3rd March 2020

The Chair
Age of Criminal Responsibility Working Group
c/- Strategic Reform Division
Department of Justice
GPO Box F317
PERTH WA 6841
Via email: LegPolicy@justice.wa.gov.au

Dear Chair,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) and thank you for the opportunity to submit to this public consultation.

The Aboriginal Legal Service (NSW/ACT) Limited ('**ALS**') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS undertakes legal work in criminal law, as well as children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as referral to further support services.

We provide this submission based on our direct involvement with and representation of Aboriginal and Torres Strait Islander children and young people who are too often forced into the quicksand of the criminal justice system.

We note our endorsement of the submission made to the public consultation by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), subject to one caveat. In response to Question Four of the consultation questions, the ALS submits that:

- *Once the age of criminal responsibility is raised to 14 years, doli incapax would cease to be relevant and therefore be redundant;*
- *However, the ALS recommends that all governments develop legislative protections to ensure that children and young people between 14-17 are appropriately diverted from the criminal justice system at every stage possible.*

The ALS would welcome the opportunity to discuss this submission further. Please contact Shannon Longhurst (Policy and Communications Manager) at shannon.longhurst@alsnswact.org.au to arrange a meeting.

Yours sincerely,
Karly Warner
Chief Executive Officer
Aboriginal Legal Service (NSW/ACT) Limited

ALS

Aboriginal Legal Service (NSW/ACT) Limited

Submission to the review of the age of criminal responsibility

by the Council of Attorneys-General

3rd March 2020

About the ALS

The Aboriginal Legal Service (NSW/ACT) Limited ('**ALS**') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS undertakes legal work in criminal law, as well as children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as broader service support such as tenant advocacy.

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Introduction

Currently there are close to 600 children under the age of 14 years who are in youth prisons across Australia each year.[1] Children who are taken to a barbed wire facility, strip searched on entry, given limited access to peers, teachers and supports, and separated from family and community. And it is Aboriginal and Torres Strait Islander children who are most impacted by this injustice. In 2019, 70% of the kids aged 10-13 years in youth prisons in Australia were Aboriginal and Torres Strait Islander.[2]

The overrepresentation of Aboriginal young people in the criminal justice system remains year after year at disgraceful levels. Each and every day ALS solicitors take calls through our Custody Notification Service regarding children in custody and speak to distressed families. Each and every day the ALS helps children and young people with different stories but the same themes; a child strip searched for $2, a child arrested for stealing $3.20 worth of lollies, a child too small to be seen over the dock, a child self-harming in juvenile detention, a child tying a jumper around his neck in the court cells. The stories of injustice are far too common.

We should be supporting kids to thrive in community and culture, not separating them from their families by locking them up in harmful prisons. Rather than harming, stigmatising and marginalising these 600 children in the criminal justice system, we should change the law so that we give kids every possible opportunity to succeed.

There is also a clear policy imperative to raise the minimum age of criminal responsibility (MACR) and divert children and young people from custody. We know that detention has adverse effects on an individual and only serves to compound existing issues for vulnerable children and young people.[3] The families and communities of children or young people in custody bear additional social and economic costs. And research tells us that children who encounter the criminal justice system at an early age tend to go on to have further and more severe interactions with police and courts than young people who have similar experiences at a later age.[4]

[1] 2017, Australian Bureau of Statistics (ABS), Recorded Crime - Offenders, 2016-17, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra and 2018, Australian Institute of Health and Welfare (AIHW), Youth Justice in Australia 2016-17, 'Table S78b: Young people in detention during the year by age, states and territories, 2016-17', available at https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/data.

[2] See Jesuit Social Services, Australian Government Must Stop Locking Up 10 Year Old Children, https://jss.org.au/australian-governments-must-stop-locking-up-10-year-old-children/

[3] Novack, M. (2019). UN Global Study on Children Deprived of Liberty, p. 8, https://undocs.org/A/74/136

[4] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing S Chen et al, 'The Transition from Juvenile to Adult Criminal Careers' (2005) 86 Crime and Justice Bulletin 1; Jason Payne 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Series No 80, Australian Institute of Criminology, 2007); L McAra and S McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315.

Right now, Australia is lagging behind the rest of the world. Currently the MACR in all Australian jurisdiction is 10 years, compared to a global median MACR of 14.[5] This is in spite of overwhelming evidence - from Aboriginal organisations and our communities, medical experts, legal experts and human rights bodies - that detention, as well as any other interaction with the criminal justice system, harms children. [6]

This submission seeks to demonstrate the critical need to raise the minimum age of criminal responsibility (MACR) to at least 14 years of age in all Australian jurisdictions, without delay and without exception.

Please note that names and other person circumstances within this submission have been altered to protect privacy.

[5] UNICEF, Age Matters! Exploring age-related legislation affecting children, adolescents and youth (Youth Policy Working Paper No 4, November 2016) 4.

[6] Organisations that support raising MACR to 14years include: Law Council of Australia, Law Society of NSW, Queensland Law Society, Law Society of South Australia, Office of the NSW Advocate for Children and Young People, Federation of Community Legal Centres, Royal Australasian College of Physicians, Australian Medical Association, Australian Indigenous Doctors' Association, National Aboriginal and Torres Strait Islander Legal Services, Lowitja Institute, Change the Record Coalition, Australian Human Rights Commission, Australian and New Zealand Children's Commissioners and Guardians, Amnesty International, UNICEF Australia, Save the Children, Human Rights Law Centre, Jesuit Social Services, National Legal Aid, and the Smart Justice for Young People coalition.

Case Study 1 - Jake

Jake is 15 years old and he has been in and out of the justice system since he was 10, the age when he could be held criminally responsible.

Both of Jake's parents suffer from substance abuse issues and his father, the most stable person in his life, died recently. His housing is unstable with the family being in and out of accommodation. He suffers from a range of mental health issues, behavioural issues and addiction. He is on daily psychiatric medication. He engages in self-harm to the point of hospitalisation. He is currently in juvenile detention.

The minimum age of criminal responsibility has resulted in Jake, from the age of 10, being held in custody on remand for a total of 132 days for matters that were either dismissed or withdrawn at hearing. With each charge, Jake was subjected to various, continuous and ultimately unnecessary and harmful interactions with the criminal justice system.

Jake has been arrested for a range of crimes ranging in seriousness, for example, climbing on a building at school to on another occasion, break and enter. Rather than providing holistic support to address the underlying causes of this behavior, the current low age of criminal responsibility creates a situation where all of these behaviours are characterised as crimes to be punished.

Before Jake turned 10, he was already being targeted by policy and monitored on a Suspect Target Management Plan. On the date of Jake's 10th birthday, he was visited by Police who interviewed him, openly recording that they were doing so, in order to create evidence to rebut the presumption of Doli Incapax on the expectation that Jake would offend.

By forcing Jake into the quicksand of the criminal justice system, the government has compounded trauma, rather than supporting him. By creating a legal response – rather than a therapeutic or rehabilitative response – Jake has been forced on a trajectory that has led directly to more trauma, more contact with the criminal justice system and to escalating criminal behaviour.

Whilst there were some limited intervention responses and diversionary approaches in Jake's life, these approaches have rarely had time to work because they are always enacted within the wider context of a harmful criminal justice system, and disrupted by overriding legal responses rather than therapeutic and social support.

Summary of Recommendations

The age of criminal responsibility should be raised to at least 14 years of age, without exception and without delay, because it:

- reflects current knowledge regarding the intellectual, moral and psychological development of children, including their capacity for judgment and control;
- removes an approach that operates to force children into the criminal justice system, too often entrenching them there;
- will reduce the overrepresentation of Aboriginal children in the criminal justice system;
- provides for an alternate approach that supports children with early intervention, prevention, diversion and rehabilitation initiatives;
- replaces an approach that increases recidivism with one that reduces it, thereby increasing community wellbeing; and
- supports children and young people to thrive with their families and in the community.

The ALS recommends that:

- *The minimum age of criminal responsibility in all Australian jurisdiction is raised to at least 14 years for all offences. There should not be any carve outs for different offences. This is consistent with medical and social research and aligns with human rights standards.*

- *Once the minimum age of criminal responsibility is raised to at least 14 years, doli incapax will cease to be relevant and become redundant.*

- *All levels of governments should develop legislative protections to ensure that children and young people between 14-17 are appropriately diverted from the criminal justice system at every stage possible.*

- *There should be a legislative presumption that no child should be deprived of liberty, except as a measure of last resort (for the shortest possible time) if they present a serious risk to the community.*

- *All levels of government should increase the availability of alternatives to detention, prioritising models which are designed and led by Aboriginal communities and organisations.*

- *In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led. Prevention, early intervention and diversionary responses should be linked to culturally-safe and trauma-responsive services including education, health and community services.*

- *Governments should undertake service mapping across jurisdictions to identify the adequacy and efficacy of current services and programs directed at the prevention of harm, early intervention and diversion. This should include consideration of existing service gaps and barriers to participation.*

- *Aboriginal and Torres Strait Islander legal services must be adequately resourced and supported to provide communities with culturally appropriate and safe legal advice and assistance.*

- *Aboriginal community controlled services focused on health, family support, education, disability, cultural connection, healing and other support services must be adequately resources to support their communities.*

- *All levels of Governments should resource and adequately support Aboriginal community controlled organisations to provide culturally safe diversion programs for children and young people.*

- *All levels of government should invest in holistic social services for children, which are provided in community settings and, as much as possible, by designed, led and delivered by Aboriginal communities and organisations.*

- *All programs for Aboriginal children and young people should be underpinned by the principle of self-determination.*

- *Voluntary therapeutic models which focus on holistic support for children should be prioritized.*

- *No new offences should be created for persons who exploit or incite children who fall under the MACR. The current legal framework is sufficient to protect children aged below the MACR from being incited to commit offences and the addition of any new offences would run the risk of disproportionately targeting Aboriginal and Torres Strait Islander people.*

- *States and territories should be prepared to lead on this reform, and act without delay to raise the minimum age of criminal responsibility to at least 14 years.*

Raise the Age to at least 14 years, with no exceptions.

Q1: Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.

Q2: If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.

Q3: If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of doli incapax (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of doli incapax differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of doli incapax be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.

1. The rationale for treating children differently – children's development

1.1 Background

At common law, children who were incapable of understanding the difference between right and wrong (having a 'guilty mind') were excused from criminal liability. The common law conclusively presumed children under 7 were incapable and between 7 and 14 could be incapable. For this latter age group a rebuttable presumption of incapacity – *doli incapax* – applied.

Australia inherited this two-tiered approach to the criminal liability of children and it remains today, although with statutory intervention that has set the minimum age at ten years Australia wide. While in NSW, the presumption of doli incapax for children 10-14 has remained within the realm of the common law, in other jurisdictions, such as the ACT, it has been legislated. To rebut the presumption requires irrefutable evidence that the child knew that the act in question was seriously, morally wrong.

Discussion around the criminality liability of children often frames the issue as simply whether children of 10 (or 12 or 14) years of age simply know the difference between right and wrong. This is not the right question to ask. In a just legal system, criminal responsibility must reflect the capacity of children to understand and assess specific situations and their behavior, including from a moral perspective, and to act on this understanding. It must also consider the capacity of children to understand and participate fully in the criminal justice process.

1.2 Children's cognitive and psychological development

While the allocation of rights and/or responsibilities according to age will inevitably involve an element of arbitrariness, it is expected that the age threshold will be based on best evidence regarding child development. The selection of ten as the minimum age of criminal responsibility is contrary to best evidence and appears to have been selected more on an acceptance of the then status quo. When in 2010, the Australian Law Reform Commission recommended 10 as the minimum age of criminal responsibility the focus was on uniformity between the States, with the Commission noting, "as most jurisdictions, including the Commonwealth, have already decided on 10 as the age of criminal responsibility it would seem to be the most obvious choice".[7] We acknowledge CAG for undertaking a robust analysis and implore all jurisdictions to develop policy that sees communities thrive and avoid policy making on the basis of status quo.

There have been significant advances in our knowledge in the areas of neurodevelopment science since the threshold was first set at ten. The development of the frontal lobe, the area of the brain associated with rational decision making and judgment has not fully developed by 14 and continues to develop into adulthood. Instead children tend to use the part of the brain associated with impulse, emotions, and aggression to make decisions.[8] Put simply, children of 14 do not have sufficient maturity to exercise judgement and control that would justify holding them criminally liable.

In other areas of law and society, this understanding of childhood development is reflected. Children are not viewed as having the maturity and life experience to vote, marry or drink alcohol and if under 16 to apply for a driver's license or consent to sexual intercourse. Parents can be charged for failing to ensure their school aged child attends school[9] or in Queensland, for failing to provide supervision for a 12 year old.[10] It is incongruous that a ten year old is accorded criminal responsibility for decisions and is thereby subject to arrest, charge and detention.

Further, we know that the particular cohort of children and young people who enter the criminal justice system have a high incidence of intellectual and other disabilities, mental health issues and trauma that may impact on capacity to exercise judgement and control.

The 2015 Young People in Custody Health Survey[11], found that:

[7] Australian Law Reform Commission, Seen and heard: priority for children in the legal process (ALRC Report 84) (November 1997)

[8] Australian Government, 'The amazing, turbulent, teenage brain' (20 February 2017) https://www.learningpotential.gov.au/the-amazing-turbulent-teenage-brain

[9] *Education Act* 1990 (NSW), s 23

[10] *Criminal Code Act* 1899 (Qld), s 364A.

[11] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, 2015 Young People in Custody Health Survey: Full Report (2017).

- 87% of Aboriginal young people in detention had a psychological disorder;
- 69% scored in the 'below average' to 'extremely low' range of ability, with 38.5% in the 'extremely low' range, indicating a potential intellectual disability;
- 86.4% had 'below average' oral language skills, the Report indicating that they have more difficulty than expected in dayto-day understanding of what is said to them or expressing their own thoughts and feelings verbally. 57.3% had 'severe difficulties';
- 67.5% had at least one parent who had been incarcerated, the Report noting that the incarceration of a parent significantly increases the risk of antisocial behaviour and criminality in their children; and
- 45.2% had been exposed to at least one traumatic event, with the Report noting the impact of trauma on neurodevelopment and the link with the development of antisocial behavioural problems.

This research aligns with the experience of the ALS, which is that the majority of offending behavior by children is impulsive, committed without thought or understanding of morality or consequence. Furthermore, much of it is welfare related. While the discussion regarding raising the age must consider how an alternative system to the criminal justice system would respond to very serious offending, this should not be determinative. Although reported case law on doli incapax inevitably involves matters of more serious offending dealt with in the higher courts and the presumption has been developed in the context of this type of offending, the overwhelming majority of children's matters involve less serious offending and are heard in the children's court.[12] In many of these matters there is either not a clear element of morality (serious or otherwise) involved or the morality is ambiguous.

For example, the ALS has represented children charged with entering the guard's compartment of a stationary train curious to see what it looked like inside; a child who climbed his school fence on the weekend; children who rode bikes without helmets; a child who found an Opal card and kept it, and children who took food because they were homeless and hungry. In these types of matters, the application of the presumption of doli incapax that considers a child's moral knowledge involves a somewhat artificial exercise. In matters like these it is essential that the government responds with an alternative to the criminal justice system because children do not have the capacity of adults regarding decision making and control and because to respond with arrest, charge and detention is disproportionate, damaging and contributes to rather than prevents recidivism.

[12] The majority of recorded youth offending in Australia is not attributable to children under. Across Australia, children under 14 are only a small proportion of all children in the justice system. And the majority of offences committed by children under 14 are not serious crimes. They are generally not crimes against the person (e.g. sexual offences, homicide, robbery) but property and deception offences. In 2018, of the total number of alleged incidents recorded for youth offences in NSW aged between 10-17 years, only 11.6% of those incidents were recorded for 10-13 year olds. And the majority of offences recorded for 10-13 year olds were transport regulatory offences and theft (Source: NSW Bureau of Crime Statistics and Research).

Case Study 2 – Jacob

Jacob is a 13 year old boy who has been assessed as having a global cognitive deficit and moderate intellectual delay at a level lower than 99.9% of his age peers. His receptive communication skills are at a functional age equivalent to less than 3 years old and his interpersonal relationship skills at less than 4 years old. Jacob also has tourettes syndrome and a rare kidney disease. He was removed by FACS from the care of his family at 3 ½ months.

Jacob has a strict behaviour management plan for his carers to help manage his behaviour. Jacob calls police and tells them he has a knife. Police arrive and see that Jacob doesn't have a knife, he has a stick. Jacob's carers tell police they do not need police assistance. At this point, Jacob who is behind a fence spits at an officer. Jacob is then arrested and taken into police custody. In custody Jacob becomes very distressed and refuses to take the 19 tablets he takes daily for his conditions.

Jacob cannot state what his charges were or what the word 'guilty' means. He says, "my heart is constantly sad and sore."

Case Study 3 - Charlie

Charlie is 13 years old. He is with a group of friends when one of them demands the mobile phone from a person walking past. The person stops and Charlie is present when his friend reaches out, pushes the person and grabs the mobile phone yelling out 'run'. Without thinking, Charlie runs. Charlie is charged with Robbery in company on the basis of joint criminal enterprise.

Case Study 4 - Will

Will is a 15 year old Aboriginal boy interested in birds, rocks and minerals. He has been diagnosed with a mild to moderate intellectual disability, ADHD, Complex Post Traumatic Stress Disorder, Anxiety, Oppositional Defiant Disorder, Autism Spectrum Disorder, Sensory processing difficulties and behavioural disturbances.

Will has been charged by police on a number of occasions since he was 12 years old spending time in custody on remand. During one period in custody on remand he is badly assaulted.

Will is again charged. Will describes the role of the Judge in court as someone who says "please be seated". He says he knows what bail is - it means he gets to go home. A report is obtained for Will which finds that he is unfit.

After a lengthy period, Will's matters are ultimately dismissed.

2. The failings of the presumption of doli incapax

The presumption of doli incapax recognizes that children who do not have criminal capacity should not be criminally responsible. It follows that if the presumption does not operate to protect these children the Government must consider an alternative means of doing so. Even with reform of the presumption, children would still be drawn into the criminal justice system.

The presumption of doli incapax fails to protect children for a number of reasons, including because:

- Unlike a minimum age of criminal responsibility, it does not prevent children being charged. Current policy ensures that children who are doli incapax are none the less brought into the criminal justice system, arrested, charged, detained and in effect subject to criminal sanctions even if their matters are ultimately diverted or dismissed.
- It results in children who are doli incapax taking diversionary options or pleading guilty to offences despite not being criminally culpable.
- It is applied inconsistently and unfairly between and within jurisdictions.
- It ensures intervention in the form of remand and detention, but not in the form of support and treatment that is required.

If the Government wants to have an impact, the only way to protect the children the presumption seeks to, is by raising the age of criminal responsibility to at least 14.

2.1 Contact with the criminal justice system

The ALS supports the current work being done to increase the rates of diversion of children and young people from the criminal justice system and to address the unacceptable disparity between the diversion rates of Aboriginal young people and non-Aboriginal young people.[13] In NSW, support for diversion under the Young Offenders Act[14] (YOA), by the legal profession, police, the courts and other stakeholders, draws on the understanding of the criminogenic impact of the criminal justice system. We know that early contact is a key predictor of future contact with the justice system.[15]

However, the only way to completely avoid this impact is to prevent children and young people from entering the criminal justice system in the first place. Although preferable to a charge, a YOA caution or conference is still a criminal sanction with potential further impact, including its use against the child in future proceedings. It is the experience of the ALS that many children who would be found doli incapax are faced with the decision whether to admit to the alleged offence and be dealt with under the YOA or

[13] Snowball L 2008. Diversion of Indigenous juvenile offenders. *Trends & issues in crime and criminal justice* no. 355. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tandi/tandi355

[14] *Young Offenders Act* 1997 (NSW)

[15] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing W Agnew-Pauley and J Holmes, 'Re-Offending in NSW' (Crime and Justice Statistics Brief No 108, Bureau of Crime Statistics and Research, 2015*)*

to wait for the issue of doli incapax to be adjudicated at court, often while the child is forced to be on remand. The extent to which these children comprehend the relevant issues is always a concern.

The length of time that children are on remand awaiting hearing is of significant concern to the ALS. Often the very vulnerability of these children results in inappropriate welfare type bail conditions, such as to attend school, or in inappropriate onerous conditions, such as daily reporting in addition to attending school. These conditions are inevitably breached leading to a cycle of arrest and detention. The majority of breaches are of a technical nature, such as curfew, rather than for new offences.

The impact of short-term remand - where a child is granted bail within 1-2 days of bail refusal - is traumatic and disrupts rehabilitation and the support that can be provided to kids in the community. Further, frequent technical breaches of bail inevitably result in bail refusal on the basis that the court is not confident bail will be complied with. This is why we see child after child spending lengthy periods in custody, despite no further offending. Further, most of these matters are ultimately dismissed or withdrawn on the day of hearing and would not attract a custodial penalty if they were to proceed to sentencing. It is our experience that many of these children decide to plead guilty to finalise their matter, 'get off bail' and go home.

On a daily basis the ALS acts for children in need of support and treatment instead subjected to a criminal justice system that labels them criminals rather than children, and their behaviours crimes to be punished rather than vulnerabilities to be supported. When the issue of doli incapax becomes a matter for the court the only intervention the criminal justice system provides is bail and detention. When there has been no plea of guilty there can be no Youth Justice bail supervision and when the matter is ultimately dismissed, as it often is, there is no follow up support or intervention by Youth Justice. Significantly, while proceedings are current and often even after dismissal of the matter, any counselling or treatment is secondary to the necessary protection from legal consequences. This means children who may be in need of counselling either cannot participate in it at all, or cannot participate fully.

The presumption of doli incapax fails the children and community it seeks to protect.

Diversion and Capacity

Case Study 5 - Deon

Deon is 11 years old and has never been in in contact with the criminal justice system before.

Deon is said to have stepped on the school bag of another student, damaging the contents. Deon is taken into custody by police who want to deal with him by way of a caution for the offence of damaging property. Deon speaks to an ALS lawyer on the custody notification service. The lawyer tries to explain to Deon the offence, the concepts of intention, what a caution is under the Young Offenders Act, the need for admissions to the offence, doli incapax, bail and the right to silence. It becomes clear Deon does not understand.

The police officer agrees to defer his decision to deal with Deon by way of charge or under the YOA and an appointment is made for Deon to attend the local ALS office with his mother. At the appointment, the lawyer tries to explain the issues to Deon. Deon clearly still does not understand the issues. Deon advises that he tripped over the bag, did nothing wrong but doesn't want to go to court no matter what.

This matter is ongoing.

Case Study 6 - Shontelle

Shontelle is 12 and has an intellectual disability. She has received two cautions for common assault against her mother, one for threatening her and the other for throwing a piece of fruit at her. Shontelle was also named as the person in need of protection in an Apprehended Violence Order against her mother which has ended.

Shontelle is charged with common assault against her mother for pushing her when her mother said she couldn't leave the house. Shontelle says she wanted to leave because her mother was angry and she wanted to get away. Shontelle's lawyer advises her that her two previous cautions will likely be used as evidence against her to rebut doli incapax but that the lawyer will argue the evidence is insufficient. Shontelle says that she thinks she shouldn't have pushed her mum because it makes the police come and doesn't understand why her mum can push her. She is on bail that says she can't reside at home. She says she wants to go home and doesn't want to go to court.

Case Study 7 –Jai

Jai is 12 years old who was removed from home by FACs at 7 years of age. Since that time he has been placed in 43 different foster placements. Jai has a serious substance abuse condition for which he has been hospitalized. He suffers from complex mental health problems, including ADHD, PTSD, ODD, Depression and Anxiety - and is on significant psychotropic medication which is known to make him blackout on occasion. His care records note that he is susceptible to the negative influence of older children. Jai has been charged with numerous offences since the age of 10, one of which relates to carrying a knife which he says he carries to feel safe. He has breached his bail on more than 19 occasions. Most breaches involve technical breaches of bail condition with Jai leaving his placement to try and visit his mother or friends. Eventually a detailed care plan is developed for Jai, noting that boredom plays a major role in him leaving from his placement.

Jai presents as without much hope for his future. He instructs his lawyer he wants to plead guilty, saying "you're not the one who has to be on bail."

Entrenchment

Case Study 8 –Jayden

Jayden is 11 years old. He is a victim of sustained sexual abuse from a perpetrator who was recently sentenced to jail. Jayden has autism and post-traumatic stress disorder. He has recently tried to commit suicide. He is in desperate need for support and treatment.

Jayden is said to have threatened his carer and is charged by police. He has never been in trouble with the police before. Jayden's lawyer must explain to Jayden the charge, the principle of doli incapax, the possibility of representations suggesting a charge that falls within the diversionary processes under the Young Offenders Act, the court process, and the relevance of mental health legislation amongst other legal issues. Jayden must instruct the lawyer how he wishes the matter to proceed. Jayden is placed on bail. Jayden's lawyer writes to police seeking withdrawal of the matter noting that there is no evidence at all with respect to doli incapax. Police reject the representations and the matter proceeds. Jayden is taken into custody on two further occasions for breaching his bail, once by not attending school and the other time for failing to be of good behaviour for fighting with his brother. Jayden's matter is ultimately dismissed.

Remand & pressure to plead guilty

Case Study 9 - Isaiah

Isaiah is 11 years old. He lives in a remote community. He is on bail for damaging property.

One of his bail conditions becomes to obey the reasonable directions of his mother. He has a curfew of 5pm. Police view him at the park with a friend at 5.05pm. The next day Isaiah reports as per his bail conditions. He is arrested and bail refused for breaching his curfew the day before. Isaiah spends 5 weeks in custody until he instructs his lawyer he wishes to plead guilty to finalise his matters.

2.2 Inconsistent & prejudicial application

Inconsistent application

In our experience the presumption of doli incapax is applied in an inconsistent manner. Our experience suggests that this inconsistency arises from a number of things, including the difficulty in applying the presumption, a lack of understanding as to its content and even a lack of awareness as to its existence. As

a result the presumption applies inequitably and there are many young people who are doli incapax for which the presumption is not applied. This is best illustrated in the case studies below.

There is inconsistency between jurisdictions and we note the concern previously expressed by the Law Reform Commission that the criminal liability of children be uniform across Australia, recommending the presumption be legislatively based. There is not uniformity. Unlike in NSW, in the ACT the presumption has been codified and is contained in s26 of the Criminal Code 2002 (ACT). Section 26 states that a child "can only be criminally responsible for an offence if the child knows that his or her conduct is wrong." In the recent case of *Williams v IM*,[16] Chief Justice Murrell confirmed that in the ACT the Criminal Code, not the common law, governed issues concerning criminal capacity. Thus, a child who is doli incapax must first satisfy an evidential burden before the onus falls to the prosecution to prove otherwise.[17]

His Honour stated:

"In relation to whether a child aged between 10 and 14 years knew that their conduct was "wrong", the evidential burden may be satisfied by "pointing to evidence" suggesting that the child did not know that their conduct was "wrong." If the evidential burden is discharged, the prosecution then bears a legal burden of establishing beyond reasonable doubt that the child did know that their conduct was "wrong"[18]….. It remains to be seen whether in the ACT this difference will, at a practical level, increase the forensic difficulty for the defence in discharging the evidential onus of pointing to evidence suggesting a reasonable possibility that a 10 to 14 year old child lacked criminal responsibility; it may be that, in the ACT, the defence needs to point to actual evidence rather than prospective evidence" (emphasis added)[19]

The Commonwealth Code codified the presumption of doli incapax for Commonwealth matters[20] and likewise includes an evidentiary burden if an accused seeks to assert a lack of criminal responsibility. Noting the comments made by the Chief Justice, it may be that there is an impact in these jurisdictions on the pressure on children to plead guilty to avoid the delay and cost that is likely associated with the potential need to obtain psychological reports.

Case Study 10 - Jo

Jo is 11 and lives in a regional town. She has never been in trouble before. She is charged by police and represented by the lawyer on duty. The lawyer does not raise the presumption with Jo and Jo pleads guilty to the offence at its first mention in court. The ALS represent Jo on some other matters and speak to Jo about this. At Jo's request they speak to the original duty lawyer who advises that he has never heard of the presumption. The lawyer had been practicing in NSW for more than 20 years.

[16] 2019 ATC SC 234

[17] The Criminal Code 2002 (ACT) s 58(2) requires an accused who wishes to assert a lack of criminal responsibility to satisfy an evidentiary burden.

[18] Ibid at 46

[19] Ibid at 47

[20] *Criminal Code* Act 1995 (Cth) Cl 7.2

Case Study 11 - Kiara

Kiara is 12 and lives in a small regional town. She is charged by police and bail refused. Kiara has never been charged before and the only evidence on the police fact sheet that may be relevant to the presumption of doli incapax is that she ran away when police saw her. Although Kiara's lawyer is familiar with the presumption and points out to the court that it's not inconsistent for 'flight' to follow 'naughty behaviour' as wells as 'seriously wrong' behavior, the court says it is enough evidence and Kiara is bail refused. Kiara spends a number of weeks in custody. Her matter is ultimately withdrawn.

Prejudicial application

In NSW the majority of matters in which doli incapax is an issue do not involve a psychological report. In a review of children in the legal process, the Australian Law Reform Commission found that "*doli incapax* can be problematic for a number of reasons", noting;

> *For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.*[21]

It is the experience of the ALS that the police will subpoena school records in the hope that information will be obtained relevant to doli incapax. We have had numerous examples where school records, including counseling records of the child and records pertaining to other students are then served in briefs of evidence. In one matter, the privileged sexual assault counseling records of a child we represent were also served. Of significant concern to the ALS is the impact on a child's relationship with counselors and perception of school as a safe place.

In our experience, attempts by police to obtain statements from family members relevant to the presumption of doli incapax can also be potentially damaging for a child. Parents are not always aware that they do not have to provide statements and it can be quite distressing for a child when a statement from a parent is served in a brief.

3. Reducing the overrepresentation of Aboriginal children and young people in the criminal justice system

Aboriginal and Torres Strait Islander children are strong and resilent and undoubtedly culture is key protective factor.

However, the low MACR has a disportionate impact on Aboriginal children and young people. Across Australia, Aboriginal and Torres Strait Islander children are overrepresented in the criminal justice

[21] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process (ALRC Report 84)* (November 1997).

system due to government policy that fails to support them. Whilst children under 14 are only a small proportion of all children under justice supervision, it is in this age category that the injustice against Aboriginal children is most pronounced.

On an average day in 2017-18, there were 1,369 children and young people under supervision in NSW[22], of which only 3.58% were children under 14.[23] However Aboriginal young people are significantly overrepresented in these figures, with approximately 63% of children aged 10-13 under supervision on an average day in NSW being Aboriginal and Torres Strait Islander. In the ALS' experience their offences tend to be minor and often result from over-policing.

Raising the age to at least 14 will keep these children out of the criminal justice system.

4. A viable alternative

As outlined below (in response to consultation questions 4 to 8), there are already successful early intervention, prevention, diversion and rehabilitation programs in existence, as well as support services that can be built upon to develop an alternative framework to the criminal justice system. An alternative approach would be one that recognises that children belong in their communities, and supports them to thrive rather than criminalising them.

We know that the incarceration of children has significant social costs - separating children from their families, disrupting their lives and routine (including education and social development), exposing them to the harmful environment of detention and increasing their chance of future contact with the criminal justice system. However, putting children in youth prisons also has a significant economic cost.[24]

It currently costs approximately $1,414 to lock up one young person for one day in NSW. We refer to case study 1 and note the 132 days Jake spent in custody bail refused for matters that were later dismissed. At a cost of $1,414 per day, this comes to a total of $186 648. This does not include the other

[22] ACT specific data is hard to obtain given the relatively small population size. However on an average day in 2017-18, there were 103 young people under youth justice supervision in the ACT. Of these, approximately: five in six (85 per cent) were under community-based supervision; one in six (15 per cent) were in detention; one in four (26 per cent) were female; three in four (74 per cent) were male; and one in five (22 per cent) were Aboriginal and Torres Strait Islander.

[23] In NSW in 2017-18, there were a total of 1,350 children and young people in detention of which 9.33% were children aged under 14; Source: Australian Institute of Health and Welfare (AIHW), Youth Justice in Australia 2017-18, supplementary data tables, https://www.aihw.gov.au/reports/youth-justice/youth-justice-australia-2017-18/data.

[24] In 2017 PIC, the Indigenous consulting branch of professional services firm PwC, and Change the Record coalition undertook a study focused on the costs of the disproportionate incarceration of Aboriginal people in Australia, using the current rates of re-offending to forecast the number of Indigenous people likely to return to prison and the associated cost. In 2016 it cost $7.9 billion per annum to imprison Aboriginal people with costs projected to grow to $9.7 billion by 2020 and $19.8 billion per annum by 2040. Closing the gap on Indigenous incarceration could save $18.9 billion in 2040. A report by PIC (PwC's Indigenous Consulting company) and the Change the Record Coalition mapped the projected reduction in re-offending rates and cost, if custodial sentences for Aboriginal children were replaced by cognitive behavioural therapy or multi-systemic therapy, holistic case management and support. This approach indicated a reduction in recidivism rates over four years of between 4 to 15 percentage points in each year and savings of $10.6 billion in 2040 and by $153.6 billion in total (present value terms).

economic costs such as courts, legal representation and policing. This money could have been allocated under an alternative system to supporting Jake and his family in the community.

Shannon is a few years younger than Jake but her path is starting similiarly. Shannon was first charged by police at 10 years of age. She has just had her 12th birthday in custody. Shannon is under the care of the Minister until she turns 18 and lives in a care placement but it's her mum she says she misses when she's locked up. Shannon loves swimming, fishing and horses. She's been diagnosed with a Mild Intellectual Delay and features of FASD and ADHD and is very impulsive. Since Shannon's first charge she has spent 175 days in custody bail refused for matters that were then dismissed. At a cost of $1414 per day, this comes to a total of $247,450.

The money allocating to policing and detaining children like Jake and Shannon could be better spent on properly resourcing therapeutic services to support them. Under an alternative system, Jake and Shannon could be on very different trajectories.

Case Study 11 - Cameron

Cameron is 12 years old. Cameron has learning difficulties and ADHD. He doesn't like taking his medication. Cameron is charged with damaging property and placed on bail. After a breach of curfew Cameron is arrested, bail refused and placed in custody, some 500 km away from his family. Youth Justice workers tell his solicitor how distressed he is in custody. Cameron pleads guilty to the offence so he can get out of custody and off bail. He is sentenced to a suspended sentence which he breaches with further offending. While waiting for sentence an Aboriginal community worker starts working with Cameron. He picks him up in the morning, reminds him to take his medication and plays sport with him at lunchtime. Cameron goes from rarely attending school to attending full time. He receives an academic achievement award.

Connection with community, cultural and practical support is what Cameron needed and deserved, not the criminal justice response of stigmatisation, disruption and detention. Fortunately the sentencing Magistrate recognised this and that the initial suspended sentence had set Cameron up to fail. Cameron was able to continue living at home with his family and going to school.

Cameron was supported in the community. This is the support that could be provided to all kids in an alternate system.

Recommendations

- ***The ALS recommends that the minimum age of criminal responsibility in all Australian jurisdiction is raised to at least 14 for all offences. There should not be any carve outs for different offences. This is consistent with medical and social research and aligns with human rights standards.***
- ***Once the minimum age of criminal responsibility is raised to at least 14 years, doli incapax will cease to be relevant and become redundant.[25]***
- ***All levels of governments should develop legislative protections to ensure that children and young people between 14-17 who are appropriately diverted from the criminal justice system at every stage possible.***

Detention of children is damaging and harmful

Q4: 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)? Please explain the reasons for your views and, if available, provide any supporting evidence.

Aboriginal and Torres Strait Islander children and young people should be thriving in community and culture, not locked up and separated from their families and communities in harmful prisons.

Putting children into detention at such a young age has been found to have adverse impacts on their development, including severe and long-term impacts on children's health and well-being. Numerous studies have shown that any period of incarceration increases a child's risk of mental illness, including increased rates of depression, suicide and self-harm.[26] For example, a recent global study noted that "in some cases, the state of psychiatric disorders of children during detention as compared with the mental health of the same children prior to detention increases tenfold."[27] Detention has also been found to reduce educational outcomes, lead to poor social and emotional development, disrupt family

[25] We note our endorsement of the submission made to the public consultation by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), subject to one caveat. In response to Question Four of the consultation questions, the ALS submits that: Once the age of criminal responsibility is raised to 14 years, doli incapax would cease to be relevant and therefore be redundant. However, the ALS recommends that all governments develop legislative protections to ensure that children and young people between 14-17 are appropriately diverted from the criminal justice system at every stage possible.

[26] Novack, M. (2019). UN Global Study on Children Deprived of Liberty, p. 8, https://undocs.org/A/74/136.

[27] *Ibid*.

relationships and been linked to higher rates of early death in children.[28]

This injustice is further compounded by the fact that many children currently in detention have not been sentenced. Currently, on an average day, around 60% of children in prisons are waiting on remand.[29] Further, on an average night, 58% of the total number of young people in unsentenced detention are Aboriginal or Torres Strait Islander.[30]

We know that the younger a child is locked up, the more likely they are to get stuck in the quicksand of the criminal justice system – including future repeated contact with police, juvenile justice detention and return to prison as adults.[31] This means that the low MACR is having a disproportionate impact on Aboriginal and Torres Strait Islander children and young people, which in turn, impacts the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Across the country there have also been numerous reports of mistreatment of children and young people in youth detention facilities, sparking inquiries in every Australian jurisdiction, including New South Wales (NSW) and the Australian Capital Territory (ACT).

For example, in the ACT, a review by the ACT Human Rights Commission found that a young person in handcuffs was punched by a staff member in a youth detention centre, in retaliation for being attacked by three detainees during a violent assault. The ACT Human Rights Commission also substantiated claims of a racist remark made by a youth worker in the centre and found that staff had encouraged detained young people to fight with each other.[32]

In the context of NSW, Aboriginal and Torres Strait Islander people account for 22 percent of all recorded strip searches in custody.[33] The NSW Inspector of Custodial Services has noted that "…the practice of searching young people by asking them to partially remove their clothes may be humiliating and distressing for young people. This is particularly the case given that many young people in detention have experienced abuse."[34]

[28] *Ibid.*

[29] AIHW, Youth Detention population in Australia. 2018. https://www.aihw.gov.au/getmedia/55f8ff82-9091-420d-a75e-37799af96943/aihw-juv-128-youth-detention-population-in-Australia-2018-bulletin-145-dec-2018.pdf.aspx?inline=true

[30] *Ibid.*

[31] McAra, L. and McVie, S. (2007) 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending;, *European Journal of Criminology*, 4)3): 315-45; McAra, L. and McVie, S. (2010) 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime', *Criminology and Criminal Justice*, 10(2): 179-209; Weatherburn, D., McGrath, A. & Bartels, L. (2012) 'Three Dogmas of Juvenile Justice', *University of New South Wales Law Journal*, Vol. 35(3): 779-809.

[32] Toohey, K, Watchirs, H, McKinnon, S, de Fatima Vieira, M., Commission Initiated Review of Allegations Regarding Bimberi Youth Justice Centre, Report March 2019

[33] Grewcock, M and Sentas, V. Rethinking Strip Searches by NSW Police, Report, August 2019, 4

[34] New South Wales Inspect of Custodial Services, Report on the Use of Force, Segregation and Confinement in NSW Juvenile Justice Centre, Report 2018, http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf

Many children who are forced into the criminal justice system have experienced trauma with around 80% of young people in detention having experienced multiple traumatic events during their lifetime.[35] Any period of detention only serves to compound this trauma and exacerbate existing health and wellbeing challenges. For example, every child who is put into prison is required to have a strip-search on entry. This is incredibly re-traumatising, particularly for those children that have been a victim of sexual abuse.

Aboriginal and Torres Strait Islander children and young people also experience intergenerational trauma due to the ongoing impacts of colonisation, dispossession and discrimination. A number of Aboriginal children have undiagnosed mental health challenges, including cognitive disability and Fetal Alcohol Spectrum Disorder (FASD), which should be addressed through a health-focused lens, not a criminal justice system response.[36]

In recognition of the damaging and harmful impact that detention has on children, the UN Committee to the Convention on the Rights of the Child (CROC) has recommended that "no child in conflict with the law below the age of 16 years old be deprived of liberty, either at the pre-trial or post-trial stage. Even above that age, deprivation of liberty should only be used as a measure of last resort and for the shortest period of time with the child's best interests as a primary consideration."[37]

To ensure that deprivation of liberty is used as a last resort, governments should establish and utilise true alternatives to detention. For instance, there is a critical need for a greater emphasis on alternatives to detention, which have a focus on assisting and supporting vulnerable kids. This should include early intervention, prevention, diversion and rehabilitation programs which are Aboriginal led, designed and controlled.

Recommendations

- ***There should be a legislative presumption that no child should be deprived of liberty, except as a measure of last resort (for the shortest possible time) if they present a serious risk to the community.***

- ***All levels of Government should increase the availability of alternatives to detention, prioritising models which are designed and led by Aboriginal communities and organisations.***

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[35] The Royal Australasian College of Physicians. The health and well-being of incarcerated adolescents. Sydney: 2011.
[36] Townsend, C., Hammil, J. and White, P. Fetal Alcohol Disorder, Cognitive Disability and the Criminal Justice System, Indigenous Law Journal, Vol.8(17), http://www.austlii.edu.au/au/journals/ILB/2015/19.pdf.
[37] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st session, UN Doc CRC/C/GC/24 (18 September 2019), [89].

Invest in Aboriginal-led early intervention, prevention and diversion initiatives

Q5. What programs and frameworks (e.g. social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

1. Aboriginal community designed and led responses

Prevention, early intervention and diversionary responses are critical to supporting kids to thrive in community. In Aboriginal and Torres Strait Islander communities, the planning and implementation of these responses should be community controlled, and "empowerment should be at the heart of the design and delivery of services."[38] This is particularly important given the history and ongoing impacts of colonisation, dispossession and discrimination on Aboriginal and Torres Strait communities.

There are a range of existing programs and services within both NSW and ACT (a number of which are outlined below) which should be built upon, with a focus on Aboriginal community control and leadership, as well as consideration for the accessibility and cultural safety of these programs and initiatives for Aboriginal children and young people.

Ideally referral to these services should be triggered by any contact with police or identification by schools or other service providers of antisocial behavior, rather than when criminal charges have been laid. We know that children are less likely to become engaged in the criminal justice system later on in the future if they are provided with social and therapeutic support, focused on addressing underlying factors behind their behaviour.

Example: Clean Slate Without Prejudice (Redfern)

A voluntary routine & boxing program for kids in Redfern that aims to provide participants with the structure, routine and commitment needed for later employment.

The program encompasses a range of strategies including early intervention, developmental crime prevention, positive relationships, support networking and behavioural workshops. An Aboriginal and/or Torres Strait Islander mentor brings the participants to boxing training three times a week and helps them find accommodation, employment, and education or training where necessary.

[38] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 7, 247-248.

Example: Maranguka – Justice Reinvestment (Bourke, NSW)

Maranguka is a model of Indigenous self-governance, guided by the Bourke Tribal Council. Maranguka partnered with Just Reinvest NSW in 2013 to develop a 'proof of concept' for justice reinvestment in Bourke. The first stage of Maranguka focused on building trust between community and service providers, data collection, identifying community priorities and 'circuit breakers'. During the next phase, a shared vision, goals and measurement system were developed as part of the community's strategy: Growing our Kids Up Safe, Smart and Strong. The Priorities identified included: Early Childhood and Parenting, 8-18 year olds and the Role of Men, as well as service sector reform.

Between 2015 and 2017, the community has recorded:

- an 18 per cent drop in the number of major offences;
- a 34 per cent drop in non-domestic violence related assaults;
- a 39 per cent fall in domestic violence related assaults;
- a 39 per cent fall in the number of people proceeded against for drug offences; and
- a 35 per cent reduction in the number of people proceeded against for driving offences.

Example: Youth Koori Court

The Youth Koori Court in NSW is a program that provides an alternative to the mainstream court system. The Youth Koori Court is available to eligible Aboriginal children and young people in the criminal jurisdiction. The Court has been operating at Parramatta since 2015 and has since expanded to Surry Hills Children's Court due to its success.

The Youth Koori Court has proven effective among its participants by addressing the underlying social factors contributing to young Aboriginal people entering the justice system, such as lack of access to housing, education, substance abuse and unemployment.

There are also significant lessons which can be learnt from international jurisdictions where the MACR already falls above the 14-year-old threshold. For example, in Finland there is MACR of 16 years, and there is no juvenile criminal court.[39] Instead, any interventions are focused around social welfare, with a

[39] Marttunen, Matti, "Finland / The basis of Finnish juvenile criminal justice", Dans Revue internationale de droit pénal 2004/1-2 (Vol. 75), pages 315 – 335.

focus on the best interests of the child. This helps to ensure children are kept out of the criminal justice system. In other countries such as Sweden, Norway, Belgium, France and the Netherlands the focus is also on how the welfare system, rather than criminal courts, can support kids to address the root causes of their behaviour.[40] These strategies could be drawn upon in the Australian context, but with a focus on ensuring any intervention are place-based and context specific.

Another critical part of prevention is ensuring that children have access to culturally-safe and trauma-responsive education, health and community services. For example, education is a well-known protective factor in a child's life. Conversely, there is a strong link between school disengagement and interactions with the juvenile justice system. School suspension is a key element of the 'school-to-prison pipeline', which sees marginalised and excluded young people at an increased risk of youth and, eventually, adult incarceration. Ensuring that broader social supports in the community are culturally safe and providing adequate and responsive support to children and young people, is critical to supporting them to achieve their full potential.

2. Availability and accessibility of services

In November and December 2017, the ALS conducted a series of state-wide community forums with ALS staff, community leaders and stakeholders focused on exploring the availability of youth diversion programs in NSW. Over 230 people attended community forums in Redfern, Tweed Heads, Grafton, Wollongong, Mount Druitt, Tamworth, Broken Hill, Walgett and Dubbo. In addition, a survey on youth diversionary programs was also provided to community members who were unable to attend the forums.
Some key findings of the survey were that:

- An overwhelming 88% of respondents said they thought youth diversionary programs help to stop offending behaviour;
- 89% of respondents said that there are not enough youth diversionary programs to meet the demand; and
- 90% of respondents said that there are not enough diversionary programs offered in rural, regional and remote NSW.

One key issue identified by many participants was the lack of local youth diversion programs particularly in regional, rural and remote areas of NSW. The lack of available services in these areas means that many young people must travel outside of their communities, away from family and support networks. Similar challenges exist within the context of the ACT.

[40] Neal Hazel, The University of Salford, "Cross-national comparison of youth justice", Youth Justice Board for England and Wales, 2008, page 3

Anecdotal evidence from respondents suggested a pattern has emerged for those young people travelling to diversionary programs outside of their communities. Initially young people engage well with the programs, but that engagement declines over the duration of the program as the young people begin to miss their family or become homesick. Attendance at programs outside of communities meant young people were unable to participate in events in their hometown or, in some cases, had to leave the program to fulfil familial obligations.

For example, participants noted that the financial burden of travelling to visit young people participating in youth diversionary programs out of communities fell on families. Some participants noted that this could be ameliorated by arranging better means for families to visit young people outside of the community or alternatively through offering semi-residential programs allowing participants to visit home regularly.

> *'Keeping kids close to community, connected with culture and country is paramount in healing. Teaching self-respect in communities rather than taking kids away.'*
>
> *'Children should not have to go off country to access services to improve their outcomes.'*

Participants noted that rural and remote areas tended to be on the tail end of larger regions, and therefore only received partial support. In one town, participants noted that while there was a caseworker working with young people, they were only present once a week. Participants commented that a lack of funding reduced chances of consistent staffing and of organisations building long term relationships with communities. Many services that are funded for particular areas do not actually get regular workers and some do not stay in the area for long term. Participants saw the high turnover of staff, programs and services as problematic, as the kind of work required by people in this sector requires building relationships of trust with communities which takes time.

These issues should be considered and addressed, to ensure all children and young people have access to the necessary support services.[41]

3. Service Mapping

Rather than starting from scratch, governments should undertake service mapping across jurisdiction to identify the adequacy and efficacy of current services and programs directed at the prevention of harm, early intervention and diversion. This should include consideration of existing service gaps, barriers to participation and the important culturally safe and Aboriginal community-led interventions.[42]

[41] For further information, see the ALS' submission to the *Inquiry into the Adequacy of Youth Diversionary Programs in NSW*, https://www.alsnswact.org.au/nsw_parliamentary_inquiry_into_adequacy_of_youth_diversion_programs

[42] Within the NSW context, the 2018 Report of the NSW Legislative Assembly on the *Inquiry into the Adequacy of Youth Diversionary Programs in NSW* and National Legal Aid's submission to this consultation provides a useful starting point for considering the availability and accessibility of support and diversion programs for children in NSW. See for example:

Recommendations

- ***In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led. Prevention, early intervention and diversionary responses should be linked to culturally-safe and trauma-responsive services including education, health and community services.***

- ***Governments should undertake service mapping across jurisdictions to identify the adequacy and efficacy of current services and programs directed at the prevention of harm, early intervention and diversion. This should include consideration of existing service gaps and barriers to participation.***

- ***Aboriginal and Torres Strait Islander legal services must be adequately resourced and supported to provide communities with culturally appropriate and safe legal advice and assistance.***

- ***Aboriginal community controlled services focused on health, family support, education, disability, cultural connection, healing and other support services must be adequately resources to support their communities***

Support place-based and individualised responses

Q6. 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 but may be engaged in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

As highlighted above, children aged less than 14 years do not yet have the developmental or mental capacity to appreciate the full impact of their behavior on others. The Royal Australian College of Physicians has noted that:

https://www.parliament.nsw.gov.au/ladocs/inquiries/2464/Report%20Adequacy%20of%20Youth%20Diversionary%20Programs%20in%20NSW.PDF
Within the ACT conext, ACTCOSS' submission to the consultation provides a useful starting point for considering the availability and accessibility of support and diversion programs for children in ACT.

> *[M]any problematic behaviours in 10 to 13 year old age children that currently are considered "crimes" under current Australian law are better understood to be within the range of behaviours one would expect, in context of the normal neuro-developmental profile of 10 to 13 year olds (poor impulse control, poorly developed capacity to plan and foresee consequences) coupled with behaviours one would expect in young children with significant neuro-developmental impairment and / or who have experienced significant past trauma. Children with problematic behaviour (and their families) need care, support and treatment, not punishment. Criminalisation and incarceration further damages children who are often traumatised.*[43]

Consequently, it is important to recognize that teaching children about behavior and responsibility should not only be the domain of the criminal justice system. In fact the NT Royal Commission found that "relying on formal charging as a means of responding to youth offending is not developmentally appropriate for the majority of children and young people and is counterproductive in most cases."[44] As a result they recommended that there be a greater emphasis placed on alternative approaches which support children and address the root causes of their behavior.

The ALS submits that there is a need for a holistic approach which is focused on ensuring that children's needs are appropriately responded to. This should include consideration of initiatives that provide for individualised responses, including case management and targeted programs and services.

Whilst not Aboriginal designed and led, one example of an alternative program is the Youth on Track program in NSW.[45] Youth on Track is an early intervention program for 10-17 year olds who are at-risk of long-term involvement in the justice system. At-risk children can be referred to the program by police, education or other agencies, regardless of whether they are involved with the criminal justice system. The program supports young people (and their families) through intensive case management and evidence-informed interventions, and is currently located in Blacktown, Hunter, Mid North Coast, Central West, Coffs and New England. The government must consider availability, accessibility and cultural safety of programs such as this, and others, across both NSW and the ACT.

In addition, it is critical that responses are place-based and tailored to local context. As noted by the recent Queensland review into youth justice;

> *In our consultations, there was wide support for place-based approaches that are driven from community and supported by genuine partnerships between community members, non-government organisations, police, courts and government service providers. There was a consistent view that genuine local partnerships, where community members, local businesses and opinion leaders contribute to a holistic response to youth offending, underpin the success of local solutions.*[46]

[43] Royal Australian College of Physicians, RACP submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility, July 2019, p.5.

[44] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2b, p.413.

[45] For more information see: http://www.youthontrack.justice.nsw.gov.au/

[46] Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, p.82, https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf.

Similarly, the recent Productivity Commission draft report on Expenditure on Children in the Northern Territory[47] noted that:

> *[G]overnments need to adopt a place-based approach to the design and delivery of services and programs for families and children. In essence, a place-based approach involves flexible service provision to find fit-for-purpose solutions that reflect the needs of local communities. This means recognising that different communities have different histories, languages and social, political and cultural dynamics — and hence different strengths, opportunities, priorities and service needs. By its nature, a place-based approach relies on engagement between governments and the community to understand the specific issues faced by the community.*

As much as possible, programs and interventions should be Aboriginal community controlled and led. In addition, it is important that services are place-based and designed to respond to the local context of the community they work within.

Recommendations

- ***All levels of Governments should resource and adequately support Aboriginal community controlled organisations to provide culturally safe diversion programs for children and young people.***

Holistic support should be provided outside of the criminal justice system

Q7. 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.

The notion that children need to be incarcerated or have contact with the youth justice system in order to access support services is inherently problematic. The responsibility is that of Government and education, child protection, health and broader support agencies to provide properly resourced services to those children in our communities who have complex needs and may require additional support.

In addition, as was noted above at question 1 and 2, when the issue of doli incapax is before the court Youth Justice cannot support the young person through bail supervision as this requires a guilty plea.

[47] Productivity Commission, Expenditure on Children in the Northern Territory, Draft Report, Canberra (2019), p.50, https://www.pc.gov.au/inquiries/current/nt-children/draft/nt-children-draft.pdf

Further, any benefit a child may receive from counselling and support must be considered in the context of protecting the child from any legal consequences. This means children who may be in need of some counselling either cannot participate in it at all, or cannot participate fully.

As highlighted above, even if contact with the criminal justice system only occurs for a limited period of time, harm is still caused. The process of charge, arrest and hearing is lengthy and inevitably involves excessive and intrusive bail conditions and detention – this is not holistic service support.

Holistic services for children should be provided in community settings and, as much as possible, be designed, led and delivered by Aboriginal communities and organisations.

Recommendation

- ***All levels of government should invest in holistic social services for children, which are provided in community settings and, as much as possible, by designed, led and delivered by Aboriginal communities and organisations.***

Prevention of harm

Q8. If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviors committed by children who fall under the minimum age threshold?

As illustrated in this submission, the criminal justice system is criminogenic, particularly in its impact on children. The majority of offences committed by children 14 and under are of the less serious type and are symptomatic of child behaviour.[48] Under the current approach, the community is less protected that it would be under an alternative model.

As much as possible, services for children and young people should be provided in community settings and be delivered by (or in partnership with) Aboriginal community controlled organisations.

As noted above, the ALS submits that Aboriginal and Torres Strait Islander children and young people thrive when they are connected to community and culture. The criminal justice system is ill-equipped to

[48] Royal Australian College of Physicians, RACP submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility, July 2019, p.5.

support children and only serves to compound and create additional trauma. As a result, there must be a holistic approach which is focused on ensuring that children are provided with the services they need to address the underlying causes of their behavior. For example, this might include services focused on addressing physical and mental health needs, including those related to trauma, cognitive impairment, family, drug or alcohol issues.

Furthermore, the vast majority of kids aged under 14 commit only very minor offences. Recognising that serious anti-social behaviour or violence is very rare, we should make sure that this small number of cases does not negatively impact upon how we respond to the needs of other kids aged 14 and under. For example, the Queensland Report on Youth Justice noted that diversion with interventions "work best with children who have moderate to high risks and needs. In contrast, intervening with low-risk children can result in involving them further in the criminal justice system and other negative outcomes."[49] As a result, the report noted that it is better to provide only minimal intervention for children with low-level offending.

One model that a number of stakeholders have pointed to is the Children's Hearings System currently utilised in Scotland in the United Kingdom. Under this system;

> *When children cause harm, they are referred to the specialised Children's Hearings System. The central principle of the Children's Hearings System is the philosophy that 'deeds are symptomatic of needs'. Children's hearings consider the welfare of the child and their best interests above all else when making decisions for further intervention. Responses are centred on the physical, emotional and educational welfare of the child, and not punishment.*[50]

International models such as this might provide some direction for the Australian context; however it is imperative that interventions are tailored to the particular context in which they operate. As much as possible, voluntary models which focus on holistic support for children should be prioritised.

For the very small cohort of children that have very complex needs, and may pose a serious risk of harm to themselves or others, a holistic, therapeutic and restorative approach is required. It is critical that any intensive therapeutic approaches are aimed at rehabilitation and eventual return to the community.

Recommendation

- ***All programs for Aboriginal children and young people should be underpinned by the principle of self-determination.***

- ***Voluntary therapeutic models which focus on holistic support for children should be prioritized***

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[49] Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 33-37, https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf

[50] Jesuit Social Services, Raising the Age of Criminal Responsibility – there is a better way, October 2019, https://jss.org.au/raising-the-age-of-criminal-responsibility-there-is-a-better-way/

Sufficient protections against exploitation

Q9. Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered doli incapax) to participate in activities or behaviours which may otherwise attract a criminal offence?

We submit that current legal provisions within both NSW and the ACT provide sufficient protection for children against exploitation by people who might incite, counsel, procure, aid or abet a child to commit a crime. Existing laws across all Australian jurisdictions ensure that children who are aged below the MACR are protected whilst also ensuring that anyone who may use a child to commit an offence can be held liable.

Any additional measures run the risk of criminalising Aboriginal and Torres Strait Islander children and young people because of family and kinship connections.

Recommendation

- ***No new offences should be created for persons who exploit or incite children who fall under the MACR. The current legal framework is sufficient to protect children aged below the MACR from being incited to commit offences and the addition of any new offences would run the risk of disproportionately targeting Aboriginal and Torres Strait Islander people.***

State/Territory Specific Issues

Q10. Are there issues specific to states or territories (e.g. operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

Currently within Australia, there is no national approach to youth justice, which means that there is a broad range of legislation, policy and practice.

For example, the ALS has offices both within New South Wales and the Australian Capital Territory, and, as noted above, across these two jurisdictions there is currently inconsistency in how doli incapax operates and is applied, as highlighted above.

The Australian Law Reform Commission has previously noted that "there should be national consistency

on when a young person is dealt with in the juvenile justice or adult criminal system" to avoid a situation where a child might be treated differently in one jurisdiction compared to another.[51]

Despite this, the desire for national consistency should not be an impediment to individual States or Territories leading on this reform, and acting without delay to raise the age.

Every day that we don't act, is another day that we are continuing to lock up kids in harmful and damaging prisons. The ALS strongly encourages all Australian jurisdictions to raise the age to at least 14 years.

Recommendation

- ***States and territories should be prepared to lead on this reform, and act without delay to raise the minimum age of criminal responsibility to at least 14 years.***

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[51] Australian Law Reform Commission, Seen and heard: priority for children in the legal process (ALRC Report 84) (November 1997)