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The Chair Age of Criminal Responsibility Working Group  
c/- Strategic Reform Division  
WA Department of Justice

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## Age of Criminal Responsibility Working Group Review 2020

Council of Attorneys-General

### **A submission from Youthlaw**

We are pleased to make this submission to the Working Group, including our responses to questions 1 to 7 of the Review.

#### **ABOUT YOUTHLAW**

Youthlaw is Victoria's state-wide specialist community legal centre for young people under 25 years of age. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

Youthlaw provides legal support, advice and representation to a significant number of children and young people having contact with police and/or dealing with criminal charges proceeding before the Children's Court.

#### **REVIEW QUESTIONS**

##### **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.**

Youthlaw supports an increase of the age of criminal responsibility to at least 14 years.

The current minimum age of criminal responsibility in Australia at 10 years of age is harmful to children, and out of step with human rights standards and medical science on child development.

It is well established by medical research that between the ages of 10 and 14, children are undergoing significant mental, emotional and physical growth and development. Their capacity to reason and understand consequences however, are nowhere near fully developed.

Australia should heed the call from the United Nations Committee on the Rights of the Child for countries to have a minimum age of criminal responsibility set at 14 or higher and wherever possible adopt their recommendation that children under 16 should not be deprived of liberty.<sup>1</sup>

**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.**

Youthlaw supports an increase of the age of criminal responsibility to at least 14 years in all circumstances, for all offences.

More serious offences should be dealt with by engaging expert panels assessing the needs of the child and their family.

Very serious violent offences by children under 14 are extremely rare. We are of the view such children should receive 'wrap-around' welfare support, rather than a criminal response and for a period may be accommodated in small facilities with well-trained staff. The environment should not be punitive, but intensely therapeutic, and should address criminogenic behaviour, and preventing a well-known trajectory of the child diving deep into the criminal justice system, causing more harm to the community.

**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.**

Youthlaw's view is that doli incapax, as it is currently practiced in Victoria, is applied inconsistently and consequently does not provide the effective safeguard to children is designed to.

Despite doli incapax being a 'rebuttable' presumption which places the onus of proof with the prosecution, the Victorian practice is that the onus is more commonly located with the defence, who bear the unofficial burden of providing a report (at their cost) to prove that the defendant is doli incapax.. Children's lawyers are required to source child psychological reports, which is a time-consuming and expensive exercise. Even when they make submission armed with a supportive psychological report often a Magistrate will make a decision contrary to the medical evidence.

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<sup>1</sup> Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system.

In some cases a child under 14 years are being held on remand even before these capacity questions are answered via professional reports. We must avoid those situations.

We submit that once the age of criminal responsibility is raised to 14 years, *doli incapax* would cease to be relevant and should not be retained

However, in the alternative if the Government is not willing to raise the minimum age of responsibility, consideration should be given the codification of the presumption of *doli incapax*, requiring the onus to be satisfied by the prosecution.

**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.**

The minimum age of detention should be 16 years, as per the recent general comment from the United Nations Committee on the Rights of the Child.<sup>2</sup>

Some of the reason for this reform include research findings that show:

- Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.
- Children who are first sentenced young, especially between the ages of 10 and 12 are more likely to reoffend than those first sentenced when they are older (Sentencing Advisory Council 2016).

**Question 5 - What programs and frameworks (e.g. 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.**

We endorse the view that rather than a criminal law response, a better way to respond involves creating an environment in which children are less likely to offend in the first place.

Accompanying a policy decision to raise the age of criminal responsibility, should be the development of crime prevention and youth justice strategies that put the welfare of the child at the centre and adopt diversionary, genuine whole of government approaches, measure life outcomes, and focus on early support to children and families.

For example Scotland's youth justice strategy '*Preventing Offending: Getting it Right for Children and Young People*' (2015-2020)<sup>3</sup>, the Whole System Approach (WSA) and Getting it Right for Every Child (GIRFEC) provide the overarching policy frameworks for youth justice practice in Scotland. GIRFEC

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<sup>2</sup> Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system

<sup>3</sup> <https://www.gov.scot/publications/preventing-offending-getting-right-children-young-people/pages/4/>

provides a consistent way for people to work with children and their families. It supports families by making sure children receive the right help, at the right time, from the right people.

Prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services including education, health and community services should be prioritised and expanded for this cohort of children. In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led.

**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.**

There must be collective responsibility for offending. A child should not be held solely accountable for their behaviour as their behaviour is often a symptom of systemic failings of public institutions. In our view effective approaches involve holding children to account for their actions while identifying and addressing the underlying causes of those actions.

There are currently many excellent programs that aim to support children and their families through early intervention and support. These include:

- The Victorian Government's *Navigator* program which helps disengaged young people return to education and learning by working with them to address the issues underlying their disengagement. It is delivered by community agencies working closely with local schools.
- Community hubs in schools, involving allied health personnel (social workers, speech pathologists, occupational therapists) supporting families when problems are identified. An example in Victoria is Doveton College, a community focused school catering for families and children, prenatal to Year 9. It offers a fully integrated wrap-around service model of education and care, including early learning, family support, maternal and child health, child safety, schooling and adult education.
- Culturally specific programs such as Barreng Moorop provide intensive caseworker support and links to welfare, housing, family and education for young Aboriginal people aged 10 to 14 years who are involved in the justice system. (Jesuit Social Services, Victorian Aboriginal Legal Service & VACCA)
- Functional Family Therapy programs where practitioners work therapeutically with all family members where there are children aged up to 17 years and where child safety and well-being concerns have been identified and need to be addressed. The FFT Child Welfare program is designed to improve family dynamics, communication and relationships while decreasing intense negativity and dysfunctional patterns of behaviour.

Multi Systemic Therapy is a family and homebased treatment for young people on control orders or diversionary orders. <http://www.ozchild.org.au/multisystemic-therapy/>

- Youth Support Service (funded by the Victorian Government supports young people (10 to 17 years old) who have had recent contact with police and may be at risk of entering the youth justice system and their families to address problems before they become too serious. YSS is a voluntary service which operates independently of the legal process to help young people and their families achieve their goals.

**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.**

We refer you to Jesuit Social Services blueprint paper *Raising the Age of Criminal Responsibility: There is a better way* – which shows a way to respond to the small number of children who would come under the threshold for the age of criminal responsibility if it was raised. They recommend:

- Low level offences should be met with immediate support for the families of the children in question so that the problem can be diagnosed and a solution found. This may be accompanied by a 'restorative justice approach where the goal is acknowledgement of harm done and reconciliation with victims and the community.
- More serious offences should be dealt with by engaging expert panels to assess the needs of the child and their family. As detailed in our report, children's hearings in Scotland put the welfare and best interests of the child at the centre of proceedings.
- Very serious violent offences by children under 14 are extremely rare. Where it is absolutely necessary, children who commit such offences should receive 'wrap-around' support in small facilities with well-trained staff. The environment should not be punitive, but intensely therapeutic, and should address criminogenic behaviour.

Australia can learn from international jurisdictions like Germany. In 1923 Germany enacted combined justice and welfare approaches, and set the age of criminal responsibility at 14 years, allowing for educational measures instead of punishment. Germany's youth justice system is characterized by the approach of minimum intervention with priority given to diversion, and non-punitive and rehabilitative responses (referred as "educational measures") Germany applies a strict model, which means young people under 18 cannot be prosecuted in the adult criminal court or receive adult criminal sanctions, even where very serious offenses take place. The guiding principle of the German juvenile justice system is Erziehung (education and care), referring to the original right and duty of parents, which the state partly executes when a juvenile commits an offence. Reforms in 1953, 1990, and 2008 further emphasized diversion, educational and rehabilitative sanctions, and restorative responses to youth offending (Rap & Weijers, 2014, p. 93).

We appreciate you taking these matters into consideration and would welcome further opportunity to inform the Working Group's deliberations.

Yours faithfully

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