

Submission to the Council of Attorneys- General – Age of Criminal Responsibility Working Group review

February 2020

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The Centre for Excellence in Child and Family Welfare (the Centre) welcomes the opportunity to provide a submission to the *Age of Criminal Responsibility Working Group review* for consideration by the Council of Attorneys-General.

The Centre is the peak body for child and family services in Victoria. For over 100 years we have advocated for the rights of children and young people to be heard, to be safe, to access education and to remain connected to family, community and culture. We represent over 150 community service organisations, students and individuals throughout Victoria working across the continuum of child and family services, from prevention and early intervention to the provision of out-of-home care. Many of our organisations work with young people in the statutory system and at risk of entering the youth justice system.

In our submission we have responded to eight of the 11 questions posed by the working group.

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

The Centre endorses the position of the Australian Medical Association (AMA) and the Law Council of Australia (LCA) on this issue.¹ There is a strong evidence base to support raising the age of criminal responsibility to at least 14 years of age in all Australian jurisdictions:

Criminalising young children is inconsistent with the evidence on brain development

‘To be criminally liable, one must ... (1) consciously will to x; (2) know that x is wrong; and (3) do x’.² However, during adolescence, the brain undergoes significant development relating to impulse control, decision-making, planning and other areas of executive function.³ The AMA and the LCA note that:

Scientific advances related to the understanding of child cognitive development favour a higher MACR [minimum age of criminal responsibility], taking into account the time taken for the adolescent brain to mature. Research shows immaturity can affect a number of areas of cognitive functioning “including impulsivity, reasoning and consequential thinking”.⁴

¹ See: <<https://www.lawcouncil.asn.au/docs/7b6b5121-5220-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>>.

² Bigenwald, A & Chambon, V 2019, ‘Criminal responsibility and neuroscience: no revolution yet’, *Frontiers in Psychology*, vol. 10, no. 1406, pp. 1-19.

³ Center on the Developing Child, What is executive function? And how does it relate to child development?, viewed 28 February 2020, <<https://developingchild.harvard.edu/resources/what-is-executive-function-and-how-does-it-relate-to-child-development/>>.

⁴ Australian Medical Association & Law Council of Australia 2019, *Minimum age of criminal responsibility*, Law Council of Australia, Canberra.

There is broad consensus within the scientific community that the age of criminal responsibility should be increased to safeguard children who are unlikely to have the cognitive and moral capacity to fully control their behaviour and comprehend its consequences.⁵ Gogtay et al. (2004) found that ‘the prefrontal cortex (which is especially important in relation to judgement, decision-making and impulse control) is the slowest to mature’.⁶ Imprisoning children before they develop this understanding is both harmful and ineffective.

Criminalising young children fails to change their trajectory

Sentencing Advisory Council data for Victoria shows that once children are involved in the youth justice system, the likelihood that they will reoffend is high.⁷ This is supported by linked data in New South Wales which found that ‘contact [with the justice system] before the age of 15 is a powerful sign of later persistent contact with the court and custodial systems’.⁸

There are better ways to respond when children exhibit risk factors for offending, and we have a responsibility to intervene early, support children to learn from their mistakes and find a positive way forward so that their trajectory does not lead them back to criminal justice involvement at a later age.

Criminalising young children punishes them for adverse life experiences

Children and young people with experiences in out-of-home care are overrepresented in the youth justice system.⁹ Dean (2018) states that:

Young people involved in both the child protection system and under youth justice supervision are generally recognised as having a range of complex needs, including developmental trauma, problem behaviours and mental health difficulties among others.¹⁰

Cross-over kids, a recent study conducted by Monash University and the Children’s Court of Victoria, analysed the case files of 300 young people involved in youth justice with current or historical child protection involvement.¹¹ The study found that 47.7 per cent of the children in the review had been in residential care and residential care was often the context in which offending took place, with challenging behaviours being criminalised.¹² Further, the *Cross-over kids* study found that:

⁵ See for example the international study undertaken by Steinberg et al. 2018, ‘Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation’, *Developmental Science*, vol. 21, no. 2, pp. 1-26.

⁶ Gogtay, N, Giedd, JN, Lusk, L, Hayashi, KM, Greenstein, D, Vaituzis, AC, Nugent, TF 3rd, Herman, DH, Clasen, LS, Toga, AW, Rapoport, JL & Thompson, PM 2004, ‘Dynamic mapping of human cortical development during childhood through early adulthood’, *Proceedings of the National Academy of Sciences*, vol. 101, no. 21, pp. 8174-8179.

⁷ Sentencing Advisory Council 2016, *Reoffending by children and young people in Victoria*, Sentencing Advisory Council, Melbourne.

⁸ Gary Groves 2020, *Stronger Communities Investment & Inclusion – Their Futures Matter: transforming life outcomes for vulnerable children and families*, Presentation at the Department of Health and Human Services (Vic), 18 February 2020.

⁹ Dean, A 2018, *The intersection between the child protection and youth justice systems*, CFA Resource Sheet, Australian Institute of Family Studies, Melbourne.

¹⁰ Dean 2018, p. 1.

¹¹ Baidawi, S & Sheehan, R 2019, ‘*Cross-over kids*’: *effective responses to children and young people in the youth justice and statutory Child Protection systems*, report to the Criminology Research Advisory Council, Australian Institute of Criminology, Canberra.

¹² Baidawi & Sheehan 2019.

- 68 per cent of children in the study had been exposed to five or more adverse and challenging circumstances or events, signalling significant levels of cumulative harm
- Exposure to family violence was very high, at 73.5 per cent; with 22 per cent of children exposed to this violence by both parents. For Aboriginal children, exposure to family violence was 95 per cent
- High percentages of these children and young people had experienced neglect (67.4 per cent), physical abuse (60.1 per cent), emotional/psychological abuse (53.4 per cent) and sexual abuse (20.5 per cent).¹³

Other adverse life experiences for these children included high percentages of households where mental illness, involvement in the criminal justice system, and/or substance abuse were present. Twenty-two per cent of the children in the review had at least one parent who had died.

This data highlights the critical importance of holistic, comprehensive supports for children and families experiencing complex challenges, provision of support when and as required, and the need for more interconnected service systems.

Placing highly vulnerable children into a prison environment, with punitive practices such as solitary confinement and strip-searching, compounds the trauma and mental health conditions many of these children are likely experiencing.¹⁴ Criminalising and punishing young people for experiencing adversity, intergenerational trauma and familial disruption beyond their control is both ineffective and morally reprehensible. Raising the age of criminal responsibility will help reduce the exposure of children experiencing significant vulnerability to the criminal justice system; in addition, there need to be 'referral pathways to age-appropriate therapeutic services that provide non-stigmatising supports for children with welfare needs'.¹⁵

Criminalising young children is discriminatory

The current age of criminal responsibility disproportionately affects Aboriginal children and the Aboriginal community. Of the children aged 10-13 who spent time under youth justice supervision in 2017-18, 66 per cent were Aboriginal.¹⁶ These high numbers are driven by discrimination and disadvantage, factors over which children have no control.¹⁷ We must build on the powerful vision in *Ngaga-dji (hear me)* for a society that enables Aboriginal children to thrive in their culture, families and communities, that hears their voices, and treats children as children, not criminals.¹⁸ Aboriginal children who are experiencing risk factors must have access to support from Aboriginal community-controlled organisations and services that understand Aboriginal wellbeing and address the causes of offending.¹⁹

¹³ Baidawi & Sheehan 2019.

¹⁴ Australian Institute of Health and Welfare (AIHW) 2013, *Young people aged 10–14 in the youth justice system 2011–12*, AIHW, Canberra.

¹⁵ O'Brien, W & Fitz-Gibbon, K 2017, 'The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' views and the need for principled reform', *Youth Justice*, vol. 17, no. 2, pp. 134-152.

¹⁶ Australian Institute of Health and Welfare (AIHW) 2019, *Youth justice in Australia 2017-18*, Cat. no. JUV 129, AIHW, Canberra.

¹⁷ Koorie Youth Council 2018, *Ngaga-dji (hear me): young voices creating change for justice*, Koorie Youth Council, Melbourne.

¹⁸ Koorie Youth Council 2018.

¹⁹ Koorie Youth Council 2018.

Criminalising young children is out of step with human rights obligations and international standards

The United Nations Committee on the Rights of the Child has called for countries to have a minimum age of criminal responsibility set at 14 years or higher and recommends that children under 16 years should not be deprived of liberty.²⁰ Upon failure to implement previous recommendations to that effect, in 2019 the UN Committee again called on Australian Governments to raise the age of criminal responsibility to at least 14 years, a recommendation supported by the National Children's Commissioner.²¹

The average age of criminal responsibility world-wide is 14 years.²² This puts Australia behind much of the world.

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

The age of criminal responsibility should be increased to at least 14 years of age for all types of offences, regardless of the circumstances or the nature of the offence in all Australian jurisdictions. As previously emphasised, children below this age are not developmentally capable of fully understanding their conduct and its consequences and therefore should not be held criminally accountable for an act, regardless of its nature. Additionally, we should not be punishing children who are vulnerable, through no fault of their own, as a result of exposure to multiple and traumatising adverse events in their childhood environments, for actions they are not developmentally able to comprehend.

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

The presumption of *doli incapax* has been critiqued – amongst other reasons – because the psychological assessments necessary to prove this are discretionary, reliant on legally trained professionals ordering such assessments rather than experts trained in developmental psychology, and the processes are not the subject of scrutiny or regulation.²³

However, as we are proposing that the age of criminal responsibility be raised to at least 14 years of age, *doli incapax* would no longer apply or be required. Only raising the age would provide a suitable safeguard for children.

²⁰ Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st session, UN Doc CRC/C/GC/24 (18 September 2019).

²¹ Australian Human Rights Commission 2019, *Children's rights report 2019 – In their own right*, Australian Human Rights Commission, Sydney; Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Australia, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019).

²² Hazel, N 2008, *Cross-national comparison of youth justice*, The University of Salford, Manchester.

²³ O'Brien & Fitz-Gibbon 2017.

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

Protecting children is everyone's responsibility. All levels of government, civil society and the broader community must be engaged in promoting the safety and wellbeing of Australia's children. We need a whole-of-government approach to coordinate these efforts. Based on the review of the literature we have undertaken and feedback from member organisations working every day with children at risk of entering the youth/criminal justice system, the Centre believes the following elements are required to enable prevention and early intervention:

Aboriginal-led solutions for Aboriginal children

The social and emotional wellbeing of Aboriginal children is supported when the principles of self-determination, child and youth participation and connection to culture, family, Elders and communities are embedded in our service systems.²⁴ The Aboriginal community must be resourced and supported to deliver a range of services to meet the needs of children, including diversionary services, as an alternative to criminal justice responses.²⁵

A shared outcomes framework

To enable the system to succeed, we must work together to develop a shared outcomes framework for children and families that would operate across all levels of government, departments and service sectors. This framework would articulate our shared and collective responsibility in working towards a common goal: keeping children out of prison and well supported in their family and community. This framework would also outline key reporting and accountability mechanisms. Scotland's National Outcomes Framework offers a useful and comprehensive example.²⁶

Investment in the first thousand days – the right supports from infancy

Providing quality support to parents and carers during the first thousand days of a child's life is critical to strengthening protective factors that can interrupt a trajectory into the criminal justice system. The Murdoch Children's Research Centre has undertaken a comprehensive examination of the evidence that shows the links between abuse and neglect in early childhood and later impacts in relation to disruptive social relationships and behaviours, criminal behaviour, violent crime and adverse health and wellbeing outcomes.²⁷

Strengthen the early intervention capacity of the child and family services system

The *Roadmap for Reform: Strong Families, Safe Children* (the Roadmap) is the Victorian Government's policy outlining the case for change in the child and family services sector, acknowledging that Victoria was failing too many children who were experiencing vulnerability and hardship. The Roadmap

²⁴ Koorie Youth Council 2018.

²⁵ Koorie Youth Council 2018.

²⁶ See Scotland National Performance Framework: <<https://nationalperformance.gov.scot/>>.

²⁷ Moore, T, Arefadib, N, Deery, A, & West, S 2017, *The first thousand days: an evidence paper*, Centre for Community Child Health, Murdoch Children's Research Institute, Melbourne.

emphasises ‘the need to focus on early intervention, prevention and sharing responsibility’.²⁸ A recent cost-benefit report from Social Ventures Australia shows that ‘early intervention prevents progression to further disadvantage and high-cost interventions, including residential services, homelessness, and the youth justice system’.²⁹

To enable the prevention and early intervention that is required, the Centre recommends additional investment in the capacity of the child and family services sector to deliver early intervention programs that are proven to work.³⁰ Investment in proven programs that enhance the caregiver skills and capacities of parents and carers through intensive support can interrupt the current trajectory that sees too many children and young people experiencing poor life outcomes, including youth justice involvement, by:

- reducing the incidence of child abuse and neglect
- addressing the concerns that result in children being reported to statutory child protection
- increasing protective factors
- reducing entries into out-of-home care
- securing a better future for children who cannot live safely at home.

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

There are a range of effective programs and approaches in Australia and overseas that could be introduced, expanded or strengthened to provide effective support to young children at risk. Government is best placed to conduct service mapping, investigate the available options and bring together a coherent strategy for service delivery. Below are some key examples of effective practice and approaches in Victoria:

Commitment to care, not custody

In February 2020, the Victorian Government released the *Framework to reduce criminalisation of young people in residential care*, a shared commitment to reduce the unnecessary and inappropriate contact of young people in residential care with the criminal justice system. The framework was co-signed by the Department of Health and Human Services, Department of Justice and Community Safety, Victoria Police, the Centre for Excellence in Child and Family Welfare and the Victorian Aboriginal Child Care Agency. The framework establishes guiding principles, outlines roles and responsibilities and governance arrangements and makes a commitment to the development of an action plan. In Victoria,

²⁸ Department of Health and Human Services 2016, *Roadmap for reform: strong families, safe children*, Victorian Government, Melbourne, p. 4.

²⁹ Social Ventures Australia (SVA) 2019, *The economic case for early intervention in the child protection and out-of-home care system in Victoria*, SVA Consulting, Melbourne.

³⁰ Centre for Excellence in Child and Family Welfare (CFECFW) 2019, *Intervening earlier with children and families experiencing vulnerability & addressing the crisis in Victoria’s out-of-home care system*, State Budget Submission 2020-21, CFECFW, Melbourne.

this will help to make sure that proactive action is taken to meet the needs of children in residential care and will form an important part of the suite of responses offered to children upon an increase to the age of criminal responsibility.

Therapeutic residential care

The *Cross-over kids* report notes that therapeutic residential care, which is available to some children and young people with complex and extreme needs, has seen significant improvements in outcomes, an experience reflected by many of our member organisations.³¹ We believe that all residential care environments must be transitioned to evidence-informed therapeutic models of care to make sure these benefits are shared among all children who cannot live with their family or in home-based care.

Evidence-based models being delivered in Victoria

Victoria is currently delivering a number of evidence-based models aimed at reducing offending among young people through support delivered in the home. Multi-Systemic Therapy (MST) is an internationally proven treatment model that works to promote positive behaviour and decrease anti-social behaviour. It is being delivered by OzChild to young people who are subject to court-ordered youth justice supervision.³²

Functional Family Therapy – Youth Justice (FFT-YJ) is being delivered by Anglicare and provides services in the family home to reduce reoffending. The program has a strong evidence base and has been shown to reduce recidivism by 50 per cent.³³ There is scope for referral pathways to these proven programs to be altered to provide support to children in need of behaviour support outside of formal youth justice pathways.

Navigator

Difficulties engaging in school and educational disruption are known risk factors for offending, an issue highlighted in the *Youth Justice Review and Strategy* report which acknowledges the role of educational responses in reducing offending among children and young people.³⁴ The *Navigator* program supports disengaged students to re-engage with education. It currently operates in several regions of Victoria, with a state-wide rollout underway. Through the provision of intensive, trauma-informed case management, including assertive outreach, *Navigator* supports young people to address and overcome barriers to school engagement and learning. As a result, *Navigator* has achieved school re-engagement with 70 per cent of young people in the program.³⁵

School and education focused initiatives are essential to prevention and early intervention, and *Navigator* serves as a successful preventative measure to youth justice involvement. It currently provides support to high school age students; however, school engagement challenges often begin

³¹ Baidawi & Sheehan 2019; Department of Health and Human Services 2016, *Program requirements for the delivery of therapeutic residential care in Victoria*, Victorian Government, Melbourne.

³² See: <<https://www.ozchild.org.au/service/multisystemic-therapy-mst/>>.

³³ See: <<https://www.anglicarevic.org.au/australian-first-youth-justice-program-promises-dramatic-reduction-in-re-offending/>>.

³⁴ Armytage, P & Ogloff, J 2017, *Youth justice review and strategy: meeting needs and reducing offending*, Victorian Government, Melbourne.

³⁵ Department of Education and Training n.d., *Navigator pilot – Evaluation snapshot*, Victorian Government, Melbourne.

much earlier. The Centre is advocating for expansion of this successful program to primary school children showing early signs of school disengagement.

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

The Centre recommends that state and territory governments establish panels of experts from across sectors and government departments to advise on implementation and to collate best practice responses. Children and society are best served by holistic supports that focus on meeting all of children's needs, including housing, safe home environments, education, health and mental health and cultural safety. By strengthening their connection to community, there is reduced likelihood of engaging in disruptive behaviours, which can act as a protective factor for other members of the community.³⁶

Are there issues specific to states or territories (e.g. operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

The Centre is not aware of any issues specific to Victoria that would be relevant to considerations of raising the age of criminal responsibility. We have previously recommended that the Victorian Government amend section 344 of the *Children, Youth and Families Act 2005* to raise the age of criminal responsibility to at least 14 years.

Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

In 2017-18, 983 children aged 10 to 13 years spent time under youth justice supervision in Australia.³⁷ While the number of children is numerically low, the costs of youth justice intervention to these children, their families, their communities and society are high.

The Centre's review of the literature, particularly in relation to children's brain development, and feedback from our members across disparate forums suggests that the current minimum age of criminal responsibility in Australia, at ten years of age, harms children, and disproportionately affects Aboriginal and Torres Strait Islander children and children in out-of-home care. It is discriminatory and out of step with human rights standards and the medical science on child brain development. This injustice must be resolved as a matter of priority, by raising the age of criminal responsibility to at least 14 years in all Australia jurisdictions and providing children with the support they need to thrive.

³⁶ Foster, C, Horwitz, A, Thomas, A, Opperman, K, Gipson, P, Burnside, A, Stone, D & King, C 2017, 'Connectedness to family, school, peers, and community in socially vulnerable adolescents', *Children and Youth Services Review*, vol. 81, pp. 321-331.

³⁷ Australian Institute of Health and Welfare (AIHW) 2019, Youth justice in Australia 2017-18, Cat. no. JUV 129, AIHW, Canberra.