

**Submission  
No 59**

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS  
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF  
DEATHS IN CUSTODY**

**Name:** Mr Ben Watson  
**Date Received:** 23 August 2020

---

**RAISE THE AGE TO BREAK THE CYCLE:  
HOW VICTIMS OF SYSTEMIC SOCIETAL FLAWS BECOME  
INSTITUTIONALISED PERPETRATORS**

***Ben Watson,<sup>1</sup> Tanya Kamil,<sup>2</sup> Shannon Finegan,<sup>3</sup> and Joshua Lessing.<sup>4</sup>***

*[In Australia, the age of criminal responsibility is 10 years old. This means that a 10 year old child can be charged and found guilty of a crime, and be sent to prison to serve time for that crime. While the principle of doli incapax means that the prosecution must prove that the child understood their act or omission was seriously wrong, this paper argues that the penal system is an inappropriate method of rehabilitation and treating child offenders. Instead, resources should be committed to reducing systematic disadvantages for children at risk of offending, and providing support for children and caregivers, to allow child offenders to ‘get back on track’ and lead full and productive lives.]*

**TABLE OF CONTENTS**

I	INTRODUCTION	1
II	GOVERNING LAWS RELATING TO CHILDREN IN VICTORIA	2
A	Legislative Frameworks	2
1	The Children, Youth and Families Act 2005 (Vic)	2
2	The Charter of Human Rights and Responsibilities Act 2006 (Vic)	3
B	Common Law Rule - Doli Incapax	3
III	THE NEED FOR LAW REFORM	4
A	Children and the Prison System	4
B	Impacts On Children From Early Involvement With Criminal Justice System	6
C	From Child Victims to Adult Perpetrators	7
D	Council of Attorneys-General (‘CAG’)	9
E	International Perspectives	13
1	Switzerland	13
2	Japan	13
IV	CONCLUSION	13

---

**I INTRODUCTION**

The treatment of children in our criminal justice system has come a long way since the colonisation of Australia. In the distant past (at least, from a post-colonial perspective),

---

<sup>1</sup> Lawyer (Johnstone and Reimer Lawyers), AdvDipJust, LLB, GDLP.

<sup>2</sup> September 2020 Reader (Victorian Bar), LLB, GDLP.

<sup>3</sup> September 2020 Reader (Victorian Bar), LLB(Hons), GDLP, RN.

<sup>4</sup> September 2020 Reader (Victorian Bar), JD(Hons), LLM, GDLP.

children in the criminal justice system were treated in the same way as adults. Whilst it is difficult to imagine the first fleet of convicts arriving on our shores in Botany Bay carrying an 8 year old boy in the same fashion as adult convicts, chained and separated from his family, it is an important reminder of the progress and development of our laws.<sup>5</sup> As the law currently stands, a child from the age of 10 to 14 can be held criminally liable for their transgressions, as long as the prosecution can prove that the child knew their actions were seriously wrong. The rate of reoffending of this cohort of offenders is over 80 percent.<sup>6</sup>

In Australia, there is a movement to ‘raise the age’ of criminal liability. In addition to the Universal Declaration of Human Rights, and the International Covenants on Human Rights, the Convention on the Rights of the Child (1990) acknowledges ‘childhood is entitled to special care and assistance... by reason of his physical and mental immaturity’.<sup>7</sup>

In part II, this paper provides the framework for child offenders in Victoria, and part III looks to the unintended consequences of allowing children under the age of 14 to be charged and found guilty of offences, and addresses what can be changed in the law to resolve these issues. This paper discusses the laws as they currently stand in relation to children in Victoria, and ancillary matters pertinent to this issue, such as the problems that we face with these laws, and perspectives that could be insightful derived from international jurisdictions.

## II GOVERNING LAWS RELATING TO CHILDREN IN VICTORIA

There are three procedural legal rules to be considered when a child is accused of a crime. They are the *Children, Youth and Families Act 2005* (Vic) (the ‘CYFA Act’), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ‘Charter’), and the common law rule of *doli incapax*. Read together, this system of laws mean that children under the age of 14 can only be charged with a crime if they are older than 10 years old, and the prosecution can prove that the child satisfies the test under *doli incapax*.

### A *Legislative Frameworks*

#### 1 *The Children, Youth and Families Act 2005 (Vic)*

The *CYFA Act* is the governing legislation pertaining to provision for children who have been charged with or have been found guilty of criminal offences.<sup>8</sup>

---

<sup>5</sup> Sydney Living Museums, ‘Child Convicts of Australia’, ABC Education (Webpage) ch 1 <<https://education.abc.net.au/home#!/digibook/3103485/child-convicts-of-australia>>.

<sup>6</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (Report, 15 December 2016) 26.

<sup>7</sup> *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>8</sup> *Children, Youth and Families Act 2005* (Vic) s 1.

A person who is alleged to have committed an offence will be deemed a child if they are above 10 years old but under 18 years of age. This definition does not encapsulate those aged 19 years or more when the proceedings for the offence commences in court.<sup>9</sup>

The best interest principles contained in section 10 of the *CYFA Act* states that ‘the best interests of the child must always be paramount’. It goes on to state:

When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.<sup>10</sup>

Furthermore, the *CYFA Act* conclusively states ‘that a child under the age of 10 years cannot commit an offence’. Having a minimum age of criminal responsibility is based on the presumption that young children are incapable of crime.<sup>11</sup>

## 2 *The Charter of Human Rights and Responsibilities Act 2006 (Vic)*

Additional protection for children in the criminal process is afforded in the Charter. Such protections include the segregation of child detainees from their adult counterparts, the need for a prompt trial (including hearing of a charge), and ensuring a convicted child is treated proportionately having regard to their age.<sup>12</sup> The effectiveness of protections contained in the Charter are questionable. The Charter is only effective from a procedural perspective, and new laws cannot be inconsistent with the Charter (unless parliament uses their powers to suspend the Charter). Establishing a breach of the Charter relies on an arguable claim under existing Victorian legislation (in a ‘piggy back’ fashion).<sup>13</sup> There are no available remedies within the Charter to bring a stand alone action under the Charter.

### *B Common Law Rule - Doli Incapax*

The common law rule of *doli incapax* applies to those aged 10 — 14 years old. The default position is that children under the age of 14 do not have the capacity to possess the requisite *mens rea* to commit a crime.<sup>14</sup> In order to bring a criminal action against a child aged between 10 and 14 years old, the prosecution must show that the presumption does not apply.

---

<sup>9</sup> *Children, Youth and Families Act 2005* (Vic) s 3.

<sup>10</sup> *Children, Youth and Families Act 2005* (Vic) s 10(2).

<sup>11</sup> *R v ALH* (2003) 6 VR 276 at [63]-[75].

<sup>12</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 23.

<sup>13</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 29. See also Law Institute of Victoria, *2015 Review of the Charter of Human Rights Submission* (2015) 19; Human Rights Law Centre, and *More Accessible, More Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter* (2015) 25.

<sup>14</sup> *RP v The Queen* [2016] 259 CLR 641 at [8]-[12].

To rebut this presumption, the prosecution must establish that the child *understood* their act or omission was ‘seriously wrong’.<sup>15</sup> This ‘will vary according to the nature of the allegation and the child’. This means that for the rule to be applied, the Court will look to the gravity of the offending, and the moral and intellectual growth of the child. This involves assessing objective information about the child, including but not limited to age, maturity, the circumstances of their family life, any disabilities, and past offending.<sup>16</sup>

### III THE NEED FOR LAW REFORM

#### A *Children and the Prison System*

Children in the criminal justice system suffer from substantial systematic disadvantages, which exist prior to, and subsequent to, offending. These disadvantages can take the form of all modalities, including but not limited to, learning difficulties and access to education, alienation from community, mental health issues, abuse in the home, and neglect. None of these issues are the fault of the child, yet the criminal justice system punishes them for breaking the rules of a society that is not inclusive to them.

The Chairman of the Youth Parole Board of Victoria gives a damning indictment of the incarceration of children:

The truly telling statistic in the characteristics of children and young people sentenced to detention or on remand is that 67 per cent have been victims of abuse, trauma and neglect... Sixty-eight per cent have previously been suspended or expelled from school. Twenty-seven per cent have a history of self harm or suicidal ideation. Thirty-eight per cent present with cognitive difficulties that affect their daily functioning. Fifty-four per cent have a history of both alcohol and drug misuse’.<sup>17</sup>

Many children who are sentenced are Aboriginal and Torres Strait Islander (ATSI) children. In June 2019, the Sentencing Advisory Council released the report ‘Crossover Kids: Vulnerable Children in the Youth Justice System’.<sup>18</sup> They found that while 1.6 percent of the overall Victorian youth population aged 10 to 20 on 30 June 2016 identified as ATSI, ATSI children made up 19 percent of children who were sentenced or diverted.<sup>19</sup>

It is clear that those children who are incarcerated by the current criminal justice system come from disadvantaged backgrounds, and are disengaged from the structures such as school

---

<sup>15</sup> Ibid at [21].

<sup>16</sup> *RP v The Queen* [2016] 259 CLR 641 at [12]. See also Judge Amanda Chambers, ‘Children’s Rights in Australia’ (Speech, Victoria University, 29 October 2015), 12-14.

<sup>17</sup> Youth Parole Board, *Annual Report 2018-19 (2019)* 4.

<sup>18</sup> Sentencing Advisory Council, *Crossover Kids* (Report No 1, June 2019).

<sup>19</sup> Ibid.

and community. Effectively, the system punishes these children for failing to fit into society. Once in the prison system, access to community is cut off, and access to education is limited. This exacerbates, rather than addresses, the problem, ensuring that the incarcerated child will never have a chance at reintegrating into and becoming a productive member of society.

Children who enter the criminal justice system early are more likely to reoffend and the younger a child is when they receive their first sentence, the greater the probability they will enter into the adult jurisdiction.<sup>20</sup>

The concept of biographic mediation for the formerly incarcerated is as ‘a process that facilitates lasting discrimination by affixing labels that justify stigma, and therefore exclusion’.<sup>21</sup> Those, including children, when seeking to gain access to some jobs ‘are forced to narrate their lives with the constant awareness of this tension, often restructuring disclosure to address biographies constructed by others with more power or control’.<sup>22</sup>

A 2018 study conducted on the relationship between involvement in the criminal justice system and socio-economic status found, ‘involvement inevitably destroys human capital, undermines future life chances, and ultimately promotes a ‘rabble’ class’.<sup>23</sup> Having a criminal record is a ‘fundamental problem’ that exists because it ‘hinders the likelihood of obtaining employment and pursuing education’.<sup>24</sup>

Once imprisoned, there is evidence that children in juvenile detention in Australia are subjected to solitary confinement, segregation, excessive force, the use of mechanical restraints, strip searches, inadequate quantities of food, and physical abuse.<sup>25</sup> The Victorian Parkville Youth Detention Centre was investigated by the Victorian Ombudsman in 2010, which found that 36 percent of staff did not hold a Working With Children Check, were inciting fights with detainees, and supplying tobacco, marijuana and lighters.<sup>26</sup> This has not improved. A follow up report in 2017 showed there is evidence of young offenders being forced to cease their VCE studies, with their textbooks confiscated, and the only option for

---

<sup>20</sup> Sentencing Advisory Council, 'Reoffending by Children and young People in Victoria' (15 December 2016) *Sentencing Council* 52 <<https://www.sentencingcouncil.vic.gov.au/publications/reoffending-children-and-young-people-victoria>>.

<sup>21</sup> Michelle Jones, 'Biographic Mediation and the Formerly Incarcerated: How Disassembling and Disclosure Counter the Extended Consequences of Criminal Convictions' (2019) 42(3) *Biography* 486.

<sup>22</sup> *Ibid* 486.

<sup>23</sup> Christopher R. Dennison and Stephen Demuth, 'The More You Have, The More The More You Lose: Criminal Justice Involvement Ascribed Socioeconomic Status, and Achieved SES (2017) *US National Library of Medicine National Institute of Health* (Online) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6438383/>>.

<sup>24</sup> *Ibid* citing Uggen Christopher and Stewart Robert, 'Piling On: Collateral Consequences and Community Supervision' (2015) 99 *Minnesota Law Review* 1871.

<sup>25</sup> Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 173, 181.

<sup>26</sup> Victorian Ombudsman, 'Investigation into conditions at the Melbourne youth justice precinct' (2010).

education being vocational studies on the weekend.<sup>27</sup> Many of the children were forced to spend up to 23 hours alone without reading materials, in cold cells without adequate clothing or bedding.<sup>28</sup> While this was the result of emergency measures (a riot at the Parkville location forced the Department of Justice to open a temporary children's wing at Barwon Prison), it is an example of the risks that occur when children are subjected to the justice system. Clearly the education and wellbeing of these children is compromised.

## B *Impacts On Children From Early Involvement With Criminal Justice System*

The offending profile of children is different to adults and 'very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles'.<sup>29</sup> The Sentencing Advisory Council found that 'the younger the children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, and continue offending into the adult jurisdiction'.<sup>30</sup> Margaret Anderson, the Aboriginal grandmother of Dajuan Hoosan (a 13 year old Arrernte and Garrwa boy, and the youngest person to address the UN Human Rights Council, who wants the age of criminal responsibility to increase from 10 to 14 years) put it similarly: 'going to jail as a child trains them to be ready for the big jail'.<sup>31</sup>

Children that enter the criminal justice system early have higher chances of reoffending, and those who serve prison sentences from age 10 to 14 have over an 80 percent rate of reoffending in the future.<sup>32</sup> As a 2008 study conducted by the Sentencing Advisory Council focussing on prior-offending and re-offending suggested, 'sentencing alone cannot address the root cause of offending by young people. The best way to protect the community is to invest in measures that prevent or interrupt criminal pathways ...such as enhanced early intervention and resources to rehabilitate young offenders are the best way to steer at-risk children away from a life of crime and protect the community in the long term'.<sup>33</sup>

---

<sup>27</sup> Victorian Ombudsman, 'Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville' (6 February 2017) 17.

<sup>28</sup> Ibid 18.

<sup>29</sup> Kelly Richards, Australian Institute of Criminology, 'What makes juvenile offenders different from adult offenders?' *Trends & issues in crime and criminal justice no. 409* (2011).

<sup>30</sup> Sentencing Advisory Council, 'Reoffending by Children and young People in Victoria' (15 December 2016) *Sentencing Council* 52 <<https://www.sentencingcouncil.vic.gov.au/publications/reoffending-children-and-young-people-victoria>>.

<sup>31</sup> #RaiseTheAge, Stories: Dajuan's Story (Online) <<https://www.raisetheage.org.au/stories-dujuan>>.

<sup>32</sup> Sentencing Advisory Council, 'Reoffending by Children and Young People in Victoria' (15 December 2016) *Sentencing Council* <<https://www.sentencingcouncil.vic.gov.au/publications/reoffending-children-and-young-people-victoria>> 26.

<sup>33</sup> Sentencing Advisory Council, 'Children Who Enter the Youth Justice System Early Are More Likely To Reoffend,' (Media Release, 15 December 2016) <<https://www.sentencingcouncil.vic.gov.au/news-media/media-releases/children-who-enter-youth-justice-system-early-are-more-likely-to-reoffend>>.

When assessing criminal responsibility, children are more likely to become victims of crime, and those children who are neglected or abused are even more prone to be institutionalised into the criminal justice system.<sup>34</sup> Vulnerable groups are most at risk of this happening, and it is observable that ‘immigrant children are involved in crime more than non-immigrant children’, and ‘the absence of the father increased the rate of committing crimes in adolescence’.<sup>35</sup>

What follows is a situation where these child victims become perpetrators of crime. Criminals institutionalised in the criminal justice system are victims of a system that never gave them a chance to live a crime-free life. The criminal perpetrates the same (or incidental) crime that they have suffered. That child is held criminally culpable for crimes that were initially perpetrated against them as children.<sup>36</sup>

The International Criminal Court is grappling with this ‘catch-22’ in the case of *Prosecutor v Dominic Ongwen*.<sup>37</sup> In this case, a child soldier, abducted and tortured, now faces charges of war crimes and crimes against humanity, however the victimhood of the perpetrator ‘cannot be severed from Ongwen the LRA commander- they exist together and simultaneously, leaving the ICC with an unclear path for prosecution’.<sup>38</sup> The Prosecution have portrayed the accused as ‘capable of making moral choices despite his upbringing in a brutal environment’.<sup>39</sup> On the other hand, Mark Drumbl, Alumni Professor of Law and Director from Transnational Law Institute, supports the non-prosecution of victim-perpetrators by the ICC, or any justice system. He instead suggests more restorative and rehabilitative justice mechanisms.<sup>40</sup>

---

<sup>34</sup> Kelly Richards, Australian Institute of Criminology, ‘What makes juvenile offenders different from adult offenders?’ *Trends & issues in crime and criminal justice no. 409* (2011); Sevcan Karatas, ‘An evaluation for children dragged into crime and children victims of crime’ (2020) 12(4) *Istanbul University Current Approaches in Psychiatry* 575.

<sup>35</sup> *Ibid* 577.

<sup>36</sup> Layal Issa, ‘Avoiding the third tragedy: Evaluating criminal responsibility of child soldiers under international law’ (2019) *Temple International & Comparative Law Journal* 61-64.

<sup>37</sup> See International Criminal Court Case Information Sheet *The Prosecutor v Dominic Ongwen* (Jan 2017) <<https://www.icc-cp.i.int/iccdocs/pids/publications/ongweneng.pdf>>.

<sup>38</sup> Layal Issa, ‘Avoiding the third tragedy: Evaluating criminal responsibility of child soldiers under international law’ (2019) *Temple International & Comparative Law Journal* 64.

<sup>39</sup> Kan, Gamaliel, ‘The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen’ (2018) 5(1) *SOAS Law Journal* 77.

<sup>40</sup> Layal Issa, ‘Avoiding the third tragedy: Evaluating criminal responsibility of child soldiers under international law’ (2019) *Temple International & Comparative Law Journal* Citing Mark Drumbl, *Victims Who Victimise*, supra note 1 (arguing that criminal proceedings are not equipped for the ethical complexity of a victim-victimizer); Armelle Vessier, Mark A. Drumbl, ‘Reimagining Child Soldiers in International Law and Policy’ (2014) 12(2) *Journal of International Criminal Justice* 399, 401.



Although this case is focused on child soldiering, the victim to victimiser conundrum arises in other types of offending such as sexual abuse, human trafficking and domestic violence. There are many examples of this occurring, including, but not limited to:

- a. Being sexually abused as a child ‘was a strong predictor of becoming a perpetrator,<sup>41</sup> of this same offending conduct. It was found, ‘the overall rate of having been a victim was 35% for perpetrators and 11% for non-perpetrators’.<sup>42</sup>
- b. Three years after Watcharaporn Nantahkhum was trafficked from Thailand to Australia she became a trafficker of two victims. In the case of *R v Watcharaporn Nantahkhum*, the accused was convicted of slavery offences in the Australian Capital Territory, however ‘her trajectory is far from unique. Since 2004, 20 people have been convicted of human trafficking-related crimes in Australia. Of those, nine have been women, with six of them having a history of some form of sexual victimisation’.<sup>43</sup>
- c. A report conducted jointly by UNICEF, the Body Shop International and the Secretariat for the United Nations Secretary- Generals’ Study on Violence against Children found:
  - i. Children who are exposed to violence in the home ‘may have difficulty learning and limited social skills, exhibit violent, risky or delinquent behaviour, or suffer from depression or severe anxiety’<sup>44</sup>
  - ii. Where a teenager is chronically violent, ‘up to 40 per cent.. have been exposed to extreme domestic violence’<sup>45</sup> and
  - iii. The presence of domestic violence in the family home is ‘the single best predictor of children becoming either perpetrators or victims of crime later in life’.<sup>46</sup>

---

<sup>41</sup> M Glasser, I Kolvin, D Campbell, A Glasser, I Leitch, S Farrelly, 'Cycle of child sexual abuse: links between being a victim and becoming a perpetrator' (2001) *National Library of Medicine* <<https://pubmed.ncbi.nlm.nih.gov/11731348/>>.

<sup>42</sup> Ibid.

<sup>43</sup> Alexandra Baxter, 'Sex trafficking's tragic paradox: when victims become perpetrators' The Conversation (Online), May 22 2019 <<https://theconversation.com/sex-traffickings-tragic-paradox-when-victims-become-perpetrators-115706>>; [2012] ACTSC 55; 6 ACTLR 228; Christopher Knaus, 'Brothel madam's slavery sentence slashed on appeal' The Age (Online), October 25 2013 <<https://www.theage.com.au/national/act/brothel-madams-slavery-sentence-slashed-on-appeal-20131025-2w5h1.html>>; United Nations Office on Drugs and Crime, 'R v Watcharaporn Nantahkhum (SCC149 of 2010) Sherlock' <[https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/aus/2012/r\\_v\\_watcharaporn\\_nantahkhum\\_scc149\\_of\\_2010.html](https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/aus/2012/r_v_watcharaporn_nantahkhum_scc149_of_2010.html)>.

<sup>44</sup> Unicef, *Behind Closed Doors: The Impact of Domestic Violence on Children* <<https://www.unicef.org/media/files/BehindClosedDoors.pdf>> 3.

<sup>45</sup> Ibid 7.

<sup>46</sup> Ibid Citing James, M, 'Domestic Violence as a Form of Child Abuse: Identification and Prevention' (1994) *Issues in Child Abuse Prevention* 7.

Raising the age of criminal responsibility of children will provide an opportunity for community intervention by health professionals, community leaders, and the supportive structures that create a cohesive society. These interventions focus on therapeutic approaches that rehabilitate and address the root causes of offending, such as issues that arise from being a child victim of crime. The ultimate goal is to break the cycle of exploitation. This is in contrast to traumatising children with Court appearances, juvenile detention and police custody, that, according to the labelling theory, reinforces delinquent behaviour.<sup>47</sup>

*'the person becomes the thing he is described as being'*

(Frank Tannenbaum, 1938)

Labelling of children occurs when they are arrested, charged, detained or convicted of a crime and will 'have the ironic consequence of encouraging deviant behaviour it is intended to discourage'.<sup>48</sup> When a child is brought into the criminal justice system, this triggers 'a self fulfilling prophecy or idea that an individuals behaviour can be altered to be the expectations of society'.<sup>49</sup> In addition to the development of a negative self-fulfilling prophecy, labelling theorists suggest 'interaction with the criminal justice system has an effect on the individual's life that triggers a movement towards subsequent engagement in crimes and deviance'.<sup>50</sup>

#### D Council of Attorneys-General ('CAG')

At the end of a communique dated 23 November 2018 (summarising a meeting of the same day) CAG agreed that it would be 'appropriate to examine whether to raise the age of criminal responsibility from 10 years of age' and indicated it would establish a working group to report back within 12 months.<sup>51</sup> The Age of Criminal Responsibility Working Group was established in February 2019.

---

<sup>47</sup> See BC Campus, *The Social Self: The Role of the Social Situation*, Opentextbc <<https://opentextbc.ca/socialpsychology/chapter/the-social-self-the-role-of-the-social-situation/>>

<sup>48</sup> Emily Beth Ciaravolo, 'Once a Criminal, Always a Criminal: How Do Individual Responses to Formal Labeling Affect Future Behaviour? A Comprehensive Evaluation of Labeling Theory' (2011) *Florida State University Libraries* 1.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid Citing Bernburg, J. G., and Krohn, M. D. (2003). Labeling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood. *Criminology*, 41, 1287-1318; Bernburg, J. G., Krohn, M.D., and Revera, C.J. (2006) Official labeling, criminal embeddedness, and subsequent delinquency: A longitudinal test; Paternoster, R., and Iovanni, L. (1989). The labeling perspective and delinquency: An elaboration of the theory and an assessment of the evidence. *Justice Quarterly*, 6(3), 359-394; Sampson, R.J. and Laub, J. H. (1997). A life-course theory of cumulative disadvantage and the stability of delinquency. In T.P. Thornberry (Ed.), *Developmental Theories of Crime and Delinquency*. Transaction Publishers 133-161.

<sup>51</sup> Council of Attorneys-General, 'Communique' (23 November 2018) 4 (online) <<https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2018.pdf>>.

The Working Group is an interjurisdictional working group chaired by the Department of Justice, Western Australia, and includes representation from each state and territory. Its terms of reference included assessing whether the age of criminal responsibility should be maintained, increased in certain circumstances, or increased.<sup>52</sup> It also addressed the principle of *doli incapax*:

It will also assess whether the principle of *doli incapax* – which presumes that children aged 10 to under 14 years are criminally incapable unless it can be proven otherwise – should be retained and if so whether the current age threshold applying to the presumption should change.

In conducting the review, the working group expects to identify key policy and legal considerations that may arise in regard to sentencing, detention, rehabilitation, recidivism, child welfare and development, community safety, and the desirability of dealing with young children outside of judicial proceedings.<sup>53</sup>

The working group was to report and make recommendations by November 2019. ‘Strong interest’ in the review was noted following a further CAG meeting on 29 November 2019 and it was agreed the working group should consult with stakeholders.<sup>54</sup>

The working group published a series of ‘consultation questions’ to be addressed in submissions from stakeholders. Those questions were (in terms):<sup>55</sup>

1. Should the age of criminal responsibility (10 years of age) be maintained, increased or increased in certain circumstances only?
2. If the age of criminal responsibility should be increased from 10 years of age, to what age should it be raised? Should the age be raised for all types of offences?
3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* be retained? Does the operation of *doli incapax* differ across jurisdictions and, if so, how might this

---

<sup>52</sup> Council of Attorneys- General, ‘Age of criminal responsibility working group terms of reference’ (Undated, accessed 15 August 2020) 1 (online) <[https://www.department.justice.wa.gov.au/\\_files/TOR-age-criminal-responsibility.pdf](https://www.department.justice.wa.gov.au/_files/TOR-age-criminal-responsibility.pdf)>.

<sup>53</sup> Ibid.

<sup>54</sup> Attorney-General for Australia and Minister for Industrial Relations, ‘Council of Attorneys-General (CAG) communique’ (Media release, 29 November 2019) <<https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-communique-29-november-2019>>.

<sup>55</sup> These questions (in their original form) were taken from New South Wales Bar Association, ‘Council of Attorneys-General - Age of Criminal Responsibility Working Group Review’ (4 March 2020), 6 - 26. The consultation questions were initially on Western Australia’s Department of Justice web page but at the time of writing were no longer available.

affect prosecutions?<sup>56</sup> Could the principle of *doli incapax* be applied more effectively in practice?

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

On 27 July 2020 CAG issued a further communique:<sup>57</sup>

---

<sup>56</sup> See Law Council of Australia, 'Supplementary Submission - *Pickett v Western Australia* [2020] HCA 20' (***Pickett***). *Pickett* required the High Court of Australia (Kiefel CJ, Bell, Keane, Gordon and Nettle JJ) to consider the liability of several adults where it may have been a child, considered *doli incapax* (in the context of WA's *Criminal Code Act 1913*, who committed the fatal stabbing. In a joint judgment, Kiefel CJ, Bell, Keane and Gordon JJ found that the liability of the adults did not depend on proof beyond reasonable doubt that the child who may have fatally wounded the deceased had capacity to know he should not have struck the blow (*Pickett*, [1]-[3]; [66]-[69]. Nettle J extended that view to common law jurisdictions *Pickett*, [94]-[95].

<sup>57</sup> Attorney-General for Australia and Minister for Industrial Relations, 'Council of Attorneys-General (CAG) communique' (Media release, 27 July 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-cag-communique-27-july-2020>>.

Participants noted the Working Group's work to date and noted that the Working Group identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour.

Federal Attorney-General Christian Porter has been quoted as saying:

...there have been instances where it is appropriate to prosecute people who've been under the age of 14 for very serious offences, if it can be established that they had the requisite level of mental capacity to understand that the crime that was committed was both morally wrong and also, contrary to the law... Now, my own observation is the present system works relatively well and allows the flexibility for that to be shown and in circumstances that are appropriate for there to be criminal responsibility attaching to very serious offences.<sup>58</sup>

NSW Attorney-General Mark Speakman similarly said he was yet to be personally convinced that reforms were needed.

There is an in-principle issue about whether you raise the age of criminal responsibility at all, but if you do, you need to know what is the alternative regime...

I think it is ambitious to raise the age to 14 without any carve-outs. We remain to be convinced, but the reason further work is being done is so if people want to convince us they can.<sup>59</sup>

It seems, then, that further submissions from stakeholders seeking to persuade CAG that the age of criminal responsibility should be raised should focus on consultation questions 5 - 8.

Those submissions may also wish to consider the degree by which raising the age of criminal responsibility, and thus reducing the number of children in detention, would help in achieving Target 11 of the National Agreement on Closing the Gap (to which the Commonwealth and State governments are parties):<sup>60</sup>

By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by 30 per cent.

Given the well recognised discrepancy in detention rates between Aboriginal and Torres Strait Islander children and children of other cultural groups, raising the age might be seen as

---

<sup>58</sup> Henry Zwartz and Joseph Dunstan, 'The push to raise Australia's minimum age of criminal responsibility,' *ABC News* (online) 27 July 2020 <<https://www.abc.net.au/news/2020-07-27/raise-the-age-of-child-criminal-responsibility-in-australia/12483178>>.

<sup>59</sup> *Ibid.*

<sup>60</sup> Coalition of Aboriginal and Torres Strait Islander Peak Organisations, Australian and State Governments, 'National agreement on closing the gap' (July 2020) (online) <<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>>.

a powerful (and perhaps obvious) tool in closing this gap.

## E *International Perspectives*

The issue of the age of criminal liability is a universal one when viewing it from an international perspective. Two countries, Switzerland and Japan, provide a deeper insight into how children are treated internationally.

### 1 *Switzerland*

In 2020, Switzerland holds a crime index of 21.18 whereas Australia sits at 42.7 (where the rate is calculated by dividing the of reported crimes by the population, and then multiplying by 100,000).<sup>61</sup> Although the age of criminal responsibility in Switzerland is 10 years of age and there are penalties for juvenile offenders, ‘the priority for young offenders under Swiss juvenile criminal law is that they are protected and educated. This means that often they are not punished in the normal sense, but are made subject to educational or therapeutic measures’.<sup>62</sup>

### 2 *Japan*

Those aged under 14 years of age cannot be criminally responsible in Article 40 of the Japanese Penal Code.<sup>63</sup> Furthermore if a person who is under 20 years of age commits a crime, the ‘Family Court in principle shall not transfer the case to the Public Prosecutor for imposing a criminal disposition, except for certain cases (Article 20). Thus, under current law, even those who possess criminal capacity should be treated with protective (educational) measures in principle, and be punished criminally only in some exceptional cases’.<sup>64</sup>

## IV CONCLUSION

Preventative structures, such as increased family and community cohesion and better opportunities for children to access social support from counsellors, sporting groups, community centres, prior to their first contact with police or courts may go a long way in preventing children from leading a life of crime. Sentencing children in any manner,

---

<sup>61</sup> World Population Review, *Crime Rate by Country* (2020) World Population Review <<https://worldpopulationreview.com/country-rankings/crime-rate-by-country>>.

<sup>62</sup> Ch.ch, ‘What are the penalties for juvenile crime?’ The Swiss Authorities Online <<https://www.ch.ch/en/what-penalties-juvenile-crime/>>.

<sup>63</sup> Child Rights International Network, *Minimum Ages of Criminal Responsibility In Asia* (2019) CRIN <<https://archive.crin.org/en/home/ages/asia.html>>.

<sup>64</sup> Guang-Xu Jin, ‘Japan/The criminal responsibility of minors in the japanese legal system’ (2004) 75 *Dans Revue Internationale De Droit Penal* 409-421.

including youth detention, has a detrimental impact on children and does little to prevent future offending. Instead, it increases the likelihood of re-offending in a more culpable manner, thus leading to follow-on consequences of imprisonment in the adult jurisdiction and institutionalisation being a very real possibility.

There is evidence, not only from within Australia but in other countries, that community-based rehabilitative programs not only provide children with valuable connections to others in their community but have a direct impact on reducing recidivism rates.

Raising the age of criminal responsibility is not about allowing children to avoid accountability. However, 'all sanctions and interventions should be focused on their rehabilitation and reintegration in society and meet specific needs which impede growing up into responsible citizens'.<sup>65</sup> As a community we need to show our kids that we care, 'this wasted potential is there for us to see... rather than being the hope for our future these people represent our future fears', the latter belief that may encourage the younger population to live up to the expectations society has of them.<sup>66</sup>

---

<sup>65</sup> C. Johnson, 'An analysis of the New Zealand Criminal Youth Justice System: How Can We Further Prevent Youth Offending and Youth Recidivism?', (2015) *Massey University* 1, citing Working Group on Juvenile Justice, European Society of Criminology, 2006.

<sup>66</sup> Ibid Citing John Key – National Party Leader and Prime Minister of New Zealand, January, 2008.