

## The Chair

Age of Criminal Responsibility Working Group

c/- Strategic Reform Division

Department of Justice

GPO Box F317

Perth WA 6841

[legpolicy@justice.wa.gov.au](mailto:legpolicy@justice.wa.gov.au)

## Submission to the Review of Age of Criminal Responsibility by Council of Attorneys-General

The Australian Youth Affairs Coalition (AYAC) and state and territory youth sector peak bodies across Australia strongly recommend raising the age of criminal responsibility to 14.

Children as young as 10 years old in Australia are being arrested, prosecuted and detained in prisons. They are being torn away from their families, communities and culture. They are being incarcerated in facilities that increase the likelihood of reoffending when compared to suitable alternatives, such as youth work programs and community supports. In Australia, there are around 600 children below the age of 14 who are locked up in prison each year.

Children and young people deserve supports that enable them to succeed. This is particularly important for children between the ages of 10–14. The earlier children have contact with the criminal justice system, the more likely they are to have long term involvement in crime.<sup>1</sup> Raising the age of criminal responsibility will reduce long term offending and increase community safety.

The Australian community, including state and territory governments, is collectively responsible for supporting children and young people to reach their potential and become positive and productive citizens. Raising the age of criminal responsibility to 14 is an appropriate first step toward reducing overrepresentation of particular cohorts of young people, and better supporting children and young people in Australia.

## Questions One and Two

AYAC joins the calls of young people, social service organisations, Aboriginal and Torres Strait Islander groups, medical and health experts, legal bodies and the United Nations who recommend an end to depriving children of their human rights.

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<sup>1</sup> Australian Institute of Health and Welfare. (2019). Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW.

Medical evidence clearly demonstrates that children aged 10 to 14 years lack the emotional, mental and intellectual maturity necessary to reflect before acting.<sup>2</sup> Children in grades four, five and six are not at a level of development where they can fully understand the criminal nature of their actions or the life-long consequences of engaging in criminal activities.<sup>3</sup> Research suggests that children and young people's brains are still developing till at least the age of 25.<sup>3</sup> This means that the age of criminal responsibility should be lifted to at least 14, if not higher.

The current age of criminal responsibility increases offending and leads to overrepresentation of certain cohorts of children and young people in the justice system. Interaction with the criminal justice system at an early age increases long term involvement in criminal activity and prevents children and young people from engaging in education and finding work.<sup>4,5,6</sup> Raising the age of criminal responsibility will lead to a reduction in offending and increased engagement in education and employment.

The current imprisonment of children as young as 10 is a breach of international human rights law and international standards. The United Nations Committee on the Rights of the Child declared in 2019 that the minimum age must be no lower than 14 years, and children under 16 may not be legally deprived of their liberty.<sup>7</sup>

AYAC recommends that the age of criminal responsibility be raised from 10 to 14 in all jurisdictions and that there should be no exceptions for any type of offences.

### Question Three

AYAC recommends that the current common law application of *doli incapax* (ie "incapable of crime") be superseded by raising the minimum age of criminal responsibility to 14 years. Further, AYAC recommends that *doli incapax* be applied for young people between the ages of 14–17 years to ensure that relevant factors for young people are considered and administered consistently by the courts.

The Australian Law Reform Commission (ALRC) states that

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<sup>2</sup> Australian Medical Association and Law Council of Australia. (2019). Minimum age of criminal responsibility: Position statement.

<sup>3</sup> Judge Andrew Becroft, 'From Little Things, Big Things Grow' Emerging Youth Justice Themes in the South Pacific, 5 referring to Sir Peter Gluckman *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Wellington, Office of the Prime Minister's Science Advisory Committee, 2011), p 24. See also Kelly Richards, 'What makes juvenile offenders different from adult offenders? Trends & Issues in crime and criminal justice' (2011), 4. See further Laurence Steinberg 'Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science' (2007) 16 *Current Directions in Psychological Science* 55, 56.

<sup>4</sup> Ibid; Australian Institute of Health and Welfare. (2013). Young People Aged 10–14 in the Youth Justice System, 2011–2012, AIHW, Canberra.

<sup>5</sup> Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017).

<sup>6</sup> Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (December 2016), 26.

<sup>7</sup> Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).

*doli incapax* can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.<sup>8</sup>

The presumption of *doli incapax* currently fails to protect many young children, but would be superseded by raising the age of criminal responsibility to 14. The presumption should apply for those between the ages of 14–17 years.

#### Question Four

AYAC recommends that the minimum age of detention be set at 16 years, to enable all children to grow up supported by their home, family, community and other social supports.

The UN Committee on the Rights of the Child recommends that ‘no child [under 18] be deprived of liberty, unless there are genuine public safety ... concerns’.<sup>9</sup> Further, they argue that:

children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) *should not be in the child justice system at all*, even if they have reached the minimum age of criminal responsibility.<sup>10</sup>

The Armytage and Ogloff Review of Victoria’s legal system confirmed that it is counter-productive to incarcerate a child, saying that:

depriving a child or young person of their liberty is detrimental to adolescent development, dislocates young people from any protective factors they may have, and must only be an option of last resort. No evidence shows that a custodial order reduces offending – in fact, the Sentence Advisory Council (2016) found that more than 80 per cent of young people on a custodial order reoffended, reflecting among the highest rates of recidivism of all young offenders.<sup>11</sup>

There should be a legislative prohibition that prevents the detention of young people under the age of 16 years. Further, there should be a legislative presumption that no young person under the age of 18 should be deprived of liberty, except as a last resort and only where there are genuine public safety concerns.

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<sup>8</sup> Australian Law Reform Commission. (1997). *Seen and Heard: Priority for Children in the Legal Process*, Report 84. [18.19].

<sup>9</sup> Committee on the Rights of the Child, General Comment No. 24 on children’s rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019), [89].

<sup>10</sup> Committee on the Rights of the Child, General Comment No. 24 on children’s rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019), [28]. *Emphasis added.*

<sup>11</sup> Victorian Department of Justice, Penny Armytage and John Ogloff, *Meeting needs and reducing offending, executive summary* (2017), 15.

### Question Five

AYAC recommends, following an increase in the minimum age of criminal responsibility, an immediate investment in:

- Skilled generalist youth workers and associated youth work programs as a key measure to build community supports and connection for young people, and prevent crime; and
- Skilled specialist youth workers for children and young people who come in contact with the justice system, but should not be convicted of a crime or incarcerated due to their age.

Youth workers and youth work programs are highly effective and efficient.<sup>12</sup> They have been shown to reduce offending by half at a cost of only \$1,680 per year for each young person. This is significantly lower than the cost of community-based supervision and detention.<sup>13</sup> Investment in youth work programs is a low-cost and highly effective justice reinvestment option that is consistent with the recommendations of the Armytage and Ogloff Review.<sup>14</sup>

Youth workers can support young people before they interact with the justice system. They can also provide an affective early intervention in more critical times (ie at the time of a warning, caution, or diversion).

Existing youth work programs have been shown to be highly effective at 'significantly' reducing offending and recidivism.<sup>15</sup> One youth work program has been shown to reduce the rate of recidivism of participants by half compared to non-participating young people. The program also resulted in 71.6% of participants entering employment, an apprenticeship or study.

AYAC recommends that investment in youth workers and youth work programs is an appropriate concurrent strategy when the age of criminal responsibility is raised to 14.

### Question Six

AYAC recommends that the territory, state and federal governments learn from the myriad examples of successful support and development programs for young people. There are excellent programs across the country that support vulnerable and marginalised young people into independence and stability.

Problematic behaviour of children is most often linked with social or environmental factors outside of their control, such as family violence, neglect, socio-economic disadvantage, racism or stigma.<sup>16</sup>

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<sup>12</sup> Hart, K. (2016). The efficacy of community justice intervention services to increase social capital and reduce incarceration for young adults (thesis). Victoria University, Melbourne, Australia.

<sup>13</sup> Productivity Commission. (2019). *Report on Government Services: Community Services*.

<sup>14</sup> Armytage et al., 2017.

<sup>15</sup> Australian Institute of Criminology. (2002). *What Works in Reducing Young People's Involvement in Crime: Review of Current Literature on Youth Crime Prevention*.

<sup>16</sup> Department of Health and Human Services. (2019). *Youth Parole Board Annual Report 2018–19*. Melbourne: Victorian Government.

A response that supports young people below 14 years must address the underlying causes of their behaviour by promoting positive social and emotional wellbeing, connection with community, family and culture, and engendering safety.

In Victoria, the Roadmap to Reform details how the government will improve lives of vulnerable children, young people and families through reforming the services that work with them. The strategy aims to improve access to universal services and provide holistic supports, targeted interventions and better outcomes for children in out-of-home care.<sup>17</sup>

The Northern Territory government is rolling out Back on Track, which provides early intervention for young people at risk of entering the youth justice system. The program involves case management, bush camps, education and training and improves cultural connectedness, sense of self and wellbeing. The program includes ways for children to take responsibility for their actions through restorative justice conferences with victims, undertaking community service or participating in a supportive boot camp.<sup>18</sup>

Social Reinvestment WA (SRWA) is a coalition of twenty not-for-profits, who have a new vision for an effective and connected approach to justice in Western Australia. They advocate for changes to government policy which prioritise healthy families, implementing smart justice, and creating safe communities. A trial site in Halls Creek managed by all key stakeholders has dramatically reduced offending by employing Youth Engagement Night Officers, guaranteeing traineeships for every high school graduate, and delivering youth rehabilitation and alternative, culturally safe education models.

Many programs and activities — including group conferencing — already require children and young people to admit guilt or acknowledge responsibility for their offending. AYAC commends existing programs that are effective in supporting children and young people at risk of engaging in offending.

### **Question Seven**

AYAC recommends that youth workers and youth work programs be invested in as an appropriate intervention for young people so they can stay in the communities in which they belong. Youth workers can also provide referral pathways to ensure children and young people access the specialist services and supports they need.

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<sup>17</sup> Armytage et al., 2017.

<sup>18</sup> Northern Territory Government. (2019). Back on Track alternative sentencing and youth diversion program. <<https://www.youthjustice.nt.gov.au/initiatives/back-track-alternative-sentencing-and-youth-diversion-program>>.

The youth justice system in its current state does not have a useful mechanism for providing access to the services that children and young people need.<sup>19</sup> The youth justice system therefore can erode child rights and put children's health, safety and wellbeing at serious risk, and preclude young people from pursuing more positive and successful pathways in life.

Detention of children and young people is more likely to lead to reoffending when compared to youth work programs. More than 40% of young people who have been placed in detention reoffend after two years.<sup>20</sup> This is much higher than rates of reoffending for young people participating in youth work programs.<sup>21</sup> The services that the youth justice system aims to provide would be better delivered by skilled and adequately funded youth workers. Youth workers are skilled in supporting and engaging young people, and engendering pro-social behaviour. They also have pathways to refer young people to specialist support where required. The primary consideration and key responsibility of youth workers is the young people with whom they engage.<sup>22</sup>

AYAC contends that youth work programs and case management already provide an appropriate strategy to support young people who will no longer be imprisoned. Greater investment in youth workers and youth work programs will enable communities to best support children and young people below the minimum age of criminal responsibility.

### Question Eight

AYAC strongly maintains that the current minimum age of criminal responsibility does not protect the community from anti-social or criminal behaviours.

Offending by children is largely linked to negative environmental or social factors, such as experiencing family violence, neglect, socio-economic disadvantage, racism or stigma. Generally, children engage in offences which are attention-seeking, public, episodic, unplanned and opportunistic.<sup>23</sup> Raising the age of criminal responsibility will not make communities more vulnerable to anti-social behaviours. The imprisonment of children and young people leads to increased long term offending and reduced community safety. Raising the age of criminal responsibility to 14 years will increase community safety.

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<sup>19</sup> Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017); Office of the Auditor General Western Australia, *Diverting Young People Away From Court*, November 2017; Penny Armytage and John Oglloff, *Meeting Needs and Reducing Offending*, Victorian Department of Justice, (2017); Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, *Report on Youth Justice*, 8 June 2018.

<sup>20</sup> Sentencing Advisory Council. (2016). *Reoffending by children and young people in Victoria*. Melbourne.

<sup>21</sup> Hart. K (2016).

<sup>22</sup> See, Youth Affairs Council Victoria. *Code of Ethical Practice for the Victorian Youth Sector*.

<sup>23</sup> Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice in Australia* (5th ed, Oxford University Press, 2015) 55.

Investing in support for young people through prevention and early intervention will create better outcomes for children, families and communities. Early intervention initiatives are also significantly more cost effective than detention.<sup>24</sup>

Place-based approaches are most successful in properly supporting young people and keeping communities safe. The *Atkinson Report on Youth Justice in Queensland* and the Productivity Commission's *Draft Report on Expenditure on Children in the Northern Territory* both support approaches that are community driven and underpinned by meaningful partnerships between community members, non-government organisations and government agencies, including those responsible for policing, welfare, health and education.<sup>25</sup>

### **Question Ten**

AYAC recommends that states and territories are supported to raise the age of criminal responsibility as soon as they are ready. The administration of youth justice by states and territories, rather than by the federal government, has created inconsistencies. In this context, there should be nothing to prevent individual states or territories from raising the age of criminal responsibility.

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<sup>24</sup> Hart. K. (2016).

<sup>25</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 82; Productivity Commission, Expenditure on Children in the Northern Territory, Draft Report, Canberra (2019).

## Endorsement

The Australian Youth Affairs Coalition (AYAC) and state and territory youth sector peak bodies across Australia reiterate our support for raising the age of criminal responsibility to 14. This submission is endorsed by the state and territory youth peaks:



## Australian Youth Affairs Coalition

The Australian Youth Affairs Coalition (AYAC) is Australia's national peak body for youth affairs. Our role is to:

- Represent the issues and interests of young people, and the sector that supports them, at national and international levels
- Offer policy advice to government and other organisations on issues that affect young people and the youth sector
- Advance the participation of young people in the community, including bringing youth voices to policy and decision making, and supporting best practice in youth participation
- Promote the well-being of young Australians
- Take a leadership role within the youth sector
- Encourage and support coordination and cooperation within the sector.