



The Chair  
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c/- Strategic Reform Division  
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**Submission to Council of Attorneys-General review of age of criminal responsibility**

Thank you for the opportunity to make a submission to the above consultation.

The attached submission is made on a whole of Commission basis. We are happy for the submission to be made available publicly.

Yours sincerely

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## About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. The Commission includes:

- The President and Human Rights Commissioner
- The Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
- The Public Advocate and Children and Young People Commissioner (PACYPC); and
- The Victims of Crime Commissioner

Both the minimum age of criminal responsibility (MACR), and its flow-on effects, in the ACT and across Australia have direct implications for many of the Commission's functions under the HRC Act.

The human rights implications of setting an appropriate MACR are relevant to both the **President and Human Rights Commissioner's** legal policy advisory and community education functions, and to the **DHSDCS Commissioner's** handling of complaints about services for children and young people, including Bimberi Youth Justice Centre, and complaints about alleged unlawful discrimination.

The MACR is also directly relevant to the **PACYPC's** jurisdiction, which includes oversight of the Bimberi Youth Justice Centre, monitoring services for the protection of children and young people, and advocating for the rights and interests of children and young people (including those with disability) in ways that promote their protection from abuse and exploitation. The PACYPC is also responsible for consulting with children and young people in the ACT in ways that promote their participation in decision-making.

By way of context, until 6 April 2000, the MACR in the ACT was fixed at 8 years of age. This was increased under the [Children's Services Amendment Act 2000](#) (ACT) in view of an Australian Law Reform Commission (ALRC) recommendation that all Australian jurisdictions standardise the MACR at 10 years or more under a model criminal code.<sup>1</sup> In the ACT, section 25 of the *Criminal Code Act 2002* now fixes the MACR at 10 years of age (consistent with all other Australian jurisdictions). Section 26 of the Code codifies the presumption of *doli incapax* in respect of children aged 10 years or older, but under 14 years of old; that is, that the prosecution must establish, as a question of fact, that the child knew their conduct constituting an offence was wrong before the child may be held criminally responsible.

The Commission has consistently called for the ACT Government to review and raise the MACR in the ACT. In her 2005 audit of the former Quamby Youth Justice Centre, the Human Rights Commissioner recommended the MACR be raised to 12 years of age.<sup>2</sup> The Commission reiterated this view in July 2011 in its inquiry into the ACT Youth Justice System, including the Bimberi Youth Justice Centre,<sup>3</sup> and, recently, for the Australian Human Rights Commission's *Children's Rights Report 2019*.<sup>4</sup>

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<sup>1</sup> Australian Law Reform Commission, [Seen and Heard: Priority for Children in the Legal Process](#) (Report No 84, November 1997), [18.19].

<sup>2</sup> ACT Human Rights Commission, 'Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation' (Report, July 2007).

<sup>3</sup> ACT Human Rights Commission, 'The ACT Youth Justice System 2011: A report to the ACT Legislative Assembly by the ACT Human Rights Commission' (Report, 28 July 2011) 237.

<sup>4</sup> ACT Human Rights Commission, [Submission No 97 to Australian Human Rights Commission](#), *Children's Rights Report 2019* (28 October 2019), 8.

## Summary of our submission

- The Commission calls for Australian jurisdictions to raise the minimum age of criminal responsibility (MACR) to at least 14 years of age, in all circumstances and without exception for specific offences. In our view, the existing MACR of 10 years of age:
  - is contrary to human rights (including the rights of children, as noted by the UN Committee on the Rights of the Child), is out of step with international practice, reinforces cycles of systemic disadvantage of Aboriginal and Torres Strait Islander children and is counterintuitive to the protection of the community and preventing reoffending.
  - unduly punishes children with complex needs, trauma history and care and protection involvement for circumstances that are often beyond their control and fails to reflect that their developing maturity may not permit them to conclusively form the requisite *mens rea* to be held criminally responsible.
  - unjustifiably expends resources on accommodating children in detention. Addressing the root causes of offending through justice reinvestment in restorative and therapeutic approaches has been shown to be more cost-effective than detention.
- The Commission considers that the rebuttable presumption of *doli incapax* provides insufficient protection for children accused of crimes, operates unevenly and without systemic oversight and, significantly, contributes to children remaining remanded in detention for longer. In particular, the age range in which the presumption operates may be set too low with regard to the medical consensus as to children's developing ability to appreciate the wrongness and possible consequences of their actions. Should the MACR be raised, the Commission does not anticipate a need for *doli incapax* for children younger than 14 years of age.
- Raising the MACR should not be viewed as reducing accountability for children who engage in offending or other anti-social behaviours. A range of socio-educational pathways to accountability and rehabilitation within a family setting exist that have demonstrated positive outcomes. Greater investment in preventative and diversionary programs and strategies ought to be prioritised notwithstanding the outcome of CAG's review of the MACR.
- In view of their distinct cultural rights and the unacceptable overrepresentation of Aboriginal and Torres Strait Islander children in contact with the youth justice system, the planning, design and implementation of prevention, early intervention and diversionary responses for these children must be Aboriginal and Torres Strait Islander led.
- The Commission considers that programs and interventions must be intensive, evidence-based, trauma-informed, culturally appropriate and, above all, applied at the earliest possible point of contact with the justice system. Responsibility for ensuring early intervention should be shared across Government, service-providers and community, with appropriate coordination, training and resourcing. Any civil responses to an increased MACR must, by necessity, examine the adequacy of existing interventions and safeguards within care and protection processes, especially in the ACT.
- We advocate expansion of intermediaries schemes to aid the meaningful participation of children with communication, language or hearing impairments in diversionary therapeutic interventions.
- The Commission does not in-principle oppose the enactment of offences for inciting children younger than the MACR to engage in conduct that would otherwise be criminal.
- Should CAG prefer a staged approach, the ACT would be ideally situated to trial an increased MACR.

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

The Commission maintains that the MACR of 10 years in the ACT and nationally is unacceptably low and must be increased, without exception, to at least 14 years of age. Broadly, our response to this question relates to three key imperatives: legal and human rights, socio-developmental and economic.

### a) Legal and human rights imperative

Setting the age at which a child is conclusively presumed capable of criminal responsibility engages and limits human rights. Deeming a child eligible on the basis of their age for arrest, conviction, and detention for having committed an offence limits rights to liberty and security of person, the protection of family and rights of children, equality and non-discrimination, and rights of children in the criminal process.

Human rights legislation operating in the ACT, Victoria and Queensland requires that public entities make decisions and act compatibly with human rights and that new laws are presented with statements about their compatibility with human rights.<sup>5</sup> As a State Party to the seven core international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), Australia also has binding obligations as a matter of international human rights law.<sup>6</sup> It is accordingly important that, in deliberating the appropriate age for the MACR nationally, the Councils of Attorney-General have due regard to all relevant human rights standards.

Under the CRC is the principle that the best interests of the child must be the primary consideration in all actions concerning children and, in some cases including where detention of children is at issue, a paramount consideration.<sup>7</sup> Moreover, the arrest, detention or imprisonment of a child must be provided for by law and only be employed as a last resort for the shortest appropriate period of time.<sup>8</sup> The CRC further requires State parties implement ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.’<sup>9</sup> The *United Nations Standard Minimum Rules for the Administration of Justice* (‘Beijing Rules’) explain this obligation by highlighting that “the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”<sup>10</sup>

These principles reflect that children are entitled to special protection due to their age and vulnerability. In September 2019, the United Nations Committee on the Rights of the Child (UNCRC) issued an updated General Comment No. 24 revising its view on the absolute minimum age that is

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<sup>5</sup> *Human Rights Act 2004* (ACT); *Charter of Rights and Responsibilities Act 2006* (VIC); and *Human Rights Act 2019* (Qld).

<sup>6</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 UNTS No 14668 (entered into force 23 March 1976) (‘ICCPR’); *Convention on the Rights of the Child*, opened for signature 20 November 1989 UNTS No 1577 (entered into force 2 September 1990) (‘CRC’), art 3.

<sup>7</sup> CRC, art 3; Committee on the Rights of the Child (‘UNCRC’), *General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para 1), UN Doc CRC/C/GC/14 (29 May 2013) [38].

<sup>8</sup> For example, CRC, art 37(b); United Nations Guidelines for the Prevention of Juvenile Delinquency (‘The Riyadh Guidelines’), GA Res 112 UN GAOR, 45<sup>th</sup> sess, UN Doc A/RES/45/112 (14 December 1990).

<sup>9</sup> CRC, art 40(3)(i).

<sup>10</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’), GA Res 33 UN GAOR, 40<sup>th</sup> sess, UN Doc A/RES/40/33 (29 November 1985), Rule 4.1.

internationally acceptable; that being no less than 14 years of age.<sup>11</sup> The UNCRC has also, in successive concluding observations on Australia's periodic reports under the CRC, repeatedly called for Australia to increase its "very low" MACR in line with international standards.<sup>12</sup>

In this respect, at 10 years of age, the MACR in all Australian jurisdictions is noticeably out of step with those of other developed nations. As at 2008, an international study of 93 countries (encompassing 146 jurisdictions) indicated that 68% had a MACR of 12 years or higher, with the most common MACR being 14 years of age.<sup>13</sup> The median MACR internationally was reported in 2009 as being 12 years of age.<sup>14</sup> Within the European Union, however, the average MACR is 14 years of age.<sup>15</sup> Even within Australia, the Law Council of Australia (LCA) and Australia Medical Association (AMA) has noted dissonance in laws recognising a child's maturity to consent to medical treatment, collection of personal information or mandating parental supervision.<sup>16</sup> These differences infer that, by virtue of a lower MACR, Australian children enjoy comparatively less protection of their rights than children in other countries and under other areas of Australian law.

The divergence between Australian and international practice also indicates that there are more effective, less rights-restrictive options available to address offending by children than criminalisation and detention.<sup>17</sup> As a matter of human rights law, the age threshold for criminal responsibility must be rationally connected and proportionate to its intended legitimate outcome (ie the protection of the community). In this regard, measures that limit rights must satisfy a test of necessity, meaning they must first preference any other reasonably viable alternative that is less restrictive of rights.<sup>18</sup> Youth justice services, legislation and policy in all Australian jurisdictions reflect this principle by emphasising diversion, therapeutic assistance, deterrence, rehabilitation and accountability, and regard to the best interests of the child as a paramount consideration.<sup>19</sup>

In the ACT, children between the ages of 10 and 14 years comprised only 1.9% (n 1761) of all persons arrested in the ACT between September 2008 and June 2018. Arrests of Aboriginal and Torres Strait Islander children between the ages of 10 and 14 during the same period comprised 3.3% (n. 347) of all arrests of Aboriginal and Torres Strait Islander people.<sup>20</sup> Further, during this period, arrests of non-Indigenous children aged between 10 and 14 years of age in the ACT comprised only 1.7% (n 1414) of all arrests of non-Indigenous people.<sup>21</sup>

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<sup>11</sup> UNCRC, *General Comment 24: Children's rights in the child justice system* ('General Comment 24'), UN Doc CRC/C/GC/24 (18 September 2019).

<sup>12</sup> UNCRC, *Concluding observations on the combined fifth and sixth periodic reports of Australia* ('CRC 2019 concluding observations'), 2402<sup>nd</sup> and 2403<sup>rd</sup> sess, UN Doc CRC/C/Aus/CO/5-6 United Nations (1 November 2019) [48(a)]; see also CRC concluding observations in 1997 (at [11,29]), 2005 (at [73]) and 2012 (at [82(a)]).

<sup>13</sup> Neal Hazel, *Cross-national comparison of youth justice approaches and youth custody* (PowerPoint, Helsinki Foundation for Human Rights Conference on Children Deprived of Liberty in Central and Eastern Europe, 4 December 2014) <<http://usir.salford.ac.uk/id/eprint/33201/>>

<sup>14</sup> Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility* (1<sup>st</sup> ed, Ashgate, 2009).

<sup>15</sup> Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017).

<sup>16</sup> Australian Medical Association and Law Council of Australia, *Minimum Age of Criminal Responsibility – Policy Statement* (17 December 2019).

<sup>17</sup> See for example, Anette Storgard, 'Juvenile Justice in Scandinavia' (2006) 5(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 188.

<sup>18</sup> CRC, art 40(4).

<sup>19</sup> See, for example, *Children and Young People Act 2008* (ACT), s 8.

<sup>20</sup> *Ibid*, Table 7 (June 2018).

<sup>21</sup> ACT Justice and Community Safety Directorate, '[ACT Criminal Justice Statistical Profile 2018](#)' ACT Policing Table 6 (June 2018).

The impacts of criminalisation of children, as examined below, are counterintuitive to the protection of the community. Far from being “soft” on young offenders, a higher MACR has not been found in other countries to correlate with higher rates of offending.<sup>22</sup> Conversely, the younger a child is exposed to the criminal justice system, the less likely they are to complete their education and find employment. This in turn compounds their risk of becoming entrenched in the criminal justice system, including into adulthood, and of dying an early death.<sup>23</sup> It is well established that some criminal justice responses to offending, including incarceration, are criminogenic (ie they promote further criminality). This concern is compounded in youth detention facilities where children’s developmental immaturity renders them more susceptible to negative peer influence and where they are more exposed to new criminal networks, strategies and skills.<sup>24</sup>

In the Australian historic and social context, it is of significant concern that the prevailing MACR of 10 years of age disproportionately impacts Aboriginal and Torres Strait Islander children, and their families. Aboriginal and Torres Strait Islander children are 23 times more likely to be detained than a non-Indigenous child.<sup>25</sup> In the ACT, 22% (n. 23) of children detained in Bimberi Youth Justice Centre during 2017-18 identified as Aboriginal and Torres Strait Islander despite comprising less than 3% of children in the ACT’s general population.<sup>26</sup> The overrepresentation of Aboriginal and Torres Strait Islander children in detention is a significant human rights issue as it entrenches intergenerational disadvantage and disempowerment, and limits both children’s and communities’ ability to practice and develop their culture, including cultural practices, beliefs, teachings, languages, knowledge and kinship ties. In the ACT, section 27(2) of the *Human Rights Act 2004* recognises and protects these unique cultural rights of Aboriginal and Torres Strait Islander peoples.

As discussed below, it is not clear that the presumption of *doli incapax* provides a sufficiently consistent, effective and well-understood safeguard for children between the ages of 10 and 14 years. We acknowledge that, in theory, *doli incapax* would appear to offer a flexible means to apply criminal justice responses on the basis of a child’s individual capacity to appreciate the moral status of their offending. In practice, however, the complexity of *doli incapax*, its inconsistency of application and the limited availability of expert witnesses often contribute to delayed and lengthy proceedings. Every day that an affected child remains remanded in detention awaiting proceedings, their risk of institutionalisation and further recidivism grows.

Given these considerations, responses framed as ‘juvenile justice’ are, in the Commission’s view, ill-equipped to effectively address the underlying causes of offending by children and are in fact likely to be counter-intuitive to their stated aims: rehabilitation and protection of the community. Accordingly, a MACR of less than 14 years of age poses an unacceptable limitation of rights that Australia is obligated to respect, protect and fulfil. The Commission therefore calls on the Council of Attorneys-General (CAG) to agree to raise the MACR to at least 14 years of age, and by doing so, preclude resort to blunt, outmoded and counterintuitive criminal justice sanctions for Australian children. Instead, raising the MACR is vital to focus attention on early intervention models that ensure developmentally

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<sup>22</sup> Ibid; Frieder Dünkel, ‘Current directions in criminal policy’ in Willie McCarney (ed) *Juvenile delinquents and young people in danger in an open environment* (31 May 1996).

<sup>23</sup> Australian Medical Association, ‘AMA Calls for Age of Criminal Responsibility to be Raised to 14 Years of Age’ (Media Release, 25 March 2019).

<sup>24</sup> Kelly Richards, ‘What makes juvenile offenders different from adult offenders?’ (‘Richards 2011’) (Australian Institute of Criminology, Trends & issues in crime and criminal justice No 409, February 2011) 7.

<sup>25</sup> Australian Institute of Health and Welfare, [Youth Justice in Australia 2017-18](#) (10 May 2019) 9.

<sup>26</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (10 May 2019), Supplementary tables – Detention, Table S83b.

tailored, trauma-informed and culturally appropriate early intervention undertaken in partnership with families, carers and communities.

## **b) Socio-developmental imperatives**

The existing MACR, which is set at 10 years of age, has not been fixed with reference to contemporary cognitive neuroscience and developmental psychology about which there is clear medical consensus. As the Law Council of Australia and Australian Medical Association underscore, children under the age of 14 years may not yet have the required capacity to be criminally responsible.<sup>27</sup> A child's ability to appreciate the wrongness and possible consequences of his or her actions is not commensurate to that of an adult.<sup>28</sup>

Although younger children may, in general, be capable of forming moral judgments as to right and wrong in an *abstract* criminal context, their competency and moral engagement is significantly lower when called for in a personal context.<sup>29</sup> The presence of peers, which is a greater feature of childhood offending, further increases risk-seeking behaviours and may compromise a child's ability to make sound decisions and restrain impulsivity.<sup>30</sup> Greater analysis as to the relevant neuroscience is outlined by Anthony Pillay in the *Journal of Child and Adolescent Mental Health*.<sup>31</sup> In short, however, it cannot be assumed that children have developed the requisite maturity to form the *mens rea* necessary for criminal conviction.

"One of the most generally accepted tenets of criminology" is that most children 'grow out' of offending behaviours.<sup>32</sup> Independent of all other variables, rates of offending usually peak in adolescence and decline in early adulthood.<sup>33</sup> Crimes committed by children are more often property-related (eg theft, entry with intent, property damage) than offences against the person.<sup>34</sup> There remains, however, a small core subset of children who offend disproportionately and consequently remain in recurring contact with the criminal justice system.<sup>35</sup> For these children especially, their contact with the criminal justice system compounds their vulnerability.

The United Nations Independent Expert on Children Deprived of Liberty, Manfred Nowak, observes that:

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<sup>27</sup> Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) (13)(2) *Youth Justice* 102.

<sup>28</sup> Sue Hawkrigde 'Children as perpetrators' in Sean Kaliski (ed) *Psycholegal assessment in South Africa* (Oxford University Press, 2006) 250-260.

<sup>29</sup> Nicholas Lennings and Chris Lennings 'Assessing serious harm under the doctrine of doli incapax: a case study' (2014) 21(5) *Psychiatry, Psychology and Law*, 791-800.

<sup>30</sup> Jason Chien, Dustin Albert, Lia O'Brien, Kaitlyn Uckert, Laurence Steinberg, 'Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry' (2011) 14(2) *Developmental Science*, F1-F10.

<sup>31</sup> Anthony L Pillay, 'The minimum age of criminal responsibility, international variation, and the Dual Systems Model in neurodevelopment' (2019) 31(3) *Journal of Child and Adolescent Mental Health*, 224-235.

<sup>32</sup> Abigail A Fagan & John Western, 'Escalation and deceleration of offending behaviours from adolescence to early adulthood' (2005) 38(1) *Australian and New Zealand Journal of Criminology*, 59-76.

<sup>33</sup> Above 22 (ie Richards 2011), 2.

<sup>34</sup> Kelly Richards, 'Juveniles' contact with the criminal justice system in Australia' (Australian Institute of Criminology, Monitoring Report No 7, September 2009) 29.

<sup>35</sup> T Skardhamar, 'Reconsidering the theory of adolescent-limited and life-course persistent anti-social behaviour' (2009) 49 *British Journal of Criminology*, 863-878; M Livingston, A Stewart, T Allard & J Ogilvie J, 'Understanding juvenile offending trajectories' (2008) 41(3) *Australian and New Zealand Journal of Criminology*, 345-363.

“Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.”<sup>36</sup>

The lifelong consequences of imprisonment and institutionalisation of children are multifarious. Children deprived of liberty often experience post-traumatic stress disorders, particularly when isolated, their risk of developing or exacerbating mental health conditions increases tenfold and, as noted above, there is a correlation between higher rates of early death of children in detention than their community peers, attributable to drug overdose, suicide, injury and violence.<sup>37</sup> Where detained, younger children are also at greater risk of violence or negative influence from older children.<sup>38</sup>

Bearing in mind their age and ongoing development, children in detention invariably exhibit multiple and complex needs that are ill-addressed by criminalisation. Such children often come from backgrounds of socio-economic disadvantage and commonly have experienced cumulative adversity, such as family violence exposure, household substance abuse or mental illness, one or more deceased parents, and neglect, physical or emotional abuse. A defining feature of children in detention, as evidenced in NSW, is a history of disengagement with education and correspondingly poor outcomes.<sup>39</sup> Children with disabilities are also significantly overrepresented in the criminal justice system and institutions, including those with comorbid mental health conditions and cognitive disability.<sup>40</sup> These conditions are often correspond other impairments, including speech, language and communication disorders and, for many Aboriginal and Torres Strait Islander children, hearing and language impairments.<sup>41</sup> Moreover, offending by children tends to follow earlier or continuing experiences of serious crimes in which they have been victims.<sup>42</sup> In these ways, the causal factors that place a child at greater risk of criminalisation are often outside their own control. As Nowak observes:

“The most important reason for the large number of children in detention is the lack of adequate support for families, caregivers and communities to provide appropriate care to children and encourage their development. Such support and effective cooperation between parents, child welfare, social protection, education, health, law enforcement and the justice system would prevent children from being placed in institutions and coming into conflict with the law.”<sup>43</sup>

There is a well-recognised trajectory for children who have been the subject of care and protection proceedings to become involved in the criminal justice system. A recent study, in the Criminal Division of Victoria’s Children’s Courts, affirmed that children who are, or have been, care and protection clients were more likely to be among those *convicted* with earlier onset, more violent and more

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<sup>36</sup> Manfred Nowak, *Global study on children deprived of liberty* GA Res 72/245, UN GAOR 74<sup>th</sup> sess, Item 68(a), UN Doc A/74/136 (11 July 2019) [3].

<sup>37</sup> *Ibid* [29].

<sup>38</sup> Above 22 (ie Richards 2011), 2; Above 36 (ie Nowak), [5].

<sup>39</sup> Leanne Dowse, Therese M Cumming, Iva Strnadova, Jung-Sook Lee, and Julian Trofimovs, ‘Young people with complex needs in the criminal justice system’, (2014) 1(2) *Research and Practice in Intellectual and Developmental Disabilities* 174-185; NSW Health and NSW Juvenile Justice, *2015 Young People in Custody Health Survey: Key Findings for All Young People* (Sydney, 2016).

<sup>40</sup> Eileen Baldry, ‘People with Multiple and Complex Support Needs, Disadvantage and Criminal Justice Systems: 40 years after the Sackville Report’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds) *Law and Poverty in Australia: 40 Years after the Sackville Report* (Federation Press, 2017).

<sup>41</sup> For example, Laura Caire, Submission No 26 to Senate Standing Committee on Community Affairs, *Prevalence of different types of speech, language and communication disorders and speech pathology services in Australia* (February 2014) 1.

<sup>42</sup> Kathleen Daly, ‘Girls, peer violence and restorative justice’ (2008) 41(1) *Australian and New Zealand Journal of Criminology*, 109-137.

<sup>43</sup> Above 36 (ie Nowak), [94].



voluminous offending.<sup>44</sup> This correlation contributes disproportionately to the noted overrepresentation of Aboriginal and Torres Strait Islander children within the criminal justice system, and speaks to inadequate preventative and restorative pathways in Australian care and protection systems.<sup>45</sup> Any countervailing civil responses to an increased MACR must therefore, as a necessity, examine the crossover of children between care and protection and youth justice systems and the adequacy of existing interventions and safeguards within such processes, especially in the ACT.

### **c) Economic and political imperatives**

In addition to the social, health and legal benefits anticipated from raising the MACR, there is also a strong underlying economic incentive. The Productivity Commission reports that in 2018-19, Australian jurisdictions collectively spent \$539.6 million on detention-based supervision for children aged between 10 and 17 years of age, representing the majority of total recurrent expenditure on all Australian youth justice supervision (including community-based supervision and group conferencing) over the period.<sup>46</sup> On average, this amounts to a daily cost per young person in detention of \$1,579.04 nationally.

In the ACT in 2018-19, the total recurrent expenditure on detention-based supervision (ie at the Bimberi Youth Justice Centre) was \$17.7 million relative to an average daily number of 11 children and young people in detention. On an average day, this amounts to the highest daily cost per child or young person in the country (\$4,395.78).<sup>47</sup> In recent years, the ACT Government has made significant investment in implementing a Justice Reinvestment Strategy in the Territory.<sup>48</sup> This approach, developed over four years in close cooperation with agencies, community and those with lived experience, has modelled and identified the root causes of offending and associated costs for the criminal justice system. This evidence-base is targeted at informing the co-design, trial and implementation of interventions that are effective in preventing or delaying entry into the justice system. In view of the high financial burden of criminalisation and detention-based supervision of children and their greater risk of recidivism once detained, the Commission suggests that adopting a justice reinvestment approach and restorative processes may prove more cost-effective in securing community safety and offender rehabilitation.

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<sup>44</sup> Susan Baidawi and Rosemary Sheehan, '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, CRG 03/15-16, December 2019).

<sup>45</sup> Australian Institute for Family Studies, [Child protection and Aboriginal and Torres Strait Islander children](#) (CFCA Resource Sheet, January 2020).

<sup>46</sup> Productivity Commission, *Report on Government Services 2020* (23 January 2020), Part F, Table 17A.21.

<sup>47</sup> Ibid.

<sup>48</sup> ACT Justice and Community Safety Directorate, *Justice Reinvestment Strategy* <<http://www.justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy>> [accessed 21 February 2019].

### **Local experience**

In recent years, very few children under 14 years of age have been found criminally responsible in the ACT. Over the term of the ACT Youth Justice Blueprint to date (ie between 1 August 2012 and 18 February 2020), the Commission is aware of 42 children younger than 14 years of age who have been detained in the Bimberi Youth Justice Centre on 94 separate occasions:

Ages	11 years	12 years	13 years	14 years
Occasions in Bimberi	7	44	43	170
No. of individual children	3	14	25	71

Data in this table is indicative only and should not be relied on as an official indicator.

In this table, 'occasions' indicate the multiple different periods during which children were detained. These numbers suggest that, should CAG choose to raise the MACR to 12 years of age (rather than 14), only a small number of children aged 11 years would likely be referred to alternative pathways to rehabilitation. For reference and comparison, we have also included the number of children aged 14 who would remain criminally responsible were the MACR increased.

As an indicative sample, the PACYPC is aware of, and in many instances has engaged with/advocated for, children between the ages of 11 and 13 years who have been either been remanded or sentenced to Bimberi, and who have exhibited the following characteristics, experiences or vulnerabilities (and often a combination of these):

- Intergenerational Aboriginal and Torres Strait Islander racial bias and associated trauma
- History of physical and emotional abuse (including sexual abuse) and/or significant neglect by a parent or carer
- Sexual grooming by a trusted adult known to the child
- Removal from biological parents and being placed in the care of the Director-General, ACT Community Services Directorate
- Multiple out-of-home care placements since infancy
- Multiple admissions to hospital for mental ill-health, often involving involuntary detention under the *Mental Health Act 2015* (ACT)
- Emotional dysregulation that manifests as violent outbursts against parents, carers, healthcare and residential staff
- Significant disengagement from education, both in a school setting and otherwise
- Drug and alcohol misuse
- Prenatal alcohol and drug use by birth parents, resulting in Fetal Alcohol Spectrum Disorder and/or other developmental and cognitive disabilities.

Having appeared alongside these children in court proceedings, or having otherwise been present in court, the Commission is often concerned that children do not receive the support they need to understand the nature of the offences alleged against them and the content and consequences of the proceedings to which they are party. In the Commission's experience, many of these children, as adults, are later either committed to increasing periods of involuntary detention under the *Mental Health Act 2015* (often culminating in Psychiatric Treatment Orders), or remanded/sentenced to imprisonment in the ACT's correctional centre, the Alexander Maconochie Centre, for more serious offending.

## 2. What age do you consider it should be raised to (eg 12 or higher)? Should the age be raised for all types of offences?

For the reasons elucidated above, the Commission strongly recommends that the MACR be raised, in line with the recommendation of the UNCRC, to at least 14 years of age. It is our view that the minimum age should be consistent across all offences and that no category of offending warrants any departure from this minimum age threshold for criminal responsibility. The prevailing neuroscientific consensus as to the still-developing ability of children to understand and discern right and wrong (especially in emotional circumstances, peer settings or where overlaid by complex needs) does not distinguish between particular crimes. Insofar as preserving exemptions to the MACR would limit rights of children and the right to liberty, such exemptions are not therefore rationally connected to the protection of the community by deterring that child or others in future.

As such, the UNCRC has expressed concern about exempting certain offences from the MACR and, in General Comment 24, strongly recommends that State parties set a MACR that does not allow, by way of exception, the use of a lower age.<sup>49</sup> In this vein, exemptions to the MACR for specific offences are rare among other countries, with exemptions permitted only in New Zealand and Ireland (at 12 years), Hungary (at 14 years) and Belgium (at 18 years).<sup>50</sup> In New Zealand, the MACR is 10 years, although a child aged 10 or 11 years may only be arrested and prosecuted and sentenced in the High Court for murder or manslaughter.<sup>51</sup> This MACR was, in fact, criticised as regressive by the UNCRC in 2011.<sup>52</sup> These exceptions “bring children into an arena where there exists a great potential for them to be given harsher punishment, without inquiry into any circumstances,” aligning principally with the aim of retribution.<sup>53</sup>

## 3. Should the presumption of *doli incapax* be retained? Does its application differ across jurisdictions and could it be applied more effectively in practice?

The Commission notes reported inconsistencies, both between jurisdictions and individual cases, in applying the rebuttable presumption *doli incapax*. Although we recognise the presumption is intended as a practical means of acknowledging the differing developing capacities among children *above* the MACR, we are concerned that its uneven application might permit discriminatory outcomes and, despite its intent, provide opaque and insufficient protection for children accused of crimes. Should the MACR be raised to 14 years of age, in line with the UNCRC’s recommendation, we are conscious this presumption would become redundant and cease to operate.

In 1997, the Australian Law Reform Commission (ALRC) observed that:

*“Doli incapax can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly*

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<sup>49</sup> General Comment 24, [35].

<sup>50</sup> John Muncie, *Youth and Crime* (Sage Publications, 2<sup>nd</sup> ed, 2004) 251.

<sup>51</sup> [Children, Young Persons, and Their Families Act 1989](#) (NZ), s 272 (amended by the [Children, Young Persons, and Their Families \(Youth Courts Jurisdiction and Orders\) Amendment Act 2010](#), s 14).

<sup>52</sup> UNCRC, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: New Zealand*, 56<sup>th</sup> sess, 1588<sup>th</sup> and 1589<sup>th</sup> meetings, UN Doc CRC/C/NZL/CO/3-4 (11 April 2011) [55].

<sup>53</sup> Francine Chye, ‘When children kill: the age of criminal responsibility and criminal procedure in New Zealand’ (2012) 8 *New Zealand Law Students Journal*, quoting David Matza, *Delinquency and Drift* (Wiley, New York, 1964).

*prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.*"<sup>54</sup>

In this regard, *doli incapax* generally requires that prosecutors obtain expert independent evidence from psychiatrists and developmental psychologists to aid the court in reaching a decision as to the child's ability to appreciate the difference between right and wrong and act accordingly. Unlike an adult forensic mental health examination, an evaluation of a child's psychological development focuses on their current level of function in terms of their cognitive, emotional, social and moral development. The Commission is concerned about suggestions among the Victorian legal community that, in practice, *doli incapax* is falling informally to the defence to rebut by initiating and bearing the costs of psychological assessments.<sup>55</sup> These findings suggest that inconsistencies in practice have undermined the value of *doli incapax* as a sufficient safeguard for the rights of children.

In the local context, the limited number of cases in which *doli incapax* arises and limited availability of experts under required timeframes may act to compromise the consistent application of *doli incapax* both within the ACT and relative to other jurisdictions. Further, as Children's Courts are often justly hesitant to make their judgments publicly available (for protective and privacy reasons), there is limited independent oversight or available data as to the operation of *doli incapax* and the weight and quality of expert testimony within and between jurisdictions.<sup>56</sup> In this regard, the monitoring of the presumption's operation, let alone whether it offers consistent protection nationally, is not assured.

For the neuroscientific and socio-developmental reasons noted above (at para [1(b)]), we consider *doli incapax* is erroneously premised on the assumption that a child will, at some stage before they reach 14 years of age, attain the requisite maturity to be held criminally responsible. Although we recognise the presumption is intended as a practical means of acknowledging the differing developing capacities among children, it is clear from contemporary medical consensus that the specified range in which *doli incapax* presently operates may be fixed too low relative to the developing capacities and maturity of children, especially when overlaid by complex needs and vulnerabilities. On balance, we therefore conclude the presumption's repeal is desirable in conjunction with an increased MACR of 14 years of age.

#### **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)?**

The Commission does not, at this time, seek to offer a view on distinguishing a separate minimum age of detention. Should a separate minimum age of detention be proposed, any such proposal must continue to respect the principle that all forms of detention and separation of a child from their parent or guardian must be a last resort.<sup>57</sup> "Last resort" denotes that detaining children should be the last option only, an exception to the rule and in principle avoided in all types of institutions.<sup>58</sup>

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<sup>54</sup> Australian Law Reform Commission, [Seen and Heard: Priority for Children in the Legal Process](#) (Report No 84, November 1997), [18.19].

<sup>55</sup> Wendy O'Brien and Kate Fitz-Gibbon, 'The minimum age of criminal responsibility in Victoria (Australia): Examining stakeholders' view and the need for principled reform' (2017) 17(2) *Youth Justice*, 134-152.

<sup>56</sup> Kate Fitz-Gibbon and Wendy O'Brien, 'A child's capacity to commit crime: examining the operation of *doli incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy*, 20.

<sup>57</sup> The Beijing Rules, Rules 13.1, 18.2 and 19.1, *United Nations Guidelines for the Prevention of Juvenile Delinquency* ('The Riyadh Guidelines'), GA Res 45/112, UN GAOR, 45<sup>th</sup> sess, 68<sup>th</sup> mtg, UN Doc A/RES/45/112 (14 December 1990) [46].

<sup>58</sup> Above 36 (ie Nowak), [29].

## 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?

The Commission acknowledges there is a risk that raising the MACR will be perceived as limiting accountability for young offenders. We maintain that children younger than 14 years of age must remain accountable for their actions. Criminalisation and detention is, in our view, more likely to entrench such behaviours rather than spur responsibility. Raising the MACR recognises that offending by children consistently stems from impoverished circumstances, intergenerational trauma and complex needs. In this regard, we are aware of several frameworks and programs, discussed below, that have proven successful in addressing offending by children and so may inform expanded responses. Should CAG choose not to raise the MACR, greater investment in such programs and strategies ought to nevertheless be prioritised.

From our perspective, critical ingredients common among effective programs are those where:

- Early referral opportunities and ‘touchpoints’ within government and community are identified, adequately trained, coordinated and resourced;
- Programs and trials are intensive, evidence-based, trauma-informed and culturally safe;
- They support and promote shared responsibility within family and regard the child’s needs as central; and
- The planning, design and implementation of prevention, early intervention and diversionary responses for Aboriginal and Torres Strait Islander children are led by the community.

Following the Commission’s 2011 human rights audit of the ACT Youth Justice System, in August 2012, the ACT Government launched its *Blueprint for Youth Justice in the ACT 2012-2022*, offering a long-term, evidence-based strategy to address the underlying causes of offending by children.<sup>59</sup> The Blueprint’s goals include reducing youth offending, re-offending and detention rates, reducing the overrepresentation of Aboriginal and Torres Strait Islander children in contact with the justice system, and prioritising early support for children and their families. Consistent annual reporting and planned evaluations under the Blueprint have regularly measured the progress, outcomes and continued relevance of its strategies and actions against its goals. Overall, the Blueprint has achieved positive outcomes in diverting children away from the criminal justice system and reducing their number in detention. A recent final report of the Blueprint for Youth Justice Taskforce noted that:

- As of 2016-17, the number of apprehensions of children and young people by ACT Policing has decreased since 2011-12 by 37% (n 1041);
- As of 2017-18, the number of children and young people in detention had fallen by 17% (n. 23) since 2011-12; and
- The number of nights children and young people spent in detention fell by an overall 36% (n. 2968) from 8347 in 2011-12 to 5379 in 2017-18, and by 55% for Aboriginal and Torres Strait Islander children.<sup>60</sup>

The Commission commends these achievements as signposting strong progress and highlighting the value of “whole-of-government and whole-of-community” involvement in supporting children and

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<sup>59</sup> ACT Community Services Directorate, *Blueprint for Youth Justice in the ACT 2012-2022* (August 2012).

<sup>60</sup> ACT Community Services Directorate, [Blueprint for Youth Justice Taskforce: Final Report](#) (May 2019); ACT Community Services Directorate, [Blueprint for Youth Justice in the ACT 2012-22: Progress Report 2012-17](#) (March 2018).

young people in contact with the youth justice system through early intervention and support. In this regard, we note the Blueprint was cooperatively designed, implemented and monitored by all relevant Government agencies (eg covering justice policy, mental health, policing, education, family support etc) and community stakeholders (eg Youth Coalition of the ACT, Anglicare, community service providers), advised by the ACT Aboriginal and Torres Strait Islander Elected Body and an expert Youth Justice Advisory Panel.

Despite the Blueprint's positive achievements, challenges still remain, including a sharp increase in young people in detention since December 2016, a growing number of 'arrest without warrant' charges (ie attributable to breaches of bail) and the continuing disproportionate over-representation of Aboriginal and Torres Strait Islander children in the ACT youth justice system. In particular, the Commission is concerned that, presently, the ACT youth justice system is the sole option available to judicial officers in responding to antisocial behaviours by children with complex needs. In November 2017, ACT judicial officers publicly expressed frustration about either sentencing children with complex needs to youth detention or dismissing their charges due to the absence of less restrictive, therapeutic alternatives. These concerns arose from the dismissal of three assault charges in three weeks against an 11-year-old girl in care.<sup>61</sup> More recently, in January 2019, charges against a 12-year-old girl who had spent 45 nights on remand in Bimberi Youth Justice Centre were reportedly dropped for similar reasons.<sup>62</sup> These criticisms about the inappropriate criminalisation of children with complex needs echo the Commission's experience; that children are being referred to detention in the absence of appropriate therapeutic responses.

There is accordingly a clear need to ensure appropriate and adequate support to advocate for diversionary and welfare-focused responses from the earliest possible point of contact with the justice system. To enable this, further responses that we consider merit attention in the ACT include:

- greater funding for the Public Advocate to deliver individual advocacy and continue to improve its oversight for children, including in care and protection;
- expansion of the ACT intermediaries scheme, described below, to assist at-risk children with communication needs to communicate the clearest possible evidence in proceedings or conferences pertaining to their antisocial behaviours; and
- bring children within the scope of the Interview Friends Program (to ensure an arrested Aboriginal and Torres Strait Islander child has another Aboriginal and Torres Strait Islander person present with them during the police interview process).

## **6. Current programs or approaches to support young people 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?**

**Functional Family Therapy – Child Welfare** – In June 2018, the ACT Government announced a new partnership with Gugan Gulwan Youth Aboriginal Corporation and OzChild to deliver a 12-month trial of Functional Family Therapy – Child Welfare (FFT-CW) for Aboriginal and Torres Strait Islander families. FFT-CW is a home-based treatment model that focuses on identifying and addressing risk and

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<sup>61</sup> Alexandra Back, 'Frustrations after girl, 11, charged with assault a third time' *Canberra Times* (online, 4 December 2017) <<https://www.canberratimes.com.au/story/6025268/frustrations-after-girl-11-charged-with-assault-a-third-time-in-three-weeks/>>

<sup>62</sup> Alexandra Back, 'Vulnerable girl, 12, repeatedly locked up in Bimberi', *Canberra Times* (online, 2 February 2019) <<https://www.canberratimes.com.au/story/5995922/vulnerable-girl-12-repeatedly-locked-up-in-bimberi/>>

protective factors within and outside the family that affect children and their adaptive development. It is an evidence-based, short-term intervention that works with children, young people and their family or kin to help them strengthen relationships, improve communication and respond to challenging behaviours. FFT-CW supports children and young people aged 0-17 years and their families who are experiencing vulnerability, and who may be at risk of care and protection involvement. The program involves a series of therapy sessions that requires all members of the household to participate. The sessions are also extended to family/kin who are close with the child or young person as they can often increase benefit from the therapy and enhance overall family outcomes. A central component of FFT's clinical model emphasises separating blame from responsibility and building and recognising the negative impacts of behaviours.

While the FFT-CW program centres on supporting families at risk of care and protection involvement, the original FFT model centred on improving outcomes for 'at risk' children and young people, including those in contact with the youth justice system. FFT has been developed and tested for almost 50 years, with over 30 years of clinical research supporting its efficacy as an evidence-based child welfare program to reduce recidivism in young offenders. It is a holistic, relational model that seeks to generate an understanding of, and viable alternative responses to, the issues that would otherwise lead to entrenched offending behaviours. The FFT model has been replicated successfully in youth justice, mental health, and child welfare settings, as well as traditional substance treatment and school-based programs.

**Sexual offending (New Street, NSW)** – In relation to sexual offending, the NSW Department of Health provides therapeutic services to children and young people between the ages of 10 and 17 to promote their understanding, acknowledgement and responsibility for committing and ceasing harmful sexual behaviour.<sup>63</sup> This service model, which operates in Parramatta, Newcastle, Tamworth and Dubbo, uniquely focuses on clients who have high needs with complex trauma backgrounds. A recent independent evaluation found that the 'New Street' program provides a necessary and effective response in a subject area that is complex, difficult and heavily affected by stigma, guilt and shame. Among other outcomes, the evaluation found that 89% (n. 63) of the 71 clients who completed the program had ceasing their inappropriate behaviours by case closure (with a very low rate of recurrence rate (ie 3%) after three months).<sup>64</sup>

**New York Foundling** – In the United States, the Commission is aware of several intervention and diversion programs developed by *The New York Foundling* that show impressive trends. These programs include Alternatives to Incarceration ('Families Rising' and 'Close to Home') and Preventing Justice System Involvement ('Kids Experiencing Young Successes' and 'Families Stronger Together'). A collaboration between The Foundling and the New York Center for Juvenile Justice, Families Rising mandates intensive FFT as an alternative to incarceration while its Close to Home initiative introduced, among other related strategies, a model by which children in the youth justice system are placed in small 6- to 18- bed residential facilities near their homes, and assisted to transition back to their families, rather than detention. According to data collated by the Columbia University Justice Lab, in the four years following the passage of Close to Home's authorising legislation, juvenile arrests in New York State plummeted by 52%, double that of the four years prior (24%).<sup>65</sup> Further analysis of lessons

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<sup>63</sup> NSW Department of Health, 'New Street Services' (Web Page) <<https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>>

<sup>64</sup> KPMG, 'Evaluation of New Street Adolescent Services' (Final Report, March 2014), 58.

<sup>65</sup> Marsha Weissman, Vincent Schiraldi, and Kendra Bradner, 'Does Keeping Youth *Close To Home* Really Matter? A Case Study (Columbia University Justice Lab, Pre-publication discussion paper, March 2018).

for other jurisdictions from the implementation of Close to Home were recently published by Weissman, Ananthakrishnan and Schiraldi.<sup>66</sup>

**Youth Justice Conferencing / Circle Sentencing** – Diversion programs in New South Wales, such as youth justice conferencing, have been shown to effectively divert young people from custody and could be expanded for use outside the justice system.<sup>67</sup> Similarly, in the ACT, restorative justice conferencing for young offenders correlates with a lesser likelihood of reoffending relative to non-participants (ie 20% to 29%). Frequency of offending during the follow-up period (between 7-12 years) was also 30% lower for those having participated in a restorative justice conference.<sup>68</sup>

Jesuit Social Services, which delivers youth justice group conferencing in Victoria and the Northern Territory suggests that the Victorian model achieves more favourable outcomes than its NSW counterpart.<sup>69</sup> It attributes these differences to a lower number of referrals by the Children’s Court (as opposed to low-level offences referred by police in NSW) and, accordingly, greater resourcing (ie \$10,000 per conference), which allows for more experienced convenors, additional supports and multiple conferences if needed.<sup>70</sup> Broadly, youth justice conferencing in Victoria has been shown to be effective in reducing offending and making communities safer while achieving high rates of victim satisfaction.<sup>71</sup> We therefore commend the continuing expansion and critically considered refinement of such models to support children engaged in antisocial behaviour as an alternative to criminalisation.

The ACT has also recently launched the Warrumbul Circle Sentencing Court, which provides an avenue for Aboriginal and Torres Strait Islander children and young people to participate in family conferencing with a panel of community elders and a Magistrate, which will determine whether they proceed to sentencing or begin a 3-12 month individualised rehabilitation pathway covering education, employment and health. Though presently a model for sentencing, this structure may inform a model of inclusive, community-led, collaborative intervention to address the root causes of antisocial behaviours for Aboriginal and Torres Strait Islander children.<sup>72</sup>

**Youth Justice Strategy Action Plan (Qld)** – The Queensland Government’s *Youth Justice Strategy Action Plan 2019-2021* also contains practical whole-of-government preventative and diversionary actions that, though based in existing criminal justice responses, may inform alternative actions.<sup>73</sup>

- *Prevention* – Deliver and expand programs, like the Youth Support Services and Transition 2 Success, to assist young people at risk of youth justice involvement to engage with education, training and employment through case management, information, advice and referrals.<sup>74</sup>

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<sup>66</sup> Marsha Weissman, Vidhya Ananthakrishnan, and Vincent Schiraldi, [Moving Beyond Youth Prisons: Lessons from New York City’s Implementation of Close to Home](#) (Columbia University Justice Lab, February 2019).

<sup>67</sup> Wai-Yin Wan, Elizabeth Moore and Steve Moffat ‘The impact of the NSW Young Offenders Act (1997) on likelihood of custodial order (NSW BOCSAR, Justice Bulletin No 166, 2013).

<sup>68</sup> Roderic Broadhurst, Anthony Morgan, Jason Payne, and Ross Maller, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation* (Australian National University and the Australian Institute of Criminology, Report of Findings for Australian Capital Territory (ACT) Justice and Community Safety Directorate, July 2018) 4.

<sup>69</sup> Jesuit Social Services, *Inquiry into the adequacy of youth diversionary programs in NSW* (January 2018) 7.

<sup>70</sup> Ibid.

<sup>71</sup> KPMG, [Review of the Youth Justice Group Conferencing Program: Final Report](#) (September 2010) 65.

<sup>72</sup> ACT Magistrates Court, [Warrumbul Circle Sentencing Court](#) (Web site, 2019).

<sup>73</sup> The State of Queensland (Department of Youth Justice), [Working Together, Changing the Story: Youth Justice Strategy Action Plan 2019-2021](#) (2019).

<sup>74</sup> State of Queensland, ‘Find a youth support service’ (Web site, 23 July 2018) <<https://www.qld.gov.au/youth/family-social-support/youth-support-services>>; State of Queensland, ‘About Transition 2 Success’ (Web site, 29 July 2019) <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/young->



- *Bail* - Removing legislative contributors to children being refused bail, breaching bail conditions and remaining on remand as well as piloting a 12-month trial of intensive supervision for young people on bail in the community.<sup>75</sup> Enhancing the conditional bail program as it addresses educational or vocational needs, mental health issues, family intervention and accommodation to maximise the potential to remain in the community while awaiting sentencing.
- *Cultural authority* – Piloting Aboriginal and Torres Strait Islander Family-Led Decision-Making processes in four locations to increase cultural authority in identifying and responding to the needs of Aboriginal and Torres Strait Islander children in the youth justice system.<sup>76</sup>
- *Evaluation* - Monitor and evaluate community youth responses and the bail support program to identify improvements needed to ensure young people and families get the right support at the right time, with a focus on the effectiveness for Aboriginal and Torres Strait Islander young peoples and young people in rural and remote areas.

**Intermediaries Schemes** – The ACT has recently introduced a witness intermediaries scheme to implement recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse*.<sup>77</sup> An intermediary is an independent communication specialist whose role is to assist a person with communication difficulties to communicate their best evidence to police and to the Court. Their role is to ensure that the needs and vulnerabilities of a witness are clearly communicated to the Court and taken into account at every step during the course of a trial. Witnesses who may benefit from the support of an intermediary could include children and people with a disability.

At present, the resourcing for the ACT intermediaries scheme is restricted to child *witnesses* in proceedings for sexual offences, or serious violent offences resulting in a person's death. In view of the overrepresentation of children with communication, hearing and language difficulties in the youth justice system, and their often dual representation as both offender and victim, we would encourage CAG to contemplate the implementation, resourcing and/or expansion of such schemes, where required, to ensure children understand and are able to participate fully in conferences and proceedings relevant to their conduct and rehabilitation, as required for procedural fairness.

## **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?**

The Commission does not view that the absence or limited availability of existing therapeutic strategies to address offending by children should preclude or delay raising the MACR. Our response to the previous question advances potential strategies, programs and services that should be trialled.

As highlighted above, a joined-up approach across government, service providers and the community is necessary to focus timely interventions and referrals at the earliest point of concern. For example, funding of additional ACT Policing Youth Liaison Officers may provide a means of increasing visibility

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[offenders-and-the-justice-system/youth-justice-community-programs-and-services/t2s/about-transition-2-success>](#)

<sup>75</sup> [Youth Justice and Other Legislation Amendment Bill 2019](#) (Qld).

<sup>76</sup> State of Queensland (Department of Child Safety, Youth and Women), 'Refer the family for family-led decision-making' (Web site, 6 July 2017) <<https://www.csyw.qld.gov.au/childsafety/child-safety-practice-manual/chapters/10-general/10-1-decision-making-about-aboriginal-torres-strait-islander-children/key-steps/3-refer-family-family-led-decision-making>>

<sup>77</sup> See *Evidence (Miscellaneous Provisions) Amendment Act 2019* (ACT); ACT Human Rights Commission, 'ACT intermediary program to start early 2020' (Web site, December 2019) <<https://hrc.act.gov.au/act-intermediary-program-to-start-early-2020/>>

of children at risk of serious offending and help triage referrals to relevant agencies and necessary support services.

**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?**

As adverted to above, raising the age of criminal responsibility should not be regarded as reducing accountability for children who engage in offending or other anti-social behaviours. Instead, as we have outlined above, socio-educational pathways to accountability and rehabilitation within a family setting exist and have been shown to have positive outcomes. Accordingly, we are not entirely convinced of an urgent need for therapeutic protection facilities should the MACR be raised. The Commission would only favour the establishment of therapeutic protection facilities in circumstances where family and home-based intervention programs would be ineffective.

We instead favour the creation of an Intensive Therapeutic Response for use in exceptional circumstances where deemed by a Children's Court Magistrate (or alternative mechanisms) to be an essential last resort option for the safety of a child or young person. A service model of this kind should aim to provide therapeutically oriented intervention and intensive support for children and young people evidencing behaviours that present a risk to themselves and/or others. The overarching principles of therapeutic care to be integrated into such a model should include:

- A system that is therapeutic at every level;
- Interventions and responses guided by contemporary understanding about the neurobiology of trauma;
- Therapeutic re-parenting responses;
- Recognition that a child's/young person's healing occurs in the living situation;
- Quality of the carer relationship;
- Predictability, stability, consistency, structure, routines, and pattern-repetitive experiences.

This response would not be intended as a form of youth justice nor would it be intended to operate in a secure environment, although purpose-built environments could be considered insofar as may be judged necessary.

**9. Would any new criminal offences be required for persons who exploit or incite children who fall under the MACR (or may be considered *doli incapax*) to participate in activities or behaviours that would otherwise attract a criminal offence?**

The Commission is anecdotally aware of occasions on which vulnerable children have contravened the law at the behest of adults or older children, often owing to substance addiction. While we do not in principle oppose enactment of any new criminal offences targeting those who exploit or incite children younger than the MACR, we acknowledge this is a matter for government and recognise such offences exist in other jurisdictions. For example, the Victorian Parliament enacted new offences under Division 11A of the *Crimes Act 1958* for recruiting a child to engage in criminal activity in 2017.<sup>78</sup>

Incitement to commit an offence is presently an offence in the ACT, under section 47 of the *Criminal Code Act 2002*, and in other model criminal code jurisdictions. Should CAG wish to address concerns

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<sup>78</sup> See [Children and Justice Legislation Amendment \(Youth Justice Reform\) Act 2017 \(Vic\)](#), No 43 of 2017.

about adults or older children who exploit or incite children to engage in criminal behaviours, minor amendments to this offence may offer a simple and uniform approach for states and territories.

**10. Are there issues specific to states or territories (eg operational issues) that are relevant to considerations of raising the age of criminal responsibility?**

The Commission recommends that CAG agree to raise the MACR uniformly to 14 years of age nationally to provide commensurate protection for children regardless of where in Australia they reside. Should raising the MACR, however, necessitate a staged approach, the ACT's early investment in restorative processes, including family conferencing, and its demonstrated commitment to justice reinvestment, ideally situate it to raise the MACR locally. In this regard, the Commission calls on the ACT to take the lead in implementing a higher MACR at the earliest opportunity. Equally, should the CAG be minded only to pilot raising the MACR, the Commission would advocate that the ACT is well-placed to undertake such a trial.

In February 2019, the ACT Government announced its focus on Justice Reinvestment and committed an initial \$14.6 million to new and expanded community programs as smarter and more cost-effective means to reducing crime and the root causes of offending and re-offending. As we understand it, the initial focus is on reducing the population of the Alexander Maconochie Centre by addressing recidivism. Noting the special vulnerability of children and the evidenced adverse effects of their early incarceration, the Commission encourages the ACT Government to formally expand this work to children and young people at the earliest opportunity.