

Age of Criminal Responsibility Working Group Review

Submission to Council of Attorneys-General

13 February 2020

CONTENTS

Who we are	3
Introduction	4
Young people in detention.....	4
The capacity of children to comprehend the nature of their conduct	5
International human rights law and the age of criminal responsibility.....	6
Relevant state/territory legislation.....	7
Conclusion.....	8

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to provide this submission to the Council of Attorneys-General ('COAG') Age of Criminal Responsibility Working Group Review.
2. The ALA considers that raising the age of criminal responsibility is a key measure in reducing the rate of incarceration of young people, who should be detained only as a last resort. Currently, the minimum age, 10 years, is the same for all Australian states and territories.² The low age across all of Australia's states and territories is in breach of human rights standards and puts Australia out of step with much of the rest of the world; the worldwide median age of criminal responsibility is 14 years.³
3. The ALA submits that the age of criminal responsibility should be raised to 14 years of age, in accordance with the recommendations of the United Nations Committee on the Rights of the Child.

Young people in detention

4. According to the Australian Institute of Health and Welfare (AIHW), in 2017–18 on any given day, 7 per cent of the total number of young people under youth justice supervision were aged between 10 and 13. This equates to approximately 385 children. Of these, the overwhelming majority (approximately 75 per cent) were Aboriginal and Torres Strait Islander children.⁴ In the Northern Territory, over 90 per cent of young people in detention are Aboriginal and Torres Strait Islander children.
5. According to a recently released Productivity Commission report on Government Services, on average there were 4,790 young people under youth justice supervision in 2018. The average daily detention rate for Aboriginal and Torres Strait Islander children between the ages of 10

² Commonwealth – *Crimes Act 1914*, s4M; *Criminal Code Act 1995*, s7.1; Australian Capital Territory – *Criminal Code 2002*, s25; Northern Territory – *Criminal Code*, ss38(1) & 42AP; New South Wales – *Children (Criminal Proceedings) Act 1987*, s5; Victoria – *Children, Youth and Families Act 2005*, s344; South Australia – *Young Offenders Act 1993*, s5; Western Australia – *Criminal Code Act Compilation Act 1913*, s29; Queensland – *Criminal Code Act 1899*, s29(1); Tasmania – *Criminal Code 1924*, s18(1).

³ Australian Human Rights Commission, National Children's Commissioner, *Children's Rights Report 2016*, 187.

⁴ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18*, May 2019, 8–9.

and 17 was more than 30 per 10,000, compared to 1.4 per 10,000 for non-Indigenous youths. This means that Aboriginal and Torres Strait Islander youth are being detained at a rate of 23 times that of non-Indigenous young people.⁵

6. According to the AIHW, it is often the most vulnerable and disadvantaged children who come to the attention of the justice system at a young age.⁶ The ALA submits that it is not appropriate for children aged between 10 and 14 to be under the supervision of the youth criminal justice system.

The capacity of children to comprehend the nature of their conduct

7. The ALA notes that there is a significant quantity of contemporary research indicating that many children aged between 10 and 14 are not at a cognitive stage of development where they are able to appropriately appreciate the nature and significance of criminal conduct and the lifelong consequences of undertaking such conduct. This creates significant doubt on the capacity for children of this age to appropriately reflect before embarking on a course of action involving criminal behaviour.⁷

8. According to the UN Committee on the Rights of the Child:

‘Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence.’⁸

⁵ Australian Government Productivity Commission, Report on Government Services 2020, Youth Justice Services, 23 January 2020, available online at: <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice>.

⁶ Australian Institute of Health and Welfare, *Youth Justice Supervision in Australia 2015-16*, Bulletin 138, supplementary data table S78b, March 2017.

⁷ Kelly Richards, ‘What makes juvenile offenders different from adult offenders?’, *Trends & Issues in crime and criminal justice*, No. 409, February 2011, 4; Laurence Steinberg, ‘Risk taking in adolescence: new perspectives from brain and behavioural science’, (2007) 16 *Current Directions in Psychological Science* 55, 56.

⁸ UN Committee on the Rights of the Child, *General comment No. 24: Children’s rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para 22.

9. The ALA is also concerned that by criminalising the behaviour of children who may not be aware of the consequences and nature of their conduct, a dangerous cycle of disadvantage is initiated, causing children to become entrenched in the criminal justice system. Several studies confirm that when children are drawn into the criminal justice system at a young age, there is a significantly higher likelihood of subsequent reoffending, and a lower likelihood of that child completing her/his education or securing employment.⁹
10. The ALA also notes that in December 2019 the Australian Medical Association stated that raising the age of criminal responsibility was an important measure to prevent the unnecessary criminalisation of vulnerable children.¹⁰

International human rights law and the age of criminal responsibility

11. Under article 40(3) of the UN Convention on the Rights of the Child (signed and ratified by Australia in 1990), state parties are required to establish a minimum age of criminal responsibility. However, the article does not specify the age. Over 50 state parties have raised the minimum age following ratification of the Convention and the most common minimum age of criminal responsibility internationally is 14.
12. The UN Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.¹¹
13. In 2017, both the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination (CERD) recommended that Australia take active steps to raise the age of criminal responsibility.¹² The CERD specifically expressed concern regarding the over-

⁹ Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision*, 2014–15, Juvenile justice series no. 20, June 2017; Australian Institute of Health and Welfare, *Young People Aged 10–14 in the Youth Justice System*, 2011–2012, July 2013.

¹⁰ Paul Karp, 'Peak legal and medical groups push to limit minimum age of criminal responsibility to 14', *The Guardian*, 17 December 2019.

¹¹ Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th session, UN Doc CRC/C/GC/10 (25 April 2007), paras 32–33; see also n7 above, para 22.

¹² Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 1 December 2017, para 44; Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20, 26 December 2017, para 26.

representation of young Aboriginal and Torres Strait Islander children who come into contact with the criminal justice system:

‘The Committee is deeply concerned about the high proportion of indigenous children in contact with the criminal justice system, some of them at a very young age. It is also concerned about the ill-treatment suffered by juveniles, especially indigenous children, and the conditions in which they are held.’¹³

Relevant state/territory legislation

14. The ALA submits that the following provisions pertaining to each of the state, territory and Commonwealth Acts should be amended to read that ‘a child under 14 years is not criminally responsible for an offence’:

Commonwealth – *Crimes Act 1914*, s4M; *Criminal Code Act 1995*, s7.1;

Australian Capital Territory – *Criminal Code 2002*, s 25;

Northern Territory – *Criminal Code 1983*, Schedule 1, s38(1) & 43AP;

New South Wales – *Children (Criminal Proceedings) Act 1987*, s5;

Victoria – *Children, Youth and Families Act 2005*, s344;

South Australia – *Young Offenders Act 1993*, s5;

Western Australia – *Criminal Code Act Compilation Act 1913*, s29;

Queensland – *Criminal Code Act 1899*, s29(1); and

Tasmania – *Criminal Code 1924*, s18(1).

15. These amendments will effectively deem children under the age of 14 years incapable of criminal responsibility and prevent young children from being dealt with in the criminal justice system.

¹³ Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20, 26 December 2017, paragraph 25.

Conclusion

16. The ALA welcomes the opportunity to have input into the review of the age of criminal responsibility being conducted by the Council of Attorneys-General. The ALA is available to further assist the COAG working group should that be required.

Andrew Christopoulos



President
Australian Lawyers Alliance