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YOUTH LEGAL CENTRE

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By email

Review of Age of Criminal Responsibility
Submission from The Shopfront Youth Legal Centre

About The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Herbert Smith Freehills.

We represent and advise young people on a range of legal issues, with a primary focus on criminal law. We are based in the inner city of Sydney but work with young people from all over the Sydney metropolitan area. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's and District Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of Indigenous young people. Common to most of our clients is the experience of homelessness, having been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance misuse problem.

The two co-authors of this submission are senior lawyers who have each worked with vulnerable young people in the NSW criminal justice system for approximately 25 years. We are both accredited specialists in criminal law; one of us is also an accredited specialist in children's law.

We have also been significantly involved in policy work, sitting on relevant NSW Law Society committees and government working parties, and providing submissions and evidence to various inquiries and legislative reviews.

General comments

We believe that the minimum age of criminal responsibility should be increased to 14 years. The current age of 10 years is too low, and has been subject to criticism by the United Nations Committee on the Rights of the Child.

Assigning criminal liability to children aged 10 to 13 years offends the basic principle of criminal justice that an individual must have criminal capacity before being criminally culpable.

Our Indigenous children and young people are substantially overrepresented among the very young coming before the courts. In our view, this is a significant factor contributing to, and the beginning of a pathway to, the overrepresentation of Aboriginal and Torres Strait Islander people in our criminal justice system.

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army

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HERBERT SMITH FREEHILLS

Question 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.

The minimum age of criminal responsibility ('MACR') in Australia should be increased. As a basic principle of criminal law, a child should only be criminally responsible and exposed to criminal liability if the child has the capacity to satisfy the criminal element of the offending. That is, that the child has the capacity to be sufficiently aware of the wrongfulness of an action in a criminal sense. The general requirement of criminal intention, or mens rea, is said to be one of the most fundamental protections in criminal law[1].

It is well-established that children under 14 years do not have the same brain maturity or neurodevelopmental capacity as older adolescents or adults. In particular, children and younger adolescents have poor executive functioning because the prefrontal cortex of their brain is not yet structurally developed[2]. "In laboratory studies of non-delinquent adolescents' reasoning in hypothetical problems, their capacities roughly reach adult levels by age 14 or 15"[3]. In the Juvenile Justice system this is compounded by the fact that there is an overrepresentation of children and young people who experience intellectual disability or mental health disorders[4].

The United Nations Committee on the Rights of the Child, in its last three reports of 2005, 2012 and 2019, which reviewed Australia's compliance with the Convention on the Rights of the Child, has called on Australia to raise the age of criminal responsibility, and has stated very clearly that the current threshold of 10 years old is considered too low on the international scale.[5] In the most recent report the Committee stated that the age of criminal responsibility in Australia should be 14 years.[6]

We are extremely concerned that the current low age of criminal responsibility has a disproportionate impact on Indigenous young people. We know that Aboriginal and Torres Strait Islander children are overrepresented as a percentage of children under 14 who are charged with offences. Indigenous young people represent 5% of the total Australian youth population[7]. However, in NSW, the proportion of Aboriginal young

[1] Australian Law Reform Commission (2014): https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/12-strict-and-absolute-liability/a-common-law-principle-2/ (accessed 1/2/2020)

[2] White, Margaret, "Youth Justice and the Age of Criminal Responsibility: Some Reflections", (2019) 40 Adelaide Law Review, page 266

[3] Furby & Beyth-Marom, 1990, cited by Kambam, Praveen and Thompson, Christopher, "The Development of Decision-making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants", Behav. Sci. Law 27: 173-190 (2009), 175

[4] Chris Cunneen, "Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report, (2017), Comparative Youth Penalty Project UNSW: http://cypp.unsw.edu.au/node/146.

[5] UN Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention: Concluding Observations –Australia (20 October 2005), CRC/C/15 Add.268; UN Committee on the Rights of the Child Consideration of reports submitted by States Parties under Article 44 of the Convention: Concluding Observations –Australia (28 August 2012), CRC/C/AUS/CO/4 ; UN Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth period reports of Australia, 30 September 2019.

[6] UN Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth period reports of Australia, 30 September 2019 at 48(a).

[7] "Aboriginal and Torres Strait Islander Adolescent and Youth Health and Wellbeing 2018", Australian Institute of Health and Welfare, https://www.aihw.gov.au/reports/indigenous-australians/atsi-adolescent-youth-health-wellbeing-2018/contents/summary (accessed 7/2/2020)

people between the ages of 10 and 12 making their first contact with the criminal justice system is 30-56 times higher than non-Aboriginal children[8].

In our experience, this very early entry into the Juvenile Justice system for many Indigenous young people is the beginning of a troubled pathway to overrepresentation in the criminal justice system more broadly. Research has shown that of those Indigenous people born in NSW in 1984, by the time they reached 23 years of age, 24.5% of them had been remanded in custody, placed in youth detention or given a prison sentence, compared to only 1.3% of the non-Indigenous population[9]. The very low age of criminal responsibility significantly contributes to the urgent problem of the overrepresentation of our First Nations people in our criminal justice system.

It is often argued that the principle of doli incapax is protective for the age group of 10-14 years. However, in our experience, that is not the case. The anecdotal experience of practitioners in NSW representing this cohort in the Children's Court, like our Victorian colleagues, is that there is an inconsistent approach by the courts in dealing with this principle[10].

From 2016-2018 doli incapax was successfully argued in only 48 cases in the Children's Court in NSW. In the same period 736 children aged between the ages of 10 and 13 were found guilty of offences[11]. In our view, these statistics illustrate that, in the vast majority of cases involving 10-13 year olds, doli incapax was not applied. These statistics are consistent with the anecdotal evidence of experienced practitioners that doli incapax is not serving its protective function.

In our view the presumption that children under the age of 14 do not have the capacity to understand that their actions are wrong in a criminal sense is not reflected in court outcomes, and therefore is not protective of this age group. This is despite the recent neurobiological and neurodevelopmental research that has identified deficits for adolescents in cognitive domains[12].

In practice, practitioners in Victoria and NSW have reported a reversal of the onus of proof in doli incapax cases in the Children's Courts, because it largely falls on the defence to prove that the child client does not have the intellectual or developmental capacity to form the criminal intent.[13]. This is despite the principle that the burden lies with the prosecution to rebut the presumption of doli incapax, as an element of the prosecution case[14]. There are simply not enough Legal Aid funds to cover the cost of this expert material, which means that, in practice, the child defendant is at an unfair disadvantage. Further, in cases where doli incapax is raised, the prosecution is usually able to lead highly prejudicial evidence, that in adult proceedings would be inadmissible, and which often works to the disadvantage of children.

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[8] Weatherburn, Don and Ramsay, Stephanie, *"Offending over the life course: Contact with the NSW Criminal justice system between the age 10 and 33"*, Crime and Justice Statistics Bureau Brief, NSW Bureau of Crime Statistics and Research, Issues Paper 132, April 2018, 7 [https://www.bocsar.nsw.gov.au/Documents/BB/2018-Report-Offending-over-the-life-course-BB132.pdf].

[9] Weatherburn, Don and Holmes, Jessica*, "Indigenous imprisonment in NSW: A closer look at the trend*":, Crime and Statistics Bureau Brief, Issues Paper 126, November 2017, 1. [https://www.bocsar.nsw.gov.au/Documents/BB/Report-2017-Indigenous-Imprisonment-in-NSW-BB126.pdf

[10] Legal Aid NSW submission to the Council of Australian Governments review of the minimum age of criminal responsibility, October 2019, 18; Wendy O'Brien and Kate Fitz-Gibbon, "The minimum age of criminal responsibility in Victoria (Australia); examining stakeholder's view and the need for principled reform" (2017): Youth Justice 17(2) 17

[11] Legal Aid NSW submission to the Council of Australian Governments review of the minimum age of criminal responsibility, October 2019, 20

[12] Kambam, Praveen and Thompson, Christopher, Op cit, 187.

[13] Legal Aid NSW submission to the Council of Australian Governments review of the minimum age of criminal responsibility, October 2019, 20

[14] *RP v The Queen* (2016) 259 CLR 641.

We believe that even litigating the issue of doli incapax in the Children's Court has the effect of drawing the youngest children into our criminal courts. This is contrary to international best practice that states, in matters relating to children, alternatives to criminal court processes should be used wherever appropriate[15].

These children may also be on onerous bail conditions, or on remand, for several months or even longer whilst awaiting their court hearing. Breaches of bail (for example residence, reporting or curfew) may result in repeated court appearances or punitive outcomes before the court determines the issue of doli incapax. In our experience, the reality of bail and remand operates as a strong disincentive for children to defend criminal charges.

Question 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.

The age of criminal responsibility should be increased to 14 years. This complies with international standards, and is an adequate response to the call from the UN Committee in 2019 urging Australia to raise the age to an internationally acceptable level, in line with its obligations in relation to the Convention on the Rights of the Child [16].

The UN Committee states that Australia should adopt a MACR that would "conform with the upper age of 14 at which doli incapax applies"[17]. Given that the principle of doli incapax is not operating well in practice, we believe that it should be replaced with an appropriate MACR of 14 years.

Question 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.

As discussed in our response to Question 1 we do not believe that the presumption of doli incapax is operating well in practice. The number of children under 14 who are found guilty in our Children's Courts, despite this principle, is testament to the inconsistent nature in which it is applied by Children's Courts.

Our view is that doli incapax is not a protective principle in practice, and therefore we firmly believe that the MACR should be raised to 14 years.

However, if the MACR were raised to 12 or 13 years, we believe that the principle of doli incapax should be retained for children under 14 years of age.

[15] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985 , 11.1: https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf

[16] UN Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth period reports of Australia, 30 September 2019 at 48(a).

[17] Ibid

Question 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.

If the MACR is raised to 14 years, children under this age will not be imprisoned in youth detention centres. In our view, children under 14 years should not be subject to detention as criminal punishment.

The issue as to whether there should be a higher minimum age of detention is a separate issue to the raising of the MACR. We believe that a minimum age of detention should involve a separate inquiry and consultation process.

However, we believe that the principle of custody as a last resort must be strengthened.

We are very concerned that a majority of young people who are in detention are unsentenced. That is, they are awaiting the outcome of their court matter or sentencing, and are bail refused[18]. Even more troubling is the number of young people who are on remand for offences that will not attract a custodial sentence. Official statistics show that over 80% of juveniles on remand in NSW do not ultimately receive a custodial sentence[19].

Indigenous young people are overrepresented in juvenile detention at an unacceptable level. On an average night in the June quarter of 2018, Indigenous young people aged 10-17 years were 26 times more likely than non-Indigenous young people to be in detention, despite making up only 5% of the youth population aged 10-17 in Australia[20].

In our experience, the younger a child enters the criminal justice system the greater the likelihood of increasing involvement in the system, including youth detention. The Australian Law Reform Commission, in the *Pathways To Justice Report (December 2017)*, called for "national criminal justice targets" to reduce the incarceration rates of Aboriginal and Torres Strait Islander people and to include these justice targets in the "Closing the Gap" framework.[21]

In 2016 the General Assembly of the United Nations appointed Manfred Nowak as an independent expert leading an in-depth global study on children deprived of liberty, including an analysis of its root causes. One of the recommendations in the 2019 Report of Manfred Nowak was that:

"States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age."[22]

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[18] On an average night in the June quarter 2018, 3 in 5 (60%) of young people in detention in Australia were unsentenced. "Youth detention population in Australia 2018", Australian Institute of Health and Welfare", Bulletin 145, December 2018,1. [https://www.aihw.gov.au/getmedia/55f8ff82-9091-420d-a75e-37799af96943/aihw-juv-128-youth-detention-population-in-Australia-2018-bulletin-145-dec-2018.pdf.aspx?inline=true]

[19] Youth Justice NSW, Young people in custody statistics, *Proportion of young people with a remand episode who receive, or do not receive a Control Order within 12 months,* http://www.juvenile.justice.nsw.gov.au/Pages/youth-justice/about/statistics_custody.aspx#ProportionofyoungpeoplewitharemandepisodewhoreceiveordonotreceiveaControlOrderwithin12months (accessed 27/2/2020)

[20] Op cit, footnote 18, 2.

[21] Australian Law Reform Commission, "Pathways to Justice- An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples", Final Report, December 2017, ALRC Report, 133, 493; https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/10-aboriginal-justice-agreements/criminal-justice-targets-for-closing-the-gap/

[22] Nowak, Manfred, "Report of the Independent Expert leading the United Nations global study on children deprived of liberty", submitted to the Seventy-fourth session of the United Nations General Assembly, A/74/136; 11 July 2019, 20/23. [https://undocs.org/A/74/136]

Question 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.

If the MACR is raised then it will require an introduction of holistic policies and a multi-pronged approach. We believe that a focus on a therapeutic and rehabilitative approach will be the most successful. Such an approach, in our view, will address the current well-documented pathway into the criminal justice for the most vulnerable, and often marginalised, in our society. This approach also best adheres to the overriding principle that prioritises the "best interests of the child", which the UN Convention on the Rights of the Child states must be the primary principle in legal processes related to children[23].

In most European countries the age of criminal responsibility is set between the ages of 14 and 16 years, although in France it is 13 years[24]. In countries such as Sweden, Norway, Finland, Belgium, France and the Netherlands the welfare system, rather than criminal courts, is considered best placed to deal with, and make an impact on very young offenders[25]. Finland has a MACR of 16 years, and does not have a juvenile criminal court, rather measures are taken by a municipal social welfare or child welfare board under the *Child Welfare Act*. The criterion for all child welfare measures is the best interests of the child[26]. This keeps children out of the criminal justice system, and there are very low rates of juvenile incarceration in this country[27].

It is our view that Australia should look to other countries that have a higher age of criminal responsibility and analyse and adopt best practice processes in relation to offenders under the age of 14 years. In our experience, very young offenders often have pressing welfare needs, which are causative to their offending. We believe that, for these children, moral culpability for offending is always extremely low because of the criminogenic issues bringing these children to the attention of police. Punitive responses to these very young offenders are inhumane and ineffective. We must focus on a model that acknowledges the importance of rehabilitation and support for these children, and therefore safety for the community in the longer term.

Further, it is well-established that early intervention measures can effectively address at risk factors in youth offending. Programs that address social inclusion for families or communities, or provide family and parenting support can be preventative in terms of youth offending. Youth offending, in our experience, is always closely linked to social problems. "It is well accepted that the main causes of youth offending are family dysfunction, child abuse, neglect, poor attendance at school, mental health problems and neurological disabilities"[28]. It is our view that, if we are serious about addressing very young offending, then targeted, very early and effective social support for families and children must be increased.

Internationally, schools have been considered a useful resource for early intervention strategies, which are incorporated in the schooling curriculum. This includes teaching

[23] UN Convention on the Rights of the Child 1989, Article 3.

[24] Neal Hazel, The University of Salford, "Cross-national comparison of youth justice", Youth Justice Board for England and Wales, 2008, page 31.

[25] Ibid, page 28.

[26] Marttunen, Matti, "Finland / The basis of Finnish juvenile criminal justice", Dans Revue internationale de droit pénal 2004/1-2 (Vol. 75), pages 315 – 335,

[27] Abrams, L. S., S. P, Jordan and L. A. Montero (2018), 'What is a juvenile? A cross-national comparison of youth justice systems', *Youth Justice* 18(2) 111-130, 125

[28] Op cit, White, page 260

conflict resolution, problem solving, moral education or resisting negative peer pressure[29]. Mediation programs in schools have also developed in countries such as Belgium, Italy, France, Austria, Hungary and Germany. These projects are based on restorative justice principles[30].

Programs aimed at diverting young people from anti-social behaviour and offending have been developed internationally, but also in Australia. We believe that these programs in NSW can be built on, and continue to provide an effective, rehabilitative and preventative strategy for children and young people whose social circumstances mean that they are at risk of entering a pathway to the juvenile justice system. Our experience is that those children who are less likely to continue to offend are those who are provided with intensive social support and access to ongoing rehabilitative programs. In our view, a Justice Reinvestment approach has much to recommend it[31].

A useful analysis of these programs in NSW are outlined in the submissions from the NSW Legal Aid Commission[32], and also the 2018 Report of the NSW Legislative Assembly on the *Inquiry into the Adequacy of Youth Diversionary Programs in NSW*[33].

Question 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.

We refer to our answer to question 5, in particular our reference to the programs outlined in the submissions from the NSW Legal Aid Commission, and also the 2018 Report of the NSW Legislative Assembly on the *Inquiry into the Adequacy of Youth Diversionary Programs in NSW*.

Question 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.

In the event that the MACR is raised, an increased capacity for alternative non-criminal-justice and needs-based responses would certainly be required for the children who fall below the new threshold.

As discussed in our answer to Question 5, we believe that a welfare-based model is the most appropriate model for this vulnerable age group. A multi-faceted approach that

[29] Op cit, Hazel, page 40.

[30] Ibid.

[31] A Justice Reinvestment trial in the town of Bourke, NSW, has shown very promising results. See http://www.justreinvest.org.au/justice-reinvestment-in-bourke/ (accessed 27/2/2020)

[32] Legal Aid NSW submission to the Council of Australian Governments review of the minimum age of criminal responsibility, October 2019, 22-28.

[33] Legislative Assembly of NSW, Law and Safety Committee, The Adequacy of Youth Diversionary Programs In New South Wales (September 2018). [https://www.parliament.nsw.gov.au/ladocs/inquiries/2464/Report%20Adequacy%20of%20Youth%20Diversionary%20Programs%20in%20NSW.PDF]

ranges from early intervention and prevention strategies, to diversionary and rehabilitative programs, and potentially more intrusive welfare interventions for conduct considered extremely serious in its nature.

There is precedent in NSW (and other jurisdictions) for the use of secure therapeutic care for young people with severe behavioural problems. These programs address these issues in a contained and therapeutic environment, usually under the supervision of a court, without criminalising the young person.

However, we need to be alert to the fundamental principles of due process and proportionality in any alternative interventions, in line with our international obligations[34].

Question 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?

Please refer to our answers to Questions 5,6 and 7.

Question 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?

In our view, the criminal law already adequately deals with accessorial liability. We note that there is an offence of recruiting a child to carry out criminal activity in s351A(2) of the NSW *Crimes Act*, and we understand that there are similar offences in other jurisdictions.

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.

In this submission we have commented on our experience which is largely in New South Wales. However the issues raised are not necessarily "specific" to NSW.

Question 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 have no additional comments to make.

Thank you for the opportunity to comment. We are happy to be contacted for further comment. Our preferred means of contact is via email at jane.sanders@theshopfront.org.

Yours sincerely

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[34] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985 , : https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf