



Review of age of criminal responsibility

Submission to the Council of Attorneys-General

February 2020

Introduction

The Centre for Innovative Justice ('the CIJ') welcomes the opportunity to contribute to the review by the Council of Attorneys-General of the age of criminal responsibility.

The CIJ's work is founded on the belief that the criminal justice system has the potential to function as a positive intervention in peoples' lives, rather than compounding trajectories of harm and disadvantage. For young people under the age of 14, however, the criminal justice system is simply not the right response. For this cohort more than any other, there is overwhelming evidence that, rather than having a deterrent effect, early contact with the criminal justice system is the greatest predictor of continuing offending.

This submission sets out a compelling argument for raising the age of criminal responsibility – one that is supported by human rights organisations, medical and legal professionals, and others who work directly with at risk young people.

Drawing on the CIJ's deep experience in researching, advocating for and piloting innovative justice approaches, we propose three approaches that the evidence suggests can more effectively address the multiple drivers of young peoples' offending.

The solutions we outline are not intended to be exhaustive, but point to the availability of restorative, rehabilitative and tested models for responding to young peoples' offending, including:

- *Restorative justice* – provides young people with an opportunity to redress harm they have caused and to better understand the experiences of those harmed by their actions.
- *Justice reinvestment* – diverts funds from prisons and into a range of evidence-based interventions within the community that work directly to address the root causes of crime.
- *Evidence-based therapeutic programs* – that can be targeted towards the very small proportion of young people whose offending is high frequency, serious and ongoing.





When referring to the cohort of 10 to 14-year-olds that are the subject of this submission, we use the terms ‘young people’ or ‘young people under 14’ - both for brevity and to recognise the agency and emerging maturity of this cohort. We consider, however, that a proportion of this cohort - certainly those aged under 12, some of whom are criminalised and even placed in detention - can be more accurately characterised as children and so have used the term ‘child’ where referring specifically to this younger age group.

Why do we need to raise the age of criminal responsibility?

In all Australian jurisdictions, the age of criminal responsibility is 10 years.¹ It is one of the lowest ages of criminal responsibility in the world.

This means that a child as young as 10 can be arrested, held in custody and charged by police; remanded in pre-trial custody until their matter is heard; brought before a court; and, for some children, sentenced to a supervised order in the community or detention in a youth detention facility.

The number of young people in Australia being exposed to the potentially harmful effects of the criminal justice system is not inconsequential: approximately 8,000 young people under the age of 14 were proceeded against by police in 2017-18.² The majority were dealt with for property-related offences as the primary offence, with theft, unlawful entry with intent and property damage together accounting for more than half of primary offences.³

For those children aged 10 to 13 who were charged and proceeded against in court, approximately 780 were subject to supervision in the community and a further 600 imprisoned in a detention facility.⁴ Many of those held in detention were on remand, having not yet been found guilty of a crime.⁵

The current age of criminal responsibility is in breach of international human rights standards

A survey of 86 countries around the world found that the median age of criminal responsibility is 14.⁶ 14 is also the minimum accepted age for criminal responsibility under international human rights law.⁷

The United Nations’ child rights experts have repeatedly criticised Australia for its ongoing failure to raise the age – most recently in September 2019, when the Committee on the Rights of the Child urged Australia to raise its age of criminal responsibility ‘to an internationally accepted level’ of no lower than 14.⁸

Raising the age of criminal responsibility to 14 would mean that each year approximately 8,000 Australian young people would be spared from harmful and criminogenic experiences endemic to the criminal justice system, and could instead be supported through developmentally appropriate and community-based responses.

The current age of criminal responsibility is not consistent with contemporary evidence on child development

The minimum age of criminal responsibility is the age at which our governments have determined a young person is capable of understanding that they have done something wrong and can be dealt with by the criminal justice system.

The current age of criminal responsibility is inconsistent with scientific evidence on child and adolescent brain development and cognition. Neurobiological evidence suggests that our brains are not fully mature until we reach our early twenties.⁹ The Sentencing Advisory Council has noted that ‘this neurological immaturity (combined with various aspects of psychosocial immaturity), may undermine adolescents’ ability to refrain from criminal behaviour.’¹⁰





Research indicates that an under-developed frontal lobe, which is responsible for reasoning, planning and organisation, contributes to a lack of impulse control for young people. This tendency is further compounded by an attraction to risk, privileging of immediate reward, and a failure to properly account for future costs. Neurological, hormonal and social factors also make young people highly susceptible to peer pressure.¹¹

Cognitive development can also occur at vastly different rates - and there is significant evidence that many young people who come into contact with the criminal justice system have an intellectual disability; mental health problems; and cognitive functioning in the extremely low to borderline range.¹² Justice-involved young people have also often experienced abuse, neglect and trauma, which can impair and harm brain development.¹³ Fragmented experiences of school engagement and education are also common.¹⁴

The evidence on brain development and cognition suggests that young people under the age of 14 have reduced capacity to understand and regulate their own behaviours in a way that would make the idea of criminal responsibility meaningful - particularly for those young people with intellectual disability, mental health problems, reduced cognitive functioning and experiences of trauma.

It disproportionately impacts Aboriginal and Torres Strait Islander young people

Although the majority of Aboriginal and Torres Strait Islander young people will never offend, Aboriginal and Torres Strait Islander young people are vastly over-represented at every level of the criminal justice system.

The reasons for this over-representation are complex and related to a legacy of dispossession, marginalisation and intergenerational trauma, resulting in a significant gap between Aboriginal and non-Aboriginal young people across a range of indicators.¹⁵

Systemic racism and inequality are also a major causal factor – Aboriginal and Torres Strait Islander young people are less likely to be cautioned,¹⁶ often receive harsh sentences for minor offences, receive limited access to diversionary options, and are more likely to be processed through the courts than non-Aboriginal young people.¹⁷ As a result, on an average day in Australia, more than three quarters of those under the age of 14 in detention are Aboriginal and Torres Strait Islander young people.¹⁸ This is despite Aboriginal and Torres Strait Islander young people making up less than three per cent of all young people aged 10 to 13 in Australia.¹⁹

Aboriginal and Torres Strait Islander young people are more likely to have early contact with the criminal justice system.²⁰ Early contact with the system can itself be criminogenic - once a young person enters there is a 70 per cent likelihood they will return,²¹ setting them on a path of cycling in and out of justice-involvement and making it more likely they will graduate to the adult system.

Aboriginal and Torres Strait Islander people with a cognitive disability are also significantly more likely to be charged with their first offence at a younger age than those without cognitive impairment.²² A recent health survey of young people in custody indicated that almost one-quarter of Aboriginal and Torres Strait Islander young people in custody had a diagnosed intellectual disability, compared with 11 per cent of non-Aboriginal young people. More than 65 per cent of Aboriginal and Torres Strait Islander young people in custody had been diagnosed with a mental health disorder.²³

A national study of children with Fetal Alcohol Syndrome (a subset of Fetal Alcohol Spectrum Disorder, or FASD) found that 65 per cent were Aboriginal.²⁴ FASD is known to affect attention, impulsivity, learning, interpersonal relatedness, social skills, working memory and language development,²⁵ and has been linked to increased risk of justice involvement.²⁶



The over-incarceration of Aboriginal and Torres Strait Islander young people both perpetuates, and is a result of, marginalisation, enduring disadvantage and systemic injustice. Raising the age of criminal responsibility will have a significant impact on Aboriginal and Torres Strait Islander young people and communities, preventing very young people from becoming entrenched in the criminal justice system, and providing space for community-led and holistic responses.

It does not reflect the multiple and complex needs of young people who come into contact with the justice system

Punitive approaches to young peoples' offending are counterproductive and fail to acknowledge the disadvantage and trauma that are often a feature of young peoples' lives.

Research shows that young people who come into contact with the criminal justice system have often experienced 'profound childhood adversity and trauma, including histories of physical or sexual abuse, neglect, family disruption and/or significant economic disadvantage'.²⁷

In Victoria, which has the lowest rates of youth justice involvement in Australia, two-thirds of young people in detention are themselves victims of violence, abuse or neglect,²⁸ while a study of justice-involved young people in Queensland and Western Australia found that three-quarters of those surveyed had experienced some form of non-sexual abuse.²⁹

Young people with intellectual disability are disproportionately represented in the criminal justice system, making up about 14 per cent of young people in detention, compared with just three per cent of young women and four per cent of young men in the general population.³⁰ More than half of young people in detention are in the extremely low to borderline range of intellectual ability.³¹

A Western Australian study of young people in detention is even more stark – suggesting that almost nine out of every 10 young people in detention had at least one domain of severe neurodevelopmental impairment.³²

The study reported that for many young people, participation in the research was the first time they had received a comprehensive assessment to examine their strengths and difficulties. This was despite being engaged in school and, in many cases, having had previous contact with child protection services and the justice system.³³

Young people with cognitive impairment are at greater risk of poverty, more likely to have poor educational outcomes, and are subject to greater stigmatisation and violence than their peers³⁴ - all of which increases their risk of criminal justice involvement. Cognitive impairment can also impact a young person's reasoning, problem solving, learning and social abilities. This in turn makes it difficult for them to manage their behaviours, resulting in what one researcher has described as 'the criminalisation of disability and disadvantage'.³⁵

Mental health issues and psychosocial disability are also prevalent among justice-involved young people. A recent Australian study indicated that more than half of justice-involved young females experience high or very high levels of psychological distress (compared with 35 per cent in the general community), while for justice-involved young males, the rate was almost twice as high (33 per cent compared with 17 per cent of their counterparts in the community).³⁶

Poor mental health outcomes rise sharply for those who have experienced abuse. The same study found that, within the justice-involved cohort, those who had experienced abuse were:

- 2.5 times more likely to experience psychological distress;
- more than four times as likely to be depressed;
- three times as likely to have attempted suicide;
- almost twice as likely to have had an alcohol abuse disorder in the past 12 months; and
- six times as likely to have a diagnosis of Post-Traumatic Stress Disorder.³⁷



Young people who have been in the out-of-home care system – which responds to young people who have experienced, or been at significant risk of, harm in their home environment - are also criminalised at disproportionately high levels.

Child protection involvement is regarded by many in the sector as a pipeline to the criminal justice system.

This is borne out in the data - two-thirds of young people in detention in Victoria are, or have been, the subject of a child protection order,³⁸ and young people in out-of-home care are 19 times more likely to have contact with the youth justice system.³⁹

The ‘pipeline’ effect is particularly pronounced for young people in residential care, more than half of whom require legal support with criminal charges within a year of their placement in a residential facility.⁴⁰

Research by the CREATE Foundation has found that many young people in residential care interact with the justice system due to minor offences like fare evasion or stealing a chocolate bar. For some, their offending is welfare motivated – for example, breaking into a building to sleep because they were homeless. For others, their justice-involvement is the result of an act committed in a residential care facility, such as minor property damage, that for most young people in a home environment would not result in police involvement.⁴¹

Data clearly indicates that many young people in Australia’s youth justice system have multiple and complex needs, including disability, mental health problems, and histories of abuse and neglect. This use of the criminal justice system as a backstop to the grave, systemic failure to adequately support young people and their families, and to provide them with the conditions they need to thrive, is not appropriate or just.

Criminal justice involvement is not shown to reduce reoffending and may actually increase it

A recent report by the Sentencing Advisory Council (SAC) found that, rather than reducing reoffending, early contact with the formal justice system is associated with subsequent and more significant offending.

The SAC’s analysis of Victorian data found that the younger a child is at their first sentence, the more likely they are to reoffend; to reoffend violently; to continue offending into the adult jurisdiction; and to be imprisoned in an adult prison by the age of 22.⁴²

The same review also found that with each one-year increase in a child’s age at first sentence, the risk of reoffending reduced by 18 per cent.⁴³

By contrast, data shows that Victoria’s long-standing focus on rehabilitation and diversion of young people away from the formal justice system – for example, through warnings, cautions and restorative justice conferencing – has not reduced community safety.

The number of incidents committed by alleged offenders aged 14 and under in Victoria almost halved between the period 2009-10 to 2015-16,⁴⁴ coinciding with a policy direction that was focused on diversion of young offenders. A 43 per cent reduction in the sentenced cases in the Children’s Court also occurred over roughly the same period.⁴⁵

A similar effect has been observed in countries with a high age of criminal responsibility like Germany and Norway, which have low incarceration rates for older juveniles who are subject to criminal law.⁴⁶

These findings are consistent with a significant body of literature which suggests that the justice system is itself criminogenic – that is, it encourages and reinforces offending behaviour.





Even when young people are not sentenced or placed under youth justice supervision, researchers have found that criminal justice involvement has a stigmatising effect. For some young people, the process of being labelled a 'criminal' or an 'offender' can reinforce their adoption of a criminal lifestyle and identity.⁴⁷

Early criminalisation and the labelling of young people also leads to social exclusion,⁴⁸ making it harder for young people to engage with protective, prosocial supports such as school, sporting clubs and their wider community, as well as much needed support services.

The criminogenic effects of justice system involvement are most pronounced for the roughly 600 Australian young people under the age of 14 who are placed in detention annually. This includes a significant number of young people who have not yet been found guilty of a crime, with more than half of young people in detention on an average day in Australia on remand.⁴⁹

Independent reviews and inquiries in multiple Australian jurisdictions, including Victoria, Queensland and the Northern Territory, have shown that youth detention facilities are not safe or appropriate environments for young people.⁵⁰ These inquiries have revealed the unacceptable use of restraints and force; extended periods of solitary confinement and isolation; and substantiated accounts of abuse and mistreatment including verbal abuse, racist remarks, physical abuse and humiliation.⁵¹ The Northern Territory Royal Commission concluded that its youth detention centres were 'not fit for accommodating, let alone rehabilitating, children and young people.'⁵²

Even where juvenile detention facilities are designed to meet basic standards of dignity and human rights, placement in a custodial environment is harmful to young people. Custodial facilities tend to function as a 'criminal learning environment',⁵³ particularly for very

young people, who may come into contact with older, more prolific and serious offenders.

Young people in detention are also removed from their support networks and have their family life and education disrupted. This disruption can be particularly harmful for Aboriginal and Torres Strait Islander young people who may be removed from culture, language and kin groups.

Rather than defining young people as 'offenders', system and community responses to young peoples' transgressions should build on this cohort's unique capacity for behavioural change and reduce their exposure to criminal justice system intervention, given that evidence confirms this makes further offending more likely.

Doli incapax is not a sufficient safeguard

Under Australian law there is a rebuttable presumption of *doli incapax* - literally 'incapable of crime' - for young people under the age of 14. This is based on the idea that a young person under 14 years is 'not sufficiently intellectually and morally developed to appreciate the difference between right and wrong', and therefore lacks the requisite intent to commit a crime.⁵⁴

At law it is the responsibility of the prosecution to present evidence that a young person knew that their criminal conduct was wrong, and therefore, that they can be held criminally responsible. Recent research conducted by O'Brien and Fitzgibbon has observed, however, an informal reversal of the onus of *doli incapax*. Their study found that, in practice, the defence was required to initiate psychological assessments to establish a young person's lack of capacity and disprove that they understood the wrongfulness of their actions.

Other issues with *doli incapax* have long been recognised in Australia. For example, police interviews have been used to establish that a young person understood their conduct was



wrong, despite widespread understanding of the suggestibility of young people in interviews.⁵⁵ The Australian Law Reform Commission has also argued that *doli incapax* can, in some instances, disadvantage rather than protect young people, as it enables the prosecution to lead 'highly prejudicial evidence that would ordinarily be inadmissible'.⁵⁶

The presence of children as young as 10 and 11 in detention in Australia suggests that doli incapax is not a sufficient legal safeguard, with recent research observing that divergences between the theory and practice of the principle have greatly eroded its efficacy.

There are existing and effective alternatives to criminalisation

There are already programs and service responses in place in Australia that have the potential to replace criminal justice system intervention and the subsequent criminalisation of young people.

The United Nations' Committee on the Rights of the Child has stated that child-friendly, multidisciplinary responses, delivered as early as possible, must be a core element of child justice policy. These responses should include evidence-based intervention programmes that have demonstrated effectiveness in addressing psychosocial causes of offending behaviour, as well as increasing protective factors.⁵⁷

Innovative and community-based approaches such as restorative justice, justice reinvestment, and evidence-based programs offer a viable, more cost-effective response to offending behaviour and prevent young people from being exposed to the harmful effects of the justice system. These types of therapeutic responses are also likely to be far more effective at addressing those factors which 'appear to be most closely associated with serious and persistent youth crime, like disadvantaged neighbourhood of residence, poverty, early childhood abuse and rejection, illiteracy and so on.'⁵⁸

Australia has the tools needed to respond to problematic behaviours without resorting to the criminal justice system. Individual jurisdictions will need to determine which interventions and solutions are right for their communities and should ensure a suite of options are available that can be matched to the specific needs of young people and their families.

Innovative and effective alternatives to criminalisation

Restorative justice

The focus of restorative justice is on victim inclusion and offender accountability.⁵⁹

Restorative justice conferencing for youth offenders has been used in Australia for more than two decades and has a legislative basis in every jurisdiction. It typically involves bringing together the young person; the victim or victims; supporters for both the young person and victims; a police officer; and the conference convenor, whose role is to facilitate the discussion, and to provide support to the young person prior to and following the conference. In some jurisdictions, the convenor will also do preparatory work with the victim, while in others, such as Victoria, support for victims is provided through a separate service.

During the conference, the young person will be asked to tell their story (for example, what led to their involvement in the offence and how they were thinking and feeling at the time), and to acknowledge the harm they caused to the victim. The victim will then tell the young person how they have been affected by the offending, emotionally, physically and materially. Supporters of both the victim and the young person may also offer comments.

The convenor will then ask the young person to reflect on what they have heard, and some young people may apologise directly to the victim. The conference concludes with discussion of how the young person can repair the harm they have caused to the extent possible – for example, they may make a commitment not



to reoffend, to offer an apology, or to volunteer within their community.⁶⁰

Restorative justice has been shown to be effective in supporting young people to take responsibility for their actions and change their behaviour, with young people who have participated in restorative justice showing fewer tendencies towards violence and significantly lower rates of recidivism.⁶¹

Unlike traditional justice processes, which can leave both victims and offenders feeling dissatisfied, or that their voice was not heard, research has consistently shown that both victims and offenders perceive that they have been treated fairly and respectfully in the conference process, and that they are satisfied with conference outcomes. It has also found that young people feel supported by the people at their conference and that those involved seemed to want to work things out, suggesting that the conference process has the capacity to 'reconnect young people with their communities of care'.⁶²

Restorative justice practices can also be designed to be culturally appropriate and may have particular benefits for Aboriginal and Torres Strait Islander young people. Examples of restorative justice models that integrate culturally strengthening approaches include Rangatahi Youth Courts held on traditional marae and Youth Group Conferencing in New Zealand.⁶³

The CIJ's own experience delivering restorative justice conferencing - through our restorative justice delivery arm Open Circle - has found that restorative justice can be particularly beneficial where the offender is known to the victims or lives in the same community.

In an Open Circle matter involving a young person charged with culpable driving, working out how they would go on living in the same community was of great importance to all participants in the process, and the restorative engagement supported both the offender and the grieving family to do this.

In the absence of this engagement, this young person may have struggled to re-enter his community, resulting in further isolation and removal from social supports. Given that young people tend to commit offences close to home, restorative justice conferencing can therefore play a valuable role in supporting young people who have caused harm to remain a part of their community.

Justice reinvestment

Justice reinvestment is an innovative approach that aims to reduce long-term criminal justice system expenditure by redirecting funds away from prisons and into targeted, evidence-based interventions within the community that work to address the root causes of crime.⁶⁴

Justice reinvestment often involves working across multiple disciplines, services and community partners to achieve collective impact, with the effectiveness of interventions being actively monitored over time. Working directly with communities to identify the drivers of criminal justice involvement and to develop interventions that respond holistically to their needs and circumstances have also been central to the early application of justice reinvestment in Australia.⁶⁵

The first major justice reinvestment pilot site in Australia - the Maranguka Justice Reinvestment Project (Maranguka) in the remote town of Bourke in northwest New South Wales - is an Aboriginal-led project that was designed to empower the Bourke community to address their over-representation within the justice system.

The project involved more than 20 non-government organisations working alongside a coalition of local Aboriginal leaders to deliver a range of targeted interventions. These included a Warrant Clinic; a driving program for young people who had committed a licensing offence or were struggling to obtain a license; School Holiday Activity Programs; Healing and Connection to Country Sessions; a comprehensive Youth Support Model; and the development of police and community protocols around bail conditions to address high rates of bail breach.



Self-governance and community engagement were embedded throughout, as was continuous data collection, reporting and reflection.

Maranguka has had significant impact on outcomes for the Bourke community across multiple domains from birth to adulthood. Prior to its implementation, the Bourke community had the highest rate of youth crime and family violence in New South Wales. Between 2016 and 2017, it achieved:

- decreases in reported family violence incidents and family violence reoffending;
- improved educational outcomes;
- reductions in the number of juvenile charges and bail breaches by juveniles;
- reductions in the number of charges and bail breaches for adults;
- reductions in the number of days spent in custody by adults; and
- reductions in drug and alcohol related hospital admissions.⁶⁶

Impact analysis conducted by KPMG estimated \$3.1 million in savings to government in that year, with additional savings of \$7 million projected over five years.⁶⁷

As the Maranguka example shows, justice reinvestment's focus on early intervention and holistic approaches has the capacity to address drivers of youth offending in ways that the youth justice system cannot. For example, it can:

- deliver interventions that support young people to engage in education and employment;
- work with families in ways that are strengths-based;
- build the capacity of young people to manage their health and psychosocial wellbeing; and
- develop and implement strategies to reduce financial disadvantage, housing instability and other factors known to drive offending behaviour.

Because of its focus on local ownership, justice reinvestment is particularly well-suited to addressing geographically-determined over-representation, which is a significant issue in youth justice (young people from low socioeconomic areas in Australia are six times as likely to be under supervision than those from the highest).⁶⁸

The emphasis on place-based and community-led solutions is also consistent with the principle of self-determination, making justice reinvestment a powerful tool for Aboriginal communities and leaders to address the over-representation of young people in the justice system.

Evidence-based programs

Several evidence-based programs exist that have been shown to improve outcomes for at risk young people and their families, including Multisystemic Therapy (MST) and Functional Family Therapy (FFT).

MST involves a dedicated clinician working in a young person's home, school and community to support all aspects of their environment and to address barriers to service access. It has proven effectiveness with young offenders, reducing adolescent antisocial behaviour, such as drug abuse, and the number of criminal offences committed.⁶⁹ Studies have also found it can be effective for specific populations, including gang-involved young people⁷⁰ and young people with intellectual disability.⁷¹ In Australia, some providers work alongside Aboriginal advisers to ensure interventions are delivered in a culturally safe way.

FFT similarly works to assess and address a young person's risk factors within and outside of the family environment. One study, in which FFT formed part of a youth diversion program, found that those who successfully completed the program were less likely to offend as young adults and, where they did reoffend, it took longer for this to occur.⁷² A youth justice-focused version of the model has been rolled out in Victoria and has already demonstrated strong outcomes.⁷³



The nature of youth offending makes it uniquely amenable to highly targeted, needs-based interventions. This is because most young people who commit offences (nearly 89 per cent) can be described as 'low frequency' offenders - they will each commit, on average, two crimes, and together they account for less than 38 per cent of all offences committed by young people. By contrast, 'high frequency' youth offenders represent less than two per cent of all young people who commit offences and yet, between the ages of 10 and 18 they each commit, on average, 76.5 offences.⁷⁴

This concentration of high frequency (and most likely high needs) offenders means that the most intensive, wraparound responses can be directed towards this very small group, while lower frequency offenders can often be supported primarily through existing mainstream and universal services, including schools and youth services.

The cost-effectiveness of evidence-based programs also means they can form an important component of justice reinvestment approaches (where they align with community needs and goals). For example, studies have found that the delivery of MST in community settings results in considerable cost savings, with returns of approximately \$5 (US Dollars) in benefits to taxpayers and crime victims for every dollar spent over a period of 2.5 years following treatment.⁷⁵

Restorative justice conferencing, justice reinvestment and evidence-based programs are three promising interventions for young offenders that have been shown to be effective, including in an Australian context.

The CIJ's experience working alongside end users tells us that, in developing and implementing new and innovative approaches to justice, it will be vital to draw on the lived experience of young people, their families and communities to understand how different solutions can address the needs and goals of different communities.



Key recommendations

1. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only?

The age of criminal responsibility should be raised to at least 14 years in all Australian jurisdictions. This is to reflect the available evidence on brain development and cognition; to stop young people, who typically grow out of offending, from being exposed to the criminogenic effects of the criminal justice system; and to bring Australia in line with its obligations under international human rights law.

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?

As noted above, the age of criminal responsibility should be raised to at least 14 years in all Australian jurisdictions. There should be no 'carve outs' or exceptions to this minimum age for any offences.

3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* 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?

Research indicates that variable practice in relation to *doli incapax* has eroded its efficacy as a legal safeguard for young people under the age of 14 years, who are criminalised at alarming rates and, in some cases, detained. Raising the age of criminal responsibility to 14 is a far more effective means of ensuring young people under the age of 14 are not criminalised and receive a developmentally appropriate response to their behaviour. Once the age of criminal responsibility is raised to 14, the principle of *doli incapax* would become redundant.

4. Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (e.g. to 12) should a higher minimum age of detention be introduced (e.g. to 14)?

The harmful effects of detention are well understood and multiple reviews and inquiries in Australia have concluded that detention facilities are not safe or appropriate environments for young people. In addition to raising the age of criminal responsibility to 14, we would advocate, at minimum, for Australia to prohibit the detention of young people under the age of 16, with detention to be used only as a last resort where a young person poses 'genuine public safety or public health concerns'.⁷⁶





5. 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 organisation should be involved in their delivery?

We have outlined several programs and approaches that could form part of the response to young people if the age of criminal responsibility is raised. These include restorative justice, justice reinvestment and evidence-based therapeutic programs. Broadly, these three approaches take a holistic view of young peoples' offending and use restorative, therapeutic and strengths-based practice to support young people to change their behaviour. The specific interventions and providers that will be most effective in different jurisdictions and communities should be determined through community consultation.

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 antisocial 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?

Restorative justice conferencing, justice reinvestment and evidence-based programs have all been shown to be effective in supporting young people who may be engaging in antisocial behaviour.

MST has been used to support young people aged 12 to 17 in a youth crime context, and to support children as young as six and their families in cases where the child is at risk of abuse or neglect. FFT similarly targets young people aged 11 to 18, with a child welfare-focused adaptation of the model used to support very young children and their families. A key benefit of these programs is the focus on building the capacity of the family, often resulting in improved outcomes for parents and siblings as well as the young person.

Justice reinvestment is similarly promising for younger age groups as it has the capacity, as demonstrated by the Maranguka project, to target outcomes across the life cycle, including early childhood. The holistic, collective impact approach taken by justice reinvestment also enables engagement with other critical aspects of the service system, such as schools and health services.

Restorative justice has been shown to be effective in supporting young people to take responsibility for their actions and change their behaviour, with young people who have participated in restorative justice showing fewer tendencies towards violence and significantly lower rates of recidivism.⁷⁷ Restorative justice provides young people with an opportunity to redress the harm they have caused, to the extent possible, and to re-negotiate their place in the community.

The CIJ's extensive experience consulting with, and working alongside, end users demonstrates the importance of co-creating solutions with those with the greatest stake in how a system works. In developing and implementing approaches to addressing young peoples' antisocial behaviour, it will therefore be vital to draw on the lived experience of young people, their families and communities to understand how these and other solutions can address the needs and goals of different communities.



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- 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.**

We are of the view that a system waiting for young people to hit the criminal justice system before they get the services they need is a failed system. The three approaches we have outlined, alongside other therapeutic responses, can operate as an alternative to the youth justice system rather than an element of it.

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

The evidence tells us that youth justice involvement often does not have a deterrent effect and is in fact predictive of ongoing offending. The best practice approach to ensuring safe communities is to work with young people, their families, and the community as a whole to address the root causes of crime and ensure young people have timely access to developmentally appropriate interventions and supports.

Broader policies that strengthen communities, reduce poverty and increase engagement in schools also have a vital role to play in community safety and should form part of any policy response to at risk young people.





¹ See *Crimes Act 1914* (Cth), s 4M; *Criminal Code Act 1995* (Cth), s 7.1; *Criminal Code 2002* (ACT), s 25; *Criminal Code* (NT), s 38(1) & 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); and *Criminal Code 1924* (Tas), s 18(1).

² Australian Bureau of Statistics, Recorded Crime – Offenders, Australia, 2017-18, Table 21: Youth offenders, Sex and principal offence by age 2017-18. Please note, this dataset excludes public order and ‘miscellaneous’ offences.

³ It is important to note that acts intended to cause injury still represented a considerable proportion of this cohort’s offending (approximately one-quarter). The CIJ also recognises the significant impact on victims that property-related offending can have, as our own research with victims of crime has highlighted.

⁴ Australian Institute of Health and Welfare, *Youth justice in Australia 2017-18* Table S40b: Young people under community-based supervision during the year by age, sex and Indigenous, Australia, 2017-18 and Table S74b: Young people in detention during the year by age, states and territories, 2017-18 (2019).

⁵ According to the Australian Human Rights Commission, *Children’s rights in Australia: a scorecard* (2019), more than half of young people in youth detention on an average day are unsentenced, awaiting an outcome.

⁶ Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project (2017), University of New South Wales, Sydney.

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