

Aboriginal Legal Service of Western Australia Limited



Submission to the review of the age of criminal responsibility by Council of Attorneys-General

28 February 2020

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ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia (WA). ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples^[1] throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a public company limited by guarantee and is governed by an Aboriginal board. The board consists of five elected directors and two co-opted directors who commit time, cultural and business expertise to provide leadership and governance.

ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout WA via 11 regional and remote offices and one head office in Perth.

BACKGROUND

Terms of reference

1. Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.
2. If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example

[1] In this submission ALSWA uses the term 'Aboriginal peoples' to refer to 'Aboriginal and Torres Strait Islander peoples.'

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.

3. 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.
4. Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.
5. What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.
6. Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.
7. If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views and, if available, provide any supporting evidence.
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?
9. 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?
10. Are there issues specific to states or territories (eg operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.
11. Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

ALSWA SUBMISSION

ALSWA's extensive experience in representing Aboriginal and Torres Strait Islander peoples throughout WA on a daily basis, as well as its longstanding research and expertise, has informed this submission.

Wherever possible, ALSWA refers to case examples to provide evidence of the views expressed in this submission. Extremely busy and passionate ALSWA lawyers and court officers have provided these case examples. Many more examples exist but the tight timeframe for the tabling of this submission along with the enormous workloads faced by ALSWA lawyers and court officers has made it impossible to provide more at this stage. The case examples included in this submission should be viewed as a 'sample' of cases rather than as the only evidence of the various problems discussed. ALSWA can provide further information and supporting documents, if required.

Executive summary

The age of criminal responsibility should be 14 years of age for all offences.

Once the age of criminal responsibility is raised to 14 years, *doli incapax* would cease to be relevant.

The minimum age of incarceration should be 16 years of age for all offences, except for homicide offences. Incarceration of children under 18 years of age should be an option of last resort. This should be enshrined in legislation.

Prevention, early intervention and diversionary responses should be prioritised. These responses should be developed and delivered in collaboration with Aboriginal community controlled organisations and delivered by them as culturally-safe and trauma-informed services.

There should be additional funding and support provided for the diagnosis, treatment and support of children with neurodevelopmental impairments, including Fetal Alcohol Spectrum Disorder (FASD).

Introduction

It is well known that Aboriginal and Torres Strait Islander people are overrepresented in the Australian criminal justice system. As the Australian Law Reform Commission (ALRC) observed, Aboriginal and Torres Strait Islander people represent 3% of the national population but constitute 27% of the adult prisoner population.¹ However, in WA Aboriginal people comprise almost 40% of the adult prisoner population and 73% of the juvenile detention population. Aboriginal women are also grossly overrepresented; as at 31 March 2017, 46% of female prisoners were Aboriginal women (compared to 34% nationally).²

The lives of many young Aboriginal people are marred by acute socio-economic disadvantage, the continuing adverse impacts of colonisation and dispossession,

¹ Australian Law Reform Commission (ALRC), *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.30].

² Western Australian Department of Corrective Services, *Adult Prisoners in Custody Quarterly Statistics March Quarter 2017*; *Young People in Detention Quarterly Statistics March Quarter 2017*.

trauma from the stolen generations, intergenerational trauma, substance abuse, homelessness, poor educational outcomes and serious physical and mental health issues. These factors often underpin a young person's involvement in the criminal justice system.

Aboriginal people in WA also experience structural bias and discriminatory practices within the justice system itself. Examples of bias and discrimination include: over-policing; lack of culturally appropriate programs in the community and in prison; mandatory sentencing; punitive bail laws; insufficient resourcing of Aboriginal-specific legal services; and the lack of Aboriginal language interpreters.

The former Chief Justice of Western Australia, Wayne Martin has argued that:

Over-representation amongst those who commit crime is, however, plainly not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by the police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.³

In addition, as observed by Morgan and Motteram:

Unless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's imprisonment rate is so much higher than the rest of the country.⁴

In this context, a recent investigation uncovered that in WA between 2010 and 2014, Aboriginal drivers had received 3.2 times more fines than non-Aboriginal drivers when issued directly by police officers, for example, following the interception by police of a vehicle driven by an Aboriginal person. However, with respect to fines issued for traffic camera infringements, Aboriginal drivers received fewer penalties on average than their non-Aboriginal counterparts.⁵

In its discussion paper on the incarceration rates of Aboriginal and Torres Strait Islander Peoples, the ALRC noted:⁶

An Australian Institute of Criminology study in 1988 found that most Australians respected and felt protected by the police forces of the states and territories. However, an Aboriginal and Torres Strait Islander perspective can differ—given the historical nature of the involvement of police in the lives of Aboriginal and Torres Strait Islander

³ The Honourable Wayne Martin AC, Chief Justice of Western Australia, *Indigenous Incarceration Rates: Strategies for much needed reform* (Law Summer School 2015) 8–9.

⁴ Morgan and Motteram as quoted in LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 83.

⁵ The Guardian Australia, 'Aboriginal drivers in WA more likely to get fines from police officers than traffic cameras', accessed: <https://www.theguardian.com/australia-news/2020/feb/05/aboriginal-drivers-in-wa-more-likely-to-get-fines-from-police-officers-than-traffic-cameras>

⁶ ALRC 'Incarceration rates of Aboriginal and Torres Strait Islander Peoples' Discussion Paper 84, Chapter 12, Police accountability, accessed: <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/12-police-accountability/background-31/>

peoples post-1788, where police came to take on the role of protectors of Aboriginal communities situated on reserves and missions. This role involved them in considerable supervision of Aboriginal people's lives. It is symbolised by images of them returning runaways in neck and leg chains ... It also came to involve the removing children from their families.

Many see the 1967 referendum as a 'watershed moment', when Australia voted for the betterment of Aboriginal peoples. Jo Kimara has however suggested that, although policing policies changed following the 1967 referendum, such a change was not necessarily for the better:

Far from being inclusionary, many policing practices became covert and exclusionary. Without specific legislation there was an increase in arrests and incarceration for offences that non-Indigenous people would be unlikely to be arrested for. This was and still is colloquially known as the offence of 'being Black in a public place' and encompasses the notorious trifecta legislation of offensive language, resist arrest and assault police. [references omitted]

The Amnesty International report, 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia', released in May 2015, highlighted the national crisis in the overrepresentation of Aboriginal young people in detention in Australia. This report found that rates of detention have increased significantly since the release of Royal Commission into Aboriginal Deaths in Custody final report in 1991 and that Aboriginal young people are now 26 times more likely to be in detention than non-Aboriginal young people.⁷

In WA, the situation is significantly worse. Between July 2013 and July 2014 Aboriginal young people were on average 54 times more likely than their non-Aboriginal peers to be in detention and the rate at which Aboriginal young people were detained was twice the national rate (66.95 per 10,000 Aboriginal young people detained in WA compared to 34.47 per 10,000 Aboriginal young people detained nationally).⁸ WA has the highest rate of overrepresentation in the nation.

Amnesty International notes that the rate of overrepresentation is particularly bleak for 10- and 11-year-old Aboriginal children who made up more than 60% of all 10 and 11 year olds in detention in Australia in 2012-13⁹ and 74% of all 10- and 11-year-olds in detention in Australia in 2014-15.¹⁰

To halt the rising rate of Indigenous youth in detention, Amnesty has called on the Australian Government to make a number of legislative changes to fulfil its obligations under the United Nations (UN) Convention on the Rights of the Child (CRC), including raising the age of criminal responsibility. Raising the age of criminal responsibility would mean that very young Aboriginal and Torres Strait Islander

⁷ Amnesty International 2015 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia', referring to Australian Institute of Health and Welfare 'Youth Detention Population in Australia', Juvenile Justice Series No 16), 5.

⁸ Amnesty International 2015 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia', referring to Australian Institute of Health and Welfare 'Youth Detention Population in Australia', 2014 Table s 10.

⁹ Amnesty International 2015 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia', referring to Australian Institute of Health and Welfare 'Youth Detention Population in Australia', 2014.

¹⁰ Amnesty International 2015 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia', referring to Australian Institute of Health and Welfare, Youth Justice in Australia 2014-15 Table S78b.

children would avoid the detrimental consequences of early contact with the criminal justice system.

Questions 1 and 2: Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only?

ALSWA submits the age of criminal responsibility should be 14 years of age for all offences.

The CRC requires that States establish a minimum age ‘below which children shall be presumed not to have the capacity to infringe penal law’. The United Nations (UN) Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) explain this further in Rule 4.1: ‘In those legal systems recognising the concept of the age of criminal responsibility for juveniles, 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.’

Neither the CRC nor the Beijing Rules determine an appropriate minimum age for criminal responsibility, but the UN Committee on the Rights of the Child has stated that 12 years of age is the absolute minimum and States should work towards higher age levels.

In its concluding observations on the implementation of the Convention in Australia in 2005 the Committee stated that the age of criminal responsibility in Australia is ‘too low’ and recommended raising it to 12 years of age. This was reiterated in its 2012 concluding observations when it again recommended that the minimum age of criminal responsibility be increased to at least 12 years.¹¹ More recently this was recommended during Australia’s Universal Periodic Review before the Human Rights Council in 2016.¹²

Although advocating for an absolute minimum age of 12 years, the UN supports minimum ages of criminal responsibility that are higher, such as 14 or 16 years.¹³

Other jurisdictions

The minimum age of criminal responsibility varies widely across the world and the criminal/penal codes of many countries prescribe higher minimum ages of criminal responsibility than Australia:

- 12 years - Canada, Greece, Netherlands, Ireland (except murder, manslaughter and sexual assault where the minimum age is 10 years);
- 13 years - France, Israel, New Zealand (except for murder and manslaughter where the minimum age is 10 years);

¹¹ Committee on the Rights of the Child, Concluding Observations – Australia (28 August 2012) CRC/AUS/CO/4, [29].

¹² Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, 31st sess, UN Doc A/HRC/31/14.

¹³ Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice (2007) CRC/C/GC/10.

- 14 years - China, Austria, Germany, Chile, Italy and many Eastern European countries;
- 15 years - Denmark, Finland, Iceland, Norway, Sweden;
- 16 years - Japan, Portugal, Spain, Argentina;
- 18 years - Belgium, Luxembourg, Brazil.

In 1983 Canada raised the minimum age to 12 but removed the rebuttable presumption of *doli incapax* for those aged 12 and 13.

In 2006 the Republic of Ireland raised the minimum age from 7 to 12 but retained the rebuttable presumption of *doli incapax* from 12 to 14 and prohibited the criminal prosecution of a child under 14 years of age except with the consent of the Director of Public Prosecutions. The median age of criminal responsibility across the world is 14 years.

Cognitive impairments

Many Aboriginal young people aged between 10 and 14 years of age are affected by cognitive impairments and developmental and intellectual disabilities, including FASD.

A study conducted by the Telethon Kids Institute in 2017 found that 89% of children in Banksia Hill Detention Centre (WA's only juvenile detention centre) had at least one form of severe neurodevelopmental impairment, while 36% were found to have FASD. The researchers noted that this was the highest known prevalence of FASD in a custodial/corrective setting worldwide, and almost double the previous highest Australian estimate in a non-custodial setting.

Young Aboriginal people with cognitive and other impairments are 'particularly vulnerable' to criminalisation as a result of their related memory issues, short attention span, low impulse control, communication style, peer pressure responses, poor emotional regulation and in some instances, inappropriate sexual behaviours.¹⁴ These young people have often experienced trauma (both direct and intergenerational) and suffer from related mental health issues. Together with any cognitive impairment(s), these experiences further impact their capacity to regulate their behaviour, understand consequences and manage emotions.

Neurological science

The neurobiological evidence suggests that the adolescent brain does not fully mature until an individual is at least in their early twenties.¹⁵ The average healthy child under 14 may therefore be 'neurologically immature' and likely to have poor impulse control, as well as poor organisational and planning skills. This leaves them susceptible to peer pressure and risk-taking behaviours, which can lead to breaches

¹⁴ Cunneen, C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney

¹⁵ Ibid.

of the criminal law.¹⁶ It is important to note that this is the case for children who do also not face the additional hurdles of socio economic disadvantage, entrenched trauma, mental health issues and cognitive disabilities, which is often the experience for young Aboriginal people.

These young people are also likely to have poor educational outcomes, including leaving school at a very young age¹⁷, which has a further deleterious impact on neurological development.

Recommendation: the age of criminal responsibility should be 14 years of age for all offences across all Australian jurisdictions.

Question 3: If the age of criminal responsibility is increased should the presumption of *doli incapax* be retained?

ALSWA submits that once the age of criminal responsibility is raised to 14 years, the need to retain *doli incapax* falls away.

Question 4: Should there be a separate minimum age of detention?

The minimum age of incarceration should be 16 years of age for all offences, save for the offences of murder and manslaughter (ss 279 and 280 of the *Criminal Code*).

Incarceration of children under 18 years of age should be an option of last resort.

Incarceration impacts disproportionately on Aboriginal young people.

In his 2017 inspection of Banksia Hill Detention Centre report, the WA Inspector of Custodial Services reported that in the previous five years the Centre had generally held 140–150 young people but numbers had been trending upwards, and during that year, had exceeded 170.¹⁸ At the time of reporting, young Aboriginal people comprised approximately 70 per cent of the Centre's total population, and almost all of the younger people from regional areas detained at the Centre.¹⁹ Of the young people detained in the Centre on 18 July 2017, the Inspector reported that two were 12 years old, fourteen were 13 years old and ten were 14 years old.²⁰

ALSWA's experiences is that the primary focus of Banksia Hill Detention Centre is on the punitive and confinement aspects of detention. In that sense, many of the issues identified by the Royal Commission into Child Protection and Youth Detention

¹⁶ Ibid; The Royal Australasian College of Physicians, 'Doctors, lawyers, experts unite in call to raise age of criminal responsibility', accessed: <https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility>

¹⁷ Australian Medical Association, 'AMA calls for age of criminal responsibility to be raised to 14 years of age', 25 March 2019, accessed: <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>

¹⁸ Office of the Inspector of Custodial Services, *2017 Inspection of Banksia Hill Detention Centre* (No 116, February 2018) iii.

¹⁹ Office of the Inspector of Custodial Services, *2017 Inspection of Banksia Hill Detention Centre* (No 116, February 2018) iii.

²⁰ Office of the Inspector of Custodial Services, *2017 Inspection of Banksia Hill Detention Centre* (No 116, February 2018) 5, 6.

in the Northern Territory are also prevalent in Banksia Hill Detention Centre, including but not limited to the degrading and humiliating treatment of young people by guards, the excessive use of force and solitary confinement, the denial of legal rights and procedural fairness and the inappropriate exposure of young detainees to hard-nosed older offenders. This leads to already profoundly damaged young people being further traumatised and inevitably impedes their prospects for reform and reclamation.

There are also significant numbers of children being held in Banksia Hill Detention Centre on remand. Of particular concern in this respect is the way young people in care are dealt with by the Department of Communities – Child Protection and Family Support. As it acts in the position of loco parentis, the Department has a statutory duty under the *Bail Act 1977*, to sign bail documentation as a ‘responsible adult’ on behalf of young people granted bail as a precondition for their release on bail. The Department also has a duty to ensure that young people under its care who are on bail are living in appropriate accommodation.

In some instances, young Aboriginal people who are in the care of the Department have remained in Banksia Hill Detention Centre, after having been granted bail, for excessive periods because the Department has refused to sign bail documentation as ‘responsible adult’ or was unable to or refused to locate suitable accommodation for the young person to live in when on bail. For example, a 16 year old Aboriginal young person in the care of the Department languished in detention for 35 days after being granted bail by a court before the Department secured appropriate accommodation for him in the community. This is not an uncommon occurrence.

Recommendation: the minimum age of incarceration should be 16 years of age for all offences, except for the offences of murder and manslaughter (ss279 and 280 of the Criminal Code). Incarceration of children under 18 years of age should be statutorily prescribed as an option of last resort.

Question 5: What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised?

A whole-of-government approach is required in order to address the drivers of Aboriginal disadvantage in WA, which is the primary catalyst for offending by Aboriginal young people.

A top down approach by Government has been used for time immemorial and has failed dismally at every turn.

As noted above, ALSWA submits prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services focussing on accommodation, education, physical and mental health, alcohol and drugs, employment, sport and recreation and community services should be prioritised and expanded. The Aboriginal community must be involved at every level in this process, ie responses need to be informed, led and driven by the Aboriginal community, not by Government departments or police. Government has, however, an important role to play in resourcing and building capacity and expertise within Aboriginal organisations and communities to develop and deliver these responses.

Question 6: Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future?

ALSWA's Youth Engagement Program (YEP) could be adapted and expanded to assist young Aboriginal people under the age of 10, those over 10 years of age who are uncharged but at risk, as well as young people aged up to 14 years, should the age of criminal responsibility be increased.

YEP operates at the Perth Children's Court (PCC), ALSWA's head office and on an outreach basis. Eligibility for the program is that the young person is appearing in the PCC and is a client of ALSWA. The program provides flexible, holistic and individualised support based on the young person's specific needs and circumstances including:

- court support;
- case management;
- mentoring;
- referrals to external programs and services;
- practical assistance (eg, transport to court, youth justice appointments and other appointments such as counselling or education meetings; reminders for court and appointments; assistance with Centrelink, obtaining Medicare cards, opening bank accounts, obtaining birth certificates, and accessing medical assistance);
- assistance to help young people reengage in education/training including identifying appropriate schools and programs, completing enrolment forms, attending enrolment meetings with the young person and their family, and purchasing necessary supplies to commence school; and
- assistance to access recreational and sporting activities including taking many young people out for fun activities such as bowling, basketball, movies, and Bounce (in order to encourage prosocial activities, build rapport and sustain engagement).

The cohort of young people referred to YEP are usually those Aboriginal young people appearing in court who are most disadvantaged and who have the most complex needs, as the following case studies reveal:

Case Study 1

YEP assisted a young Aboriginal girl who has FASD to hand herself into court on an arrest warrant after she had previously failed to attend court. Two diversion officers visited her at home, encouraged her to hand herself into the court and picked her up the next morning to take her to court. Her matter was not heard until later in the afternoon and her diversion officer stayed with her throughout all day before taking her home. This young girl remained in the physical proximity of the diversion officer for the entire day, often holding onto her arm for support. The client was subsequently sentenced to a four-month

Conditional Release Order (suspended sentenced of detention). YEP, along with another NGO program, provided extensive assistance to enable her to complete this order (transport and support for reporting to youth justice, constant reminders and ongoing mentoring). If she had not complied with this order, she would have been required to attend court for breach proceedings and would have most likely been sentenced to four months detention (at a minimum cost to the state of \$58, 620). This young girl told her diversion officer that she was the first person who had ever helped her.

Case Study 2

YEP assisted a young Aboriginal male to reengage with his Conditional Release Order after he attended court for breach proceedings. He was required comply with strict bail conditions and then attend court for sentencing a few weeks later. On this court hearing date, he absconded from the court building due to extreme anxiety. The diversion officer was able to locate him outside the court, calm him down and facilitated his appearance by requesting a closed court. This client was then sentenced to a one-month Conditional Release Order which was successfully completed with considerable help from YEP. Over this one-month period, the diversion officer transported him to and supported him at supervision and counselling appointments on approximately seven occasions.

Case Study 3

YEP helped a young boy who was in Banksia Hill Detention Centre on remand. The diversion officer identified a suitable carer and developed a release plan with the client and his family. This release plan included a referral to alcohol counselling at the Aboriginal Alcohol and Drug Service. A bail application before the President of the Children's Court was successful and he was released on bail for two hearing dates approximately one and half months later. If he had not been released on bail, the cost to the state would have been in the vicinity of \$43,965.

Case Study 4

A young boy commenced YEP at the end of 2017. During the early part of 2018 he was somewhat disengaged from school and spent time in and out of detention. During this time, YEP assisted him to reengage with a previous football club and after an early injury, he recommenced football in May 2018 and has continued playing all season. In May 2018 he was sentenced to an IYSO for six months. Since that time, he has engaged extremely well with his diversion officer who has provided him with significant support and mentoring. YEP has transported him to court, to numerous youth justice supervision appointments and to other appointments. YEP has referred him to counselling for substance misuse and for PTSD which he has commenced and is enjoying. His diversion officer has watched him play football on the weekend and has established a strong rapport with him over the past months. This young boy is fully compliant with his youth justice order, is attending school every day and is enjoying his developing football career.

ALSWA strongly believes that YEP provides considerable support to young Aboriginal people to comply and engage with the court system thus avoiding significant costs

such as detention, multiple court dates and returns to court. Other benefits of the program include reengagement in education and training; access to services and programs such as accommodation and culturally competent counselling; positive role modelling and enhancement of cultural connections; mentoring and positive reintegration into the community.

ALSWA believes that key features of YEP that enable these outcomes are that:

1. The diversion officers are all Aboriginal and positive role models; hence they can communicate effectively with the young people and ensure a culturally competent service.
2. The program is operated by ALSWA – an Aboriginal community controlled organisation with a long history and strong degree of trust and respect in the Aboriginal community. Therefore, the diversion officers are not hindered by the level of mistrust that youth workers/caseworkers from government and mainstream non-government organisations experience.
3. YEP capitalises on the existing relationship between the young person and ALSWA.

As noted above, YEP could be readily adapted and expanded to assist young Aboriginal people up to the age of 14 who are at risk of offending. YEP is due to be evaluated by the Department of Justice in the second half of 2020.

At a regional level, the Yiriman Project is operated out of the Aboriginal community Jarlmadangah Burru, which is 120km from Derby. The Project commenced in 2000. The primary goal of the Project is to support young Aboriginal people from remote communities who are connected culturally and linguistically within Nyikina, Mangala, Walmajarri and Karajarri traditional land and language groups. The program has equipped young people with the skills and resilience to engage with contemporary society, while imparting in them a strength to move away from activities involving self-harm and substance abuse.²¹ The program is now based in Fitzroy Crossing and also works with the Bunuba and Gooniyandi groups.²²

The Yiriman Project is an example of a best practice model and could be adopted and duplicated as a tool to assist with Aboriginal youth offending and Aboriginal youth suicide for the following reasons:

- (a) its emphasis on the protective characteristics of Aboriginal culture against mental health and other issues;
- (b) the importance of health policy grounded in Aboriginal culture to balance against traditional Western approaches to Aboriginal health;

²¹ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, 299 – 305.

²² Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, 299 – 305.

- (c) the Project's emphasis on targeted interventions for at-risk youth and incorporation of the voice of local elders through an Aboriginal-centric and holistic approach to well-being is, in turn, profoundly empowering for communities; and
- (d) the model is designed by the language groups of the Fitzroy Valley and can be duplicated across Aboriginal groups, where elders are empowered to design on-country trips with specific cultural content.

In her findings in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, State Coroner Fogliani recommended that the Yiriman Project, or a model akin to it, be extended.²³

The Olabud Doogethu Project in Halls Creek, WA's first social reinvestment site, is an Aboriginal community-owned project that uses principles of 'Asset Based Community Development', 'Justice Reinvestment' and 'Collective Impact' for individual community plans, delivering place-based solutions to the underlying social causes of youth offending across the Shire of Halls Creek in the East Kimberley. The Project was informed by extensive 18 month co-design projects with Aboriginal communities across the area. The Project is only in its initial stages, however, it has already demonstrated considerable success in several areas. In particular, the Project has employed a team of Youth Engagement Night Officers to provide monitoring and safety for Halls Creek young people and community members during the late evening and early morning hours. Since the introduction of the Night Officers there has been a significant reduction in offending by young people in Halls Creek. The Project has also introduced Learning on Country Coordinators for both Halls Creek and other East Kimberley Aboriginal communities. These positions involve local Aboriginal people using traditions, stories to facilitate learning on country and cultural resilience, as well as the development of culturally secure youth rehabilitation and alternative education models.

The role of police in this area should not be overlooked. Many young Aboriginal people have numerous negative experiences with police, which feeds into a long held Aboriginal community fears and distrust of police more generally. In the inquest into the deaths of thirteen children and young persons in the Kimberley Region, senior police officers gave evidence about the 'Adopt-A-Cop' program, which involves WA Police officers attending school classrooms in Halls Creek and engaging with children. Programs like the Adopt-A-Cop program provide opportunities for Aboriginal young people and police to engage positively. This enables individual police officers to develop a rapport with local Aboriginal young people, outside traditional policing roles and offers scope to dispel feelings of fear and distrust towards police. Evidence at the inquest into the deaths of thirteen children and young persons in the Kimberley Region inquest demonstrated that such programs are most effective when developed in consultation with the Aboriginal community. The State Coroner recommended:

²³ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 16, 305.

That police stations in the Kimberley Regions consider undertaking activities similar to the 'Adopt-A-Cop' program in Halls Creek, ensuring these programs are developed in consultation with senior members of the Aboriginal community and that those police efforts be supported (Recommendation 32).²⁴

Question 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?

See ALSWA's answer to Question 5.

Further, the justice system should never be regarded as providing an opportunity to access services, especially in the case of young Aboriginal people. The justice system should be considered a resource of last resort in this regard. In particular, it is often too late if services are finally accessed by a young Aboriginal person after, for example, being sentenced to a term of juvenile detention. The four grey walls of a detention cell is not a good place to start trying to rehabilitate a young life. The focus must be on early intervention.

In her findings in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, State Coroner Fogliani recommended that additional funding be provided for the diagnosis, treatment and support of young people with neurodevelopmental impairment. These young people are at heightened risk of contact with police, the justice system and eventually, incarceration. The State Coroner recommended:

that there be universal screening for FASD at the following points: during infant health assessments and upon a child entering into the child protection system or justice system for the first time; and

that all children identified as at risk of neurodevelopment impairment on the basis of antenatal exposure to alcohol or early life trauma be assessed by a paediatrician for developmental and behavioural impairments at the age of one year and in the year prior to school entry; and

in respect of a child entering the child protection system for the first time in addition to FASD universal screening:

- i. That preliminary assessments and screening be undertaken by Department of Communities' district psychologists;
- ii. That referrals be made for comprehensive IQ and functional capacity assessments where and when required by presentation and behaviours; and
- iii. That there be referrals to other treatment and therapy services for trauma-related developmental and behavioural issues, including mental health issues, impulsivity, and harmful sexual behaviours, that

²⁴ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 32, 349.

may or may not include cognitive impairments and neuro-disabilities such as FASD(Recommendation 1).²⁵

Further, the State Coroner recommended:

That neurodevelopmental impairment (an umbrella term which includes behavioural, developmental and cognitive impairments) incorporating the criteria defined in the Australian Guide to the diagnosis of FASD be recognised as a disability within the National Disability Insurance Scheme (the NDIS); and

That where FASD has actually been diagnosed at the appropriate level of severity, it is separately recognised as a disability within the NDIS. (Recommendation 3).²⁶

The State Coroner also recommended:

That consideration be given to additional funding for primary care services in areas with a high burden of neurodevelopmental impairment to increase diagnostic capacity for complex conditions including FASD, and to respond to the diagnosis by way of therapeutic services for children and young people diagnosed with FASD (Recommendation 4).²⁷

The State Coroner also recommended that education campaigns around FASD be expanded and that the WA Government expand the funding for the 'Making FASD History' project that ran successfully in the Fitzroy Valley (Recommendations 3, 5 and 6).²⁸

ALSWA echoes the State Coroner's call for further funding and support for the diagnosis, treatment and support of children with neurodevelopmental impairments, including FASD.

The Department of Communities has an important role to play in service provision for young people in its care. Young people in care should also have ready access and, where needed, at an early age, to culturally competent medical professionals to diagnose cognitive, behavioural and developmental disorders. Once a diagnosis is made young people should be provided with the requisite culturally secure supports and services.

The Department also needs to embrace the notion of devolving service design and delivery to Aboriginal community controlled organisations. In particular, Department staff responsible for the day to day care of young people in care, eg staff employed in Department group homes, need to be provided with all the tools required to deal with young Aboriginal people who are traumatised and/or have complex needs and conditions to improve wellbeing and divert them away from the justice system. Too often recourse is made by group home staff to police in relation to minor incidents,

²⁵ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 1, 267-268.

²⁶ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 2, 270.

²⁷ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 4, 273.

²⁸ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendations 3, 5, 6, 272 – 277.

eg breaking a window in a group home, which frequently further enmeshes vulnerable young people in care in the criminal justice system.

ALSWA submits that a position of Commissioner for Aboriginal Children and Young Persons also should be created. The position would recognise the unique place occupied by Aboriginal young people in WA, along with the significant issues and vulnerabilities faced by them. The role should have an important advocacy focus; Aboriginal young people in contact with Government departments, police and the justice system are usually disempowered, demoralised and voiceless. The role could also monitor the performance of Government departments and agencies tasked with the responsibility of service delivery to ensure that vulnerable young Aboriginal people do not engage in anti-social conduct.

There also needs to be improved service integration within and between the Western Australian Government, Commonwealth Government and non-government service providers. In her findings in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, State Coroner Fogliani discussed the establishment of the role of 'family advocate'. In her evidence before the Inquest, Professor Pat Dudgeon suggested that struggling families would be assisted by a 'family advocate'. Individual family advocates would assist Aboriginal families with financial management, alcohol and drug issues, navigating the criminal justice system, accessing health services and in helping children attend school. The State Coroner recommended:

That there be the appointment of Local Area Co-ordinators or local Family Advocates in the Kimberley Region who can assist families in need to accessing service providers and that all efforts be made to have such roles filled by an Aboriginal person (Recommendation 12).²⁹

It is also important to employ Aboriginal and Torres Strait Islander people in senior roles within government departments and organisations that provide services to the Aboriginal community. The relevant training and qualifications required for these positions should be modified to reflect the circumstances faced by Aboriginal people in obtaining such employment, especially Aboriginal people living in regional and remote areas. This could involve the creation of localised training courses in order to recruit suitable Aboriginal people. The State Coroner recommended:

That efforts continue to be made to employ Aboriginal person in health (including mental health), education, child protection and police and, where necessary or desirable, that consideration be given to introducing bridging courses and cadet programs and/or locally accessible training courses to assist prospective employees to obtain the necessary qualifications (Recommendation 21).³⁰

It is critically important that cultural healing projects are developed. The inquest into the deaths of thirteen children and young persons in the Kimberley region heard evidence during its visit to the Nyamba Buru Yawaru Centre (the NBYC) in Broome,

²⁹ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 12, 294.

³⁰ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 21, 323-324.

which is run by the traditional Aboriginal owners in the region, the Yawuru people. During the visit, the Yawuru concept of Liyan was discussed, which is the interconnectedness for Aboriginal people between the self, the wider community and the land. Liyan is an integral part of the wellbeing of Yawuru people. At the time of the visit, the NBYC was in the process of obtaining funding for a cultural healing centre to be built at its premises.³¹ The State Coroner recommended:

That there be funding by Government for the development of cultural healing projects in the Kimberley Region such as the one being developed by the Nyamba Buru Yawuru Centre in Broome (Recommendation 25).³²

Recommendation: the WA government consider implementing Recommendations 1 – 7 from the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia.

Recommendation: that the position of Commissioner for Aboriginal children and Young People be created.

Recommendation: that Local Area Co-ordinators or local Family Advocates be created across Western Australia.

Recommendation: that Aboriginal community controlled organisations be used in the design and implementation of service delivery across Western Australia.

Recommendation: that cultural healing projects be created across Western Australia

Question 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 above, an early intervention, therapeutic and trauma informed model designed and implemented by properly resourced Aboriginal community controlled organisations and agencies is needed to steer young people falling under the minimum age threshold away from criminal and anti-social activity. This will, in turn, provide protection to the community.

The public discourse around crime and punishment must also change. This must be led by Government. The “dive to the bottom” by successive governments on law and order as a means of gaining electoral advantage has condemned the community to a poor understanding of crime and its causes. A new narrative must be created if the community is to understand the utility in raising the age of criminal responsibility.

³¹ Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, 330 – 334.

³² Finding in the inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, Recommendation 25, 334.

Question 9: 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?

ALSWA submits there is no need for any new criminal offences of this nature; the current offences in relation to conspiracy and incitement in the *Criminal Code* adequately cater for any alleged offending of this type.

Any new offences of this nature will necessarily draw more Aboriginal people into the criminal justice system and, in the end, contribute to increased rates of Aboriginal imprisonment.

Question 10: Issues specific to Western Australia

The policing of the Aboriginal community in WA remains hugely problematic and is linked with the overrepresentation of Aboriginal young people in the justice system.

The relationship of the WA Aboriginal community with police has historically been riven with conflict, violence and distrust, beginning with police massacres during the early years of colonisation and culminating in more recent times, the gruesome and entirely avoidable death of Ms Dhu in a police cell.

Policing practices targeting Aboriginal young people for minor offending enmesh them in the justice system at a young age. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs stated in 2011:

The Committee is concerned about evidence suggesting that over-policing of Indigenous communities continues to be an issue affecting not only relations between Indigenous people and the police, but also the rate at which Indigenous people come into contact with the criminal justice system.³³

In June 2019, the WA Police Commissioner, Chris Dawson, commented that the ‘vast volume’ of Aboriginal children who are charged with a criminal offence in this State could be dealt with through community justice arrangements and not end up in custody. Further, he stated that the problem of why Aboriginal children who are found by WA Police to be breaking the law are more likely to end up in court than non-Aboriginal children needs to be addressed.³⁴

The following are examples of “over policing” of young Aboriginal people. Several of these case examples involved young people who spent varying periods of time in either police cells or detention for offences which very arguably should not have resulted in a prosecution, let alone the loss of liberty. This issue is also often overlooked; the devastating impact on young Aboriginal lives of even a very short stint in custody.

³³ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time –Time for Doing: Indigenous youth in the criminal justice system* (2011) [7.22].

³⁴ The Guardian, ‘WA police says ‘vast volume’ of Indigenous children shouldn’t be in custody’, 3 June 2019, accessed: <https://www.theguardian.com/australia-news/2019/jun/03/wa-police-says-vast-volume-of-indigenous-children-shouldnt-be-in-custody>

Case Study 5

A 15 year old Aboriginal boy from a remote area spent nearly two weeks in custody at Banksia Hill Detention Centre on remand after being arrested and charged by police with attempting to steal an ice cream valued at \$2.30.

Case Study 6

A 12 year old Aboriginal boy from a regional town was charged by police with receiving a stolen Freddo frog valued at about 70c. The boy spent several hours in a police lock up after failing to attend a court date in relation to the charge.

Case Study 7

A 16-year-old Aboriginal boy from a remote community who attempted to commit suicide by throwing himself in front of a car was charged with damaging the vehicle.

Case Study 8

An 11-year-old with no prior contact with the justice system was charged with threats to harm and doused in capsicum spray by police following an incident at her primary school where she allegedly threatened teachers with plastic scissors.

Case Study 8

A 10-year-old Aboriginal boy from a regional town was found by police playing in an abandoned house after another young person had broken a window to enable them to get inside. The boy used a rake to push out the glass to avoid cutting himself when getting inside. The boy was charged by police with criminal damage.

Case Study 9

A 12-year-old Aboriginal girl who was charged with possession of stolen property after her friend stole two chocolate bars and she took a bite from one of them.

Case Example 10

The grandmother of an 11 year old boy contacted police after her grandson and another young boy were pursued by an adult male driving a 4WD at speed after the boys had been seen by the man walking onto his property. When the grandmother asked whether police would investigate and charge the man, she was told that if police did investigate than her grandson could be charged with stealing a tent peg from the property.

It is inconceivable that the above offences would have been preferred against non-Aboriginal young people. More importantly, most of the above offences could not be prosecuted if the age of criminal responsibility was raised. There is a powerful

argument that raising the age of criminal responsibility might also temper police decisions to prosecute young people over the age of 14, in cases where the offending is trivial or innocuous, eg a 15 year old attempting to steal an ice cream or a 16 year old who damages a car when attempting to commit suicide.

In 2018-19 Western Australia Police conducted strip searches on 1,444 children under 18 years of age. Nineteen of these children strip searched were 10 years of age, 24 were 11 years of age, 68 were 12 years of age and a staggering 138 children were 13 years of age. Self-evidently, enduring a strip search can be deeply traumatic, disempowering and intimidating for a young person, especially young Aboriginal people who have been exposed to other trauma in the form of sexual and other forms of abuse. These sorts of negative interactions by young Aboriginal people with police would be avoided or minimised if the age of criminal responsibility were raised.

Conclusion

ALSWA submits the time is nigh for the Commonwealth to take a lead role in reducing Aboriginal incarceration rates and improving Aboriginal wellbeing. Raising the age of criminal responsibility would be a small step in the right direction and provide a ray of hope for Aboriginal communities and their families, in an otherwise depressingly bleak landscape, that the Commonwealth is genuinely committed to achieving these aims.