

NTCOSS welcomes the opportunity to contribute to the Council of Attorneys-General Age of Criminal Responsibility Working Group review.

The current minimum age of criminal responsibility at 10 years of age harms children, and in particular Aboriginal and Torres Strait Islander children. It is discriminatory, out of step with human rights standards and contemporary neuroscientific understanding of child and adolescent brain development.

In keeping with recommendations by the United Nations Committee on the Rights of the Child, all Australian Governments should raise the age of criminal responsibility to at least 14 years. This adoption of children's rights is of particular importance for Aboriginal and Torres Strait Islander children and those with disability, who are overrepresented in Australia's justice systems.

Youth offending is closely linked with entrenched social and economic disadvantage. Children who are involved in the youth justice system are more likely to have experienced child maltreatment, homelessness, mental health difficulties, substance misuse, poverty, disability, trauma, placement in out of home care, and exposure to family violence¹. Australia needs to do more to support children in a therapeutic way, rather than use punitive responses that are harmful and have been shown to be less effective in reducing recidivism.

NTCOSS supports the following key principles for reform as endorsed by key groups, including Change the Record, NATSILS, the Human Rights Law Centre, Amnesty International, Australian Medical Association and Jesuit Social Services:

1. The minimum age of criminal responsibility must be raised to at least 14 years

- In keeping with contemporary evidence and understanding of child and adolescent brain development, the minimum age of criminal responsibility should be increased to at least 14 years across Australia, for all offences.
- The current minimum age of criminal responsibility at 10 years of age has a disproportionate impact on Aboriginal and Torres Strait Islander children, with Aboriginal and Torres Strait Islander children representing more than 50% of all children in detention in 2017 – 2018². The concentration of Aboriginal and Torres Strait Islander children aged 12 years and younger in Australian youth justice systems is even greater.³ According to the National Children's Commissioner, raising the minimum age of criminal responsibility would assist in addressing the overrepresentation of Aboriginal and Torres Strait Islander children in detention⁴.
- Detention or imprisonment of children and young people should be used only as a measure of last resort and only occur for the shortest appropriate period of time.

¹ Dean A 2018, 'The intersection between the child protection and youth justice systems', Child Family Community Australia Resource Sheet – July 2018, Australian Institute of Family Studies

² p39 Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–2018* (Report, 2019)

³ p15 Cuneen C 2017, 'Arguments for raising the minimum aged of criminal responsibility

⁴ p244 Australian Human Rights Commission, National Children's Commissioner, *Children's Rights Report 2019 In Their Own Right: Children's Rights in Australia*

- As argued in the NT Royal Commission’s report, the deterrent value of incarceration for children and young people is ‘far outweighed by its detrimental impacts’.⁵ The Commissioners found that for pre-teens and young teenagers, ‘the harsh consequences of separation ... from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth detention can interrupt the normal pattern of ‘aging out’ of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism’.⁶

2. There must be no ‘carve outs’ to this legislation, even for serious offences

- The relatively small number of younger children who do offend are arguably the most vulnerable, with evidence suggesting that many children in the justice system have multiple, complex mental health, social and emotional wellbeing needs⁷. It is for this reason that NTCOSS recommends against raising the minimum age of criminal responsibility for certain circumstances only, as children engaging in more serious crimes are likely to be the most vulnerable cohort.
- The Committee on the Rights of the Child strongly recommends that the minimum age of criminal responsibility ‘does not allow, by way of exception, the use of a lower age’⁸.

3. *Doli incapax* – fails to safeguard children, is applied inconsistently and results in discriminatory practices

- *Doli incapax* is an old, common law rebuttable presumption that children lack the capacity to be legally responsible for their acts, however it routinely fails to safeguard children.
- The presumption of *doli incapax* is inconsistently applied across Australia. The absence of adequate data in the NT presents difficulties in assessing the application of the principle, however the number of young children who are subject to criminal penalties suggests that it is inconsistently or frequently unsuccessfully in this jurisdiction. Furthermore, contrary to common law, the onus to establish *doli incapax* appears to have become the responsibility of the defence, rather than the responsibility of the prosecution to refute⁹. In the NT, this practice means that young defendants are subjected to bail (and often held in remand), and the principle of *doli*

⁵ p419 Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, Vol.2B

⁶ *ibid*

⁷ p350 Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory November 2017, Vol.2B

⁸ p.9 United Nations Committee on the Rights of the Child 2019, ‘General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children’s rights in juvenile justice’, United Nations Human Rights Office of the High Commissioner

⁹ O’Brien, Wendy and Fitz-Gibbon, Kate 2017, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders’ view and the need for principled reform, *Youth Justice*, vol. 17, no. 2, pp. 134-152.

incapax is tested by way of contested hearing.¹⁰ As argued by Ng, the increasing number of young children being charged with breach of bail offences and the relatively small percentage of children held on remand receiving a custodial sentence ‘compromises the fundamental objective behind the doctrine of *doli incapax* and more importantly, the presumption of innocence. The very children who should be protected by the doctrine of *doli incapax* due to their vulnerabilities are put in custody precisely because they are subject to criminal processes such as bail, despite concerns over their ability to understand the nature and the consequences of not complying the process itself’.¹¹

- Raising the minimum age of criminal responsibility to 14 will remove the needs for courts to consider the confusing and complex *doli incapax* presumption.

4. Prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services including education, health and community services should be prioritised and expanded

- The criminal justice system has both short and long term negative impacts, and reduced opportunities for family and community support to assist in improving child wellbeing and behaviour. A continuum of responses is necessary for children under the age of 14 who engage in harmful or inappropriate behaviour, ranging from early community-based family support with lower risk cases, to assessment, intervention and intensive work for children demonstrating the highest risk and needs.¹²
- Comprehensive, community-based, culturally appropriate, intensive family support services must be universally available across urban, regional and remote communities¹³
- Therapeutic, multi-disciplinary approaches have been shown to reduce recidivism, and have a sustained reduction in behavioural problems and emotional difficulties in young people.¹⁴
- As recommended by the Aboriginal Medical Service Alliance of the NT, any programs and responses must be adapted to the ‘specific social and cultural context of young Aboriginal people’ and services must address all issues holistically¹⁵
- Recent reforms and the introduction and expansion of diversionary and family support programs in the Northern Territory provides Australia with examples of operational responses that could underpin raising the minimum age of criminal responsibility.

¹⁰ Ng C 2019, ‘Applying the Doli Incapax Principle in the Northern Territory: the implications and the way forward’,

¹¹ *ibid*

¹² Hackett S, Branigan P and Holmes D (2019) ‘Operational framework for children and young people displaying harmful sexual behaviours’ second edition, London NSPCC

¹³ <http://www.naaaja.org.au/wp-content/uploads/2018/11/APONT-NAAJA-Joint-Report-to-the-UN-Committee-on-the-Rights-of-the-Child.pdf>

¹⁴ Porter M and Nuntavisit L 2016, ‘An Evaluation of Multisystemic Therapy with Australian Families’, *The Australian and New Zealand Journal of Family Therapy* 37 (4) 443 - 462

¹⁵ p31 Aboriginal Medical Services Alliance NT (AMSANT) 2017, ‘AMSANT Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory’

5. In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led.

- The current minimum age of criminal responsibility at 10 years of age has a disproportionate impact on Aboriginal and Torres Strait Islander children, with Aboriginal and Torres Strait Islander children representing almost 60% of all children in detention in 2017 – 2018¹⁶. The concentration of Aboriginal and Torres Strait Islander children aged 12 years and younger in Australian youth justice systems is even greater.¹⁷
- Raising the age of criminal responsibility will assist in addressing the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system¹⁸, and with investment and support, will provide greater opportunities to enable and empower Aboriginal families, communities, and organisations to support children in culturally safe and appropriate ways.
- As stated by Change the Record, policy solutions must be ‘underpinned by the principle of self-determination, respect for Aboriginal and Torres Strait Islander people’s culture and identity, and recognition of the history of dispossession and trauma experienced by many communities’¹⁹

¹⁶ p39 Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–2018* (Report, 2019)

¹⁷ p15 Cuneen C 2017, ‘Arguments for raising the minimum aged of criminal responsibility

¹⁸ p244 Australian Human Rights Commission, National Children’s Commissioner, *Children’s Rights Report 2019 In Their Own Right: Children’s Rights in Australia*

¹⁹ p5 Change the Record Coalition 2015, *Blueprint for Change: Changing the Record on the disproportionate imprisonment rates, and rates of violence experienced by Aboriginal and Torres Strait Islander people*