



PeakCare  
Queensland Inc.

Submission to the

**Council of Attorneys-General**

**Age of Criminal Responsibility Working Group  
review**

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## INTRODUCTION

PeakCare Queensland Incorporated (PeakCare) welcomes the opportunity to provide information in response to the Council of Attorneys-General's invitation for submissions in relation to the *Age of Criminal Responsibility Working Group review*.

## ABOUT PEAKCARE

PeakCare is a not for profit peak body for child protection and related family support services in Queensland, providing an independent and impartial voice representing and promoting matters of interest to the non-government sector.

Across Queensland, PeakCare has around 60 members which are a mix of small, medium and large, local, statewide and national non-government organisations that provide prevention and early intervention, generic, targeted and intensive family support to children, young people, adults and families. Member organisations also provide child protection services, foster and kinship care and residential care services for children and young people and their families who are at risk of entry to, or who are in the statutory child protection system.

A network of registered Supporters made up of individuals and other entities with an interest in child protection and related services and who are supportive of PeakCare's policy platform around the safety, wellbeing and connection of children and young people, also subscribe to PeakCare.

## ABOUT PEAKCARE'S SUBMISSION

Given the overlap of children and young people at risk of entry to, or in the youth justice system, with those engaged with the child protection system, PeakCare has a strong interest in youth justice reform and effective, timely and holistic responses and interventions to children, young people and their families. With a longstanding history in advocating for better understanding and management of the intersection between the child protection and youth justice systems, PeakCare's motivation in lodging this submission reflects the following:

- the need to address both the welfare *and* the justice needs of young people who have been or who are in contact with the child protection system and the youth justice system, particularly young people subject to dual (interim or finalised) orders
- ensuring local access to prevention and early intervention services, responses and programs for children, young people and families to 'nip problems in the bud' or 'turn their lives around' - the right service at the right time from the right provider for the right amount of time
- young people's entitlement (and that of their families) to understand and to participate in administrative and judicial decision-making

- congruence in legislative frameworks and the administration of youth justice, child protection and intersecting service systems (eg. education and training, youth development, family support, housing and homelessness, legal services and legal aid, family and domestic violence, health, and drugs and alcohol mis-use) directly or indirectly delivered across government agencies
- developing specific strategies to address the disproportionate representation of Aboriginal and Torres Strait Islander young people in the youth justice system, and
- the importance of underpinning policy directions and reforms with research evidence

## PEAKCARE'S RESPONSES TO MATTERS RAISED BY THE AGE OF CRIMINAL RESPONSIBILITY WORKING GROUP FOR CONSIDERATION

### Whether or not the minimum age of criminal responsibility should be raised

PeakCare strongly supports the raising of the minimum age of criminal responsibility in Australia. There are a range of supporting arguments which have been advanced over time and across numerous jurisdictions (nationally and internationally), backed by evidence, for raising the minimum age of criminal responsibility. This evidence can be grouped generally in the following areas:

#### **Contemporary research about neurocognitive and psychosocial developmental stages confirms that children and young people are not mature enough to attribute criminal culpability in the same way as for adults**

Children in primary school, and often older, while being able to understand right and wrong, are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of being labelled a criminal.

Research into brain development consistently shows that young people lack the ability to make comprehensive judgements, as the prefrontal cortex of the brain, which is responsible for higher-order cognitive processes including impulse control, attention, planning, reasoning, consequential thinking and decision-making, is not fully developed until at least their early twenties<sup>1</sup>.

Adolescents are in a period of neurodevelopmental immaturity where they are prone to impulsive, sensation-seeking behaviour, with an underdeveloped capacity to gauge the consequences of actions<sup>2</sup>. More recent research confirms that even though children at a young age may have the

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<sup>1</sup> Johnson, Sara B, Blum, Robert W, Giedd, Jay N (2009) *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health 45(3) 216- 221

<sup>2</sup> The Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012) 201  
<<https://www.centreforsocialjustice.org.uk/library/rules-engagement-changing-heart-youth-justice>>.

capacity to make moral judgments about right and wrong in an abstract context they may lack this capacity in the concrete context of the commission of the act<sup>3</sup>.

Moreover, brain development can be affected by maltreatment and exposure to trauma and violence. Research has established that a child's experience of abuse and trauma can impair brain development leading to anxiety, impulsivity, poor affect regulation, hyperactivity, poorer problem solving and impoverished capacity for empathy"<sup>4</sup>. Disruption to healthy brain development can cause children to remain 'hyper-vigilant' and reactive to perceived threats and triggers. This can have consequences for a child's emotional and behavioural regulation. This is an important consideration because children who have had contact with the child protection system (having experienced neglect, abuse and/or trauma) are heavily represented in the youth justice system. See further about this in the next section.

Dr Mick Creati, International Child and Adolescent Health Specialist and Senior Fellow with the Royal Australasian College of Physicians, said in a recent media release that the medical evidence is clear – developmentally, children are very different to adults<sup>5</sup>. Dr Creati went on to say "Children of this age have relatively immature brain development when it comes to decision-making, organisation, impulse control and planning for their future. We shouldn't criminalise actions that may be developmentally normal for children of this age".

In addition to neurological immaturity, early adolescence is a time associated with emotional lability (rapid, often exaggerated changes in mood), a significant social shift from parents to peers as the primary reference sources and can be accompanied by considerable anxiety and concern on the part of adolescents about their own identity, belonging and social standing which leads young people to be particularly focused on obtaining approval from peers who, like the individuals themselves, have much less mature and appropriate means of judging the appropriateness and/or suitability of behaviour. The attraction to risk and the high value placed on immediate rewards, as well as the heavy discounting of the future costs of risky behaviour during this period of development also contributes.

The developmental differences in the ability of young people to fully understand their circumstances and to anticipate the future consequences of their actions and statements, not only affects their behaviour (that is, the likelihood that they may become involved in anti-social or criminal behaviour) but also their ability to appropriately instruct counsel, make important decisions (for example, whether or not to confess), to accept pleas and to participate meaningfully in the criminal justice process. This can seriously compromise the rights of children to have the opportunity to be heard and involved in proceedings.

If we accept the evidence, that due to neurological immaturity, children are unable to appreciate the real nature of their criminal offending, that many children in the youth justice system also have a range of other disabilities and impairments and have abuse and trauma histories, and that their

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<sup>3</sup> N Newton and K Bussey, "The Age of Reason: An Examination of Psychosocial Factors Involved in Delinquent Behaviour" (2012) 17 *Legal and Criminological Psychology*, 75.

<sup>4</sup> The Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012) 201 <<https://www.centreforsocialjustice.org.uk/library/rules-engagement-changing-heart-youth-justice>>. 202

<sup>5</sup> <https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility>

harmful behaviour is more effectively responded to outside of the criminal justice system, it is not logical to take a different approach for very serious offences such as murder and manslaughter. Children who commit serious offences still merit the consideration and special protection otherwise provided for children.

PeakCare advocates that young people who offend should be treated as individuals whose developmental capacities and tendencies require them to be treated within an educational/welfare system that emphasizes the opportunity for maturation and rehabilitation, rather than within a criminal justice system that places a heavy emphasis on punishment.

### **Children at risk of offending have complex needs**

In addition to age appropriate developmental immaturity as noted above, many children in the youth justice system experience significant additional neurodevelopmental delays and also have high rates of significant pre-existing trauma.

Most children involved with the justice system have faced multiple layers of complex disadvantage in their young lives, in circumstances beyond their control. Many have had contact with child protection services, have mental health problems, or experience cognitive difficulties. Most young people in the justice system are themselves victims of trauma, abuse or neglect, and children in contact with the justice system are often victims of crime themselves<sup>6</sup>.

Children with a disability are also overrepresented in the youth justice system, particularly children with intellectual disabilities or psychosocial disabilities<sup>7</sup>.

A recent study shockingly found nine out of ten young people in Western Australian youth detention are severely impaired in at least one area of brain function such as memory, language, attention, and executive function (planning and understanding consequences), including one in three young people being identified as having fetal alcohol spectrum disorder. The study noted that impairments may come across in behaviours with young people appearing willfully naughty, defiant, or lazy, when in reality they may be struggling to remember, understand or comprehend what is required of them<sup>8</sup>.

The Royal Australasian College of Physicians proposes that many problematic behaviours in 10 to 13 year old age children that currently are considered 'crimes' under current Australian law are better understood to be within the range of behaviours one would expect, in context of the normal neurodevelopmental profile of 10 to 13 year olds (poor impulse control, poorly developed capacity to plan and foresee consequences) coupled with behaviours one would expect in young children with significant neurodevelopmental impairment and/or who have experienced significant past trauma<sup>9</sup>.

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<sup>6</sup> Jesuit Social Services (2019) Raising the Age of Criminal Responsibility: There is a better way

<sup>7</sup> Australian Human Rights Commission (2019) *Children's Rights Report 2019*

<sup>8</sup> Bower C, Watkins RE, Mutch RC, *et al.* Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. *BMJ Open* 2018

<sup>9</sup> Royal Australasian College of Physicians (RACP) (July 2019) submission to the Council of Attorneys General Working group reviewing the Age of Criminal Responsibility

A child or young person who has, for example, an offending background, family problems and substance use, and who is disengaged from school, needs support in all areas, not just in desisting from offending. These young people with multiple complex needs, and their families, clearly require a range of specialised integrated supports and services not likely to be available in the criminal justice system. Two particularly vulnerable groups of children with complex needs warrant special mention – young people in care and Aboriginal and Torres Strait Islander young people.

### **Disproportionate impact on young people in care**

The criminalisation of children living in out-of-home-care and their over-representation in the youth justice system has been identified as a concern across Australian jurisdictions. Children placed in out-of-home care are 16 times more likely than children in the general population to be under youth justice supervision in the same year<sup>10</sup>.

For children removed from their families into out-of-home care, this may also include removal from the child's community, friends and school, and their experience of care can compound the trauma that they have already experienced. Research also suggests that children in care may be more likely to be prosecuted for behaviour that would usually be dealt with in the family home, contributing to their over-representation among sentenced and diverted children<sup>11</sup>.

Similarly, New South Wales research found that children living in out-of-home care are more likely than those not in care to be charged following their first contact with police, and be charged for relatively minor offences where a caution would have been more appropriate<sup>12</sup>.

Children placed within residential care settings are particularly vulnerable to criminalisation as they mostly have complex needs resulting from trauma which may manifest in an inability to regulate emotions and behaviour and other social difficulties, which can result in an escalation to involve police more so than children in home based care.

Children involved in both child protection and youth justice systems have a greater likelihood of experiencing poorer life outcomes, such as poor mental and physical health, and increased difficulties in accessing education, employment and housing, creating a range of long term impacts and their associated costs for both individuals and society more generally<sup>13</sup>.

Understanding the context of a child's offending and the role played by circumstances such as abuse, separation from family and the experience of out-of-home care is important in determining appropriate responses to avoid criminalisation and perpetrating the cycle of intergenerational disadvantage.

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<sup>10</sup> Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2018) 487

<sup>11</sup> Sentencing Advisory Council (2019) *Crossover kids: Vulnerable children in the youth justice system*, Report 1

<sup>12</sup> McFarlane, K (2017) *Care-criminalisation: The involvement of children in out-of-home-care in the New South Wales criminal justice system*, *Australian & New Zealand Journal of Criminology*, 0(0), p 7

<sup>13</sup> Queensland Family and Child Commission (2018) *The criminalisation of children living in out-of-home care in Queensland*

### **Over-representation of Aboriginal and Torres Strait Islander children in the youth justice system**

On an average day Aboriginal and Torres Strait Islander children aged 10 – 17 years were 17 times more likely than non-Indigenous children to be under youth justice supervision. This level was higher in detention (23 times as likely)<sup>14</sup>.

Aboriginal and Torres Strait Islander children are overrepresented in both detention and community-based supervision at all ages but are particularly overrepresented in the younger age groups. On an average day in 2017–18, about half (48%) of all Aboriginal and Torres Strait Islander young people under supervision were aged 10–15 years, compared with one-third (33%) of non-Indigenous young people<sup>15</sup>.

Reasons for the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system include legal and policy factors, such as restrictive bail laws and mandatory sentencing, socio-economic factors, such as intergenerational disadvantage, racism, cultural displacement, trauma and poor health and living conditions<sup>16</sup>.

Dr Kali Hayward, President of the Australian Indigenous Doctors' Association said in a recent media release about the age of criminal responsibility that the health and safety of children, families and communities must be prioritised over the current traumatising approach to remove children. "The continued practice of removing children from their families and communities creates new intergenerational trauma and continues the cycle of social disadvantage, with subsequent significant negative health impacts. These policies represent the antithesis of a fair and caring society"<sup>17</sup>.

It has been argued by many that raising the minimum age of criminal responsibility would help break the cycle of early entry of Aboriginal and Torres Strait Islander children and young people into the criminal justice system and entanglement within that system and it would help Australia comply with its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Declaration on the Rights of Indigenous Peoples* as well as the *United Nations Convention on the Rights of the Child*<sup>18</sup>.

### **Criminalisation of young people and other adverse outcomes from early contact with the criminal justice system**

While the practices, procedures and measures of the juvenile justice systems in Australia are designed to promote the welfare of young people, the system is still a criminal justice system with all the burdens, stigma and consequences that this entails.

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<sup>14</sup> Australian Human Rights Commission (2019) *Children's Rights Report 2019*

<sup>15</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–2018* (Report, 2019)

<sup>16</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009) 45

<sup>17</sup> <https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility>

<sup>18</sup> Crofts, Thomas (2019) Will Australia Raise the Minimum Age of Criminal Responsibility, *Criminal Law Journal*, 2019



It is now well documented that negative impacts flow from early contact with the criminal justice system. The younger a child has their first contact with the criminal justice system, the higher the chance of future offending<sup>19</sup>.

The Victorian Sentencing Advisory Council's research found that age at first sentence is strongly associated with future contact with the criminal justice system. The younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently and be sentenced to a term of adult imprisonment before their 22<sup>nd</sup> birthday. Children who were first sentenced at a young age proceeded to commit a disproportionate volume of all youth crime<sup>20</sup>.

Research also shows that children who come into contact with the criminal justice system are less likely to complete their school education, undertake further education or training, or gain employment, and they are more likely than other children to become chronic adult offenders<sup>21</sup>.

Raising the age of criminal responsibility would avoid children coming into contact with the criminal justice system at a young age, and thus help to avoid the extremely adverse outcomes evidence above.

### **Inconsistency between civil and criminal statutes**

In Australia, you legally have to be 16-17 years of age to consent to sexual activity and obtain a driver's license, 17 to enlist for military service, whilst 18 years is when a young person is considered an adult and can assume civic and social responsibilities and privileges such as being on a jury, voting, buying alcohol and getting married.

How we treat children within the criminal justice system is starkly different to how we treat them in other areas of social policy. While the law in most areas recognises that children do not have the same capacity as adults to make decisions, when it comes to criminal law, we bestow adult type responsibility from the age of 10.

Raising the minimum age of criminal responsibility would improve consistency in the conceptualisation of young people's rights and responsibilities across civil and criminal law and be in line with the United Nations Commentary on rule 4.1 of the Beijing Rules: "[i]n general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc)"<sup>22</sup>.

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<sup>19</sup> Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra:

<sup>20</sup> Sentencing Advisory Council Victoria (2016), above n 19, 27 (Table 5), 30–31 (Figure 19). See further [4.9]–[4.10]. Also supported by Australian Institute of Health and Welfare, *Young people aged 10-14 in the youth justice system 2011-12 (Report 2013)*

<sup>21</sup> Sentencing Advisory Council Victoria (2016), above n 19, 27 (Table 5), 30–31 (Figure 19). See further [4.9]–[4.10]. Also supported by Australian Institute of Health and Welfare, *Young people aged 10-14 in the youth justice system 2011-12 (Report 2013)*

<sup>22</sup> <http://wwda.org.au/wp-content/uploads/2013/12/beijrule1.pdf>

## **Obligations to protect children’s rights under international conventions**

Australia’s age of criminal responsibility is comparatively low compared with other countries around the world. The United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older. The United Nations has repeatedly called on Australia to raise the age of criminal responsibility, noting that holding a child criminally responsible from the age of ten is not compatible with our obligations under the Convention of the Rights of the Child<sup>23</sup>.

In addition, nationally on an average day in 2017-18, 60% of young people in detention were unsentenced<sup>24</sup>, arguably in breach of article 37 of the Convention of the Rights of the Child, which in part requires *The arrest, detention or imprisonment of a child shall ... be used only as a measure of last resort and for the shortest appropriate period of time*<sup>25</sup> and demonstrates the need for non-custodial alternatives.

Australian and New Zealand Children’s Commissioners and Guardians (ANZCCG) notes that the fundamental rights of the child under the Convention on the Rights of the Child and the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) are being breached in relation to detention practices in some jurisdictions. This refers to the inappropriate use of police watch houses/police cells to hold children and young people, including for extended periods<sup>26</sup>.

A higher minimum age of criminal responsibility would address the above issues and contribute to meeting the requirements of article 40(3)(b) of the Convention on the Rights of the Child, in that children in conflict with the law can be dealt with using educational and welfare measures, without resorting to judicial proceedings.

## **The appropriate minimum age for criminal responsibility**

The average minimum age of criminal responsibility in the European Union, as well as many countries outside of the European Union, is 14 years, where “it can be shown that there are no negative consequences to be seen in terms of crime rates”<sup>27</sup>. Many of these countries have low incarceration rates for older juveniles suggesting the absence of a younger cohort of children who would otherwise have become entrenched in the system through re-offending and the accumulation of a prior offending history, and has had downstream positive effects on youth detention rates.

PeakCare supports raising the minimum age of criminal responsibility to at least 14 years. Anything less will still be in conflict with neuroscience evidence about children and young people’s developmental stages, will continue to disproportionately affect those most disadvantaged and vulnerable children and young people with complex needs, including Aboriginal and Torres Strait

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<sup>23</sup> United Nations Committee on the Rights of the Child, *General comment No 24 (2019) on children’s rights in the child justice system*

<sup>24</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (Report 2019)

<sup>25</sup> <https://archive.crin.org/en/home/rights/convention/articles/article-37-torture-and-deprivation-liberty.html>

<sup>26</sup> <https://www.humanrights.gov.au/our-work/childrens-rights/publications/australian-and-new-zealand-childrens-commissioners-and-0>

<sup>27</sup> Cunneen, C (2017) *Arguments for Raising the Minimum age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney

Islander children and young people, and is unlikely to achieve the desired result of minimising the adverse consequences of criminalisation.

### The retention or not of the presumption of *doli incapax*

While the obligation on the prosecution to rebut the presumption of *doli incapax* is designed to result in a graduated response across an age range where the court can take into account the considerable variation in intellectual and emotional maturity in the young people who appear before it, there are a number of criticisms in the literature about the limitations of *doli incapax* and its failure to protect young children. Researchers in Victoria found that “inconsistencies in practice undermine the extent to which the practice of *doli incapax* offers a legal safeguard for young children in conflict with the law”<sup>28</sup>. The same study found that children lacked the protection of the presumption of *doli incapax* and the onus has fallen on the defence to actively pursue an assessment that determined the child lacked the capacity to know their actions were seriously wrong.

The Australian Law Reform Commission has noted that the presumption of *doli incapax* is problematic because “it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage”<sup>29</sup>.

The Law Council of Australia has recently advocated for Australia to lift the minimum age of criminal responsibility to 14 years to improve justice outcomes for vulnerable children and remove the need for the fraught *doli incapax* presumption<sup>30</sup>.

PeakCare’s preferred option is a higher minimum age of criminal responsibility of at least 14, plus the extension of the presumption of *doli incapax* to all young people under 16. This mechanism, while currently not always operating as intended, is required to prevent young people being drawn into the criminal justice system if they are not developed enough to have the capacities required to be held criminally responsible<sup>31</sup>.

Individual children of an identical chronological age may demonstrate vastly different cognitive capacities for understanding, and as such there is a need to ensure a rebuttable presumption of developmental immaturity throughout.

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<sup>28</sup> O’Brien W and Fitz-Gibbon K (2017) *The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform*, Youth Justice 17(2): 134 - 152

<sup>29</sup> Crofts, Thomas --- “A Brighter Tomorrow: Raise the Age of Criminal Responsibility” [2015] CICrimJust 15; (2015) 27(1) Current Issues in Criminal Justice 123 and <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC84.pdf> (18.19)

<sup>30</sup> <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>

<sup>31</sup> Crofts, Thomas (2019) Will Australia Raise the Minimum Age of Criminal Responsibility, Criminal Law Journal, 2019

## The appropriate minimum age for detention

The Royal Commission into the Protection and Detention of Children in the Northern Territory was particularly critical of placing children in detention, noting that any apparent punishment and deterrent value of detention is far outweighed by its detrimental impacts, particularly for the minority group of pre-teens and young teenagers<sup>32</sup>.

It found that detention is counterproductive to efforts to rehabilitate children and prevent recidivism, because “[T]he harsh consequences of separation of younger children 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<sup>33</sup>.

The Royal Commission recommended that no child under 14 should be sentenced to, or remanded in, detention<sup>34</sup>.

PeakCare supports the position that detention should not be an option for children and young people until a young person is at least 14 years and preferably not until 16 years. Children belong with their families/carers, in their communities and going to school or some other educational program, not in detention.

## Appropriate frameworks and programs

Across Australia, children under 14 years are only a small proportion of all children under youth justice supervision (that is, 7% of all children under youth justice supervision, equating to approximately 386 children on an average day in 2017-18<sup>35</sup>). Given the number of children 10-13 years coming into contact with the youth justice system is so small and they are often the most vulnerable in our community, a more effective rehabilitative response for this group to avoid criminalisation and further disadvantage is strongly supported and very achievable.

Raising the age of criminal responsibility to exclude children and young people from the criminal justice system does not mean there should be no intervention with children who engage in antisocial, harmful or offending behaviours but rather that any response should focus around their assessed needs within the context of their family, social network and community and should occur in within a framework of education and social/welfare support, outside the criminal justice system<sup>36</sup>. This also requires the concept of responsibility and accountability for young people who engage in these behaviours to be separated from that of criminalisation.

Raising the minimum age must be done in conjunction with measures to ensure children receive appropriate community support directed at addressing risk factors. At their last meeting in

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<sup>32</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1 Vol IIB, 419

<sup>33</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1 Vol IIB, 419

<sup>34</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 418.

<sup>35</sup> Australian Institute of Health and Welfare 2019. Youth Justice in Australia 2017–18. Cat. no. JUV 129. Canberra: AIHW: 8

<sup>36</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 419.

November 2019, Australian and New Zealand Children’s Commissioners and Guardians (ANZCCG) called for governments to move to a developmentally-appropriate, trauma-informed and culturally safe early intervention model that supports children in their families and communities for children under 14 years<sup>37</sup>.

As an example of potentially suitable programs to replace the criminal justice response, Jesuit Social Services have proposed a model which includes prevention and early intervention supports to address disadvantage and reduce risks, targeted therapeutic, restorative and diversion approaches for children and their families who have come to attention of police, therapeutic interventions and forms of supervision for children who use violence or cause serious harm, and small facilities with multi-disciplinary specialists in an intensive therapeutic environment for children with very serious violent behaviour<sup>38</sup>.

Effective responses outlined in the literature include variations on these sorts of program elements, which might include group conferencing processes, family-centred therapeutic processes, wrap around support, restorative justice, justice reinvestment, expert panels to assess need, specific culturally responsive programs, cognitive-behavioural programs, interpersonal skills training, multi-disciplinary responses to holistically address needs, assertive outreach, case management, trauma informed programs, Children’s Hearings model (Scotland) et cetera.

These types of approaches would need to be built into existing supports or newly developed to ensure a comprehensive suite of evidence based responses to meet the diversity of complex needs of young people in order to be effective in reducing individual vulnerability, reducing recidivism, and protecting the community. Aboriginal and Torres Strait Islander community controlled and led solutions and programs are required for Aboriginal and Torres Strait Islander children and young people.

An additional program component aimed more broadly at community education and awareness will also be necessary to create a positive environment for a better understanding and avoid the impact of politicised pressure and influence from sensationalised media narratives on complex social issues that can result in reactive justice policies that are not evidence based<sup>39</sup>. This negative presentation and criminalisation of child offenders is often based on misrepresentation and/or misunderstanding of the causes of youth anti-social behaviour and offending, and typically results regularly in a call for a tougher approach such as zero-tolerance, three strikes and you are out, mandatory sentences and other primarily punitive measures.

### **Protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold**

Despite public perception that there is a rise in the number of crimes committed by children, in reality, the statistics do not bear this out. On an average day in 2017–18, 5 513 young people aged 10 and over were under youth justice supervision across Australia. Over the 5 years from 2013–14 to

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<sup>37</sup>[https://www.kidsguardian.nsw.gov.au/ArticleDocuments/165/ANZCCG\\_MediaReleaseNovember2019.pdf.aspx?Embed=Y](https://www.kidsguardian.nsw.gov.au/ArticleDocuments/165/ANZCCG_MediaReleaseNovember2019.pdf.aspx?Embed=Y)

<sup>38</sup> Jesuit Social Services (2019) Raising the Age of Criminal Responsibility: There is a better way

<sup>39</sup> B Sellers, “Community-based recovery and youth justice” (2015) 42 (1) *Criminal Justice and Behavior* 58 at 59.

2017–18, the number of young people aged 10–17 under supervision on an average day fell by 9%<sup>40</sup>. The numbers of children aged 10 to 13 who come into contact with the criminal justice system are extremely low – on an average day in 2017-18, only 386 children across Australia under youth justice supervision were aged between 10 and 13 years. Children are not responsible for the majority of crime committed in Australia.

Research has shown that children in general are more likely than adults to commit less serious offences, and they commit more property than person offences. Young people aged 10-14 years were more likely than older young people to have principal offences of theft, unlawful entry with intent and property damage<sup>41</sup>.

As described earlier, part of the challenge is negative and discriminatory community perceptions (exacerbated by the media) about ‘young offenders’, and there needs to be an effective education and awareness raising campaign to better inform about the evidence. It is PeakCare’s position that it is preferable for children to be held more effectively to account for their actions through non-criminalising responses which are also more effective in preventing further anti-social and harmful behaviours, reducing recidivism thus better protecting the community and achieving substantial economic benefits for society in downstream cost savings.

The United Nations Committee on the Rights of the Child acknowledges that the preservation of public safety is a legitimate aim of the justice system, including the youth justice system. However, in the Committee’s view this aim is best served by full respect for and implementation of the principles of youth justice as enshrined in the Convention on the Rights of the Child<sup>42</sup>. PeakCare supports this view.

Thank you for the opportunity to provide submissions on aspects of the Council of Attorneys-General *Age of Criminal Responsibility Working Group review*.

Yours sincerely



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<sup>40</sup> Australian Institute of Health and Welfare 2019. Youth Justice in Australia 2017–18. Cat. no. JUV 129. Canberra: AIHW: v

<sup>41</sup> Australian Institute of Health and Welfare, *Young people aged 10-14 in the youth justice system 2011-12 (Report 2013)*

<sup>42</sup> UN committee on the rights of the child General Comment No. 24 (201x), replacing General Comment No. 10 (2007)