

Submission regarding the review of the age of criminal responsibility

February 2020

Australian Red Cross (Red Cross) is committed to improving the wellbeing of those experiencing extreme vulnerability and we understand that children and young people coming into contact with the justice system are amongst some of the most vulnerable people in our community.

As such, we are pleased that the Council of Attorneys-Generals are exploring if and how to raise the age of criminal responsibility.

As a matter of course, all children and young people should be diverted away from the justice system as much as possible. However, where diversion is not possible, we believe based on international evidence and best practice that only young people aged 14 or over should be held criminally responsible for their offending.

Children and young people under this age lack the cognitive and neurological capabilities to be held fully and criminally accountable for the consequences of their actions and further, those who offend are often found to have experienced trauma and complex disadvantage with compounding intellectual or mental health issues which affect their behaviour. For such a cohort, a criminal justice led response causes more harm than good. Instead an integrated education, health and child protection system led response is far more suitable.

We acknowledge the shocking over-representation of Aboriginal and Torres Strait Islander children and young people in the justice system. We also highlight the preamble to the Uluru Statement from the Heart which acknowledges that:

“Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future!”

Red Cross encourages the Council of Attorneys-General Age of Criminal Responsibility Working Group to consider with particular regard, submissions from Aboriginal and Torres Strait Islander organisations on this matter and further emphasises that initiatives targeted towards Indigenous young people should be led by First Nations organisations and communities.

We hope that our submission is of value to the Working Group and would be pleased to discuss our submission further, or work with governments and other stakeholders in order to realise this important reform.

Yours sincerely,

Noel Clement



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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? Please explain the reasons for your view and, if available, provide any supporting evidence.

Red Cross believes that the age of criminal responsibility should be increased to 14 years in all Australian jurisdictions as quickly as possible. Such a change is necessary for a number of reasons, in particular to:

- acknowledge the cognitive capabilities of children under 14,
- recognise the delayed development, disabilities and mental health concerns of many children under 14 who currently interact with the justice system,
- mitigate the harmful effects of detention including prevalence towards future offending and;
- avoid the negative and harmful life trajectory that a justice system response at a young age can often have for young people.

There is consensus amongst child psychologists, psychiatrists, neurologists and others in the development science and medical professions that children under the age of 14 have developing brains with limited capacity for reflection before action. It is well established that children under the age of 14 do not have the cognitive abilities to fully appreciate the criminal nature of their action, nor can they fully anticipate the consequences of their actionsⁱⁱ. It is therefore incompatible for a fair and just legal system to hold them criminally accountable for their actions.

Research and evidence also demonstrates that amongst the cohort of children aged under 14 likely to come into contact with the criminal justice system or be incarcerated, a significant proportion experience a cognitive, neurological or intellectual impairment. Whilst precise data is not available (particularly because many children interacting with the justice system may be living with an undiagnosed impairment), a recent study in Western Australia found that a third of children in detention suffered from foetal alcohol spectrum disorder (FASD) and one in nine had another neurodevelopmental disorderⁱⁱⁱ. Another study in New South Wales found that amongst children across eight prisons, almost half had borderline or lower intellectual functioning^{iv}.

We further understand the well-documented link between contact with the child protection system and involvement in the justice system, which demonstrates the trauma and neglect many children and young people who become involved in the justice system have experienced^v.

This evidence demonstrates what is well understood – that most young children who become involved in the justice system are facing significant barriers and living with conditions that contribute substantially to anti-social behaviour. Not only is it unfair to hold them criminally responsible for their actions, it is also ineffective use of justice system resources. These children would be better served by a health, education, child protection (or combination thereof) response.

There is also significant evidence demonstrating the harm that is done to children when they are involved in the justice system. International and domestic evidence has long identified the

relationship between juvenile and adult offending and in particular, the pathway to re-offending young children often follow after initial contact with the criminal justice system^{vi}.

This is starkly demonstrated by evidence, which shows that the younger a child is at first contact with the criminal justice system, then the more likely it is the child will become entrenched in the justice system as an adult^{vii}. This evidence indicates that in and of itself, contact with the justice system is a criminogenic factor and in order to divert people away from the system, we should invest in keeping young people away from the justice system for as long as possible and instead adopt restorative approaches which address the underlying factors of offending and the needs of the child.

Such effects are particularly pronounced for Aboriginal and Torres Strait Islander children who are over-represented in both the child protection and justice systems. Aboriginal and Torres Strait Islander children are currently more likely to be arrested, to have bail refused, and for their matter to be determined in court^{viii} and less likely than non-Indigenous children or young people to receive the benefit of a diversionary option. Raising the age of criminal responsibility is therefore particularly important for Aboriginal and Torres Strait Islander children and young people.

All of this demonstrates that the young children involved in the justice system are an extremely vulnerable cohort and that a criminal justice response does little more than lock them into a trajectory of further contact with the justice system.

We should act quickly to raise the age of criminal responsibility to 14 and invest in preventative, rehabilitative and therapeutic approaches for children and young people who are offending.

RECOMMENDATION: Red Cross recommends that the age of criminal responsibility is raised to at least 14 years in all Australian jurisdictions.

- 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? Please explain the reasons for your view and, if available, provide any supporting evidence.**

For the reasons outlined above, Red Cross believes that the age of criminal responsibility should be increased to at least 14 for all offences. 14 is an age where there is reasonable consensus amongst child development experts that children can reasonably be held fully accountable for the impacts of their actions. As such, it is the median age of criminal responsibility in most European countries and is in line with United Nation recommendations.

RECOMMENDATION: Red Cross recommends that the age of criminal responsibility is raised to 14 years for all offences.

- 3. 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.**

Red Cross does not have the expertise or experience to comment on the cross-jurisdictional application of the principle of *doli incapax*, however, we note the Law Council of Australia's view that it is a confusing and complex doctrine and leads to delays and inconsistencies in the treatment of children^{ix}.

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)? Please explain the reasons for your views and, if available, provide any supporting evidence.

Red Cross believes that detention should be a measure of last resort for all young people and children who commit offences. As much as possible, alternatives to detention should be applied with a focus on rehabilitation, balancing the need to ensure community safety and respond to serious offending. Detention should not be used as a stopgap because alternative accommodation for children or young people cannot be found^x.

Red Cross acknowledges that there are circumstances where detention of a young person might be necessary in order to protect community or individual safety. As such, we recommend that the minimum age of detention be at least 14 with provisions to ensure that detention is used only as a last resort.

In the small number of circumstances where detention is necessary, we believe that the facilities should be small-scale, community based and therapeutic, drawing from international best practice examples such as New York City and the Netherlands. The University of Melbourne recently published a [report outlining design approaches^{xi}](#) that can be taken to improve outcomes of juvenile justice facilities drawing on best practice international evidence.

RECOMMENDATION: Red Cross recommends that the minimum age of criminal detention is raised to 14 to align with the minimum age of criminal responsibility and that detention for all children and young people should only be a measure of last resort and should be in small-scale, therapeutic facilities.

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? Please explain the reasons for your views and, if available, provide any supporting evidence.

As outlined in our [2016 Vulnerability Report – Rethinking Justice^{xii}](#), there is a need for substantial investment in social diversion and prevention strategies across all points of the criminal justice system, for all ages and which are genuinely responsive to the unique nature of Aboriginal and Torres Strait Islander social and cultural systems and family structures. This includes an early intervention and prevention approach, which responds to children and young people who are offending with restorative and therapeutic approaches and addresses underlying behaviour, as well as health and cognitive factors and supports the family unit and connection to culture.

Such an approach includes increasing support for family preservation services. 'Protecting Children is Everyone's Business: The National Framework for Protecting Australia's Children 2009–2020'

acknowledges the complexity of factors that contribute to poor outcomes for children and adopts a public health approach to the provision of a continuum of supports and services. This approach moves from seeing 'protecting children' merely as a response to abuse and neglect to one of promoting the safety and wellbeing of children. Under a public health model, priority is placed on having universal supports available for all families. More intensive secondary prevention interventions are provided to those families who need additional assistance with a focus on early intervention. Tertiary child protection services are a last resort and the least desirable option for children, families, communities and governments. Within this public health approach, we argue that sufficient funds must be provided for a spectrum of child and family wellbeing responses to support primary and secondary strategies and interventions in order to prevent families falling into the tertiary level of 'last resort'. Just as a health system is more than hospitals, a system for the protection of children needs to be more than tertiary responses such as statutory child protection and Out-of-Home-Care.

For children and young people and more specifically, children under 14 years (Red Cross recommended age of criminal responsibility) we suggest the following programs and frameworks are required.

The first is to ensure a whole of government response that reduces silos and avoids children and young people slipping between the cracks of various agencies or departments. A better integrated child and family, child protection and juvenile justice response is a necessary first step to ensure better coordinated service responses. There are a range of strategies that could be used to achieve a whole of government response, in recognition of the significant cross-over between services and similarity in support needs, including cross agency governance and shared accountability for coordinated service responses across child and family, child protection and juvenile justice departments, which has been undertaken in some jurisdictions already. Any approach must be tailored to and be centred on the needs of children and young people. (See Point 10 for additional detail).

Appropriate training and support for first responders such as police is also an important element of ensuring that as much as possible, children and young people are diverted away from the justice system at the earliest point. This should include trauma informed and culturally grounded, development training to enable police and other responders to understand and appropriately respond when children or young people are demonstrating anti-social behaviours. Equally important is ensuring that services such as child protection or acute youth support units are resourced appropriately so that police are not required to respond to gaps in capacity from other parts of the system.

It is also imperative to ensure that there are adequate youth diversion services in place for young people and children to access. Programs and services designed to support children and young people through key points of known vulnerability can assist children and young people to transition away from further contact with the criminal justice system. This is particularly relevant in regional and remote communities where there is often a scarcity of diversionary activities children at risk of further contact with the justice system can be referred into. Such activities should be therapeutic, trauma informed, culturally grounded and based on strong evidence. The specific service will need

to be determined by the particular needs of local communities but there is substantial domestic and international evidence to draw from including examples of Red Cross services detailed below.

Red Cross delivers youth diversion programs in a range of locations, in particular our 'Step Out' program, which supports young people aged between 14 and 25 who have been involved with the youth justice system more than once, or who received more than one youth justice order, and/or are at risk of re-offending.

Step Out links these young people to a dedicated mentor who guides the personal development of the young person by helping them to identify their goals and to take the steps they need to make positive changes in their life. Red Cross mentors walk alongside young people through some of their most vulnerable times, including when they are exiting custody and moving away from mandated orders, providing support where other mandated services are no longer accessible.

Red Cross actions are not mandated. The young person participates voluntarily and takes the leading role in their own development through the program. Findings from an independent evaluation of Step Out undertaken by Flinders University SA (2012)^{xiii} were very positive, with the mentoring making a substantive impact on participants' decision-making and capacity to plan for their futures, as well as practical and immediate outcomes such as securing accommodation, job training or employment. Young people identified having someone in their life they could rely on and trust as the single most important benefit of the program. Apart from the long-term social benefits of diverting a young person from a life of involvement with the criminal justice system, there are substantial economic benefits when you compare the relative costs of community-based programs such as Step Out with the substantial costs involved in keeping a young person in detention for a year.

The SHAK (Safe Hangout for All Kids) in Darwin is a drop-in centre run by Red Cross for children and young people in Casuarina, Darwin. The SHAK provides (predominantly Aboriginal and/or Torres Strait Islander) young people aged 12-18 with a safe and supportive environment to engage with others, access meaningful and developmental activities and programs, and access referrals to other services. Centres such as these are vital in terms of providing safe and engaging activities for young people who are at risk of offending to engage in, and for providing an easy entry point to other support services. Its efficacy could be extended by engaging with the families and/or guardians of young people who visit the SHAK.

There are a number of other programs that are successfully working with young people and children to desist from offending and engage in pro-social activities. Of particular note are responses for Aboriginal and Torres Strait Islander children and young people that have a focus on connecting with culture and which are led by Indigenous peoples, communities and organisations. Such initiatives may also include elements of healing practice acknowledging the ongoing impacts of inter-generational trauma. Aboriginal and Torres Strait Islander organisations and communities should be given the resourcing and other supports required to develop and/or implement culturally appropriate diversionary programs as appropriate.

Any youth diversion or prevention service should take a long-term and holistic approach with flexibility to work with the child or young person's support network or family. They should be also tailored for local environments including regional, urban or remote activities.

Children and young people themselves should also be engaged in the design and implementation of diversionary services. Such involvement will ensure the effectiveness of a service response, and will also generate the engagement and buy in required for an intervention to be successful.

Evidence based models that have demonstrated efficacy in other jurisdictions or internationally may also be appropriate. For example, in [New York City](#)^{xiv} a number of reformers attribute some success in reducing the number of children and young people in prison to models such as Multi-Systemic Therapy (MST) and Multidimensional Treatment Foster Care (MTFC). Some Australian jurisdictions have implemented these models in the child protection systems; pending evidence on efficacy in the Australian context further implementation targeted at a juvenile justice cohort could be of merit.

Given the prevalence of developmental, cognitive and intellectual disability and/or mental health concerns amongst children and young people who are likely to interact with police, a mechanism to proactively screen, diagnose and treat children as they first become known to police is necessary. Such a mechanism should not duplicate existing clinical treatment processes or plans through systems such as child protection or education but complement existing efforts.

RECOMMENDATION: Red Cross recommends that Australian governments invest in youth diversion and prevention services that take a long term and holistic approach that address the underlying causes of offending behaviour in children and young people, especially those under 14

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

Justice reinvestment is a community centred approach that redirects money away from incarcerating people and invests in locally driven and owned solutions aimed at addressing the underlying causes of crime. The community centred approach is central to justice reinvestment and involves local stakeholders collaborating across their community to identify the drivers of criminal justice costs and potential solutions. For example, in Port Adelaide, South Australia, Red Cross and Justice Reinvestment SA¹ have been working with the local Aboriginal community to support their vision and goals. This has resulted in a community-driven action plan to reduce offending (adult and youth) focussing on approaches such as better engagement with schools, stronger connection to support services and stronger and more connected communities

There are a number of other justice reinvestment trials underway across States and Territories detailed at the [Justice Reinvestment Network of Australia's website](#)^{xv}. We would encourage the Working Group explore the appropriateness of a justice reinvestment approach in communities where there is persistent youth offending and/or child protection involvement, in particular in

¹ www.justicereinvestmentsa.org

partnership with local Aboriginal and Torres Strait Islander leadership and/or community controlled groups using community-led approaches.

Group Conferencing or similar approaches (whereby the child or young person takes responsibility for their actions in an environment with appropriate support and proposed actions to redress those who have been affected) is another mechanism that could be appropriate for children and young people who fall below the age of criminal responsibility. Such an approach could be informed by statutory conferencing schemes already in place and represent an opportunity for the child or young person to accept responsibility for their actions whilst at the same time receiving supports from their family or guardian and other support services (likely including education, child protection and health). For Aboriginal and Torres Strait Islander or culturally and linguistically diverse children and young people, there is an opportunity to build in cultural protective factors and for Indigenous children, for this process to be led by Elders or other respected members of the community.

The Australian Law Reform Commission details additional approaches to diversion in [their report](#) on children in the legal process^{xvi}.

RECOMMENDATION: Red Cross recommends that Australian governments support justice reinvestment approaches to address the underlying causes of offending in communities where children and young people are particularly at risk of being in contact with justice system

7. 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? Please explain the reasons for your views and, if available, provide any supporting evidence.

Red Cross has nothing further to add in response to this question that has not already been covered in our other responses.

8. 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?

A higher age of criminal responsibility does not automatically mean that there will be an increase in anti-social or criminal behaviours committed by children who fall under the minimum threshold. Indeed, many European countries with higher ages of criminal responsibility have lower rates in youth offending. One theory to explain this is that by diverting children away from the justice system at a young age, they are less likely to continue or escalate with their offending^{xvii}.

Nevertheless, Red Cross recognises that responses outside the justice system are required to address anti-social or offending behaviour for children and young people. We believe that the responses proposed in response to questions 5 and 6 represent best practice in terms of protecting the community.

RECOMMENDATION: Refer to questions 5 and 6

- 9. 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?**

Red Cross does not have the experience or capability to respond to this question.

- 10. Are there issues specific to states or territories (eg operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.**

As previously mentioned, Red Cross recommends that all Australian governments consider a co-ordinated and accountable approach across agencies through strong interagency governance and accountability in order to reduce silos between agencies and in recognition of the substantial cross-over between cohorts. There are a range of strategies that could be used to achieve improved whole of government response. These include improving and formalising interagency collaboration, through legislation and/or policy that mandates shared case planning and decision making across Juvenile Justice and Child Protection Departments, for mutual clients. These approaches should utilise approaches which empower families and strengthen their decision making, such as Family Group Conferencing.

RECOMMENDATION: Red Cross recommends that all Australian governments improve interagency collaboration, for example by establishing Interagency Child Protection Advisor roles within juvenile justice to act as not only advisors of good practice, but also be the conduit on complex and difficult cases across departments

- 11. Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.**

We would like to reiterate the need to take a long-term preventative approach in order to achieve a meaningful reduction in offending across all age groups, not just children and young people.

Justice reinvestment is one such approach which generates community leadership in order to address the underlying causes of offending. We encourage all governments to explore the applicability of justice reinvestment approaches in communities that are over-represented in the criminal justice system.

RECOMMENDATION: NA

References:

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- ⁱⁱⁱ 2017, Bower et al, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia, BMJ Open, p.6-8, available at <https://bmjopen.bmj.com/content/8/2/e019605>.
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