

The Chair
Age of Criminal Responsibility Working Group
c/- Strategic Reform Division
Department of Justice
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Council of Attorneys-General – Age of Criminal Responsibility Working Group review

Dr KJ Snow^{1,2}, Dr JT Young^{1,2}, Dr RD Borschmann^{1,2}, Ms L Southalan¹, Prof SM Sawyer^{1,2} and Prof SA Kinner^{1,2}

1) Justice Health Unit
University of Melbourne

2) Centre for Adolescent Health
Murdoch Children's Research Institute

We are pleased to have the opportunity to prepare a submission on this important issue. As public health professionals, we have focused our response on the terms of reference which pertain to government systems and responses, rather than specific matters of law (ToRs 3 and 9). Our responses to each remaining term of reference are below.

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

The age of criminal responsibility in Australia should be raised to at least 14 years in all circumstances. This is consistent with evidence regarding the reasoning abilities of children and young adolescents,¹ the harmful impacts of the criminal justice system on their health, well-being, and development,² and their risk of future offending.^{3,4} It is also consistent with the recommendation of the United Nations Committee on the Rights of the Child in its 2019 General Comment 24. The Committee, having considered extensive evidence and submissions, called on all States to raise the minimum age of criminal responsibility to at least 14 years.⁵

*“In the original general comment No. 10 (2007), the Committee had considered 12 years as the absolute minimum age. However, the Committee finds that this age indication is still low. States parties are encouraged to **increase their minimum age to at least 14 years of age**. At the same time, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age.”* - United Nations Committee on the Rights of the Child⁵ (our emphasis)

Children under 14 years old have limited impulse control and ability to predict and appreciate the consequences of their actions.¹ This is well-recognised in other areas of Australian law. For example, it is one

of the reasons why children of this age are not permitted to operate motor vehicles or consent to medical care without parental/guardian involvement. Despite the apparent presumption of *doli incapax*, hundreds of children under 14 years old are detained each year in Australia, most of these on remand.⁶

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

The age of criminal responsibility in Australia should be raised to at least 14 years in all circumstances. One might expect that in Australia at present, children under 14 years old would only be incarcerated in extreme circumstances such as in relation to serious violent acts. However, this is not the case. For example, no child under 14 was convicted of homicide, attempted homicide or manslaughter in Australia in 2018-19.⁷ Instead, the most common convictions for children aged 10-14 years old were theft and unlawful entry.⁷

Many cases of theft and unlawful entry are spontaneous acts, rather than planned, intentional acts. They are often undertaken when children are emotionally aroused by being in the presence of other young people. While the outcomes of certain behaviours may be characterised as 'criminal', the child's intent may not have been to commit a crime. There is a very real risk that behaviours at the margin of normal adolescence are being criminalised.

Australian Bureau of Statistics (ABS) data regarding criminal proceedings indicate that many children are prosecuted for relatively minor matters. In addition, more young people are held on remand than after sentencing: the rate of unsentenced detention of young people is significantly higher than for sentenced detention (3.47 per 100 000 compared to 2.36 Australia-wide for the June quarter 2018)⁸. Many children held on remand are not found guilty of the crime they were accused of.

Whether criminal proceedings are initiated against children is determined not only by their alleged behaviour, but also by various external factors, many of which are beyond their control. Aboriginal and Torres Strait Islander children are disproportionately impacted by the criminal justice system,⁶ as are children with current or prior involvement with the out-of-home care system.⁹ Behaviours that would be dealt with privately in a family home can result in police involvement when they occur in a residential out-of-home care facility.¹⁰ Recently, a lawyer told us of a case where a child was charged with an offence after throwing a cup in a residential care home (a "resi"). Involving the police in such matters is likely inappropriate, and is presumably symptomatic of wider problems within these services. Staff working in the out-of-home-care system require appropriate training and support to manage and de-escalate problematic behaviours from the children in their care, without involving the police except when necessary.

*"Resi [residential care] is not a home. It's a house where they take all the kids doing bad sh*t and the kids who've had bad sh*t done to them and stick 'em together like fire with fire. [...] Cops were always at that resi unit, called around 'cos someone smashed a cup, stole another kid's phone or punched a wall." – Ngaga-dji (Hear Me) report¹⁰*

Even when a child does commit a serious or violent act, a criminal justice response may be counter-productive. To the extent that the aim of the youth justice system is to promote development into a healthy adult who is less likely to harm others, both recidivism statistics and narrative reports suggest that the current youth justice system in Australia is not achieving that aim.^{2,3,10}

Alternative systems exist in other countries where, for example, violent behaviour in children is managed by the health and social welfare systems, as opposed to the criminal justice system.^{11,12} To suggest that such a system be adopted in Australia is not to downplay the seriousness of any violent acts committed by children. Such acts are inherently serious, whether they are committed by a nine year old or a thirteen year old. The question is whether the most effective response to these acts is criminal prosecution, and whether criminal prosecution achieves the aims we desire, both for the child involved and for our society more broadly. If criminal prosecution is not in their best interests and does not achieve the aims we desire, then we need to seriously consider alternative approaches.

ToR 4: Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

The minimum age of detention should be raised to 16 years or higher. An alternative system, in which community services play a more prominent role, needs to be implemented to more effectively respond to harmful behaviours by children.

*“The Committee encourages the State parties to fix an age limit for the use of deprivation of liberty and **recommends that no child in conflict with the law below the age of 16 years old be deprived of liberty**, either at the pre-trial or post-trial stage. Even above that age, deprivation of liberty should only be used as a measure of last resort and for the shortest period of time with the child’s best interests as a primary consideration.” - United Nations Committee on the Rights of the Child⁵ (our emphasis)*

A Public Health Approach

In addition to the human rights arguments, there are strong public health grounds in particular for minimising or eliminating the use of detention against children. Children and adolescents in youth justice detention have complex health needs and require intensive support.^{12,13} Detention damages these children.^{2,10,14} Despite numerous well-meaning policies intended to limit the damaging and counter-productive impacts of detention on children, multiple inquiries have shown that these policies are not effective.^{2,14}

The Royal Commission And Board Of Inquiry Into The Protection And Detention Of Children In The Northern Territory found that: *“Senior executives and the management and staff at the detention centres implemented and/or maintained and/or tolerated a detention system seemingly intent on ‘breaking’ rather than ‘rehabilitating’ the children and young people in their care, particularly those with difficult and complex behaviours”.*² A different response is required.

The capacity of intellectually disabled children, in particular, to adapt to the environment in a youth detention centre and follow staff instructions is limited.² The commissioners into youth detention in the Northern Territory made the point that incarcerating an intellectually disabled ten year old could be understood as equivalent to incarcerating a developmentally normal six or seven year old, depending on the child's level of capacity.² Such children's experiences of detention can be highly traumatic and will likely compound their problematic behaviours and add new concerns, rather than reduce them.² Yet, too many children with mild to moderate cognitive disabilities remain undiagnosed both in the community and in juvenile justice settings. These disabilities may be congenital (e.g. fetal alcohol syndrome) or may be due to acquired brain injuries (e.g. following physical trauma).

Research in 2018 found that 89% of sentenced young people in Western Australia's youth detention facility had at least one severe neurodevelopmental impairment.¹⁵ This research found that many of the young people with profound impairment had not received any prior comprehensive assessment. This was despite their prior engagement with child protection services and the justice system, and their attendance at school. This indicates a tendency in multiple sectors to classify problematic behaviour as being 'naughty' or criminal rather than properly investigating underlying health issues.

Recent reviews of the health of young people in detention have found high rates of other physical and mental health problems and health-risk behaviours among adolescents in the justice system, compared to their peers who have not been detained.^{13,16} The reviews found that many detained adolescents have complex, co-occurring health conditions, including mental disorders such as self-harm, suicidal behaviour, substance dependence, and cognitive dysfunction and learning difficulties. One review also noted growing evidence that "adolescents who have been in detention die at a rate that is five to 41 times higher than that of their age-matched and sex-matched peers, most often from drug overdose, suicide, injury, or violence."¹²

Un-sentenced Detention

The issue of remand is particularly pressing. On any given day, many more children are held on remand in Australia than in sentenced detention.⁶ Children held on remand have limited access to services, including health assessments and appropriate transitional planning.² Furthermore, children are sometimes held on remand or in police cells for operational and "welfare" reasons, rather than due to safety or flight-risk considerations.^{2,17} Children held on remand are often held in the same facilities as sentenced children, or in some cases, as adults.^{2,14,17} This is unacceptable.¹² Detaining a 10 or 12 year old with 16-18 year old adolescents is both physically unsafe and developmentally inappropriate.¹⁷ An additional problem is that most staff in adult correctional facilities have limited training or resources to safely care for children,¹⁴ particularly those aged 10-13, who are physically small and intensely vulnerable. There is an urgent need to limit the use of remand against children under 14, and to develop a more effective system for any older child who is detained.

Sentenced Detention

Even if remand were addressed, sentenced detention in the criminal justice system would continue to have profound, negative impacts on children's social, emotional and educational development.² The younger the child, the more profound these impacts can be. The social norms that a 10 or 12 year old learns in a youth justice facility are radically different to those that would be learned in a primary school. Engagement with

quality education is one of the few protective factors in the lives of many vulnerable children. In contrast, inappropriate socialisation within a youth justice facility is likely to have profound and lifelong impacts.

Children who commit serious, violent offences require an intensive response to address the underlying causes of this behaviour, and promote their development into healthy adults. Removing children from family supports and mainstream education in order to incarcerate them with older adolescents is extremely unlikely to achieve this aim. Evidence clearly shows that the consequences of incarcerating children are the opposite of what would be wished: their recidivism rates are higher than almost any other group.³ The younger a child is when they are first detained, the less likely it is that they will avoid incarceration in adulthood.³ This is demonstrated both by descriptive statistics from the Australian Institute of Health and Welfare,³ and by causal analysis using data from the USA.⁴

“Of those with detention as their first supervised sentence, all (100%) those aged 10–12 at the start of this sentence returned to some type of sentenced supervision before they turned 18. This rate of return fell slightly with successive age groups, to about 84% of those aged 14, 75% of those aged 15, 53% of those aged 16, and 16% of those aged 17.” – Australian Institute of Health and Welfare³ [our emphasis]

This is stark evidence that our current policies are not consistent with what they were intended to achieve.

ToR 5: What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

Recommendations for preventing and responding to harmful behaviour by children

1. Implement and adequately resource a ‘justice-reinvestment’ approach.
2. Provide adequate resources for schools to constructively address disruptive or harmful behaviour by students without resorting to exclusion, suspension, or expulsion.
3. Provide intensive support services for families and carers of children with intellectual disability or behavioural problems, including crisis response by appropriately trained health professionals (rather than police).
4. Invest in the out-of-home-care system to better support kinship carers, attract and retain more appropriately trained and well-supported foster families, and limit the use of residential units.
5. Provide predictable, consistent funding for community-based health, social and legal services to minimise staff turn-over and burn-out, and maximise consistency of care.

A multi-sectoral approach is needed to address harmful behaviour by children, spanning the education, child protection, health, and criminal justice systems.^{2,17} Contact with the criminal justice system often occurs after a long period of difficulties in school,¹⁰ ongoing challenges associated with health and social problems (particularly neurodevelopmental disability),^{16,17} and involvement in the child protection system.^{2,9}

Education

Schools are critical sites for prevention.¹⁷ At present, teachers in many schools are severely under-resourced and under-supported to deal with challenging behaviour from their students, including behaviours related to intellectual disability and poor mental health.¹⁸ Often the default response is exclusionary – first removal from the classroom, followed by suspension from school, and eventually expulsion.^{10,19} Children with neurodevelopmental disability or other educational challenges frequently act out in classrooms as a result of frustration or humiliation.²⁰ Repeated exclusion from school sets children back educationally and compounds social exclusion, making it harder for them to (re-)engage in the classroom, and fuelling a vicious cycle of more disruptive behaviour.¹⁰

“Every school I’ve been to kicked me out. Expelled in Grade One, Grade Two, Grade Four and Year Seven. At one school they told me to come in from 9am-11am. At the next one they said, “Just come in on Tuesdays.” I got so behind it was impossible. They didn’t want me, so it was better for everyone that I stopped trying. I never got reading and writing so there was no point in staying.” Ngaga-dji (Hear Me) report¹⁰

These issues can be addressed through additional educational support, however currently assessment and support services are not available at the scale needed.¹⁸ Judges from the children’s courts have told us of cases where intellectual disability was not recognised until the child came into contact with the criminal justice system. Schools need pathways to multidisciplinary assessment for students with disruptive behaviours; assistance with the development of learning and behavioural strategies, and sufficient resources to support struggling children to remain involved in education.^{18,19}

Disability Support

A very high proportion of children who are charged with criminal offenses have an intellectual disability or an acquired brain injury.^{16,17} Parents of these children often report having limited support from the health system in caring for their children and responding to their behaviours. One mother told us of the serious challenges she faced caring for her adolescent son, whose acquired brain injury had made him impulsive and prone to violent behaviour. The only support available to her during these episodes was to call the police. He was recurrently detained in the youth justice system, and is now in an adult prison. Families need consistent long-term support in caring for children who engage in challenging or harmful behaviours, not just a punitive criminal justice response during times of crisis. The ongoing Royal Commission into disability services is likely to shed light on the extent to which reforms are needed in the health and disability sector to better support families.

Consistent under-funding of community-based services – including Aboriginal health services, alcohol and other drug services, and legal aid services – contributes to high staff turn-over and burn-out. A consequence of this is that vulnerable children and young people must constantly rebuild trusting relationships with service providers. This compromises their ability to fully engage with and be retained in these services.¹⁰

When resourced appropriately, these services can help children to address substance use and other underlying issues that drive problematic behaviour. The location of services is another issue, with remote, regional and outer metropolitan communities having comparatively limited access to many services, especially specialist health services and legal aid.

Family Support and Out-of-Home-Care

Many children arrive in youth justice facilities following contact with the out-of-home-care system.¹⁰ Vulnerable families require support in the early years to provide a safe, nurturing environment for their children and to prevent abuse or neglect.¹⁹ Some removals to out-of-home-care occur as a direct consequence of poverty, rather than neglect.¹⁰ If abuse or neglect does occur, residential care facilities do not support the healthy development of children who have had these experiences.¹⁹ Placing multiple children with traumatic histories, challenging behaviours and/or intellectual disabilities in the same residential facility is unlikely to yield positive outcomes, especially in the absence of adequate resources to manage their predictable challenging behaviours.¹⁹ Access to trained staff is imperative, as are appropriate staff-to-resident ratios. Frequent movements between out-of-home-care placements further disrupt positive relationships with families, communities, health services and schools.¹⁰

“Children as young as nine live in facilities where they have to ask staff to unlock their bedroom door if they need time to themselves, or ask for the kitchen to be unlocked if they want something to eat. The risks of peer-to-peer sexual abuse, assaults and other critical incidents are aggravated by poor matching of residents within the units. The evidence against this form of care continuing is overwhelming and recommendations for their closure have been made repeatedly. The Commission recommends that these units be closed.” - Child Protection Systems Royal Commission Report, 2016¹⁹

The out-of-home-care system itself is severely under-resourced, contributing to the over-use of remand.^{2,17,19} Multiple cases are documented in which children have been held in custody because there was no suitable alternative accommodation to send them to: their families were unsafe, no emergency foster placement was available, and residential care facilities were full.¹⁷ Sometimes this has also occurred with sentenced children despite many months being available to plan for release from custody.² This is an avoidable and unacceptable situation.

Far greater support for kinship care is needed to keep children connected to their families and communities, especially Aboriginal children.^{10,19} Many children in out-of-home-care have complex health and psychosocial needs, which kinship or foster carers may not be able to meet without intensive support.^{19,21} Additional investment is also needed in attracting, training and supporting foster families, who are currently being lost from the system faster than they are being replaced.²¹

Justice Reinvestment

Detention of children in Australia costs approximately \$531,000 per child per year, when all associated costs are accounted for.²² In contrast, using the same accounting methods, community supervision costs approximately \$60,000 per child per year.²² These funds come largely from state government budgets, as would the funds for the preventive strategies proposed above. Those strategies would have widespread

financial benefits, not only in terms of reduced criminal justice costs, but also in improved productivity and reduced health system costs. A public health approach to youth justice, such as outlined above, would have profound benefits for the well-being of many thousands of vulnerable children and their families each year. Raising the age of criminal responsibility to 14 years old is a critical step towards such a public health approach. Strengthened supports through schools, disability services, out-of-home-care and legal services would maximise the opportunities for prevention and intervention among the most marginalised children in our society. New services or changes to existing services should be designed and implemented in consultation with young people, their families, and communities.

The approaches described above are reflected in the extensive work that has been undertaken in Australia to support justice reinvestment approaches to criminal justice reform. The value of a justice reinvestment approach was considered at length in the 2013 report of the Senate Legal and Constitutional Affairs References Committee, 'Value of a justice reinvestment approach to criminal justice in Australia'.²³ The Committee noted, for example, that offending behaviour by young people is linked to their circumstances and that there is strong evidence that children who suffer abuse or neglect are more likely to engage in criminal activity than those who do not. They also cited work by the Australian Institute of Health and Welfare showing that almost 15 per cent of young people under juvenile justice supervision received homelessness support in the year before their most recent supervision.²³ The Committee made nine recommendations about how a justice reinvestment approach could be implemented in Australia, including through national initiatives to support the data, evidence and evaluations required.

Notably, seven years later, data on key indicators of the youth justice system are still not available. The Productivity Commission reports that there are limited or missing data for numerous "key indicators" within the evaluation framework for youth justice systems in Australia.²² Data were only complete, up to date, and comparable for five of the eighteen indicators. Indicators with no data included "Equitable access to youth justice services"; "Timely access to diversionary services"; "Secure housing on exit"; "Family engagement with youth justice services" and "Completion of programs to address offending behaviour". That these indicators are not being assessed and reported highlights a failure to prioritise prevention and equity, as distinct from security concerns.

Some of the indicators are very basic, such that even a score of 100% may give little meaningful information. For example, it was reported that "Nationally (excluding the NT) in 2018-19, 99.3 per cent of young people in detention and of compulsory school age were attending an education course". While this is commendable, it provides no information about the level of engagement - a child might be enrolled but have been excluded from classes for the majority of their time in custody. The Royal Commission into youth detention in the Northern Territory reported significant interruptions to education due to lock-downs and short-staffing.² Children detained at that time may have been enrolled, but they were not meaningfully engaged in education. Data are needed on the existing indicators, in the first instance, but more meaningful indicators also need to be developed.

In addition to the 2013 Senate Inquiry on Justice Reinvestment, the 2018 report of the Australian Law Reform Commission '*Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*' also provides concrete recommendations for legal and administrative reform.²⁴ These reforms would support both a justice reinvestment approach and the associated improvements in community-based, non-detention measures.

This submission endorses the recommendations in both the 2013 Senate inquiry and the 2018 Australian Law Reform Commission as representing the approach needed to meaningfully improve Australia's response to young people in contact with criminal justice agencies.^{23,24}

ToR 6: 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.

Detailed recommendations for responding to harmful behaviour by children and reforming youth justice systems are available from numerous reports published in recent years, including the report of the Royal Commission And Board Of Inquiry Into The Protection And Detention Of Children In The Northern Territory,² the Ngaga-dji report,¹⁰ and others.^{14,17,19,24} Although many investigations are focused on specific jurisdictions, the guiding principles and many concrete recommendations have broader relevance.

Some challenging behaviour by children may be expected given their developmental stage, particularly by children with intellectual disability or histories of trauma. Almost by definition, children aged 10-13 have limited capacity to take responsibility for their actions – this is one of the key things that differentiates them from adults. Teaching children appropriate and pro-social behaviour is best achieved by supporting strong relationships with families and carers, continued engagement in education, and addressing their needs for safety, secure attachment. This would support the development of age-appropriate emotional regulation as they grow up. There is abundant evidence that the youth justice system is not achieving this.^{2,3}

ToR 7: If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views and, if available, provide any supporting evidence.

Making service provision contingent on a child being charged with a crime is perverse, but service providers and police report that this is how indeed the system sometimes functions in Australia. If children and their families require services related to disability support, mental health, substance use, child protection, or education, they should be able to access them regardless of whether the child has been charged with or convicted of a crime. As discussed above, the Australian Law Reform Commission's 2018 report provides concrete recommendations for redirecting support services currently linked to justice system involvement into communities.

ToR 8: 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?

There are examples of alternative systems from which Australia could learn how best to prevent and address problematic behaviour by young adolescents. In Sweden, for example, children under 15 years who engage in violent or anti-social behaviour are managed through the social welfare system, rather than the criminal justice system.¹¹ This system provides for secure institutional care when needed, much as health and human services systems in Australia provide for the care of disabled children who cannot safely remain at home, including those who exhibit challenging or dangerous behaviours. In New Zealand, multi-systemic therapy is being used to provide effective alternatives to detention.²⁵ Within Australia, secure welfare units provide another example of secure settings where children in difficult circumstances are cared for and managed outside of the criminal justice system. Various Australian jurisdictions have already implemented successful diversionary programs which could be expanded.

ToR 10: Are there issues specific to states or territories (eg 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.

Australia's geography and demographics cannot be ignored when considering the impact of criminal justice policy on children. For geographically large jurisdictions with dispersed populations, such as Western Australia, Queensland and the Northern Territory, this is a critical consideration. Moving children thousands of kilometres from their homes exacerbates the many other harmful impacts of a low age of criminal responsibility. In the case of Western Australia, for example, the state's juvenile detention centre, Banksia Hill, is located in Perth. The 2017 report on Banksia Hill by the Office of the Inspector of Custodial Services described the demographics of the children:

"Some detainees are as young as 10, others are 18 or more. And they come from all parts of the State, many from as far away as the Kimberley, the Pilbara, and the Ngaanyatjarra Lands. Aboriginal children comprise 70 per cent of the total population, and almost all of the younger and regional children." - Office of the Inspector of Custodial Services²⁶

A system which relies on the removal of children under 14 thousands of kilometres away to detention – most of whom have severe neurodevelopmental impairment, as discussed above – is both counter-productive and expensive. The appropriate response to these issues is not the creation of additional places of detention in regional areas, but rather a multi-sectoral response focused on social determinants and justice reinvestment. A key part of this response is to raise of the minimum age of criminal responsibility and minimum age of detention. Geographically dispersed and culturally diverse populations create a more pressing need for place-based responses, including culturally appropriate and community controlled services.

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