://www.humanrights.gov.au/our-work/childrens-rights/publications/australian-and-new-zealand-childrens-commissioners-and-0>

¹⁰² <https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>

¹⁰³ <https://www.savethechildren.org.au/media/media-releases/raise-the-age-of-criminal-responsibility>

¹⁰⁴ Human Rights Law Centre, 'Explainer: Raising the age', *Factsheets* (20 March 2018)

<<https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age>>

¹⁰⁵ <https://jss.org.au/raising-the-age-of-criminal-responsibility-there-is-a-better-way/>

¹⁰⁶ NSW Bar Association, *NSW Election 2019: Policy Statement* (February 2019). Available at:

https://www.nswbar.asn.au/docs/webdocs/Election_2019_22.2.19.pdf

¹⁰⁷ Law Institute of Victoria, 'Ratifying OPCAT In The Context Of Youth Detention: submission to the Australian Children's Commissioner' (14 June 2016).

¹⁰⁸ Atkinson, Bob, et al. 'Report on Youth Justice' (8 June 2019). Available at:

<https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/youth-justice-report-strategy/youth-justice-report.pdf>.

¹⁰⁹ Law Council of Australia, 'Law Council and NT Law Society support increase of NT age of criminal responsibility' (media release, 31 January 2019). Available at: <https://www.lawcouncil.asn.au/media/media-releases/Law-Council-and-NT-Law-Society-support-increase-of-NT-age-of-criminal-responsibility>. Note that subsequently Law Council of Australia, supported the raising of MACR to 14.

Many of these organisations' positions are that the MACR be raised to at least 12 with a view to further increase to 14. We also note that these organisations' positions were stated *before*:

- the Law Council of Australia amended its position from advocating that the MACR be raised to at least 12 to advocating that the MACR be raised to 14
- the United Nations' General Comment that the MACR should be at least 14, and
- the United Nations Committee on the Rights of the Child Concluding Observations in 2019 that the MACR should be 14.

International standards

8.1 Recommendations from international human rights bodies

United Nations Committee on the Rights of the Child

The United Nations Convention on the Rights of the Child (UNCRC) requires State Parties to establish a MACR, though the Convention itself does not specify a particular age.¹¹⁰ The United Nations Committee on the Rights of the Child (the Committee) has provided guidance on the issue. Prior to 2018, the Committee had stated in General Comment that the MACR should be an absolute minimum of 12 years old and that State Parties should continue to increase it to higher age levels.¹¹¹ The Committee went on to state that 'a higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3)(b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected'.¹¹²

In late 2018, the Committee released a revised General Comment on children's rights in juvenile justice, updated to reflect modern understanding of children's development.¹¹³ In the revised General Comment, the Committee noted that the previous recommended MACR of 12 years should be considered the absolute minimum and regarded this age to be still low. The Committee encouraged State Parties to increase their MACR to at least 14.¹¹⁴ It commended State Parties that have a higher MACR, for instance 15 or 16 years of age. It recommended that any State Parties with a MACR higher than 14 should under no circumstances reduce the MACR.

¹¹⁰ *UN Convention on the Rights of the Child* (1989) art 40(3)(a).

¹¹¹ The UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*.

¹¹² *Ibid* 33.

¹¹³ UN Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 1.

¹¹⁴ *Ibid* 33.

The Committee has reviewed Australia's compliance with the UNCRC. In 2005¹¹⁵ and 2012¹¹⁶ it recommended Australia raise its MACR 'to an internationally acceptable level'. On the 30 September 2019, the Committee released its Concluding Observations on the combined fifth and sixth period reports of Australia. It recommends that Australia:

*Raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 at which doli incapax applies.*¹¹⁷

Other United Nations instruments concerning juvenile justice

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.¹¹⁸ Similarly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh 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.¹¹⁹

United Nations Global Study on Children Deprived of Liberty

Also recently (11 July 2019), the Report of the Independent Expert leading the United Nations Global Study on children deprived of liberty recommended that States should establish a MACR which shall not be below 14 years of age.¹²⁰ The Report also recommended that State Parties should prioritise restorative justice, diversion from judicial proceedings and non-custodial solutions.

United Nations Special Rapporteur on Rights of Indigenous People

In her 2017 visit to Australia, the United Nations Special Rapporteur on the Rights of Indigenous People noted that the 'incredibly high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern'.¹²¹ She was particularly concerned about the incarceration of Aboriginal and Torres Straits Islander children for mostly relatively minor non-violent offences:

It is completely inappropriate to detain these children in punitive, rather than rehabilitative, conditions. They are essentially being punished for being poor and in

¹¹⁵ UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.

¹¹⁶ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.

¹¹⁷ UN Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth period reports of Australia*, 30 September 2019, at 48 (a).

¹¹⁸ *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985), 4.1.

¹¹⁹ *United Nations Guidelines for the Prevention of Juvenile Delinquency* (1990), art 5(e).

¹²⁰ Report of the Independent Expert leading the United Nations Global study on children deprived of liberty (2019), 109.

¹²¹ Tauli-Corpuz, V, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia' (2017), 8.

*most cases, prison will only aggravate the cycle of violence, poverty and crime. I found meeting young children, some only twelve years old, in detention the most disturbing element of my visit.*¹²²

As recommended by the Committee on the Rights of the Child, the Special Rapporteur urged Australia to increase its MACR.

United Nations Committee on the Elimination of Racial Discrimination

Similarly, the United National Committee on the Elimination of Racial Discrimination noted the higher risk of indigenous children being removed from their families and placed in alternative care and expressed its 'deep concern' at the high proportion of indigenous children in the criminal justice system, some at a very young age.¹²³ The Committee was also concerned about the conditions in which these children were held, noting its concerns extended not only to the Northern Territory. The Committee called upon Australia to raise its MACR.

8.2 International average

Countries around the world have different MACR. A study of 90 countries found that 68 had a MACR of 12 or higher. The international average was 14 years.¹²⁴ This was consistent across all continents and across countries with different legal systems. Countries with a MACR of 14 include countries in Europe, Asia, Africa, and America.

For example, the minimum age is:

- 12 years in Canada and the Netherlands
- 13 years in France
- 14 years in Albania, Angola, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Chile, China, Columbia, Croatia, DR Congo, Estonia Germany, Hungary, Italy, Japan, Russia, Vietnam, Spain, and many other Eastern European countries, inter alia
- 15 years in Denmark, Finland, Iceland, Norway and Sweden
- 16 years in Portugal, and
- 18 years in Belgium and Luxembourg.¹²⁵

Where countries have a minimum age of criminal responsibility of 14 or higher 'it can be shown that there are no negative consequences to be seen in terms of crime rates'.¹²⁶

¹²² Ibid, 10.

¹²³ United Nations Committee on the Elimination of Racial Discrimination, 'Concluding observations on the eighteenth to twentieth periodic reports of Australia', (8 December 2017).

¹²⁴ Nean Hazel, 'Cross-national comparison of youth justice' (2008), Young Justice Board for England and Wales. Available at: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

¹²⁵ Child Rights Taskforce (2011) *Listen to Children. Child Rights NGO Report Australia*, National Children and Youth Law Centre, Sydney. <http://www.nclyc.org.au/images/2011report.pdf>.

Instead, there are positive consequences, with many countries having a low incarceration rate for older juveniles, suggesting the absence of a younger cohort of children who would otherwise have become entrenched in the system through reoffending.¹²⁷

Australia is currently anomalous with global norms. However, there is a trend for countries around the world to raise their ages of criminal responsibility¹²⁸ and this Council of Attorneys-General review presents an opportunity for Australia to do so too.

9. Alternatives to a criminal law response for children aged 10-13

An increase in the MACR should be accompanied by an increased capacity for alternative non-criminal law responses to behaviour which currently constitutes ‘offending’ for children aged 10 to 13.¹²⁹ Responses must be embedded in Outcomes Frameworks in each jurisdiction, which are linked to crime prevention outcomes. Outcomes Frameworks underlie an integrated support service sector approach where outcomes are shared (e.g. education, early childhood, health and child protection). Program level responses are inherently piecemeal, there is no overarching coordination and little collective accountability. An Outcomes Framework will facilitate greater whole of government and community service coordination and evaluation, and encourage all services to work towards the same goal.

As an example, the NSW Government in 2019 committed to adopting an outcomes-focused approach to the design, delivery and evaluation of human services, which is intended to build a common understanding of the outcomes which are priorities across NSW Government agencies and NGOs, support human services agencies and NGOs to adopt an outcomes-focused approach, encourage Government agencies and other organisations which deliver human services to work together more effectively, and assist operational staff to understand how their roles contribute to broader human services outcomes.¹³⁰ The Victorian Department of Justice and Community Safety’s *Statement of Direction 2019 – 2023* also commits to embedding a consistent Whole of Government outcomes approach.¹³¹

The service response would ideally be community led, administered through government agencies and suitable non-governmental organisations. They could operate within or

¹²⁶ Chris Cunneen, ‘Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report’ (2017), *Comparative Youth Penalty Project UNSW*, quoting Dunkel, (1996), 38.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Bob Atkinson AO, *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.

¹³⁰ The Human Services Outcomes Framework, https://www.finance.nsw.gov.au/human_services

¹³¹ Victoria DJCS *Statement of Direction 2019 – 2023*; https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/08/5c/7b42cf673/DJCS_StatementofDirection_2019.pdf

alongside therapeutic support provided by existing child protection, mental health and education systems. Community-led place based change work that leads to crime prevention initiatives in health, education and housing are essential for community buy-in to offender reintegration and rehabilitation.

Using an Outcomes Framework will ensure a coordinated funding model, in which each jurisdiction has a single government entity (i.e. in that state or territory) which has oversight over a collaborative funding model which is linked to crime prevention outcomes and enables a meaningful allocation of funding to integrated and community-tailored services.

The Law Council of Australia has observed that, in place of a criminal justice response, there must be a greater emphasis on 'rehabilitative and welfare-based responses, justice reinvestment projects, early intervention, prevention, and community-led diversion programs'.¹³² As criminal justice responses are criminogenic, alternative responses must be child recovery and development focused, tailored to the individual's needs and circumstances. Alternative responses for children aged 10-13 must not be secure welfare by another name, creating a further system tier which feeds into the criminal justice system when children turn 14.

Concerning behaviours arise out of a process of maturation and brain development, and most often arise in the context of early trauma, stress and adverse life events. Responses must be properly resourced, recovery focused and provide wrap around support to address the underlying causes of concerning behaviours. Children should be supported to take responsibility for their actions and engage in restorative processes where appropriate. A critical aspect of this is support for families and schools.

Alternatives to the criminal justice system should prioritise:

- The best interests of the child;
- Connecting children with communities;
- Supporting families;
- Strengthening support given to children in OOHC;
- Trauma informed, holistic service provision;
- Addressing children's health and welfare needs, including housing, mental health and drug and alcohol issues;
- Connecting children with the education system and supporting schools;
- Providing culturally appropriate services, including Aboriginal led services.

There are a range of effective evidence-based programs which are already being used in Australia to divert early adolescent children from the criminal justice system. Some of these

¹³² Law Council of Australia, 'Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax' (26 June 2019). Available at: <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>

programs divert children who have entered the criminal justice system (e.g. police diversion or court diversion under the NSW *Young Offenders Act*). Others are considered to be 'early interventions' and divert children who have not yet entered the criminal justice system. We note the NSW Legislative Assembly's report on the *Inquiry into the adequacy of youth diversionary programs in NSW*, provides an analysis of a wide range of diversionary options available to children.¹³³

Police may play an important role in referrals to these programs or as participants in them. The most effective programs may involve multi-disciplinary and multi-agency approaches. These programs often help children and families to work together to address the underlying risk factors that lead to inappropriate behaviour. However, it is important that police are not the first responders to early behaviours of concern, particularly where safety is not an issue.

If the MACR is raised, there will need to be an expansion of existing programs which are successful as well as additional services. Particular consideration will need to be given to service provision in regional, rural and remote areas of high need. Savings to the criminal justice system that derive from raising the MACR¹³⁴ can be reinvested into these programs, noting the proven benefits of Justice Reinvest programs.¹³⁵

It costs around \$1414 to lock up one young person for one day in NSW.¹³⁶ Juvenile detention is not only economically costly - it has long term social costs for children, their families and their community. There is little evidence that detention acts as a deterrent to youth offending and is not effective in reducing recidivism, whereas there is ample evidence to show that alternative programs are successful.

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

By supporting place-based and community-led design and collaborative service delivery, youth diversionary initiatives will be more effective and accessible for Aboriginal and Torres Strait Islander children across NSW, including rural, regional and remote areas. JR in Australia has been driven predominantly by First Nations leaders and organisations,

¹³³ Legislative Assembly of New South Wales, Law and Safety Committee, *The Adequacy of Youth Diversionary Programs In New South Wales* (September 2018).

¹³⁴ For example, it costs roughly \$531,000 per year to keep a child in detention. Nationally, in 2017-18, the average cost per day per young person subject to detention based supervision was \$1455: In 2018-2018, Australia spent \$509 million on youth detention: Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, Ch 17, 17.25 and Table 17 A.8.

¹³⁵ See below for further discussion.

¹³⁶ Australian Government Productivity Commission, *Report on Government Services 2020*, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice/rogs-2020-partf-section17.pdf> Table 17A.21.

promoting self-determination through a move away from top down, ‘off the shelf’ approaches in favour of locally designed, collaborative and holistic solutions.

A JR approach has been recommended in numerous reports over the past decade, including the Aboriginal and Torres Strait Islander Social Justice Commissioner’s Social Justice Report in 2009 and the Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, in 2013. In its 2018 report *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, the Australian Law Reform Commission recommended that Commonwealth, state and territory governments provide support for JR sites and for the establishment of an independent JR body.

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

Maranguka is a model of Indigenous self-governance guided by the Bourke Tribal Council. Maranguka partnered with Just Reinvest NSW in 2013 to develop a ‘proof of concept’ for JR in Bourke. It was the first major JR initiative in Australia. The development and implementation of its *Growing our Kids Up Safe, Smart and Strong Strategy* underpins the framework of the initiative. KPMG evaluated Maranguka and calculated the savings generated in 2017 by the collaborative efforts in Bourke at \$3.1 million – 2/3 in justice savings and 1/3 broader economic impact to the region. This economic impact was five times greater than the operational costs of Maranguka in 2017. KPMG estimates that if just half the results achieved in 2017 are sustained, Bourke could deliver an additional economic impact of \$7 million over the next five years. Maranguka is discussed in more detail in **Appendix A**.

Some examples of other existing programs within Australia are also attached in **Appendix A**.

Guidance can also be found by examining the approach of international jurisdictions with higher MACRs. While noting that each international jurisdiction has unique features and thus cannot be seamlessly replicated in Australian state and territory contexts, we refer the Council of Attorneys-General Working Group to consider the approaches in Scotland, New Zealand and Wales which embed a shared outcomes focused framework.

10. Raising the minimum age of criminal responsibility for all types of offences and all circumstances

No offences should be excluded from a raised MACR. The majority of offences committed by children under 14 are not serious crimes. They are generally not crimes against the person (e.g. sexual offences, homicide, robbery) but property and deception offences (e.g.

property damage and theft).¹³⁷ Across Australia, children under 14 are only a small proportion of all children in the justice system. There are very low numbers of children under 14 who commit serious crimes.

As discussed above, the medical evidence suggests that children under 14 do not have the requisite capacity to be criminally responsible. This lack of capacity applies regardless of the seriousness of the offence. For example, a homicide may be committed impulsively, a terrorism offence may be committed as a result of susceptibility to adult influence, and the onset of puberty and sexual experimentation may contribute to the commission of sexual offences. The fact that an offence is serious does not mean that a child possesses greater criminal capacity.

Also, certain offence types cover a broad spectrum of criminality. For example, sexual offences can include relatively less serious offences such as consensual underage sexting.

The United Nations Committee on the Rights of the Child Revised General Comment No 24 specifically expressed its concern about allowing exceptions to the MACR, for example for certain serious offences. The Committee strongly recommended not allowing, by way of exception, the use of a lower MACR.¹³⁸

Allowing certain offences to be exempt from the MACR may also lead to practical difficulties. The creation of two systems for dealing with children may cause confusion. Police may also have great discretion about whether to criminalise a child who allegedly commits conduct which may or may not constitute an exempt offence. Where there is any risk that a child may be charged with an exempt offence, the child may choose to exercise their right to silence so as to not jeopardise any potential proceedings. This may prevent the child from being referred to and fully participating in counselling for problematic behaviour. Hence, having offences which are exempt from the MACR may adversely affect those children who are charged with those offences but also children who are not.

Minimum age of detention

Raising the MACR to at least 14 will have an impact upon young children being detained. However, even if no children under 14 were detained, there still remains compelling reasons for raising the MACR to at least 14. The criminalisation of children under 14 involves not only subjecting children to detention but also the adverse effects of involvement with the criminal justice system itself and the lasting effects of criminal records. Hence, the imposition of a minimum age of detention should not be viewed as an alternative to raising the MACR.

¹³⁷ Jesuit Social Services (October 2019), *Raising the Age of Criminal Responsibility: There is a better way*. <https://jss.org.au/raising-the-age-of-criminal-responsibility-there-is-a-better-way/>

¹³⁸ UN Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 35.

Regardless of whether and to what extent the MACR is raised, detention of children should always be a last resort. The raising of MACR and the attendant focus on alternatives to a criminal law response will strengthen alternatives to detention.

Offences of exploiting or inciting children under MACR to participate in conduct which would otherwise be a criminal offence

Some jurisdictions already have offences which prevent the exploitation of children by older offenders. Victoria has offences of incitement under Division 11 of the *Crimes Act 1958 (Vic)*. Furthermore, s 321LB of the *Crimes Act 1958 (Vic)* provides that an adult 21 years or older may be prosecuted for an offence of recruiting a child to engage in criminal activity. The child need not engage in criminal activity or be prosecuted or found guilty of any criminal offence.¹³⁹

In NSW, a person who incites the commission of a sexual offence is liable for the penalty for that sexual offence.¹⁴⁰ The person may be found guilty even if the commission of the sexual offence is impossible - for example, if the child who was incited is below the MACR. Further, s 351A(2) of the *Crimes Act 1900 (NSW)* provides that where an adult recruits a child (under the age of 18) to carry out or assist in carrying out a serious indictable offence, that person may be prosecuted for an offence.

The Australian Capital Territory (ACT) has offences of incitement under Chapter 6A of the *Criminal Code 2002 (ACT)*. Specifically, s 655(2) of the *Criminal Code 2002 (ACT)* provides that a person may be prosecuted for an offence of recruiting children to carry out, or to assist in carrying out, a criminal activity.

In the Northern Territory, a person who incites the commission of an offence may be prosecuted under the offence of incitement.¹⁴¹ The person may be found guilty even if the commission of the offence is impossible.¹⁴²

¹³⁹ *Crimes Act 1958 (Vic)*, s 321LC.

¹⁴⁰ *Crimes Act 1900 (NSW)*, s 80G.

¹⁴¹ *Criminal Code Act 1983 (NT)*, s 43BI(1).

¹⁴² *Criminal Code Act 1983 (NT)*, s 43BI(4).

11. Conclusion

The minimum age of criminal responsibility represents an age where society recognises a child has capacity to be responsible for criminal acts or omissions. Australia's MACR is now long outdated. It needs to be raised to at least 14 so that it is in line with current neurodevelopmental science, human rights, international standards, and the expert evidence of doctors and lawyers.

Australia's peak medical bodies state that children under the age of 14 lack the requisite criminal capacity.

The criminal justice system for young children is criminogenic. Across Australia, each year approximately 600 children below the age of 14 are locked up in detention.¹⁴³ Many more are subjected to lengthy periods on onerous bail conditions which they risk breaching. Most come from disadvantaged backgrounds. Aboriginal children, cross over children and children with mental health issues/cognitive impairments are grossly overrepresented, particularly amongst children under 14. Dealing with them under the criminal justice system perpetuates cycles of disadvantage, with significant financial and social costs across justice, health, education and other sectors.

Doli incapax does not provide sufficient protection and compounds the problems with the criminal justice system. The presumption is misunderstood, inconsistently applied by police, lawyers and courts, results in discriminatory, and prejudicial practices and is adverse to a child's rehabilitation. It does not prevent criminalisation but prevents treatment and impedes rehabilitation.

The benefits of raising the MACR are manifold. It will reduce reoffending, facilitate treatment and recovery, and allow children to accept responsibility and support in more appropriate ways. The savings that derive from an increased MACR can be reinvested into existing and additional services and programs, under a shared outcomes framework. Such services, including multi agency approaches, are already proven to work with young children effectively.

There is strong, varied and evidence based support for the raising of the MACR for all offences to at least 14 years old. Some jurisdictions have already recently considered raising the age.¹⁴⁴ This NLA submission provides the stories of children affected and the experience of LACs who deal with them regularly. From their stories, it is clear that such children are the most vulnerable in our society. We call on the leadership of the members of the Council of Attorneys-General Working Group to seize the opportunity to take immediate action – raise the MACR to at least 14.

¹⁴³ Australian Institute of Health and Welfare (2017) *Youth justice Supervision in Australia 2015-2016*, Bulletin 138, supplementary data table S 78b, AIHW, Canberra.

¹⁴⁴ For example, in the Northern Territory, Queensland, and the *Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019*.

Appendix A: Existing programs available as alternatives to a criminal law response for children aged 10-13

Early intervention

The **Youth Umbrella Program (YUP)** in Victoria is an excellent example of a crime prevention program that operates under a case management framework, focusing on early intervention. The YUP program is available for children aged 12-24 years old who reside in a limited catchment area.¹⁴⁵ It is targeted at children who are at risk of engaging in the criminal justice system. The services include housing, employment, offence focused counselling, drugs and alcohol, education, recreation, culturally-specific financial assistance, mental health support. Lawyers can make referrals to YUP for children who need assistance and YUP provides written updates to court as to a child's engagement. It is used as an alternative to linking in a child with youth justice in some cases (where a child might be looking at a supervisory order) or in other cases, to provide extra support for a child who might be otherwise a first offender and their engagement with this program can be used to persuade a court as to the appropriateness of a diversionary outcome.

The **Youth Support Service (YSS)** in Victoria is available in five metropolitan and regional catchment areas service; it supports children aged 10-17 who have had recent contact with police and who may be at risk of entering the youth justice system. YSS supports these children and their families to address problems before they become too serious. YSS is a voluntary service which operates independently of the legal process to help children and their families achieve their goals.

Education

It has been estimated that approximately 40% of children coming before the NSW Children's Court are disengaged from school.¹⁴⁶ Legal Aid NSW's High Service User's Report found that 90% of high service users were not engaged in education.¹⁴⁷

A critical component of prevention and early intervention for young children at risk is supporting children's educational and social inclusion. Schools need to be supported to keep their children at school, including with wrap around education, health and allied support. An example of this holistic approach is the Doveton School in Victoria, where the families' needs are met at the school campus. The school provides a wide range of wrap around educational and allied health support including maternal and child health services,

¹⁴⁵ <https://www.youthjunctioninc.net.au/where-we-can-help/free-workshops/details/6/youth-umbrella-project>

¹⁴⁶ Law and Safety Committee. Legislative Assembly of NSW. *The Adequacy of Youth Diversionary Programs in NSW*, (September 2018),123.

¹⁴⁷ Legal Aid NSW's High Service User's report (discussed below) found that 90% of high service users were not enrolled in education: Legal Aid NSW, *High Service users at Legal Aid NSW* (2013), 14.

medical service, and adult learning opportunities for the parents and wider community members.

Given the correlation between disengagement in school and offending, alternatives that involve specialised and tailored learning support in mainstream schools are another way to promote rehabilitation.

The **Victorian Education Justice Initiative** has had extremely successful results re-engaging 75% of these children back into education.¹⁴⁸ Referrals are made by reaching out to children directly in the Children's Court. Recently, in conjunction with the pilot, *Their Futures Matter - A Place to Go*, NSW Department of Education have placed education liaison officers at five Children's Courts, mirroring the Victorian Education Justice Initiative.

The **NSW Department of Education** is also involved in interagency work with students in a number of ways, including:

- Its Case Management and Specialist Support Unit which provides support to students and information sharing with other agencies such as Family and Community Services and NSW Police;
- Liaison with NSW Police school liaison officers of which there are currently 41 within NSW;
- 22 Networked Specialist Centres;
- School Link – designed to provide access to specialist mental health services to child and young people in schools and TAFE and delivered in approximately 3000 schools; and
- Connected Communities – providing interagency support to Aboriginal students and communities.

Families

Child offending can be viewed as a result of failing to support their families. Proper wrap around support for families, particularly support to keep their children at home and at school, is essential for prevention and early intervention of concerning behaviours.

The **Family Investment Model** is a pilot running in Dubbo and Kempsey in NSW. It aims to address entrenched intergenerational disadvantage and offending by co-locating a multi-government agency team to work with at-risk families. The multi-government agency team, led by the Department of Families and Justice has representatives from key government agencies including Youth Justice, Corrective Services NSW, the NSW Police Force, the Department of Family and Community Services, the Department of Education and NSW

¹⁴⁸ Te Riele, K. Rosauer, K. Education at the Heart of the Children's Court. Evaluation of the Education Justice Initiative. Final Report. (December 2015) <<https://www.vu.edu.au/sites/default/files/victoria-institute/pdfs/Education-at-the-Heart-of-the-Children's-Court-Final-Report-web.pdf?fbclid=IwAR3bk8laOFUicIRdELouGZZwtkgTExTPieUds-lo7Lah3Crec1I5D-bh96w>>

Health. The Family Investment Model aims to address complex and longstanding needs that have led to multiple contacts with government agencies, particularly Justice agencies.¹⁴⁹

Community Conferencing

Community Conferencing is another example of an alternative to proceeding against a child with criminal charges. An example is a high-profile case involving a small number of children who were alleged to have been involved at the lower end of the spectrum in violence that occurred in the Melbourne CBD at the end of the Moomba carnival, in early 2016.

A Victoria Legal Aid and Victoria Police joint initiative took an unprecedented step in holding a community conference with eight young people who had appeared on less serious charges at the Melbourne Children's Court. The conference was held at the Neighbourhood Justice Centre (in central Melbourne) and was attended by the young people and their families, Victoria Police, and victims of the violence. All eight young people apologised for their actions in the conference and victims were given a unique opportunity to express the impact of the violence on them and the harm that it had caused. Ultimately, all young people were diverted from the criminal justice system, successfully completing the diversion program.¹⁵⁰

Specific offending

Sexual offences

New Street Adolescent Services (NSW) is an early intervention program delivered by NSW Health targeted to address harmful sexual behaviours displayed by children aged 10-17 years.¹⁵¹ The service accepts referrals from FACS and NSW Police for children who have not been charged with an offence relating to the sexual behaviour.

This program has an evidence-informed model of operation that involves working with the entire family unit. A 2014 evaluation found that the service achieved significant outcomes for children and their families. There were positive impacts for both individuals and the child protection system as a whole.¹⁵² The evaluation included a cost benefit analysis, which

¹⁴⁹ See Hon Troy Grant MP, Minister for Police and Minister for Emergency Services, *Legislative Assembly Debates*, 21 November 2017, NSW Parliament website, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-99960>, viewed 21 June 2018. See also Mr Paul McKnight, Executive Director, Policy and Reform, Department of Justice NSW, *Transcript of Evidence*, 8 May 2018, p43.

¹⁵⁰ <https://www.theage.com.au/national/victoria/the-young-moomba-rioters-restoring-faith-in-justice-20170510-gw1zs0.html>

¹⁵¹ NSW Health, 'New Street Services' (September 2018). Available at: <https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>

¹⁵² KPMG, *Evaluation of New Street Adolescent Services Health and Human Services Advisory* (March 2014). Available at: <https://www.health.nsw.gov.au/parvan/hsb/Documents/new-street-evaluation-report.pdf>

identified a 'significant net [economic] benefit attached to the completion of New Street compared to all alternative scenarios'.¹⁵³

New Street was also endorsed by the Special Commission of Inquiry into Child Protection Services in NSW. New Street was identified as a service model that should be retained and developed because it avoided the criminalisation of children and because of its impact on children avoiding adult sexual offending.¹⁵⁴

The effectiveness of New Street could be further enhanced by adopting the recommendation of NSW Legislative Assembly Inquiry into the Adequacy of Youth Diversionary Programs in NSW and examining the introduction of statutory privilege be introduced to protect counselling notes and other information obtained in therapeutic sessions.¹⁵⁵

A similar service (Sexually Abusive Behaviour Treatment Services) exists in Victoria.

Drug and Alcohol use

The Rural Residential Rehabilitation Adolescent Alcohol and Other Drugs Services (NSW) in Dubbo and Coffs Harbour targets young people 13 to 18 years old, both male and female, who are clients of Youth Justice NSW and have a history of significant alcohol and other drug use and offending behaviour.¹⁵⁶

Youth Substance Treatment Intervention Regime (YSTIR) and Young Persons Opportunity Program (YPOP) (Western Australia) are drug intervention programs for young people aged from 10 years and 12 years respectively. YSTIR is a program available in the Perth Children's Drug Court, so it requires a child to be charged with an offence. YPOP requires a Juvenile Justice Team referral - either from police or the court - so it also requires that a child is charged with an offence.

Youth Substance and Abuse Service (YSAS) (Victoria) provides community based and statewide specialist services for children aged 12 and above with drug and alcohol issues in metropolitan and regional Victoria. These include access to Home Based Withdrawal for people undergoing withdrawal while remaining in the community or a Residential Rehabilitation Programs. For example, the Youth Empowerment Project operates for children aged from 12 years, from culturally and linguistically diverse backgrounds.

¹⁵³ Ibid 64.

¹⁵⁴ NSW Government. Report of the Special Commission of Inquiry into Child Protection Services in NSW. Executive Summary recommendations as cited in KPMG. *Evaluation of New Street Adolescent Services. NSW Kids and Families*. Final Report (March 2014), 16.

¹⁵⁵ Recommendation 37. Law and Safety Committee. Legislative Assembly of NSW. *The Adequacy of Youth Diversionary Programs in NSW*. (September 2018), xiv.

¹⁵⁶ Legislative Assembly of New South Wales, Law and Safety Committee, *The Adequacy of Youth Diversionary Programs In New South Wales* (September 2018), 9.

Arson

The Juvenile Fire Awareness and Intervention Program (JFAIP) is a joint initiative of the Melbourne Metropolitan Fire Board and the Country Fire Authority.¹⁵⁷ It is a state-wide early intervention program available to all Victorian children from the age of 6 to 17 and was developed in response to concerns about risky fire behaviour amongst children. It is a free service that can be delivered at a child's home by a firefighter and referral can be from the child's parent, school, allied health professional or by the court.

Victoria Legal Aid are aware of Victoria Police utilising this program as an alternative to proceeding with criminal charges for fire related conduct. That is, once a child who has been identified by police as engaging in fire risky behaviour has completed this program, police can exercise discretion to proceed with a caution instead of issuing criminal charges. In other cases, attendance at this course can be ordered by a Magistrate in the Children's Court, as a part of a sentence such as a condition on a good behaviour bond.

Indigenous

Junaa Buwa! and Mac River (NSW) are residential rehabilitation centres which provide holistic services for young people who have entered, or are at risk of entering, the juvenile justice system and have a history of alcohol and other drug use.

The Maranguka Justice Reinvestment project (NSW) in Bourke is an example of a community-led system of working across local communities and sectors. The project provides services to children and families across justice, education and health. For example, police, schools and local communities are engaged in finding solutions to divert from the criminal justice system and back into school.

An impact assessment of the project by KPMG in 2018 found that it had led to a 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories, among other benefits.¹⁵⁸

The Tiwi Islands Youth Development and Diversion Unit (Northern Territory) offers young people aged 10 -17 the opportunity to participate in a youth justice conference, involving issuing apologies to the victim, increasing school attendance, and undertaking community service. Qualitative data has shown that the program is useful in reconnecting young people to cultural norms. It addresses the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education.¹⁵⁹

¹⁵⁷ <http://www.mfb.vic.gov.au/Community/Safety-Programs/Fire-Awareness.html>

¹⁵⁸ KPMG, 'Maranguka Justice Reinvestment Project: Impact assessment' (27 November 2018). Available at: <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

¹⁵⁹ Bodean Hedwards et al, 'Indigenous youth justice programs evaluation' (Special report, Australian Institute of Criminology, 2014) 37 <<https://aic.gov.au/publications/special/005>>.

Children who participated in the program credited it for helping them recognise wrongdoing and adopt strategies to stay out of the criminal justice system.¹⁶⁰

Panyappi Indigenous Youth Mentoring Program (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 build voluntary relationships of trust.¹⁶¹ These mentors provide access to educational, training and recreational services.¹⁶² 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.¹⁶³

The Koori Youth Justice Program (KYJP) (Victoria) is a community-based early intervention initiative run by Koori community-controlled organisations and the Youth Support Service.¹⁶⁴ The program targets youths who are at risk of offending as well as clients on community-based and custodial orders and aims to prevent offending and recidivism by maintaining connections between youths, their family and their community.¹⁶⁵ The KYJP connects young Aboriginal and Torres Strait Islander offenders to appropriate role models in the community and offers them culturally sensitive support, advocacy and casework. Koori Youth Justice Workers are tasked with developing Aboriginal cultural support plans, providing support to clients and their families, and creating preventive programs such as sporting and recreational programs.¹⁶⁶

Police programs

Youth Action Meetings (NSW) were established in mid-2018 by NSW Police and are a coordinated approach to addressing the needs of young people at risk of significant harm, particularly those at risk of becoming a victim or offender of crime. The YAMs model is closely aligned with Safety Action Meetings (SAMs) in NSW, which were developed to reduce serious threats to the safety of domestic and family violence victims and their children.

¹⁶⁰ Ibid.

¹⁶¹ 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.

¹⁶² Tom Calma, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Australian Human Rights Commission, 2008) 29.

¹⁶³ Just Reinvest, 'Examples of promising interventions for reducing offending, in particular Indigenous juvenile offending' (2013).

¹⁶⁴ Penny Armytage and Professor James Ogloff AM, 'Youth Justice Review and Strategy: Meeting Needs and Reducing Offending - Part 2', Parliament of Victoria, July 2017) 169.

¹⁶⁵ Penny Armytage and Professor James Ogloff AM, 'Youth Justice Review and Strategy: Meeting Needs and Reducing Offending - Part 1', Parliament of Victoria, July 2017) 96.

¹⁶⁶ Australian Institute of Health and Welfare, *Youth justice in Australia 2015-16* (Web Page) <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2015-16/contents/victoria>>.

YAMs were piloted in the Wollongong Police District (PD) and currently operate in an additional four locations: Mount Druitt Police Area Command (PAC), Hunter Valley PD, Nepean PD, and Riverina PD.

There are a number of stakeholders involved in the operation of YAMs, including Youth Justice NSW, Department of Education, NSW Ministry of Health, Department of Community Services and Justice (Child Protection and Housing), and local non-government organisations.

YAMs are regular meetings, chaired by the NSW Police Force, of key local government and non-government service providers. The agencies identify risks, develop action plans and put strategies in place to support the referred young people. The meetings are an opportunity to ensure that there is a coordinated response to addressing the needs of a young person and any identified risks. The model supports better resource allocation, tangible outcomes and reduces the risk of service duplication.

Young people are referred into YAMs through the participating agencies and subject to a risk assessment to determine their suitability for discussion at YAMs. YAMs are able to be used for children under the current MACR. Several children 10 to 14 have already undertaken YAMs with significant benefits.

Police Citizens Youth Clubs (PCYC) (NSW). Launched in August 2018, the NSW Police Force Commissioner's RISEUP strategy is an early intervention initiative aimed at preventing and disrupting youth-related crime and diverting young people from the criminal justice system. RISEUP is a collaborative approach between the NSW Police Force, Police Citizens Youth Clubs NSW (PCYC) and industry leaders. Aimed at building engagement with education, employment and community, RISEUP incorporates job ready programs, mentoring and vocational training for at-risk-youth.

Fit for life

This entry level program is designed to have a positive engagement with young persons and familiarise them with Police. This program involves early morning fitness activities and breakfast, before ensuring the young person attends school.

Fit for work

This program is designed to develop young persons to be ready for employment, while exposing them to basic vocational skills training. Support for the young person and employers is provided for a period of 12 months to maintain their progress and ongoing employment.

Fit together

This program is designed to improve police relationships within Aboriginal communities and connection to country, whilst providing support, education and awareness to Aboriginal and/or Torres Strait Islander young people.

Fit for Home

This program aims to break the cycle of domestic and family violence (D&FV) and to develop skills young people need to treat their partners/family/friends with respect. This program also aims to improve the level of care and protection to support those who have been exposed to D&FV.

Fit to learn

This program is designed to reconnect disengaged youth with the education system allowing them to develop intellectually and socially within the school environment for all students and teachers.

Fit for service

This program is designed to assist young people up to the age of 24 who show interest in government and armed services.

Youth on Track is a program delivered by the NSW Department of Communities and Justice. It is an early intervention scheme for children aged 10 to 17 years that identifies and responds to young people at risk of long-term involvement with the criminal justice system. The program 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 CIRCA found that Youth on Track is contributing to enhanced social outcomes for many clients and addresses individual criminogenic risk factors of children.¹⁶⁷

Community Legal Education

Legal Aid NSW

Community Legal Education (CLE) is also vital as a crime prevention tool and a rehabilitative tool. Legal Aid NSW's CLE unit provides CLE which is targeted at children, including at young children who are at risk of contact with the criminal justice system. They include the following:

Putting the X in Sexy Text is a workshop that brings to life the criminal law implications of making, sending and keeping proscribed images. It also covers online bullying. It encourages young people to think about their choices and helps them resist peer pressure online. The workshop is delivered to young people aged 12 to 15.

Police Powers is a workshop utilising a short film and role play scenarios to explore police powers and responsibilities, and children's responsibilities, especially in public spaces. The workshop also considers strategies that can improve interactions between young people and police. It encourages young people to remain calm when dealing with police rather than acting impulsively or becoming aggressive.

¹⁶⁷ Circa, *Youth on Track Social Outcomes Evaluation* (April 2017). Available at: <http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf>

Finally, this workshop also educates young people about some common offences for which children are charged and aims to correct any misconceptions about these offences. The workshop is delivered to young people aged 12 to 17.

Let's talk about consent is a recent workshop developed in response to demand identified by children and teachers. Through the use of practical scenarios children are taught about the laws surrounding consent for sexual activity and sexting.

BURN is a workshop involving a DVD produced by children. The DVD shows a child becoming involved in a serious crime through joint criminal enterprise with a group of friends and strangers. Students see the reality of being arrested and placed in custody for being a 'look out'. The workshop illustrates the effect of drug and alcohol use on impeding judgment and teaches the importance of developing peer refusal skills.

These workshops are delivered to young people in a range of contexts throughout NSW. The majority of workshops are delivered to high school groups, with a focus on young people at risk of disengaging from school in the Links to Learning program. The workshops are also delivered at youth centres and Youth Justice centres.

The strong, ongoing demand for these workshops across the State speaks to how well they have been received by students and teachers alike. Legal Aid NSW has built enduring relationships with schools and community groups and many organisations have requested our workshops every year for many years. For example, our workshops have become a staple of many of the Links to Learning programs across the state.

Anecdotal reports from teachers and young people who have undertaken the workshops indicate that they are effective in encouraging young people to consider their choices in relation to offending and to explore the negative implications of offending behaviour.

With reference to Legal Aid NSW's High Service Users report and the above-mentioned research into the connection between criminal justice contact at an early age and further reoffending, it follows that if the MACR is increased there would be considerable cost savings in the criminal justice system. These savings could be used to scale up evidence-based alternatives such as those mentioned above.

Victoria Legal Aid

Victoria Legal Aid has similar preventative education programs for young people.¹⁶⁸

Stay or go? is a preventative education session for young people about the serious consequences of being involved in criminal activity when not the main offender. Lawyers and educators from Victoria Legal Aid have been piloting education sessions with flexible learning centres, Victorian Certificate of Applied Learning providers and mainstream

¹⁶⁸ VLA Community education and projects, <https://www.legalaid.vic.gov.au/about-us/community-education-and-projects>.

schools. These sessions explain laws relating to complicity so that young people can make educated choices.

Sex, young people and the law is legal education about sex and the law for secondary school students.

Street law is a program focusing on young people's rights and responsibilities when dealing with police officers and protective services officers.

The **Learning the law teachers' kit** is an online suite of teaching tools for secondary specialist school teachers.

Thank you for the opportunity to provide a submission on this review.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely,

A handwritten signature in black ink that reads "Suzan Cox". The signature is written in a cursive style with a large initial 'S' and a stylized 'Cox'.

Suzan Cox OAM QC
Director with the NLA Criminal Law Network
Director, Northern Territory Legal Aid Commission