



Public Health Association
AUSTRALIA

**Public Health Association of Australia
submission on Council of Attorneys-
General – Age of Criminal Responsibility
Working Group review**

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28 February 2020

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Preamble

The Public Health Association of Australia

The Public Health Association of Australia (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia.

The PHAA works to ensure that the public's health is improved through sustained and determined efforts of the Board, the National Office, the State and Territory Branches, the Special Interest Groups and members.

The efforts of the PHAA are enhanced by our vision for a healthy Australia and by engaging with like-minded stakeholders in order to build coalitions of interest that influence public opinion, the media, political parties and governments.

Health is a human right, a vital resource for everyday life, and key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

All members of the Association are committed to better health outcomes based on these principles.

Vision for a healthy population

A healthy region, a healthy nation, healthy people: living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health for all.

The reduction of social and health inequities should be an over-arching goal of national policy and recognised as a key measure of our progress as a society. All public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

Mission for the Public Health Association of Australia

As the leading national peak body for public health representation and advocacy, to drive better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health.



Introduction

PHAA welcomes the opportunity to provide input to the Council of Attorneys-General Age of Criminal Responsibility Working Group review.

PHAA Response to the review

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?

Why raise the age?

Australia is out of step with United Nations' recommendations, and current practice internationally regarding the minimum age of criminal responsibility. This renders young people in contact with criminal justice systems in Australia at risk of significant developmental harm – with damaging implications for their health and wellbeing across their life course. Since ratification of the 1989 UN Convention on the Rights of the Child, 50 countries have raised their minimum age - the most common internationally is now 14 years.¹ The UN Committee on the Rights of the Child concluded in 2007 that 'a minimum age of criminal responsibility under the age of 12 years is considered by the Committee not to be internationally acceptable'.² The most recent Committee on the Rights of the Child General Comment on children's rights in the child justice system specifically recommends 'at least 14 years of age' in line with child development and neuroscientific evidence.¹

The current age of criminal responsibility in Australia is in direct contravention of this recommendation, which has been specifically noted by the UN Committee's 2019 period report on Australia.³ This is unacceptable and requires urgent attention at Federal and State levels.

In March 2019 Australia's peak medical body the Australian Medical Association (AMA) called for raising the age of criminal responsibility in all Australian jurisdictions in order to protect young and vulnerable children.⁴ Children who come into contact with criminal justice systems as early as ten are mostly from disadvantaged backgrounds characterised by histories of abuse and neglect with significant mental health needs. Imprisonment likely exacerbates the risk of mental ill health, alienation from education and employment and early death.⁵ The position of the AMA echoes that of other health and human rights expert bodies in Australia - including the Royal Australian College of Physicians (RACP), the Australian Indigenous Doctors' Association (AIDA), The National Aboriginal and Torres Strait Islander Legal Services, the Lowitja Institute, the Human Rights Law Centre (HRLC), Amnesty International, and the Law Council of Australia. PHAA reiterates that locking up children has a detrimental impact on their life outcomes.

To promote the health of the community and tackle social inequities in Australia, discussions relating to justice must be framed by a firm commitment to restorative justice. Using this lens, the community's response to criminal behaviour should assess how harm is repaired, and how recurrence of criminal behaviour is prevented. Indeed, current practices of incarcerating young offenders does not only fail to repair harm, but in many cases amplifies the conditions leading to the offending of vulnerable young people.

Raising the age represents a prevention measure because early involvement with the justice system can lead to more serious involvement. Young people aged 10-14 years at first youth justice supervision are more likely to have complex, varied and serious pathways through youth justice system, especially including detention.⁶

The effects of a lower age are highlighted in a natural experiment when Denmark lowered the minimum age of criminal responsibility from 15 to 14 years in July 2010. The result was that 14 year olds were not deterred from committing crimes, but were more likely to recidivate, and more likely to have their education negatively affected.⁷ Following this, the age was subsequently lifted again to 15 years in March 2012.

The current age in Australia also represents inconsistencies in children's rights. For example, our medical system considers children competent to give consent to medical treatment once there are 16 years of age. Indeed, in most countries with a minimum age for consent to mental health treatment, it is higher than the minimum age of criminal responsibility.⁸

The 2019 report of the National Commissioner for Children summarised reasons for raising the age of criminal responsibility:

- Many children involved in the criminal justice system come from highly disadvantaged backgrounds and have complex needs better addressed outside the criminal justice system.
- It would help to decrease the rate of overrepresentation of Aboriginal and Torres Strait Islander children in detention.
- Research into brain development is inconsistent with the current age of criminal responsibility of 10 year-old children as they have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility.
- Children lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings.
- In general, children are more likely than adults to commit less serious offences, and they commit more property than person-related offences. Research has shown that young people aged 10-14 years are more likely than those aged 15-17 years to have principal offences of theft, unlawful entry with intent and property damage, and less likely to have principal public order and illicit drug offences.
- Studies have shown that the younger children are when they encounter the justice system, the more likely they are to reoffend. Between 2011 and 2012, children who were first subject to supervision under the youth justice system due to offending when aged 10-14 years were more likely to experience all types of supervision in their later teens (33% compared to 8% for those first supervised at older ages).

This report recommended raising the minimum age of criminal responsibility to at least 14 years.⁹

How many young people are in the criminal justice system currently and why?

In 2017-18, there were 37,207 young people aged 10-17 years who had offences proceeded with by police. Of these, 21% were aged 10-13 years,¹⁰ representing under 3% of all offenders (Table 21). On an average day in 2017-18, of the 5,513 young people under some form of youth justice supervision, 7% were aged 10-13 years. These youngest people were more likely to be Aboriginal and/or Torres Strait Islander. One-quarter (26%) of young people under supervision had their first supervision aged 10-13 years (39% of Aboriginal and Torres Strait Islander young people, 15% other backgrounds).¹¹

Often, the youngest in the youth justice system experience detention as their first contact with youth justice supervision. For 10-13 year olds, 29% of first supervision is remand (being held in detention awaiting trial or sentencing),¹¹ and early experiences of detention are more likely to lead to continued and serious contact with the youth justice system, than if those early experiences are community-based.⁶

Of significant concern is the frequency with which young people are held in remand for reasons other than criminal convictions. Key drivers of remand for young people include increasingly complex needs, young people not applying for bail, lack of access to legal representation, judicial attitudes, punitive community attitudes, court delays, difficulties locating 'responsible adults' to support young people's bail applications, policing performance measures, administrative errors and lack of access to services and programs.¹² There is ample scope for removing many young people from the youth justice system through improved processes and access to support programs and services.

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 to 12 or higher)? Should the age be raised for all types of offences?

At a minimum Australia should comply with UN recommendations that the minimum age of criminal responsibility should be 14 years of age, for all offence types.

Children aged between 10 and 14 are not developmentally mature enough to be fairly tried in the criminal justice system.¹³ The human prefrontal cortex- responsible for planning and impulse control – continues to develop until the age of 25.¹⁴ Many of the young people involved in the criminal justice system have themselves been victims of trauma, abuse and neglect, which have enormous implications for their developmental trajectories.¹⁵

Raising the minimum age of criminal responsibility to 14 years of age will bring Australia in to line with UN requests of OECD countries.

3. If the age of criminal responsibility is increased (or increased in certain circumstance) 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?

The presumption of doli incapax provides an important mechanism to ensure that issues of maturity, capacity and culpability are considered when young people come into contact with the criminal justice system. However, it has been difficult to apply, and has failed to protect children aged 10-14 from being imprisoned. The UN Committee on the Rights of the Child notes that while systems with 2 ages (such as Australia with doli incapax) were designed as protective, instead the high level of discretion for the courts often results in discriminatory practices.¹ Raising the age of criminal responsibility to 14 years, in line with international standards, would render doli incapax redundant.

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)?

In accordance with the recommendations of the Committee of the Rights of the Child, PHAA strongly argues that detention of individuals should always be a last resort, regardless of the age of an offender. Article 37(b) of the *UN Convention on the Rights of the Child* states

“deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured”¹⁶

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in 2018 recommended a global commitment to abolishing places of child detention.¹⁷

The principles of restorative justice emphasise the importance of non-custodial sentencing measures where a young person is convicted of a crime. Particularly where offenders are young people with a raft of vulnerabilities contributing to offending behaviour, a focus on restorative justice should be embedded in all decision making and sentencing.

Most children who have been convicted of minor offences do not reoffend, and pose little to no threat to the safety of the community. The harm caused to them by incarceration far outweighs that of their minor offences – and has no deterrent effect on other children. UN General Assembly notes that violence is endemic at all stages of deprivation of liberty and administration of justice – rendering detention a traumatic experience.¹⁸ Detention is likely to deprive children of contact with their family and outside world in a manner that is damaging to health and wellbeing. Our response to criminal convictions should provide a means by which children can be held accountable for their actions while being shielded from damaging contact with the criminal justice system.

Convicted children who complete community-based restorative justice programmes are more likely to return to school and so increase their chances of becoming productive members of society. Strengthening community-based alternatives to incarceration reduces recidivism and is less costly to the tax-payer – as institutionalisation in a closed environment is markedly more financially expensive than per-capita cost of community-based care options.¹⁹

In those circumstances where there is no viable option other than imprisonment for a young person convicted of a crime, PHAA supports calls by the Independent Expert Report to the UN General Assembly that:

“[deprivation of liberty] shall be applied only for the shortest appropriate period of time. States have an obligation to apply child-friendly conditions, without any discrimination. Children shall not be exposed to neglect, violence, sexual abuse or exploitation, ill-treatment, torture and inhuman conditions of detention. States should ensure that children have access to essential services aimed at their rehabilitation and reintegration into society, including education, vocational training, family contacts, sports and recreation, adequate nutrition, housing and health care. Health services in detention shall be of a standard equivalent to that available in the community at large.” (Recommendation 102)¹⁸

In keeping with the findings of the Royal Commission into the protection and detention of children in the Northern Territory that incarceration should not be a sentencing option for children under 14 years, nor should children under 14 years be remanded in detention.

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?

“Research has demonstrated that intensive family- and community-based treatment programmes designed to make positive changes in aspects of the various social systems (home, school community, peer relations) that contribute to the serious behavioural difficulties of children reduce the risk of children coming into child justice systems” (p4).¹

Raising the age of criminal responsibility should be coupled with both programs that both prevent involvement in criminal behaviour and also provide early intervention for children and families facing difficulties. Appropriate responses to offending behaviours by children include the provision of necessary services and support, including access to education and health services, psycho-social support, vocational training and the provision of alternative activities and interests to avoid children falling back into previous behavioural patterns and engaging in risky behaviour with peers.¹⁹ Meeting the complex needs of young people at risk of involvement with youth justice will require a highly skilled multidisciplinary team including teachers, lawyers, social workers, physicians, nurses, probation officers, judges, mentors, coaches, spiritual leaders, policy makers and mental health clinicians, all of whom should be educated in the principles and delivery of restorative justice practices.²⁰

Universal systems of support such as programs to retain children in education and training and to ensure stable housing are imperative to minimising disadvantage and youth offending. A growing body of literature from the United States highlights the impact of punitive policies that see vulnerable children suspended and expelled from school settings, and pushed into what is referred to as the “school-to-prison pipeline”.²¹ Supporting schools and educational facilities to keep vulnerable young people engaged in formal education is likely to be of utmost importance to preventing criminal behaviour among young people.²²

Young people in the child protection system are 9 times more likely than those in the general population to enter the youth justice system.²³ The Sentencing Advisory Council Victoria found 38% of young people sentenced or diverted in Victorian Children’s Court were known to child protection services, and 15% had experienced out of home care. Of those, 50% had more than 5 placements.¹⁵ PHAA encourages reference to the 2016-217 Royal Commission into the protection and detention of children in the Northern Territory which outline the importance of careful attention to reshaping and strengthening Child Protection systems, which are closely linked to youth justice systems.²⁴

In response to the Victorian findings, the Centre for Excellence in Child and Family Welfare noted:

- We are missing opportunities for earlier and swifter interventions to support families who are experiencing multiple forms of disadvantage
- We must address placement instability
- We must work together to prevent criminalising children and young people in residential care
- We must provide therapeutic and rehabilitative support to children in care before they have serious contact with the justice system
- We must implement clear legislative targets to keep governments accountable for reducing the over-representation of Aboriginal and Torres Strait Islander children in youth justice and child protection²⁵

PHAA highlights the imperative to address the first 1000 days of human life which have an immeasurable impact on the future health and development of children and their communities. Investment in maternal-child health and risk factors for impaired early-life development (such as foetal-alcohol spectrum disorder) will be critical to reducing involvement with youth justice. Addressing biological, social ecological and individual factors that affect development in the first 1000 days of life will support the resilience of children against later adverse experiences and outcomes.²⁶

All programs delivered should be informed by the particular needs of the communities in which they are delivered. Due to unique cultural, social and historical factors, specific solutions to address issues of disadvantage designed by Aboriginal and Torres Strait Islander people are required. Culturally safe and trauma-informed services are key to ensuring access for Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander Community Controlled Health Organisations have a track record of

effective and efficient holistic models of care among young people²⁷ and should be preferred providers of services.

The recommendations of the Australian Law Reform Commission's 2017 report *Pathways to Justice*²⁸ must be implemented to promote substantive equality before the law and fairer enforcement of the law; provide effective and culturally appropriate diversion, support and rehabilitation programs; promote justice reinvestment through redirection of funding and focus to prevention, rehabilitation and support; and ensure Aboriginal and Torres Strait Islander leadership in policy and program development and delivery.

Criminal behaviour is often politicised and contentious in public debate. Any changes to current prevention and interventions should be supported by public education campaigns to ensure the broader community understand the rationale of the changes and the principles on which they are founded. Socially excluded children are often stigmatised and perceived as a threat to the community.¹⁹ Efforts to tackle negative stereotyping and reassure society of the effectiveness of restorative justice programmes will support their success.

6. 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?

If our approach to criminal justice is framed in a commitment to reducing risks of criminal justice contact, other types of health, education and family support infrastructure can then identify and assist children and young people, rather than the youth justice system. Other services and supports can then be used, rather than underlying issues only being addressed when criminalised. Thus access to services should not be predicated on having had contact with the youth justice system.

7. 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?

The introduction and prosecution of any new criminal offences may divert attention and resources away from efforts to tackle the drivers of the social circumstances that result in some children being vulnerable to criminal offending.

8. Are there issues specific to states or territories (eg operational issues) that are relevant to considerations of raising the age of criminal responsibility?

PHAA supports the Human Rights Law Centre in its recommendation 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*, s 4M; *Criminal Code Act 1995*, s 7.1;

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

Northern Territory- *Criminal Code*, s 38(1) & 42AP;

New South Wales- *Children (Criminal Proceedings) Act 1987*, s 5;

Victoria- *Children, Youth and Families Act 2005*, s 344;

South Australia- *Young Offenders Act 1993*, s 5;

Western Australia- *Criminal Code Act Compilation Act 1913*, s 29;

Queensland- *Criminal Code Act 1899*, s 29(1);

Tasmania- *Criminal Code 1924*, s 18(1).²⁹

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.

9. Are there any additional matters you wish to raise?

Health impacts that interact with overall life outcomes

There is plentiful evidence indicating that young people in the criminal justice system have a significant burden of disease, with shared underlying determinants for poor health and crime including exclusion from education, social isolation and poverty. Important health issues for justice-involved young people include mental health, disability including FASD, substance misuse, sexual health including STIs and trauma.³⁰

Young people who enter the justice system are more likely to be affected by disabilities and poor mental health and wellbeing. Youth justice supervision and detention exacerbate these challenges.

For example, one Australian study found that 75% of justice involved young people had experienced some form of non-sexual abuse including physical, verbal, emotional, financial or neglect. Compared with their peers in the general community, justice-involved young people were six times as likely to have attempted suicide, more than twice as likely to have recently self-harmed, and twice as likely to experience high or very high psychological distress.³¹ One-third of the group of justice-involved young people met the criteria for at least 2 mental health disorders.

A global scoping study found physical and mental health problems including major depressive disorder, anxiety disorder, post-traumatic stress disorder, conduct disorder, schizophrenia, suicide and suicide attempts, substance use disorder, alcohol use disorder, communication impairments, fetal alcohol spectrum disorder, learning disabilities, traumatic brain injury, and bloodborne and sexually transmitted infections all more common among young people in detention than in the general community. Health and especially neurodevelopmental issues are important considerations for addressing the needs of young people, for example in engagement with interventions and services, and should be taken into consideration in the design and delivery of these services.⁵

Cumulative incarceration duration during adolescence and early adulthood is independently associated with worse physical and mental health later in adulthood including functional limitations, depressive symptoms and suicidal thoughts. Incarceration of young people may systematically degrade their healthy development.³²

There are numerous cases that make this intolerable situation less abstract. In Australia, a former youth detainee whose first experience of detention was at age 11, has talked about the cognitive cost including the ongoing trauma of his detention experiences.³³ Expert witnesses at the 2016 Royal Commission directly linked these experiences of detention with subsequent violent offending, with the cycle of repeated incarceration setting young people up to fail.³⁴

Despite the high level of need for mental health services, few young people involved with the justice system access these services in the community. There is a clear need for holistic, trauma-informed social and health care interventions for these young people, with priority given to preventing, identifying and intervening to reduce abuse.³¹

Conclusion

PHAA strongly supports the proposal to increase the minimum age of criminal responsibility in Australia, in line with international recommendations and practice. We are particularly keen that the following points are highlighted:

- No young people under the age of 14 years should have their behaviour criminalised. Contact with the youth justice system at early ages leads to increased contact with the justice system.
- With a minimum age of criminal responsibility of 14 years, *doli incapax* would be rendered redundant.
- Young people entering the criminal justice system bring with them complex social and economic disadvantage, and health and mental health challenges. These are best addressed through support services in the community, not the criminal justice system.
- Prevention, early intervention and diversionary responses linked to culturally safe and trauma-informed services including education, health and community services should be prioritised and expanded.
- Aboriginal and Torres Strait Islander people and their organisations must be engaged in a genuine partnership in policy development, and programs and services must be community led.

The PHAA appreciates the opportunity to make this submission and the opportunity to contribute to improved outcomes for young people in Australia.

Please do not hesitate to contact me should you require additional information or have any queries in relation to this submission.



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28 February 2020

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