North Australian Aboriginal Justice Agency

NAAJA Submission

Council of Attorneys-General – Age of Criminal Responsibility Working Group review

February 2020

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1. About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal and Torres Strait Islander people throughout the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). From 1 January 2018 NAAJA has been providing legal services for the southern region of the Northern Territory formerly provided by CAALAS (Central Australian Aboriginal Legal Aid Service). NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice. NAAJA's legal practice area is broad, encompassing criminal, civil, care and protection and family law. NAAJA has offices in Darwin, Alice Springs, Katherine and Tennant Creek and travels to remote communities across the Northern Territory to provide legal advice, representation, community legal education and consult with relevant groups to inform policy submissions.

As part of our work, NAAJA provides a number of services specific to youth, which are aimed to be holistic, trauma informed, and responsive to the different and often complex needs of young people in contact with the youth justice system. Our team of criminal lawyers includes youth lawyers who specialise in youth matters. We have Youth Justice Aboriginal Legal Support Officers who assist young clients at court. We also have youth Throughcare teams in Darwin and Alice Springs, who work closely with young people in detention pre and post release with a view to facilitating engagement with necessary services and reducing the risk of reoffending. Our civil law team provides advice and representation to families in relation to care and protection matters, and assists young people to exercise their rights in detention. Additionally, our Law and Justice teams regularly deliver youth specific community legal education sessions, often in the detention setting.

This submission draws on the cultural authority of an Aboriginal board which governs NAAJA as an Aboriginal Community Controlled Organisation. NAAJA staff are inspired by the strength and resilience of the Aboriginal people who are board members and come from across the Northern Territory including a strong focus and representation from regional and remote areas. We particularly acknowledge the Elders of our board and the contribution of Aboriginal and Torres Strait Islander people who developed and strengthened NAAJA and its earlier bodies over the years.

2. Background to our Submission: the NT context

The 'Age of Criminal Responsibility Review' is of fundamental importance review as it does consider the future of all Australian children interaction with the Australian criminal justice system. How each Australian Government responds to the Review will have a direct impact on ongoing generations of Australian children and how we as a nation care for children that is supportive and not punitive, that is corrective without being retributive and guides children to safe, healthy and law-abiding lives.

On this national issue, the context of the Northern Territory's experiences of children and the recommendations of Inquires and Royal Commission will be at the forefront of this Review and our submission.

NAAJA's submission will show that the Review and statutory and policy reform concerning raising the 'Minimum age of criminal responsibility is really a discussion about Aboriginal children, families and communities.[1] The raising of the criminal age of youth is in the Northern Territory the essential component of a long overdue cultural shift towards an early intervention and therapeutic Youth Justice System. This transformation of the Youth Justice System will reflect modern neurological science regarding adolescent brain development and acknowledges the importance of focusing on social and emotional wellbeing of young people.

The disproportionate overrepresentation of Aboriginal children in the Northern Territory's youth justice system are well known. Aboriginal youth are overrepresented in the Northern Territory's criminal justice system, more so, than both female and male Aboriginal adults, and are under supervision at a higher rate than any other Australian jurisdiction.[2]

Aboriginal children between the ages of 10-14 years in the Northern Territory are prosecuted at grossly disproportionate levels. The Royal Commission into the Protection and Detention of Children in the NT (Royal Commission) found that over the ten year period from 2006 – 2016, the number of arrests of all children and young people more than tripled, and that the most dramatic rise involved the youngest children aged from 10 – 14 with an eightfold increase.

Of all children arrested in the during the ten year period from 2006 – 2016, 88% were Aboriginal.[3] On an average day in 2015–16, 71% of young people in detention in the Northern Territory were on remand, significantly more than the national average of 57%.[4] Almost all of these young people will have been Aboriginal – with Aboriginal young people consistently making up the entire, if not the overwhelming majority, of young people in youth detention.

An Aboriginal child is more likely to be arrested and charged, less likely to be receive or complete youth diversion, will remain in the Court system for longer and be held on remand or more likely be sentenced to a period of detention.

Should there be the continuation of the minimum age of criminal responsibility of 10 years will continue to impact most heavily on Aboriginal children and their families of the Northern Territory.

[1] This section responds to question 12 of the Working Group, relating to state or Territory specific issues and considerations

[2] Australian Institute for Health and Welfare, Youth Justice in Australia 2017-18 (2019) cat no. JUV 129, Table 2.1, 5, accessed at https://www.aihw.gov.au/getmedia/f80cfcb3-c058-4c1c-bda5-e37ba51fa66b/aihw-juv-129.pdf.aspx?inline=true>

[3] Table 25.2 'Arrests of children and young people in the NT by gender and Aboriginal status, 2006-2007 to 2015-2016', RCPDCNT Final Report Volume 2B, p224

[4] Australian Institute of Health and Welfare, 2016, Northern Territory: Youth justice supervision in 2015-16, Youth Justice Fact sheets, no. 77, p. 3.

The Royal Commission heard the compelling account of the effects of the detention on a child who was aged 10 years old.

Witness:

When I first went into the Old Don Dale I was kept in my cell by myself all day except for about 15 to 30 minutes a day when they would let me out in the yard or when I went to school. I was told that this was because I was too young to be in with the rest of the boys, but that really confused me because I thought why would they put me in Don Dale in the first place if they thought I was too young to be around the other boys … Being isolated in the cells was boring, but it was also very lonely.[5]

3. NAAJA's responses to the questions of the Working Group

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.

It is no longer acceptable that in all Australian jurisdictions to retain the minimum age of criminal responsibility at 10 years. Setting the age of criminal responsibility at 10 years will adversely effect children but mostly Aboriginal children in providing an early entry point into the Criminal Justice system. It is also at odds with global human rights standards and medical evidence concerning child brain development.

Neurological evidence shows that at 10 years of age, children are not developmentally mature enough to have the sufficient skills and capacities necessary for criminal responsibility.[6] The UN Committee on the Rights of the Child has repeatedly recommended that Australia raise the age of criminal responsibility.[7] The age of criminal responsibility in Australia is disproportionately low when compared to many European countries where the average age is 14 years.[8] Countries such as Portugal even considered 14 years to be too young, and set the age of criminal responsibility at 16.

The Northern Territory Government accepted early in the course of the Royal Commission that the youth justice and child protection system is broken and it is well documented of the criminalisation of Aboriginal children as young as 10 and 11 years of age that can be an extremely stigmatizing and traumatic experience. There are no Northern Territory Police holding cells in any remote community or police post that are purpose built for youth, and are entirely inappropriate environments for any young person to be held. Aboriginal children and younger people are often held in conditions that are unsanitary, scary, poorly lit, lacking in privacy, and often bring the young person into contact with adult offenders who may be highly agitated or intoxicated. For Aboriginal children, language and cultural barriers can compound

[5] Witness Statement of 22 February 2017

[6] Jesuit Social Services, 'Too much too young: Raise the age of criminal responsibility to 12', October 2015, 2, 6

[7] Queensland Family & Child Commission, 'The age of criminal responsibility in Queensland', 2017, 6.

[8] Ibid, 8.

this highly stressful environment. Raising the age of criminal responsibility will endure the minimisation of the exposure of children to harmful and traumatic environments.

The NT Royal Commission recommendation 27.1 called for section 38(1) of the *Criminal Code Act* (NT) to be amended to provide that the age of criminal responsibility be 12 years.

Since this recommendation was made, further research and evidence has become known that supports raising the age to at least 14 that NAAJA endorses. These developments are outlined below in our submission.

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.

NAAJA view is that the statutory age of criminal responsibility should be 14 years of age and above. It is therefore necessary that all laws of the Commonwealth, States and Territories should have a consistent age of 14 years as the minimum age of criminal responsibility.

In 2019, the UN Committee on the Rights of the Child increased its recommended age from 12 to at least 14 years of age, to reflect current research in child development and neuroscience. The Committee called on all State parties to increase the age of criminal responsibility to at least 14, stating that:

> 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. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.[9]

A child who is below the age of criminal responsibility at 14 should be excluded from all criminal prosecutions, public infringements, and fines. The prescribing of the age of criminal

[9] "General comment No. 24 (2019) on children's rights in the child justice system", UN Committee on the Rights of the Child, 18 September 2019, p6

responsibility at 14 years is founded on an evidence based, rational and humane approach in which children are to be deemed to be dealt within the criminal justice system.

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.

It is NAAJA's primary submission that the statutory age of criminal responsibility should be at the age of 14 years and above. It is therefore necessary that all laws of the Commonwealth, States and Territories should have a consistent age of 14 years as the minimum age of criminal responsibility.

The proper application, adjudication and enforcement of the presumption of *doli incapax* is not an alternative to raising of the age of criminal responsibility to 14 years. The presumption of *doli incapax* alone does not address fundamental questions of the disproportionate overrepresentation of Aboriginal children in the Northern Territory justice system, and the harmful effects of arrest, stigmatisation and incarceration.

It is NAAJA's position that the presumption of *doli incapax* should be raised also so that it aligns to the new minimum age of criminal responsibility for 'A child aged 14 years to 17 years old'.

NAAJA supports a national test for *doli incapax* that is consistent when it comes to criminal offences with an intentional element[10] and criminal offences of strict liability[11].

NAAJA would support the retention of the current *doli incapax* test for criminal offences (that are of not strict liability) as under section 38(2) where

'… is excused from criminal responsibility for an act, omission, or event unless is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event'.

NAAJA would not endorse the retention of the current section 43AQ of the Criminal Code for criminal offences of strict liability and would support a new national test for *doli incapax*. Whereby criminal offences of strict liability accords with the approach adopted by the High Court of Australia in *RP v the Queen*, namely that the child knew what he or she did 'was seriously wrong'.

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

[10] See section 38(2) of the Northern Territory Criminal Code

[11] See section 43AQ of the Northern Territory Criminal Code

introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

NAAJA submission to the Review is that it is necessary to consider all forms of 'detention' including not just Youth Detention Centres/Facilities but all places where a child may be detained including Police watch-houses, holding cells or other places of detention.

The NT Royal Commission recommendation 27.1 stated;

Section 83 of the *Youth Justice Act* (NT) be amended to add a qualifying condition to section 83(1)(I) that youth under the age of 14 years may not be ordered to serve a time of detention, other than where the youth

> has been convicted of a serious and violent crime against the person
> presents a serious risk to the community, and
> the sentence is approved by the President of the proposed Children's Court.

It is NAAJA's submission that the there should be a minimum age of detention that is higher than recommendation 27.1 and that the age should be raised to 16 years.

The UN Committee on the Rights of the Child recommends that "no child be deprived of liberty, unless there are genuine public safety or public health concerns", and that State parties should fix an age limit of 16 below which children may not legally be deprived of their liberty. [12] In making this recommendation, 'deprivation of liberty' was broadly defined to include any form of detention, imprisonment or placement of a person in a custodial setting, from which the person is not permitted to leave at will.

In the Northern Territory Aboriginal children continue to suffer harm in the detention setting, which also causes great damage to a child's prospects of rehabilitation and reintegration. Despite the diversionary and therapeutic options provided for in the current *Youth Justice Act* (NT), Aboriginal young children continue to be detained with worrying frequency.

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.

It is NAAJA's view that there is no need for further delay to raising the age of criminal responsibility in the Northern Territory. The final report of the Royal Commission was released in November 2017. Shortly after that time, the Northern Territory Government committed to adopting all recommendations including raising the age of criminal responsibility. Significant work has been undertaken in relation to youth justice already in the Northern Territory, and there is no need for further frameworks or strategies – just action on what we already know.

Given the low numbers of children of the relevant age cohort, raising of the age of criminal responsibility would not create a detrimental impact in the transformation of youth system. Children in this age cohort engaging in criminal behaviour should more appropriately be assisted through early intervention and diversion pathways from the criminal justice system. .

[12] "General comment No. 24 (2019) on children's rights in the child justice system", UN Committee on the Rights of the Child, 18 September 2019, p14

NAAJA's Submission to the NT Royal Commission on Pre and Post Detention spoke to the strengthening, healing factor of Aboriginal involvement, decision making and participation in Youth justice for Aboriginal children"

"Empowering Aboriginal ownership and control

> The thing we want most from this Royal Commission is our power back. We want to be able to exercise Burnawarra authority over our community. Self-determination is our number one priority. Self-determination is crucial to effective youth policy.
>
> Self-determination is how we managed to live in harmony and how we managed to surivive for such a long time. We want to have formal input into policy and legislation.[13]

…

We urge the Royal Commission to ensure that its recommendations are informed by Aboriginal people's right to self-determination, recognition of Aboriginal cultural authority and use of traditional decision-making processes. There should be an Aboriginal-centric or Aboriginal-controlled approach at all levels of the structure, supervision and management of youth justice in the Northern Territory. The Northern Territory should be leading the way in delivering culturally-strengthening justice programs for Aboriginal people. Efforts must be made to increase Aboriginal participation in policy and legislation development, and the design and delivery of all services and programs.

The Kurdiji Law and Justice Group gave evidence about the importance of locally-driven responses:

> As the Kurdiji group we have been showing the way, showing that a strong Aboriginal group running things the way it wants for itself, can make a big difference in the community. We feel that supporting groups like ours will do a lot more to solve these problems than spending money on taking children away, sending kids to detention and putting so many of our young people in jail.[14]

…

In these submissions, we have recommended a number of ways in which the participation of Aboriginal people should be embedded across the youth justice system, including decisions about suitability for diversion, facilitating traditional mediation and conflict resolution processes, bail determinations, preparing pre-sentencing reports and establishing lay advocates in the Youth Justice Court.".

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?

[13] Exhibit 526.000, Statement of Bunawarra Dispute Resolution Elders (Maningrida), 15 June 2017, 9 [51]–[52].
[14] Exhibit 531.000, Lajamanu Kurdiji submission, 9 March 2017, 2.

Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

NAAJA's experience is that the best programs for supporting and rehabilitating Aboriginal youth are those provided by Aboriginal Community Controlled Organisations, and which focus on Aboriginal culture and strengthening Aboriginal families. Elders play a crucial role.

Prevention, early intervention, and diversion are essential to supporting young people and reducing the likelihood of involvement with the criminal justice system. This includes recognising the linkages between disadvantage in the areas of housing, education and health to offending-type behaviour in children.

As is the case in countries such as New Zealand and Scotland, offending-type behaviour in children under the age of criminal responsibility should be treated as a public health issue rather than a criminal justice issue. This is appropriate given the common cross-over of children between the care and protection and youth justice systems, which indicates that protective concerns are likely contributing to the behaviour that may be bringing a young person to the attention of police. A diversionary, therapeutic, public health approach led by Aboriginal organisations would have the effect of reducing the number of children in both systems.

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?

The best practice for improving community safety in the Northern Territory context, specifically in relation to Aboriginal children, is to work with families and strengthen family networks, form genuine partnerships with community elders and Law and Justice Groups, and support culturally based programs.

The underlying driving factors of anti-social or criminal behaviours by young children were covered comprehensively during the RCPDCNT, as were the recommended ways of addressing these issues. The Commission heard compelling evidence about the importance of empowering Aboriginal people to develop the solutions and have ownership and control of delivery of services and programs across the youth justice system. To be truly effective and achieve meaningful change, approaches must be informed by Aboriginal people's right to self-determination, recognition of Aboriginal cultural authority, and incorporate traditional decision making processes.

NAAJA submission to the NT Royal Commission hearings on Pre and Post Detention stated:

"Restoring young people to their community

Efforts should be made to return young people to their community, allowing them to heal, to connect with culture and to re-engage with education and training opportunities. There must be divestment from institutional responses to offending and a return of resources to the community.

Successful justice reinvestment policy requires commitment from the Commonwealth and Northern Territory governments and the empowerment of Aboriginal governance structures.[15]

In order for justice to be meaningful to young people, it needs to be connected to where they come from. The Kurdiji Group told the Commission:

> We don't want our children sent away; we want them to stay in the community and receive their punishment and rehabilitation here. If we had some support from outside, our leaders and elders could mentor them, take them out bush to connect with country and teach them the knowledge they need to behave properly and to treat others with respect. We know many of our kids have problems and we've been asking government for many years to support us to work with those kids so they can be strong, happy and law-abiding.[16]

Other jurisdictions nationally and internationally have shown that youth detention numbers can be significantly reduced without compromising community safety. For example, Ontario transformed its youth justice system from a custody-focused system to one that offers a broad range of community-based options. In her evidence to the Commission, Tamara Stone attributed the significant drop in youth detention admissions from 2452 in 2003/04 to 421 in 2015/16 to the creation of community-based sentencing options that allowed young people to access therapeutic services and supports in community.[17] Community-based, culturally-strengthening programs were specifically targeted for Indigenous youth, and many were provided by Indigenous organisations.[18] Achieving change of this scale takes time and calls for dedicated, sustained effort and long-term investment. It also requires extensive consultation with all stakeholders and capacity building in the community.

Empowering Aboriginal communities

Evidence shows that 'well-resourced programs that are owned and run by the community are more successful than generic, short-term, and sometimes inflexible programs imposed on communities.'[19]

Ranger programs deliver significant cultural, social and economic benefits for Aboriginal communities, including for children and young people who are at risk of, or are in contact with the justice system.[20] For example, a recent evaluation for the Department of Prime Minister and Cabinet specifically noted the benefits of the Warddeken Indigenous Protected Area ranger program in curbing the over-representation of Aboriginal people in the justice system.[21]

The Congress After Hours Youth Services, which provides workers to engage with young people at risk in Alice Springs and refers them to social, emotional and wellbeing services, is a prime example

[15] Oral evidence of Dr Jill Guthrie, 28 June 2017, 5241:43–46.
[16] Exhibit 531.000, Lajamanu Kurdiji submission, 9 March 2017, 1.
[17] Oral evidence of Tamara Stone, 30 June 2017, 5380–5381.
[18] Ibid, 5385.
[19] Exhibit 018.001, Little Children are Sacred Report, 30 April 2007, 53.
[20] Department of the Prime Minister and Cabinet, Consolidated report on Indigenous Protected Areas following Social Return on Investment analyses, 2016 <http://www.socialventures.com.au/assets/Consolidated-SROI-Report-on-IPA-WoC.pdf>.
[21] Ibid.

of the benefits of Aboriginal-run programs.[22] Positive Aboriginal-run programs always have funding uncertainty and are at risk of de-funding by government changes and directions.[23]

Aboriginal communities must be empowered to develop the solutions and own and control service delivery in communities, with an emphasis on self-determination and locally-based solutions.

NAAJA endorses a place-based model where Aboriginal communities are supported to build capacity for services within their own community. This approach enables service delivery to recognise that connection to culture, family, community and country is fundamental to building strong Aboriginal communities, families and children".

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?

NAAJA strongly opposes the creation of any such criminal offence. There is no need, due to existing protections that are already adequately provided for in criminal law and civil law.

It is our experience that association type criminal type offences can adversely effect Aboriginal people due to family and kinship relationships. With the example of children and young people offending, there may be other family and kin present or involved of a variety of ages and kinship relationships including under the age of criminal responsibility or may be considered for *doli incapax*.

The introduction of a specific offence of this nature would adversely affect Aboriginal children and could potentially result in perverse situations of Aboriginal children being prosecuted for association with younger siblings or other relations. An association-type offence is completely inappropriate in an Aboriginal context.

4. Conclusion

NAAJA thanks the Working Group for considering our feedback on these issues that affect our client base so profoundly. We hope that our responses have been of assistance, and would be happy to provide further information to the Working Group if required. We look forward to the outcome of this Review, and do so with a sense of anticipation as to the tangible positive changes that would flow to Aboriginal children and families as a result of long awaited reform in this area.

[22] Exhibit 456.000, Statement of Donna Ah Chee, 22 May 2017.
[23] Oral evidence of expert panel of Ah Chee, Walder and Balmer, 29 May 2017, 4034.