Submission No 114

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

Organisation: Public Interest Advocacy Centre

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ADVOCACY CENTRE

Submission to the NSW Parliament Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should contain clear guidance to police to the effect that arrest is to be used as a measure of last resort.

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Section 77(3)(c) of the Bail Act 2013 (NSW) should be amended to insert after 'the personal attributes and circumstances of the person,' the words 'including any special vulnerability or needs the person has because of youth, being an Aboriginal or Torres Strait Islander person, or having a cognitive or mental health impairment.'

1. Introduction

1.1 Executive Summary

This submission focuses on strategies to reduce the high level of Aboriginal and Torres Strait Islander people in custody, partiucularly by reducing harmful interactions between Aboriginal and Torres Strait Islander children and the criminal justice system.

The submission is limited to areas of PIAC's current experience from working on these issues. We do not attempt to cover all aspects of the Committee's inquiry, or repeat the many previous recommendations that have been made by earlier inquiries.

Australian research demonstrates a strong link between encountering the criminal justice system at a young age and re-offending later in life.[1] Aboriginal and Torres Strait children experience higher levels of contact with the police through policing practices such as the Suspect Target Management Plan (STMP), and the heavy policing of people in out of home care. These young people are then dragged into further contact with the criminal justice system through the inappropriate use of arrest for minor offending or for breaches of bail. These policing practices are failing to appropriately divert young Aboriginal and Torres Strait Islander people away from custody.

Practical steps must be taken by NSW Government to ensure real change to policing practices. We focus on four key actions that would help reduce the number of Aboriginal and Torres Strait Islander People in custody:

1. Raise the age of criminal responsibility to 14;
2. Discontinue the use of the Suspect Target Management Plan (**STMP**) on children;
3. Implement the recommendations of the Family is Culture Review; and
4. Embed the principle of arrest as a last resort into NSW legislation and NSW Police operational guidelines.

This submission sets out both legislative amendments and policy changes that are ready to be made in NSW for immediate implementation.

1.2 Self determination at the heart of reform

PIAC urges the Committee in its deliberations to emphasise the role of Aboriginal communities in leading reforms that impact on their communities. This approach is consistent with Australia's support of the *United Nations Declaration on the Rights of Indigenous Peoples*[2], particularly the right of Indigenous people to 'participate in decision-making in matters which would affect their

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1 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, 11. See also Richards, Australian Institute of Criminology 409, '*What makes juvenile offenders different from adult offenders?*', 2011; Fitz-Gibbon and O'Brien, International Journal for Crime, Justice and Social Democracy 8(1), '*Examining the Operation of Doli Incapax in Victoria (Australia)*', 2019; Gatti, Tremblay and Vitaro, Journal of Child Psychology and Psychiatry 50(8) 991-8, '*Latrogenic effect of juvenile justice*', 2009, 7.

2 *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly in the 107th plenary meeting, 13 September 2007, available at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. Australia became a signatory in 2009>.

rights'[3], and the obligation of signatory states to 'consult and cooperate in good faith' with Indigenous people in order to obtain their consent 'before adopting and implementing legislative or administrative measures that may affect them'.[4]

1.3 Outstanding implementation of past recommendations

Recommendations from past inquiries into the over-representation of First Nations people in custody remain relevant for the Select Committee's current inquiry, most notably:

- The Australian Law Reform Commission's Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – Pathways to Justice (2018),
- The Royal Commission into the Protection and Detention of Children in the Northern Territory (2016-2017), and
- The Royal Commission into Aboriginal Deaths in Custody (1987-1991).

Unfortuantely, too many of the recommendations of these inquiries have not been implemented. The NSW Government must commit to implementing outsanding recommendations in full. In particular, we urge the adoption of the following recommendations.[5]

1.3.2 A justice reinvestment approach

Recommendation 1

NSW Government should promote justice reinvestment through redirection of resources from incarceration to prevention, rehabilitation and support, in order to reduce reoffending and the long-term economic cost of incarceration of Aboriginal and Torres Strait Islander peoples.

1.3.3 Specialist approach to sentencing

Recommendation 2

NSW Government should establish properly resourced specialist Aboriginal and Torres Strait Islander sentencing courts to be designed and implemented in consultation with Aboriginal organisations, including the Walama Court in the NSW District Court.

1.3.4 Review offensive conduct and language offences

Recommendation 3

Review Section 4 and 4A of the Summary Offences Act 1988 (NSW) with a view to repeal these provisions or limit these provisions to language that is abusive and/or threatening.

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3 *Ibid* art 18.

4 *Ibid* art 19.

5 For closer consideration of the benefits of these recommendations, please see the Australian Law Reform Commission's Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – Pathways to Justice Report (2018).

2. Higher proportion of Aboriginal and Torres Strait Islander young people under the age of 14 being dragged into the criminal justice system

The current minimum age of criminal responsibility of 10 years of age disproportionately draws Aboriginal and Torres Strait Islander children and young people into the criminal justice system at an early stage of their life.[6] Available data shows that Aboriginal and Torres Strait Islander children tend to come into conflict with the law at a younger age than non-Indigenous children. Notably, the greatest overrepresentation occurs between the ages 10 and 14.[7] For example, at a national level:

- about half (48%) of the Aboriginal and Torres Strait Islander young people under supervision on an average day in 2017-18 were aged 10-15, compared with one-third (33%) of non-Indigenous young people;
- two in five (39%) of the Aboriginal and Torres Strait Islander young people under supervision in 2017-18 were first supervised when aged 10-13, compared with about 1 in 7 (15%) of non-Indigenous young people;[8]
- three in four (73%) boys aged 10 to 12 appearing before the Children's Court between 2006 to 2015 were Aboriginal and Torres Strait Islander, with Aboriginal and Torres Strait Islander girls representing three in five (60%) girls appearing before the Children's Court in the same age bracket;[9] and
- Aboriginal and Torres Strait Islander young people aged 10-14 in 2010-11 were 23 times as likely as non-Indigenous young people aged 10-14 to be under community-based supervision and 25 times as likely to be in detention.[10]

Presently, in NSW, the minimum age of criminal responsibility is 10 years of age,[11] although there is a rebuttable presumption of *doli incapax* that a child between the ages of 10 and 14 years is not sufficiently intellectually and morally developed in order to be held responsible for their actions by the criminal law.[12]

This approach is out-dated and inconsistent with community standards. It is also contrary to the overhwleming evidence of how to make our community stronger and safer. It is well recognised that criminalising children is harmful to their physical, emotional and social development. It does not prevent crime: indeed it makes young people more likely to reoffend.

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6 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, 6.

7 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [2.76] citing Australian Institute of Health and Welfare, '*Juvenile Justice National Minimum Dataset 2015-2016*', 2017, Supplementary Tab.

8 Australian Institute of Health and Welfare, '*Youth Justice in Australia 2017-18*', 2018, 8.

9 Cunneen, Comparative Youth Penalty Project, '*Arguments for Raising the Minimum Age*', 2017, 15.

10 Excluding Western Australia and the Northern Territory. Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, vi. See also Australian Institute of Health and Welfare, '*Youth Justice in Australia 2017-18*', 2018, 9.

11 *Children (Criminal Proceedings) Act 1987* (NSW), s 5.

12 *RP v The Queen* [2016] HCA 53, [8].

Australian research demonstrates a strong link between encountering the criminal justice system at a young age and re-offending later in life.[13] Professor Chris Cunneen, a leading Australian criminologist, notes that almost 80% of juvenile offenders appearing in NSW Courts in 2004 were reconvicted within 10 years, compared with 56% of adult offenders.[14] Further, physical removal from positive influences through arrest and detention can cause further trauma and problematic behaviour in young people.[15]

Reforming the law to raise the minimum age of criminal responsibility is one of the primary ways in which Aboriginal and Torres Strait Islander children and young people can be diverted from contact with the criminal justice system. The minimum age of criminal responsibility should be increased to at least 14 years old as one method of addressing the disproportionately high level of Aboriginal and Torres Strait Islander people in custody in New South Wales.

In advocating for the minimum age of criminal responsibility to be raised to at least 14, we are not arguing that actions should not have consequences. Rather, that those consequences should not be harmful, counter productive, contrary to evidence and unjust. Raising the age of criminal responsibility should also not involve children missing out on services. Rather, children who need support should receive services *otherwise than through the criminal justice system.*

Instead of applying a criminal justice response to children under the age of 14, there should be an investment in programs and strategies that have been demonstrated to work. Comprehensive service and program mapping should be completed to assist to identify the programs and responses that already exist in relation to addressing the underlying causes of offending-type behaviour.

Aboriginal and Torres Strait Islander controlled organisations must be at the centre of the design of frameworks and the delivery of services to Aboriginal children and young people and their families. In its submission to the NSW Youth Diversion Inquiry, the Aboriginal Legal Service (ACT/NSW) noted the particular importance of Aboriginal and Torres Strait Islander-controlled organisations in regional and rural areas:

> A frequent observation by participants was the lack of culturally appropriate programs available to Indigenous young people. Participants stated that the most effective programs are those that teach troubled youth about language, culture and (self) respect ... Many participants emphasised the importance of Aboriginal-led organisations leading solutions in their communities. Geographical (and ideological/cultural) distance makes it difficult for organisations based in Sydney or regional centres to understand community-specific needs. Some participants argued that devolution of control over services to local Aboriginal-controlled organisations would contribute to genuine self-determination.[16]

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13 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, 11. See also Richards, Australian Institute of Criminology 409, '*What makes juvenile offenders different from adult offenders?*', 2011; Fitz-Gibbon and O'Brien, International Journal for Crime, Justice and Social Democracy 8(1), '*Examining the Operation of Doli Incapax in Victoria (Australia)*', 2019; Gatti, Tremblay and Vitaro, Journal of Child Psychology and Psychiatry 50(8) 991-8, '*Latrogenic effect of juvenile justice*', 2009, 7.

14 Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age*', 2017, 12.

15 Royal Australasian College of Physicians, '*Submission to the Council of Attorneys General Working group reviewing the Age of Criminal Responsibility*', July 2019, 5.

16 Aboriginal Legal Service (NSW/ACT), 'Submission No 23: Inquiry into the adequacy of youth diversionary programs in NSW', February 2018, 14.

The NSW Youth Diversion Inquiry found that 'place-based' approaches towards design and delivery of diversionary programs for Aboriginal and Torres Strait Islander children and families were key in ensuring engagement, legitimacy and success within communities.[17]

For a more comprehensive discussion of the benefits of raising the age of criminal responsibility to 14, please see PIAC's submission to Councils of Attorneys-General (CAG) Working Group (Annexure A).

Recommendation 4

Section 5 of the Children (Criminal Proceedings) Act 1987 (NSW) should be amended to legislate that no child who is under the age of 14 years can be guilty of an offence.

Recommendation 5

There should be a continued investment in early intervention and prevention programs and strategies to work with children and their families to support the raising of the age of criminal responsibility to at least 14 years old. Aboriginal and Torres Strait Islander-controlled organisations must be at the centre of program design and delivery for Aboriginal and Torres Strait Islander children and their families.

Recommendation 6

We recommend comprehensive program and services mapping by the New South Wales Government to assist in identifying the programs and responses that already exist in relation to addressing the underlying causes of offending-type behaviour.

3. Proactive policing of young people through the Suspect Target Management Plan (STMP)

Proactive policing methods, including the STMP, contribute to the overrepresentation of Aboriginal and Torres Strait Islander children and young persons.

The Suspect Target Management Plan, or STMP, is a predictive police strategy introduced by the NSW police force to *"target repeat offenders to disrupt their criminal behaviour"*.[18] This is achieved through repeated police interactions, through police attendances at the young person's home, regular stops and searches, and move-on directions.[19]

These coercive targeting strategies under the STMP are not diversionary in nature, and are contrary to the expressed objective of the NSW Police Aboriginal Strategic Direction for 2012-

[17] NSW Parliament, Legislative Assembly, Committee on Law and Safety, 'Adequacy of Youth Diversion Programs', September 2018, [5.42].

[18] Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on Children and Young People* (Interim Report, Operation Tepito, 13 February 2020) 7-8 <https://www.lecc.nsw.gov.au/news-and-publications/publications/operation-tepito-interimreport-january-2020.pdf>.

[19] Ibid 48 [5.2], 55 [5.4.1]; Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW* (25 October 2017) <http://www.yjc.org.au/resources/YJC-STMP-Report.pdf>.

2017 to '[p]romote the diversion of Aboriginal youth from the criminal justice system through initiatives such as the Cautioning Aboriginal Young People (CAYP) protocol and the Protected Admissions Scheme (PAS).'[20] It is also inconsistent with the principles and objects of the *Young Offenders Act 1997* (NSW), and results in unnecessary contact with the criminal justice system.

The use of STMPs has particularly concerning negative impacts for Aboriginal and Torres Strait Islander children and young people. The intensive monitoring deteriorates police-community relations, increases the stigmatisation and criminalisation of Aboriginal and Torres Strait Islander young people and disrupts family relations where a young person is living with their family and is subject to repeated police visits.[21]

STMP selection criteria are opaque, and have led to the STMP disproportionately being applied to Aboriginal and Torres Strait Islander children and young people. The Law Enforcement Conduct Commission is currently investigating the formulation and use of the STMP on young people. In its interim report, it noted that:[22]

> The factors considered by the risk assessment, and perhaps also the target identification process, are often aligned with socioeconomic status and could affect the overall scores received by certain populations such as Aboriginal youth, and young people from lower socioeconomic areas. The Commission's investigation cohort is reflective of this with more than half (63%) living in the bottom half of postcodes for socioeconomic advantage, and 72% being possibly Aboriginal or Torres Strait Islander. The Commission holds concerns that the effect of these measures leans towards vulnerable young people being selected for STMP targeting…a high proportion of young people (72% of the cohort) who the NSW Police Force had identified as 'possibly ATSI' were selected for STMP targeting (the NSW Police Force estimates that the proportion of the cohort that is Aboriginal is actually 42%, and uses a different method for calculating this figure).

Where these invasive policing strategies are continuing with such little transparency about their application, 'even the appearance of discrimination in the application of a policy such as the STMP can have negative implications for its effectiveness'. [23]

Increased police interactions have a negative criminogenic and psychological effect on young persons. Once this first interaction with the police occurs, it is often difficult for young people to disentangle themselves from the juvenile and criminal justice system.[24] The power imbalance between a young person and a police officer in any interaction is more acute for First Nations children in the context of the intergenerational harms of overpolicing, even in intended as benign, 'positive' or as 'community policing'.

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20 NSW Police, *Aboriginal Strategic Direction 2012-17*, page 28, available at: http://www.police.nsw.gov.au/__data/assets/pdf_file/0003/481215/ASD_2012-2017_Book_Revised_FA_Proof.pdf accessed on 5 February 2018.

21 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan* (2017), 21.

8 Ibid.

22 Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on children and young people*, (Operation Tepito - Interim Report, January 2020), 11.

23 Sentas and Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan* (2017).

24 Ibid.

Police are not the appropriate responders for the complex needs of vulnerable and traumatised children, who are likely to be the majority of those on the STMP. The use of the STMP on children should accordingly be discontinued.

For further information about the Suspect Target Management Plan, please see Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW* (25 October 2017), available at: http://www.yjc.org.au/resources/YJC-STMP-Report.pdf.

Recommendation 7

NSW Police should discontinue applying the Suspect Target Management Plan to children.

4. Care-Criminalisation

There is a widely recognised correlation between out of home care (OOHC) and involvement in the criminal justice system, particularly for Aboriginal and Torres Strait Islander children who are overrepresented in both systems.[25]

While this correlation is often explained as a result of the mistreatment suffered by children before (and as the reason for) their entry into OOHC, the 2019 *Family Is Culture Review* into Aboriginal and Torres Strait Islander children in OOHC in NSW **('FIC Review'),** describes the 'care-criminalisation' process by which children and young people in OOHC are arrested for behaviour that would normally be dealt with by parental discipline without a criminal justice response. [26]

Heavy policing of residential care homes also increases rates of arrest for breach of bail conditions as compared with young people who are not in OOHC. Following arrest, children in OOHC are more likely to be remanded in custody for longer periods of time, often due to the instability of their accommodation. Further, children do not always receive adequate support from child protection services after arrest, including at the police station or court.[27]

Addressing the overrepresentation of First Nations children and young people in OOHC is an important part of reducing the high level of First Nations people in custody. The FIC Review made a number of specific recommendations to address the impact of care-criminalisation in NSW, including funding a program of ongoing training in the *Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system*, improved data collection and legislative reform to enable the Children's Court to require the attendance of a delegate of the

[25] Kath McFarlane, 'Care Criminalisation: The Involvement of children in out-of-home care in the New South Wales criminal justice system' (2018) 51(3) *Australian & New Zealand Journal of Criminology* 412, 418., and Australian Institute of Health and Welfare, 'Young People in child protection and under youth justice supervision: 1 July 2013 to 30 June 2017' (2018), available online at <https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2013-17/contents/table-of-contents>.

[26] Ibid, 236.

[27] Family Is Culture Review, above n 3, 237, 239.

Secretary of the Department of Communities and Justice in criminal proceedings for a child under his parental responsibility. [28]

The broader recommendations of the FIC Review are also relevant in that they are directed to reducing the overall number of Aboriginal children entering OOHC and improving outcomes in relation to a number of the other features of OOHC that increase risk of involvement in the criminal justice system. In particular, the FIC Review recommended significant reform of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), including to mandate the provision of support services to Aboriginal families and require the Department of Communities and Justice to take active efforts to prevent entry of Aboriginal children into OOHC.[29]

In its response to the FIC Review in July 2020, the NSW Government did not specifically address the recommendations pertaining to care-criminalisation. The NSW Government also postponed consideration of all recommended legislative changes to 2024, beyond the term of the current Parliament.[30] Aboriginal stakeholders and organisations including the Aboriginal Legal Service NSW/ACT Ltd and AbSec have expressed concern at the further delay of these critical reforms and the impact on the thousands of Aboriginal and Torres Strait Islander children and young people expected to enter OOHC in the years before 2024.

Recommendation 8

The NSW Government act urgently to implement the recommendations of the FIC Review, in particular bringing forward critical legislative reform to address care-criminalisation and further reduce the numbers of Aboriginal and Torres Strait Islander children in OOHC.

5. Arrest as a last resort

PIAC regularly assists Aboriginal and Torres Strait Islander clients to make claims against the State of NSW for false imprisonment where police did not have a lawful basis for making an arrest. Many of our clients are Aboriginal and Torres Strait Islander young people, who are 'more likely to be arrested than their non-Indigenous counterparts even after other factors such as the offence, offending history and background factors are considered'.[31]

In PIAC's view, the failure to apply the principle of arrest as a measure of last resort to Aboriginal and Torres Strait Islander people contributes to the higher levels of arrest. The principle of arrest as a last resort for young people must be more clearly legislated. This reform is essential to promote the objective of diverting youth from the criminal justice system and to address the over representation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system.

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPRA**) governs the power of police officers to arrest without a warrant, including young people. While the the principle of arrest as a measure of last resort may be inferred from the legislation and case

28 Ibid, Recommendations 65-70.
29 Ibid, Recommendations 25-26.
30 Minister for Family and Community Services, Response to the Family Is Culture Review, available online at <https://www.facs.nsw.gov.au/download?file=784517>.
31 Australian Law Reform Commission, ALRC Report 133, '*Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*', 2018, [14.24].

authorities, the principle itself is not expressly articulated anywhere in LEPRA and this should be remedied.

As originally enacted, section 99(3) of LEPRA specifically provided that 'a police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more' of the prescribed purposes in the Act.[32]

As a result of amendments in 2013, section 99 of LEPRA now provides that a police officer may arrest a person without a warrant if they suspect on reasonable grounds that a person is committing or has committed an offence and are satisfied that the arrest is reasonably necessary for any one or more of the reasons set out in section 99(1)(b) of LEPRA.

Whereas the language of section 99 as originally enacted was expressed in more absolute terms and provided that the power to arrest for the purpose of taking proceedings for an offence *must not* be exercised other than for the six purposes prescribed in section 99(3), the amended section 99(1) introduces more discretion by framing the power in terms of 'may, without a warrant, arrest a person if' the requisite suspicion is held on reasonable grounds and the arrest is reasonably necessary for the prescribed purposes.[33]

Despite this change in expression, section 99 continues to be interpreted by the courts in a way that suggests that the principle of arrest as a measure of last resort endures. The 'reasonably necessary' criterion in section 99(1)(b) of LEPRA was recently interpreted in the NSW Court of Appeal case *Jankovic v Director of Public Prosecutions* [2020] NSWCA 31 where it was held at [60]-[61]:

> '…The section imports a requirement of proportionality into police officers' decision-making. Each of the reasons in s 99(1)(b)(i) to (ix) is expressed in terms of a particular outcome relevant to law enforcement…
>
> …Only if, according to an objectively reasonable assessment, continuing freedom (with or without some other available measure) presents a significant risk to attainment of any of the law enforcement results will immediate arrest be a proportionate response to that risk and therefore substantially preferable and "reasonably necessary". The police officer is required to assess the situation at hand and make an evaluative judgment. A vital component in the comparison is the alternatives to arrest at the disposal of the police officer.'34

Despite provisions emphasising the alternatives to arrest[35], in PIAC's experience, the principle of arrest as a measure of last resort is not routinely adhered to by NSW police officers in deciding what action to take when confronted with suspected offending, particularly in relation to young people and Aboriginal and Torres Strait Islander people. PIAC recommends that the principle of

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32 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99(3), as enacted.

33 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 99(1).

34 *Jankovic v Director of Public Prosecutions* [2020] NSWCA 31, [60]-[61].

35 Section 105 of LEPRA also provides that 'a police officer may discontinue an arrest at any time' including in circumstances where the 'person is no longer a suspect or the reason for the arrest no longer exists', or if it is more appropriate to deal with the matter by, for example, issuing a warning, caution, penalty notice, court attendance notice or, in the case of a child, dealing with the matter under the YOA. Section 107 of LEPRA confirms that the police powers relating to arrest do not affect 'the power of a police officer to commence proceedings for an offence against a person otherwise than by arresting the person' or 'the power of a police officer to issue a warning or a caution or a penalty notice to a person.'

arrest as a measure of last resort should be expressly legislated to provide clearer guidance to police officers with respect to the operation of section 99.

Children (Criminal Proceedings) Act

The *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**) provides that 'criminal proceedings should not be commenced against a child otherwise than by way of court attendance notice' (**CAN**), unless an exception applies.[36] In the case of *DPP v GW* [2018] NSWSC 50, Rothman J, referred to this section and noted at [46]:

> '…it is inappropriate for the powers of arrest to be used for minor offences, where the defendant's name and address are known and there is no risk of the defendant fleeing. Further, in particular, the provisions of s 8 of the *Children (Criminal Proceedings) Act 1987* (NSW) emphasise the inappropriateness of treating the arrest of a young person as the first and primary option, even though arrest may be "technically" permitted.'[37]

Notwithstanding case authority, PIAC submits that the CCPA should be amended to expressly enshrine the principle of arrest as a measure of last resort in terms consistent with the Convention on the Rights of the Child. PIAC also understands that all proceedings are currently commenced by way of CAN and therefore sections 8 and 9 of the CCPA should be updated to reflect current practice.

Recommendation 9

Section 99 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) should be amended to expressly legislate that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time.

Recommendation 10

The Children (Criminal Proceedings) Act 1987 (NSW) should be amended to expressly legislate that the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.

5.1 Arrests for Breaches of Bail

The unnecessary use of police powers of arrest to enforce minor transgressions concerning bail conditions increases the rates of police interaction for Aboriginal and Torres Strait Islander people. This may be a significant contributor to the incarceration rates of Aboriginal and Torres Strait Islander people.[38]

PIAC is particularly concerned about the high rate of arrests for breach of bail where there has been no further offending. In 2018, 4118 people were arrested for breach of bail that involved no further offending. Almost a quarter of those arrested were Aboriginal or Torres Strait Islander people (24.9% or 1025 people).[39]

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36 *Children (Criminal Proceedings) Act 1987* (NSW) s 8.

37 *DPP v GW* [2018] NSWSC 50, [46].

38 Public Interest Advocacy Centre, *NSW Parliamentary Inquiry into the Adequacy of Youth Diversion Programs*, 5 February 2018, 11.

39 Parliament of New South Wales, Police and Emergency Services Responses to Supplementary Questions to Portfolio Committee No. 5 – Legal Affairs, Legislative Council, *Budget Estimates 2019-2020* (24 September

PIAC is concerned about the impact of unnecessary arrests for breaches of bail where there has been no further suspected offending. Our clients are often arrested and detained, sometimes overnight, for such a breach, only for bail to be gratned by the court. Young people also frequently spend a number of nights in detention as a result of being arrested for breach of bail but are then not subject to a custodial sentence.

Our work consistently reveals police officers failing to consider alternatives to arrest, such as issuing a warning or application notice, and failing to consider the mandatory matters in section 77(3) in deciding what action to take, such as the triviality of the breach and the personal attributes and circumstances of the person.

This approach unnecessarily takes young people away from family, school and work, and can entrench them in the criminal justice system. The harms, particularly to children, caused by exposure to arrest and detention are well-known. So are the economic costs – it costs $1344 per day to keep a young person in detention, in addition to the costs of the Court, lawyers, police and social services.[40]

The principle of arrest, detention and imprisonment of a child as a measure of last resort should be expressly legislated to ensure police officers apply this principle when considering how to respond to breaches of bail where there has been no further suspected offending. The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory recommended that:

> police only arrest a child or young person for breach of bail where the breach occurs as a result of or in connection with further offending and after police have considered and rejected as inappropriate issuing a summons, or where the breaching conduct clearly indicates a materially increased risk of non-attendance at court or further offending.[41]

PIAC supports similar reform in NSW. We recommend that section 77 of the Bail Act is amended to provide that young people are not to be arrested for breach of bail where the breach does not involve further offending, and to clarify that arrest for a breach of bail should only be used as a last resort.

2019) 59-61 [229] –[237] <https://www.parliament.nsw.gov.au/lcdocs/other/12534/Answers%20to%20supplementary%20questions%20-%20PC%205%20-%20Police%20and%20Emergency%20Services%20-%20Elliott.pdf>.

40 YFoundations, *Section 28 – Criminalising the Young and Homeless* May 2019, < http://yfoundations.org.au/wp-content/uploads/2019/05/Yfoundations-Bail-Policy-Position-Paper.pdf> Accessed 7 August 2020.

41 *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017) vol. 2B, 298 [Recommendation 25.20] <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-2b.pdf>.

Case Study: Bradley* (17)

Bradley is an Aboriginal young person who was arrested and detained by police who told him that he was breaching his curfew. Bradley did not have a curfew condition and was not in breach of his bail.

Bradley was 17 years old when he was walking home with three friends at about 1.30am. He was approached by a police car. The police officer asked Bradley if he had bail. Bradley said no, because he did not think he was in breach of any conditions. Without making further enquiries, the police officer then told Bradley he had a curfew and proceeded to search him, arrest him, place him in handcuffs and take him to the police station.

At the station, the custody manager told the arresting officer that Bradley did not have a curfew, and that he should be driven home. Bradley was held in custody for an hour and a half before being returned home to his parents. The arrest caused Bradley to fear that he would be taken to Cobham Juvenile Justice Centre.

The arresting officer had made no attempts to clarify whether Bradley was breaching any bail conditions. The arresting officer also did not consider

- Bradley's personal circumstances;
- the relative triviality of the alleged breach; or
- whether any alternative action such as a warning would be more appropriate than arresting Bradley.

This unlawful arrest left Bradley feeling scared to leave the house, for fear he would be stopped and arrested by police again.

*Not real *name*

Recommendation 11

Section 77 should be amended to state that a police officer must not take action under ss(1)(c) – (1)(f) unless satisfied on reasonable grounds that the action is necessary in the circumstances.

Recommendation 12

Section 77 of the Bail Act 2013 (NSW) should be amended to provide that a child must not be arrested for breach of bail where the breach does not involve further offending, unless exceptional circumstances exist.

Recommendation 13

NSW Police Force officers should be required to undertake regular training on section 77 of the Bail Act 2013 (NSW) and the principle of arrest of a measure of last resort.

Recommendation 14

The NSW Police Force should make amendments to the Bail Standard Operating Procedures to require police officers to record their consideration of section 77(3) matters in Computerised

Operational Policing System (COPS) Event Reports. The Bail Standard Operating Procedures should also be made publicly available.

Recommendation 15

Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should contain clear guidance to police to the effect that arrest is to be used as a measure of last resort.

5.2 Consideration of 'special vulnerabilities'

Currently, police officers, authorised justices and courts are obliged to consider a number of matters in assessing bail concerns, including '*any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.* PIAC submits that these considerations should also apply in decision-making relating to enforcing bail requirements, including what action to take under section 77(3) of the Bail Act.

While special vulnerabilities and needs are already captured in section 77(3)(c) relating to the personal attributes and circumstances of the person, PIAC recommends that these specific considerations be expressly stated to provide clearer safeguards against the inappropriate use of arrest powers. This additional safeguard is also necessary in circumstances where there are no separate bail laws for young people.

Recommendation 16

Section 77(3)(c) of the Bail Act 2013 (NSW) should be amended to insert after 'the personal attributes and circumstances of the person,' the words 'including any special vulnerability or needs the person has because of youth, being an Aboriginal or Torres Strait Islander person, or having a cognitive or mental health impairment.'

Annexure A PIAC Submission to Council of Attorneys-General - Age of Criminal Responsibility Working Group review (28 February 2020)

public interest
ADVOCACY CENTRE

Submission to Council of Attorneys-General - Age of Criminal Responsibility Working Group review

28 February 2020

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

PIAC's work in relation to youth justice and Aboriginal and Torres Strait Islander young people

PIAC has a long history of work on issues closely linked to the subject matter of this review.

We have worked for many years in partnership with Aboriginal and Torres Strait Islander organisations and communities to identify public interest issues that impact Aboriginal and Torres Strait Islander people, and conduct advocacy, strategic litigation and policy work to protect and promote their human rights.

This work has had a particular focus on police accountability and the exercise of police powers, through both strategic litigation and policy advocacy. This includes an emphasis of the impact of police powers on young people, and especially on Aboriginal and Torres Strait Islander young people. As part of this work, PIAC aims to ensure that police use their powers, particularly the power of arrest, lawfully and appropriately, including through litigation to challenge inappropriate, unlawful or unjust treatment.

To date, PIAC has assisted over 160 Aboriginal and Torres Strait Islander clients in relation to complaints and claims regarding unlawful police conduct. The case work generated from the work has also provided a basis for PIAC's systemic advocacy and law reform on police powers and the broader operation of the criminal justice system in NSW, particularly as it affects Aboriginal and Torres Strait Islander young people.

PIAC also operates the long-standing Homeless Persons' Legal Service (HPLS), which addresses the legal needs of homeless people and plays an active role in reducing

homelessness. As part of this project we work closely with government and service providers on issues relating to homelessness, including groups that are disproportionately affected by homelessness, such as Aboriginal and Torres Strait Islander people.

public interest ADVOCACY CENTRE

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Response to Question 2

The age of criminal responsibility in all Australian jurisdictions should be raised to at least 14 years of age. There should be no 'carve outs' or exceptions for certain offences.

Response to Question 3

The age of criminal responsibility should be set to at least 14 years. Once this is achieved, doli incapax will have no application.

Response to Question 4

A minimum age of responsibility of at least 14 will ensure children 10 to 13 are not subject to detention. For children at and above the age of criminal responsibility, detention should only occur as a measure of last resort and for the shortest appropriate period of time.

Response to Question 5

There should be a continued investment in early intervention and prevention programs and strategies to work with children and their families if the age of criminal responsibility is raised to at least 14 years old. Aboriginal and Torres Strait Islander controlled organisations must be at the centre of program design and delivery for Aboriginal and Torres Strait Islander children and their families.

Response to Question 6

We recommend comprehensive program and services mapping by State and Territory governments to assist identify the programs and responses that already exist in relation to addressing the underlying causes of offending-type behaviour.

Response to Question 7

The assumption that children aged 10 to 13 are able to routinely access services through the criminal justice system should be examined. We otherwise refer to our response to Questions 5 and 6.

Response to Question 8

The best means of keeping the community safe is addressing the underlying causes of offending behaviour. Other secure detention processes already exist in relation to the rare and limited circumstances this may be necessary.

Response to Question 9

It is a matter for State, Territory and Commonwealth governments to review their laws for any perceived gaps regarding the liability of persons who incite or encourage children under the minimum age of criminal responsibility to engage in criminal activity.

Response to Question 10

Nothing further.

Response to Question 11

Nothing further.

1. Question 1

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.*

Repsonse: *The age of criminal responsibility should be increased from 10 years to at least 14 years old in all Australian jurisdictions.*

1.1 Australia's age of criminal responsibility must reflect current evidence on child development

Australia's leading medical and health research bodies agree that children aged 10 to 13 should not have contact with the criminal justice system.

The Royal Australasian College of Physicians (**RACP**) represent over 17,000 physicians in Australia and New Zealand in medical specialties including neurology, paediatrics and child health. The College's position is that the current minimum age of criminal responsibility is inappropriate in light of the physical and neurocognitive vulnerabilities experienced by children towards the lower end of the current minimum age. In relation to neurocognitive vulnerability, the RACP notes:

> Functional neuro-imaging indicates that the pre-frontal cortex of the brain, the part of the brain that controls "executive functions" (that is impulse control, planning and weighing up long term consequences of one's actions), is not fully developed until around 25 years of age.
>
> Impulse control, the ability to plan and foresee the consequences of one's actions is vastly less developed in a 10 year old than an adult.[5] As such, when faced with a choice of jumping into a stolen car with peers, or being left on the side of the road alone, it is highly conceivable that a 10 year old may jump into the stolen car, and thus become an accessory to a crime, without having planned this or thought through the consequences.[1]

The RACP observe that behaviours which typically bring children aged 10 to 13 in conflict with the law are better understood and responded to 'as behaviours within the expected range in the typical neurodevelopment' for this group of children, particularly when considering children whose behaviours arise out of significant past trauma or severe disadvantage.[2]

The neurodevelopmental profile of incarcerated children, the prevalence of pre-existing trauma in children who come into contact with the criminal justice system at a young age, and the physical

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1 Royal Australasian College of Physicians, '*Submission to the Council of Attorneys General Working Group Reviewing the Age of Criminal Responsibility'*, July 2019, 3. Footnotes omitted.

2 Ibid, 5. See further Abram and Teplin, Archives of General Psychiatry 61(4), 403-10, '*Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*', 2004 and Johnson and Giedd, Journal of Adolescent Health 45(3), 216-21, *'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*', 2009.

vulnerabilities of children aged 10 to 13 are all reasons cited by the RACP in support of raising the current age of criminal responsibility to 14.[3]

The Australian Medical Association, The Australian Indigenous Doctors' Association, the National Aboriginal Community Controlled Health Organisation and the Lowitja Institute all recommend that the minimum age of criminal responsibility should be raised to 14 years of age.[4]

The idea that criminal law responses to a child's anti-social behaviour should reflect their development is accepted in our legal system.[5]

There is a clear consensus emerging that our approach to the age of criminal responsibility must be informed by current evidence of child and adolescent brain development. For example:

- the President of the NSW Children's Court submitted in 2018 that the current minimum age of criminal responsibility failed to account for increased understanding within the neuroscience community of adolescent frontal lobe underdevelopment and disproportionately high activity in the hippocampus (largely responsible for emotion), stating the Court was 'very supportive' of raising the minimum age of criminal responsibility on the basis of this better understanding;[6]

- the NSW Legislative Assembly Committee on Law and Safety's Inquiry into the Adequacy of Youth Diversion in 2018 (**NSW Youth Diversion Inquiry**) found the minimum age of criminal responsibility 'warrant[ed] review' by the NSW Government, emphasising the importance stakeholders had placed on current scientific evidence regarding adolescent brain development in calling for the minimum age of criminal responsibility to be raised;[7]

- the Queensland Report on Youth Justice in 2018 recognised a child's development as one of two 'leading arguments' in favour of raising the age;[8] and

- in 2019, Australian and New Zealand Children's Commissioners and Guardians noted the impact of the continued development of children's brains during adolescence on their 'ability to reason, predict consequences, control impulses and comprehend criminal

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3 Royal Australasian College of Physicians, '*Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility*', July 2019, 4-6.

4 Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be Raised to 14 years of age', (Media release, 25 March 2019), Royal Australian College of Physicians, Human Rights Law Centre, National Aboriginal and Torres Strait Islander Legal Services, Australian Indigenous Doctors' Association, *'Media Release: Doctors, lawyers, experts unite in call to raise the age of criminal responsibility*', November 2017.

5 For example, in NSW, recognition of a child's 'dependency and immaturity' and need for 'guidance and assistance' are already principles that guide decision making under the *Children (Criminal Procedure) Act 1987* (NSW) s 6.

6 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [2.59].

7 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [2.51], [3.8].

8 Atkinson, '*Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence: Version 2*', 2018, 105.

proceedings' as a key reason for calling on the age of criminal responsibility to be raised to at least 14.[9]

1.2 A minimum age of only 10 entrenches children in the criminal justice system, decreases community safety

Another significant reason for raising the age of criminal responsibility is that a criminal law response to offending behaviour by young children only serves to increase the likelihood of future offending. It does not act as a deterrent.

Australian research demonstrates a strong link between encountering the criminal justice system at a young age, and re-offending later in life.[10]

Professor Chris Cunneen, a leading Australian criminologist, has drawn attention to the fact that 'the younger the child is when first having contact with juvenile justice … the more likely it is the child will become entrenched in the justice system.' He notes that almost 80% of juvenile offenders appearing in NSW Courts in 2004 were reconvicted within 10 years, compared with 56% of adult offenders.[11]

This is reflected in Australia-wide statistics. In 2017-18, of children aged 10 to 13 who were released from sentenced detention, nearly all (94%) were reconvicted to sentenced supervision within 12 months.[12] Indeed, it is estimated that children arrested before the age of 14 are three times more likely to reoffend as adults than children arrested after 14 years.[13]

As Professor Cunneen has previously argued:

> We … know that a small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age. For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending.[14]

The Royal Australasian College of Physicians have offered an explanation as to how early contact can lead to entrenchment in the criminal justice system for children:

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9 Australian and New Zealand Children's Commissioners and Guardians, *'Media Release: Raise the age of criminal responsibility: Australian and New Zealand Children's Commissioners and Guardians*', 2019.

10 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, 11. See also Richards, Australian Institute of Criminology 409, *'What makes juvenile offenders different from adult offenders?*', 2011; Fitz-Gibbon and O'Brien, International Journal for Crime, Justice and Social Democracy 8(1), *'Examining the Operation of Doli Incapax in Victoria (Australia)',* 2019.

11 Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age*', 2017, 12.

12 Australian Institute of Health and Welfare, *'Young people returning to sentenced youth justice supervision 2017–18'*, 2019, 16. The issue of high recidivism rates of juvenile detainees in Australia is also discussed in response to Question 4.

13 Queensland Family & Child Commission, *The age of criminal responsibility in Queensland*, 2017, 30. Citations omitted.

14 Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age*', 2017, 12 referencing Weatherburn, McGrath and Bartels, UNSW Law Journal 779 35(3), 779-809, *'Three Dogmas of Juvenile Justice'*, 2012.

> Criminalisation and incarceration results in adverse developmental trajectories. Adolescence is a time of transition between childhood and adulthood, during which one develops not only physically, but also mentally and socially. It is over this period that one's sense of self identity is fully developed.1[7]
>
> … If a young person enters the youth justice system and is removed from these positive influences, they are often sent on a different, less positive developmental trajectory. Furthermore, it would be expected that the removal from family or care, and isolation in police cells or incarceration, will further traumatise children who have already experienced significant past trauma, and trigger further mental health issues and problematic behaviour.[15]

It is also clear that children who enter the criminal justice system between the ages of 10 to 13 are disproportionately represented in repeat adult offenders, particularly among repeat violent offenders. As was noted by the Sentencing Advisory Council in their review of reoffending by children and young people in Victoria:

> The younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to an adult sentence of imprisonment before their 22nd birthday. After accounting for the effect of other factors, each additional year in age at entry into the criminal courts was associated with an 18% decline in the likelihood of reoffending.[16]

Diverting children aged 10 to 13 away from the criminal justice by raising the age of criminal responsibility to at least 14 is an important first step in preventing the offending trajectory and reducing chronic, adult reoffending.

1.3 The current age of criminal responsibility has a disproportionate impact on Aboriginal and Torres Strait Islander children

The current minimum age of criminal responsibility of 10 disproportionately affects Aboriginal and Torres Strait Islander children and young people.[17]

Available data shows that Aboriginal and Torres Strait Islander children tend to come into conflict with the law at a younger age than non-Indigenous children. Notably, the greatest overrepresentation occurs between ages 10 and 14.[18] For example, at the national level:

- about half (48%) Aboriginal and Torres Strait Islander young people under supervision on an average day in 2017-18 were aged 10-15, compared with one-third (33%) of non-Indigenous young people;

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15 Royal Australasian College of Physicians, *'RACP submission to the Council of Attorneys General Working group reviewing the Age of Criminal Responsibility'*, July 2019, 5.

16 Sentencing Advisory Council Victoria, *'Reoffending by Children and Young People in Victoria'*, 2016, xiii.

17 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, 6.

18 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [2.76] citing Australian Institute of Health and Welfare, '*Juvenile Justice National Minimum Dataset 2015-2016'*, 2017, Supplementary Tab.

- two in five (39%) Aboriginal and Torres Strait Islander young people under supervision in 2017-18 were first supervised when aged 10-13, compared with about 1 in 7 (15%) non-Indigenous young people;[19]
- three in four (73%) boys aged 10 to 12 appearing before the Children's Court between 2006 to 2015 were Aboriginal and Torres Strait Islander, with Aboriginal and Torres Strait Islander girls representing three in five (60%) girls appearing before the Children's Court in the same age bracket;[20] and
- Aboriginal and Torres Strait Islander young people aged 10-14 in 2010-11 were 23 times as likely as non-Indigenous young people aged 10-14 to be under community-based supervision and 25 times as likely to be in detention.[21]

There is also evidence that the law is applied unequally by police when confronted with suspected offending. The Australian Law Reform Commission's *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* noted that 'research suggests that Aboriginal and Torres Strait Islander young people are more likely to be arrested than their non-Indigenous counterparts even after other factors such as the offence, offending history and background factors are considered.'[22]

Aboriginal and Torres Strait Islander children are hugely overrepresented in both supervision and detention rates compared with non-Indigenous children, with greatest overrepresentation occurring at the youngest ages. Raising the minimum age of criminal responsibility is another important first step in addressing the overrepresentation of Aboriginal and Torres Strait Islander children people in detention and prison.

1.4 The current age of criminal responsibility disproportionately impacts our most vulnerable children

Children and young people experiencing intellectual disability and mental illness

Australia's current minimum age of criminal responsibility also disproportionately impacts children and young people with an intellectual disability and mental illness.

A New South Wales study from 2014 found that almost half (46%) of young people in detention had 'borderline' or lower intellectual functioning, indicating significant impairment, with particularly poor cognitive function in relation to receptive verbal skills (the ability to understand what someone is saying).[23]

Frize et al have previously found that while 1% of adults incarcerated in NSW prisons had an IQ below 70, almost one in five (17%) children in juvenile detention in Australia had an IQ below 70 – suggesting significant underdiagnoses of and lack of response to intellectual disability at a pre-

19 Australian Institute of Health and Welfare, '*Youth Justice in Australia 2017-18*', 2018, 8.
20 Cunneen, Comparative Youth Penalty Project, '*Arguments for Raising the Minimum Age*', 2017, 15.
21 Excluding Western Australia and the Northern Territory. Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, vi. See also Australian Institute of Health and Welfare, '*Youth Justice in Australia 2017-18*', 2018, 9.
22 Australian Law Reform Commission, ALRC Report 133, '*Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*', 2018, [14.24].
23 Australian Institute of Health and Welfare, *'National data on the health of justice-involved young people: a feasibility study 2016–17*', 2018, 5.

detention stage.[24] The authors found that children with intellectual disability on supervision orders were also at significantly higher risk of breach and recidivism.[25]

When Aboriginal and Torres Strait Islander status and intellectual disability intersect for children, the risks of early entrenchment in the criminal justice system are even more pronounced. Baldry et al found that when compared with the non-Indigenous young people in the cohort, Aboriginal and Torres Strait Islander young people with an intellectual disability had on average police contact over two years earlier (at age 12), in addition to earlier first convictions and earlier use of custody.[26]

In relation to trauma and brain injury, a meta-analysis examining prevalence of mental health issues among youth in detention found rates of psychosis at 10 times those found in the general community.[27] Traumatic brain injury is also significantly more likely among those involved in youth justice than for the general community.[28]

In relation to mental health, one in six young people under youth justice supervision in 2016-17 reported having deliberately harmed themselves in the previous six months. These young people were also more likely than other young offenders to have other mental health problems, alcohol and other drug issues and social risk factors.[29]

Children with an intellectual disability or mental illness that are engaging in anti-social behaviours need care, services and treatment, not incarceration and entrenchment within the criminal justice system. Raising the age of criminal responsibility to at least 14 is an important first step in ensuring this occurs.

Children and young people and child protection services

Children and young people who have had contact with child protection services are particularly vulnerable to being caught up in the criminal justice system.

Young people who had received child protection services were nine times as likely as the general population to have also been under youth justice supervision over the period 2014 to 2018.[30] Although only a minority of children who had received child protection also experienced

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24 Frize, Kenny and Lennings, Journal of Intellectual Disability Research 52(6), '*The relationship between intellectual disability, Indigenous status and risk of reoffending in juvenile offenders on community orders'*, 2008, 4. See also Human Rights and Equal Opportunity Commission, '*Indigenous young people with cognitive disabilities and Australian juvenile justice systems*', 2005. See also Justice Health & Forensic Mental Health Network, Juvenile Justice NSW, *'2015 Young People in Custody Health Survey: Full Report*', 2017.

25 Frize, Kenny and Lennings, Journal of Intellectual Disability Research 52(6), '*The relationship between intellectual disability, Indigenous status and risk of reoffending in juvenile offenders on community orders'*, 2008, 4.

26 Baldry, McCausland, Dowse and McEntyre, UNSW, '*A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system'*, 2015, 2-4.

27 Australian Institute of Health and Welfare, *'National data on the health of justice-involved young people: a feasibility study 2016–17'*, 2018, 5.

28 Farrer, Frost, and Hedges, Child Neuropsychology 19(3), 225–34, *'Prevalence of traumatic brain injury in juvenile offenders: a meta-analysis'*, 2013.

29 Australian Institute of Health and Welfare, *'National data on the health of justice-involved young people: a feasibility study 2016–17'*, 2018, 5.

30 Baldry, McCausland, Dowse and McEntyre, UNSW, '*A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system'*, 2015, 2-4.

supervision, the majority (55%) of those under justice supervision had previously received child protection services[31] and the younger a child was at first supervision, the more likely they were to also have received child protection services.[32]

In 2016-2017, statistics reveal that of the 438 children aged 10-13 first sentenced or diverted in the Victorian Children's Court:

- 1 in 2 were the subject of a report to child protection
- 1 in 3 were the subject of a child protection order
- 1 in 3 experienced out-of-home care
- 1 in 4 experienced residential care.[33]

Once again, Aboriginal and Torres Strait Islander children at the intersection experienced the poorest observed justice system outcomes. For example, when compared to their non-Indigenous counterparts, Aboriginal and Torres Strait Islander children were 17 times more likely to have received both child protection and supervision between 2014 and 2018.[34] Aboriginal and Torres Strait Islander girls in youth detention experienced the highest rates of crossover with child protection of all groups at 72%.[35]

Relevantly for this review, data from the Sentencing Advisory Council of Victoria shows that it is the youngest children that are likely to experience the highest rates of both detention and child protection:

> The highest rate of children with child protection involvement was found among children sentenced to custodial sentences and among children who were aged 10–13 at first sentence. The highest rate of over-representation of Aboriginal and Torres Strait Islander children was found at the intersection of the most severe sentence type (custodial orders) and the most serious end of the child protection system (child protection orders, out-of-home care and residential care).[36]

The fact that so many children who enter the juvenile justice system are known to government through interaction with the child protection system is a serious concern. An important first step towards ensuring children in contact with child protection services are protected from the further harm from the criminal justice system is raising the minimum age of criminal responsibility to at least 14.

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31 Australian Institute of Health and Welfare, *'Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018'*, 2019, iv-v.

32 Australian Institute of Health and Welfare, *'Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018'*, 2019, v.

33 Sentencing Advisory Council Victoria, *"Crossover Kids': Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court*', June 2019.

34 Australian Institute of Health and Welfare, *'Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018'*, 2019, v.

35 Australian Institute of Health and Welfare, *'Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018'*, 2019, v.

36 Sentencing Advisory Council Victoria, '*'Crossover kids': Vulnerable children in the youth justice system – Report 1'*, June 2019, 93.

1.5 A higher age of criminal responsibility is consistent with international law and comparable countries

At 10 years of age, Australia's minimum age of criminal responsibility falls well below international human rights standards. This has attracted criticism from human rights bodies for many years.[37] Amnesty International noted that following her visit to Australia in 2017, the United Nations Special Rapporteur on the Rights of Indigenous Peoples stated that the most distressing aspect of her visit was the routine detention of children aged 10 and 11.[38]

The United Nations Committee on the Rights of the Child (**UNCRC**) considers 14 to be the absolute minimum age for criminal responsibility and encourages all state parties to increase their minimum age to at least 14.[39]

It is noteworthy that the UNCRC have changed their recommendation regarding the absolute minimum age of criminal responsibility; they had previously recommended 12 years of age as the absolute minimum. In endorsing a higher minimum age, the UNCRC noted that:

> Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.[40]

Reviews of youth justice laws and policy in the Northern Territory and Queensland cited the previous UNCRC recommendation that the minimum age of criminal responsibility should not be below the age of 12 in ultimately recommending raising the age to 12.[41] This must be kept in mind when considering the minimum age recommendations of these Australian reviews. As noted above, the UNCRC now considers 12 too low and recommends the minimum age be at least 14.

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37 For example, United Nations Committee on the Rights of the Child, *'Sessions of the Committee'*, 1997, [11], [20]; United Nations Committee on the Rights of the Child, *'Sessions of the Committee'*, 2005, [73]; United Nations Committee on the Rights of the Child, *'Sessions of the Committee'*, 2012, [82(a)]; United Nations Committee on the Elimination of All Forms of Racial Discrimination, *'Sessions of the Committee'*, 2017, [25].

38 Amnesty International, 'The Sky is the Limit: Keeping young children out of prison by raising the age of criminal responsibility', September 2018, 4 citing United Nations Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia', 2017.

39 United Nations Committee on the Rights of the Child, *'General Comment No. 24 (2019), replacing General Comment No. 10 (2007) Children's rights in juvenile justice'*, 2019 at [22].

40 Ibid [22].

41 See Atkinson, '*Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence: Version 2'*, 2018, 104; Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 417.

Since the Northern Territory Royal Commission, former Commissioner Margaret White has expressed the view that 12 is still too low an age,[42] while former Commissioner Mick Gooda has publicly endorsed raising the age of criminal responsibility to at least 14 years of age.[43]

Raising the minimum age of criminal responsibility to at least 14 would also bring Australia in line with comparable countries. The average minimum age of criminal responsibility across the European Union is 14. [44] An international study of 90 countries found the most common age being 14 years while 60% had a minimum age of 12 years or higher.[45] The minimum age of criminal responsibility is at least 14 in Austria, Germany, Portugal, Sweden, Spain, Norway and Denmark, without offence-based exceptions.[46] These countries demonstrate that there is nothing necessary, or inevitable, about a minimum age of 10 years and there are successful, alternative approaches to dealing with problematic actions by children aged 10 to 13.

1.6 Children should be supported to take responsibility for their behaviour

In advocating for the minimum age of criminal responsibility to be raised to at least 14, we are not arguing that actions should not have consequences. Rather, that those consequences should not be harmful, counter productive, contrary to evidence and unjust.

The minimum age of criminal responsibility considers only the age at which a person can be charged and be held responsible for their actions *by the criminal law*. There are many ways in which children can be effectively supported to take responsibility for their actions which avoid the blunt, harmful and criminogenic processes of the criminal justice system.

Engagement with diversionary and early intervention services and supports is no easy out for young children engaged in anti-social behaviour. This is particularly so considering the challenging personal circumstances many of the children in conflict with the law face. We must move away from a narrative of accountability that emphasises reactive measures and the imposition of penalties and recognise the hard work involved in engagement in diversion and restorative justice processes that address the underlying causes of offending, and ultimately, improve community safety.

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42 White, Adelaide Law Review 40(1), 250-71, *'Youth justice and the age of criminal responsibility: some reflections*', 2019.

43 Change the Record, '*Indigenous children in Queensland police watchhouses are a "death in custody waiting to happen", calls to raise age of criminal responsibility to at least 14*', (Media release, 2019).<https://changetherecord.org.au/blog/news/indigenous-children-in-queensland-police-watchhouses-are-a-death-in-custody-waiting-to-happen-calls-to-raise-age-of-criminal-responsibility-to-at-least-14/>.

44 Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age*', 2017, 3.

45 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [2.70].

46 Ibid.

2. Question 2

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.*

Repsonse*: The age of criminal responsibility should be increased from 10 years to at least 14 years old in all Australian jurisdictions.*

2.1 The nature of offending by children and young people

We are aware of arguments that there should be a lower minimum age of criminal responsibility for certain serious offences. PIAC does not support this approach.

It is important to consider the nature of offending by children and young people when considering exceptions to the minimum age of criminal responsibility for serious offending.

The majority of young people never come into formal contact with the criminal justice system.

When young people do commit crime, they generally commit less serious offences than adults, and are more likely to commit property than person offences.[47] In Australia, in 2017-18, the most common principal offences among young people aged 10-14 years finalised in Children's Courts were:

- theft (23%);
- unlawful entry with intent (22%);
- acts intended to cause injury (22%);
- property damage (10%); and
- public order offences (7%).[48]

When grouped together, theft and property related offences account for over half (55%) of all offences finalised in Children's Courts among young people aged 10-14.

Incidents of serious offending by children aged 10 to 13 are extremely low.[49]

2.2 The evidence does not support exceptions to the minimum age of criminal responsibility

In PIAC's view there should be no 'carve outs' or exceptions from the minimum age of criminal responsibility for certain offences. The objective seriousness of an offence is not, in of itself, determinative of a child's capacity to understand their actions were seriously wrong for the

47 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, 7.

48 Australian Institute of Health and Welfare, '*Youth Justice in Australia 2016-17*', 2018, 7.

49 For example, there were zero people aged 10-14 finalised nationally across Children's Courts for a principal offence of homicide in 2017-18. 1.5% of all people aged 10-14 finalised nationally over the same period had a principal offence of sexual assault (102 people). Australian Bureau of Statistics, '*4513.0 - Criminal Courts, Australia, 2017-18',* 2019, Table 3.

purpose of being held responsible by the criminal law. This is already recognised in relation to the common law doctrine of *doli incapax*. In that context the High Court has held:

> No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.
>
> …The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct.[50]

Consistent with this view, we note that Australia's leading medical and health research bodies such as Royal Australasian College of Physicians, the Australian Medical Association, the Australian Indigenous Doctors' Association, the National Aboriginal Community Controlled Health Organisation and the Lowitja Institute all recommend raising the age of criminal responsibility to 14 years old, without exception.[51]

The United Nations Committee on the Rights of the Child has expressed its concern about the practice of permitting exceptions to the established minimum age of criminal responsibility by allowing the use of a lower age for certain serious offences and strongly recommends against this practice.[52]

The existence of a lower age of criminal responsibility for serious offences in some other jurisdictions appears to reflect political appeal to public perceptions about the nature of offending by children rather than what is known about child development.

PIAC submits that, even when children aged 10 to 13 engage in very serious offending-type behaviour, the response should be one that prioritises treatment and support to address the underlying causes of the behaviour. As noted by Amnesty International in the *Sky is the Limit* report:

> The major risk factors for youth criminality include 'poverty, homelessness, abuse and neglect, mental illness, intellectual impairment and having one or more parents with a criminal record.' If a child aged between 10 and 13 years has committed a serious violent offence, something has gone very wrong in their life. It is the responsibility for government to provide that child with the services needed to address the underlying causes of their behaviour and to set their childhood in a better direction. Services may need to address experiences of physical, emotional or mental abuse, trauma, cognitive impairment, family or drug and alcohol issues.[53]

PIAC stresses that punitive responses are recognised to be harmful, counter-productive and contrary to evidence. Prioritising community safety means seeking to avoid the life-long

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50 *RP v The Queen* (2016) 259 CLR 641 at [9].

51 Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be Raised to 14 years of age', (Media release, 25 March 2019), Human Rights Law Centre, '*Media Release: Doctors, lawyers, experts unite in call to raise the age of criminal responsibility',* 2017.

52 United Nations Committee on the Rights of the Child, *'General Comment No. 24 (2019), replacing General Comment No. 10 (2007) Children's rights in juvenile justice'*, 2019, [25].

53 Amnesty International Australia, '*The Sky is the Limit: Keeping young children out of prison by raising the age of criminal responsibility*', September 2018, 13.

consequences in terms of justice, education and health outcomes for young people exposed to the criminal justice system.

3. Question 3

Question 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 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.*

Repsonse: *The age of criminal responsibility should be raised to at least 14. Once this is achieved, doli incapax will have no application.*

Doli incapax is a common law legal presumption that children aged 10 to 13 lack the capacity to be responsible for their crimes. In the case of *RP v The Queen*,[54] the High Court described the purpose of the doctrine as follows:

> The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea.[55]

The prosecution is responsible for rebutting the presumption of *doli incapax* and proving that the child was able, at the relevant time, to adequately distinguish between right and wrong.[56]

Although the doctrine is supposed to provide a degree of protection from the sanctions of the criminal law to children aged 10 to 13 by presuming they lack the required criminal intention, it has been the subject of sustained criticism for failing to adequately safeguard the children from contact and entrenchment in the criminal justice system.

Particularly problematic is the fact that determination of *doli incapax* takes place at one of the last stages of the criminal justice process, during hearing. This means that a child aged 10 to 13 accused of a crime can be arrested, taken into police custody, handcuffed, searched (including strip searched), questioned, remanded in custody and subject to bail conditions, before eventually being found to be *doli* – resulting in charges being dismissed.

As noted above, early contact with the juvenile justice system has been shown to greatly increase the likelihood of entrenchment in the criminal justice system[57] and physical removal from positive influences through arrest and detention can cause further trauma and problematic behaviour in young people.[58]

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54 (2016) 259 CLR 641.

55 *RP v The Queen* (2016) 259 CLR 641, [9].

56 The test is that the child must know the act is seriously wrong as distinct from merely naughty or mischievous, see *RP v The Queen* (2016) 259 CLR 641, [9].

57 Gatti, Tremblay and Vitaro, Journal of Child Psychology and Psychiatry 50(8) 991-8, *'Iatrogenic effect of juvenile justice'*, 2009, 7. See also Ibid, 4. See above, Response to Question 1 at 1.2.

58 Royal Australasian College of Physicians, '*Submission to the Council of Attorneys General Working group reviewing the Age of Criminal Responsibility*', July 2019, 5.

3.1 Case studies

Through our work on police accountability, we have acted for dozens of young people in claims of unlawful conduct against the police. The stories of our young clients illustrate how the common law doctrine of *doli incapax* fails to protect primary school aged children from some of the most damaging aspects of the criminal justice system such as the trauma of arrest, search and detention.

Trisha* (13)

Trisha is Aboriginal. She was 13 years of age at the time of the incident.

Trisha was walking along with friends late at night. The group visited a local fast food establishment. After they left, a police van pulled up next to them and asked them if they were under the influence of drugs and alcohol, to which they answered 'no'.

Police decided to search the group of girls. One of the officers grabbed Trisha by the shirt and broke her necklace. The same officer then started to search Trisha's backpack, so Trisha reached for her backpack and pushed the officer away. Trisha was then told that she was under arrest for assaulting a police officer.

By the end of the incident there were seven police officers present and four police vehicles, with two officers holding Trisha on the ground, placing their knee into her back, and bending her arms behind her back in order to handcuff her. After being put into the police vehicle, Trisha broke down crying, scared that she was going to be assaulted. The searches conducted by police revealed nothing unlawful on Trisha or any of the other girls.

When Trisha was eventually released from police custody that night, Trisha was so frustrated that she punched the wall of her house, fracturing her wrist.

Trisha, the youngest of the group, was charged by police with hindering police. The police refused to deal with her by way of a youth justice conference through the Young Offenders Act 1997 and her charge proceeded to hearing.

At hearing, the charge was dismissed on the basis of *doli incapax*. While awaiting the hearing, Trisha was subject to strict bail conditions, including a curfew. This was the third set of charges against Trisha that has been dismissed on the basis of *doli incapax*.

James* (11)

James is Aboriginal and was 11 years of age at the time of the incident. He lived with his father and did not have a criminal record.

James' father had failed to bring James to court in relation to Children's Court proceedings because he forgot the date, following which a warrant for James' arrest was issued.

At six pm on a Sunday night, police attended James' father's house to execute the warrant. James was arrested and taken to a police station and later to a Juvenile Justice Facility. James was held at the Juvenile Justice Facility overnight after being denied bail by police.

The next day James was taken to appear at the Children's Court, where he was cautioned without conviction and released.

By the time of his release, James had spent 19 hours in detention.

Raising the age of criminal responsibility to at least 14 will mean that the common law doctrine of *doli incapax* will have no application.

4. Question 4

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.*

Repsonse: *A minimum age of responsibility of at least 14 will ensure children 10 to 13 are not subject to detention. For children at and above the age of criminal responsibility, detention should only occur as a measure of last resort and for the shortest appropriate period of time.*

There are numerous arguments against the use of deprivation of liberty as a response to offending-type behavior by children and young people. Some of the key arguments are outlined below.

4.1 Detention increases recidivism and decreases community safety

As highlighted in our response to Question 1, it is widely recognised that incarceration is criminogenic: it fosters further criminality. In this way, it fails to protect the community.

Australian figures demonstrate high rates of recidivism amongst children and young people subject to a custodial sentence. Nationally, of children aged 10-16 years released from sentenced detention in 2016-17, 80% returned to supervision (detention or community-based) within 12 months, with some 59% returning within 6 months.[59] Relevantly, recidivism rates were even higher for younger children. Of those aged 10-13 years old at the time of release, 94% returned within 12 months, the highest of any group observed.[60]

[59] Australian Institute of Health and Welfare, *'Young people returning to sentenced youth justice supervision 2017–18'*, 2019, iv.

[60] Ibid, 16.

4.2 Detention has a disproportionate impact on particular groups of children

Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander children and young people are vastly over-represented in detention, particularly in the under 14 cohort:

- In 2016-17, Aboriginal and Torres Strait Islander children made up 69% of children aged 10 to 13 in prison.[61]
- In 2015-16, 73% of children placed in detention aged 10 to 12 were Aboriginal or Torres Strait Islander.[62]
- In 2010-11 Aboriginal and Torres Strait Islander young people aged 10-14 were 25 times as likely as likely as non-Indigenous young people to be in detention.[63]

When Aboriginal and Torres Strait Islander children are detained, the separation and alienation from their family, culture and community groups can be particularly distressing. For remote and regional Aboriginal and Torres Strait Islander young people, incarceration can also lead to missing out on participation in cultural obligations and initiatory rites of passage.

Children with intellectual disability and mental illness

Children and young people with an intellectual disability or mental illness are also over-represented in detention. As noted in response to Question 1, research has previously demonstrated that juveniles in detention are about 17 times more likely than adult prisoners to have an IQ below 70.

4.3 PIAC's response

We acknowledge there is some international precedent for having a minimum age of criminal responsibility and a higher minimum age of detention.[64]

We also note the recent comment by the United Nations Committee on the Rights of the Child which encourages State's to adopt a minimum age of detention, such as 16 years of age.[65] We

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61 Australian Institute of Health and Welfare, '*Youth Justice in Australia 2016-17*', 2018, Table S80b.

62 Australian Institute of Health and Welfare, '*Youth Justice Supervision in Australia 2015-16*', 2017, Tables S78b and S40b.

63 Australian Institute of Health and Welfare, '*Young people aged 10-14 in the youth justice system 2011-12*', 2013, vi.

64 For example, in Switzerland the MACR is 10, but the youth court can only impose 'educational measures' on children aged 10 to 14. Juvenile prison sentences are restricted to those aged 15 and above: Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age'*, 2017, 17-8. In Belgium legislation provides minimum age thresholds for imposing different types of measures on children and young people who offend. A sentence of detention is only allowed for children above the age of 14: Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 418. Scotland has had a welfare approach to youth justice. There is no prison service for children under the age of 16: Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 364, 411, 419.

65 United Nations Committee on the Rights of the Child, 'General Comment No. 24 (*2019), replacing General Comment No. 10 (2007) Children's rights in juvenile justice*', [89].

see force in this view and consider there to be few arguments in favour of subjecting any child aged 10 to 17 to detention.

The CAG Working Group has been tasked with reviewing the minimum age of criminal responsibility; the minimum age at which a person can be charged and be held responsible for their actions by our criminal law. It is our view that this issue should remain the focus of the Working Group's review.

We note that a minimum age of criminal responsibility of at least 14 will ensure that Australia's primary school aged children will not be subject to deprivation of liberty. We would welcome further examination into wider reform youth justice in Australia which should include the use of punitive detention/deprivation of liberty for offending type behavior.

In the meantime, in recognition of the issues outlined above, all State and Territories should ensure that detention of children should only occur as a measure of last resort and for the shortest appropriate period of time.

5. Question 5

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.*

Repsonse: *There should be a continued investment in early intervention and prevention programs and strategies to work with children and their families if the age of criminal responsibility is raised to at least 14 years old. Aboriginal and Torres Strait Islander controlled organisations must be at the centre of program design and delivery for Aboriginal and Torres Strait Islander children and their families.*

5.1 Early and preventative interventions

Programs and frameworks based on early intervention and prevention to address the underlying causes of anti-social behaviour must be at the core of any youth justice strategy, including if the age of criminal responsibility is raised to at least 14.

The need for targeted and evidence-based prevention, supports and services for vulnerable children and their families is not controversial and has been emphasised by several recent State and Territory reports investigating youth justice.[66]

The NSW Youth Diversion Inquiry stated:

[66] Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 411-12; NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Finding 13; Atkinson, '*Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence: Version 2*', 2018, Recommendations 2-5.

> The Committee agrees that early intervention is key and that, wherever possible, funds should be used to address the underlying causes of offending before it occurs, rather than reacting afterwards.
>
> For this reason, the Committee has made findings and recommendations throughout the report in support of an early intervention approach … It has also recommended increased funding for youth homelessness services, mental health, and drug and alcohol services, measures to stop young people disengaging from school, and training and staff within schools to identify areas of concern.[67]

And as noted by the NT Royal Commission:

> The goal of early intervention is to reduce risk factors, strengthen protective factors and provide children and young people with life skills and family and community support. Prevention programs are aimed at reducing the likelihood a child may offend or reoffend through addressing individual risk factors for offending behaviour.[68]

It is important to note that in many cases, children will cease offending on their own accord, and any response to anti-social behaviour by children aged 10 to 13 must be proportionate and sensitive to the child's needs. The NT Royal Commission observed:

> Offering diversion for young offenders recognises that not all young offenders are or will ever become dangerous criminals, and that for some young people an early intervention at the right time can change patterns of behaviour. Diversion gives children and young people an opportunity to learn from their mistakes and correct their behaviours without resorting to the formal justice system.[69]

Any government response to children who come to the attention of the criminal justice system at a young age must consider their unique vulnerabilities and backgrounds, and ensure services and programs are adequately well-resourced to meet those needs.

Programs and frameworks addressing risk factors or problematic behaviours should strengthen 'protective factors', such as the school environment, family and peer networks, the individual by providing alternate strategies to dealing with high-stress situations or 'risk factors' such as drug and alcohol misuse or homelessness.[70]

Strategies should target a variety of protective factors simultaneously in a holistic, structured manner, with a focus on supporting those with the greatest amount of interaction with the child, such as parents, family. mkjm and teachers.[71] As was stated by the NT Royal Commission:

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67 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [4.246] – [4.247]. See also Finding 4, 13 and 32 of that review. Finding 13 states 'Early intervention is a key factor in diverting young people from the criminal justice system', xv.

68 Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 411

69 Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 249.

70 Noetic Solutions Pty Limited, Minister for Juvenile Justice (NSW), *'Review of effective practice in juvenile justice: report for the Minister for Juvenile Justice'*, 2010; Lambie and Randell, Clinical Psychology Review 33(3), 448-59, *'The impact of incarceration on juvenile offenders*', 2013; Australian Institute of Health and Welfare, *'Young people returning to sentenced youth justice supervision 2017–18'*, 2019; Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age*', 2017.

71 Noetic Solutions Pty Limited, Minister for Juvenile Justice (NSW), *'Review of Effective Practice in Juvenile Justice Report for the Minister for Juvenile Justice*', 2010, 36-8.

> While there is a '*paucity of robust evaluation data'* in Australia about the effectiveness of mainstream and Aboriginal-specific prevention and early intervention programs that address criminogenic needs, international analysis of prevention programs has found strong evidence in the capacity of family-based programs, including behavioural parent training, to reduce youth delinquency and antisocial behaviour. There is also strong evidence that family-focused interventions can be built into a public health approach to improving parenting capacity. School retention and engagement are important factors in reducing the risk of criminal justice involvement … Given the linkage between children at risk of offending and those who are the subject of child protection involvement, there is an obvious connection between early intervention aimed at child protection and youth offending improvement objectives.[72]

Another important factor, given the high numbers of young children with an intellectual disability and mental illness in detention, is frameworks to identify children with these needs. The under-diagnosis of disability and health issues in children not only hinders the ability of governments to assist these children to engage in society as healthy, functioning adults, but also risks later criminalisation of the most vulnerable children in our community. The NSW Youth Diversion Inquiry found that early screening is a key, but missing, part of early intervention in NSW. It made recommendations that the NSW Government identify and implement further opportunity for early screening, particularly in school settings. [73] PIAC agrees with this approach.

Departments and agencies involved in health, education, child protection, and social supports in partnership with families, communities and other key agencies and organisations, should have primary responsibility for prevention and early intervention in relation to responding to children at risk of entering the criminal justice system.

5.2 Aboriginal and Torres Strait Islander-controlled organisations

Aboriginal and Torres Strait Islander controlled organisations must be at the centre of the design of frameworks and the delivery of services to Aboriginal children and young people and their families. As the then CEO of the Lowitja Institute, Romlie Mokak, has stated:

> To maximise children's chances to lead healthy, fulfilling lives, governments must focus on early intervention and diversion services. In doing this, it is critical to prioritise engagement with Aboriginal and Torres Strait Islander Peoples, organisations and researchers, particularly in early design of programs and later monitoring of outcomes.[74]

In its submission to the NSW Youth Diversion Inquiry, the Aboriginal Legal Service (ACT/NSW) noted the particular importance of Aboriginal and Torres Strait Islander-controlled organisations in regional and rural areas:

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72 Emphasis in original. Commonwealth of Australia, '*Royal Commission into the Protection and Detention of Children in the Northern Territory*', 2017, 412.

73 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Recommendation 32.

74 Human Rights Law Centre, '*Media Release: Doctors, lawyers, experts unite in call to raise the age of criminal responsibility',* 2017. < https://www.hrlc.org.au/news/2017/11/20/experts-unite-in-call-to-raise-age-of-criminal-responsibility>.

> A frequent observation by participants was the lack of culturally appropriate programs available to Indigenous young people. Participants stated that the most effective programs are those that teach troubled youth about language, culture and (self) respect … Many participants emphasised the importance of Aboriginal-led organisations leading solutions in their communities. Geographical (and ideological/cultural) distance makes it difficult for organisations based in Sydney or regional centres to understand community-specific needs. Some participants argued that devolution of control over services to local Aboriginal-controlled organisations would contribute to genuine self-determination.[75]

The NSW Youth Diversion Inquiry found that 'place-based' approaches towards design and delivery of diversionary programs for Aboriginal and Torres Strait Islander children and families were key in ensuring engagement, legitimacy and success within communities.[76]

6. Question 6

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.*

Repsonse: *We recommend comprehensive program and services mapping by State and Territory governments to assist to identify the programs and responses that already exist in relation to addressing the underlying causes of offending-type behaviour*

There are already many early intervention and diversionary programs in place in NSW and around Australia.

We note generally that the NSW Youth Diversion Inquiry included a comprehensive discussion of existing government services and programs for children at risk of offending or problematic behaviour in addition to health programs and early intervention programs run by child protection and welfare agencies.[77] Some of these programs appear to be available to children under 10[78] and to children at risk of offending but not charged.[79]

Comprehensive service and program mapping should be completed by all State and Territory governments to assist identify the programs and responses that already exist in relation to

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75 Aboriginal Legal Service (NSW/ACT), *'Submission No 23: Inquiry into the adequacy of youth diversionary programs in NSW'*, February 2018, 14.

76 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [5.42].

77 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [1.25] – [1.62] and Appendix 6.

78 For example Getting on Track in Time – Got It! (a school-based early intervention program supporting children aged 5-8 years in their social and emotional development) and Breaking Barriers (a twice weekly fitness and mentoring program aimed for 7 to 16 year olds overseen by Aboriginal and Torres Strait Islander Elders and Mount Druitt police).

79 Ibid. Other examples include Youth on Track (see above) and Triple Care Farm (a youth withdrawal program and a youth residential rehab program for young people with co-occurring mental illness and drug and alcohol problems).

addressing the underlying causes of offending-type behaviour. This mapping exercise should include what is provided, the age groups that are targeted, the location and any cost of the service, referral criteria (including whether or not some form of contact with the criminal justice system is currently required) , referral pathways, any barriers to accessibility and service needs and available data on outcomes and evaluation

Outlined below are prorgams that have received support from stakeholders or positive feedback from evaluations.

Youth on Track

Youth on Track 'is an early intervention scheme for children aged 10 to 17 that identifies and responds to young people at risk of long-term involvement with the criminal justice system'.[80] The scheme is currently available in in seven locations across NSW including Blacktown, the Hunter, the Mid North Coast, the Central West, Coffs, Riverina and New England.[81]

Funded by government, the scheme is delivered by non-government organisations including Mission Australia and Centacare. The scheme utilises a multi-agency response which includes schools, community groups, police and other stakeholders in order to provide consistent services in a non-duplicated way.[82]

Youth on Track does not require an admission of wrongdoing or a finding of guilty in relation to an offence, but operates on a referral system through police and local schools. In addition, Youth on Track is voluntary. [83]

Discretionary referrals to the program can be made by schools and police youth liaison officers for young people who have received at least one caution.[84] Automatic referrals are made by Youth on Track screening officers for young people with at least two formal contacts with the police and who are assessed as having at least at 60% likelihood of reoffending.[85]

The NSW Youth Diversion Inquiry found that Youth on Track had stakeholder support, including from the NSW Advocate for Children and Young People and the President of the NSW Children's Court.[86] The initiative is currently undergoing evaluation and due to report in 2020 however the

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80 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [3.96].

81 NSW Department of Communities and Justice, '*Youth on Track locations*', 2019. Available at http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot-locations.aspx.

82 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [1.28].

83 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [1.28].

84 NSW Government, Department of Communities and Justice, *'Youth on Track Referrer Factsheet'*, p 1-2. < www.yout/ontrack.justice.nsw.gov.au/Documents/Youth%20on%20Track%20Referrer%20Fact%20Sheet%2023%20August%202019.pdf>.

85 Ibid.

86 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, [2.77], [3.49].

Inquiry recommended the program be expanded should the evaluation be positive, and that additional referral options should be considered in the meantime.[87]

Maranguka Justice Reinvestment Project

The Maranguka Justice Reinvest Project in Bourke is the first major justice reinvestment initiative in Australia,[88] operating as a partnership between the Bourke Aboriginal community and Just Reinvest NSW since 2013.[89] The project is 'community-led, using a collective impact framework that brings together a diverse range of organisations and services to work on a common agenda'.[90]

Reducing Aboriginal young people's contact with the criminal justice system was a priority founding goal of the Maranguka Initiative, the representative body of the Bourke Aboriginal community in relation to the project.[91] This was in part due to the high level of youth offending observed in Bourke, and community concern that not enough was being done to ensure existing programs and services provided to at risk children and families were sustainably funded, long-term and properly evaluated.[92]

The project was positively evaluated by the firm KPMG in 2018, whose report showed a 38% reduction in the number of juvenile charges in the five most common offence categories over a 1-year period, and a 27% reduction in bail breaches by young people.[93]

The Maranguka Support Model is a specific aspect of the project focusing on children and young people. It includes a school-based component, a family component, an out of school hours component, and an acute response and return to community component.[94] The school-based component is known as the Our Place Program (OPP), and is designed specifically for children with complex needs, who have disengaged or are disengaging from school and are at risk of entering the criminal justice system.[95] The out of school hours component, known as Save Our Sons/Sisters (SOS) emerged following community identification of school holidays as a high-risk

87 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Finding 7-8.

88 Just Reinvest NSW, *'Justice Reinvestment in Bourke'*. <www.justreinvest.org.au/justice-reinvestment-in-bourke/>.

89 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Submission No 21, 5.

90 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Submission No 21, 5.

91 Australian Law Reform Commission, ALRC Report 133, '*Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'*, 2017, [4.45].

92 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Submission No 21, 6. See also Australian Law Reform Commission, ALRC Report 133, '*Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'*, 2017, [4.43].

93 KPMG, 'Impact Assessment of the Maranguka Justice Reinvestment Project', November 2018, 22.

94 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Submission No 21, 26.

95 NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Submission No 21, 23.

period in relation to youth involvement in crime, and a need to ensure continued routine and engagement in OPP by participants following completion of a school term.[96]

7. Question 7

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.*

Repsonse: *The assumption that children aged 10 to 13 are able to routinely access services through the criminal justice system should be examined. We otherwise refer to our response to Question 5 and 6*

Raising the age of criminal responsibility should not involve children missing out on services. Rather, children who need support should, as discussed above, receive services *otherwise than through the criminal justice system.* Amongst other things, this will result in those services being more effective as they will not be undermined by the negative effects of interaction with the criminal justice system. Accessing services should not be contingent on contact with the criminal justice system.

This question assumes that involvement in the youth justice system automatically leads to children accessing services that they would otherwise not receive. This assumption should be examined. PIAC understands that it is not uncommon for children aged 10 to 13 to avoid or be advised against accessing services, if contact with that service would generate evidence (eg case notes) that the prosecution may then seek to use to rebut the presumption of *doli incapax*. We also understand that diversion processes are dependent on the admission of wrongdoing, which may also see a children miss out on referral to much needed supports at the time of charge.

We otherwise refer to our response to Questions 5 and 6 as to the strategies that may be required for children aged 10 to 13 if the age of criminal responsibility is raised to at least 14. If, in mapping current service provision, effective strategies are identified for children which are only presently available via involvement in the criminal justice system, these should be made available through other referral pathways.

8. Question 8

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?*

Repsonse:
The best means of keeping the community safe is addressing the underlying causes of offending behaviour. Other secure detention processes already exist in relation to the rare and limited circumstances this may be necessary.

[96] NSW Parliament, Legislative Assembly, Committee on Law and Safety, '*Adequacy of Youth Diversion Programs*', September 2018, Submission No 21, 26.

We recognise that community safety is a priority in considering reform in this area. It is essential that our responses are guided by evidence as to what works to make the community safer. As outlined above, what we know *does not work* is criminalising children.

Raising the age of criminal responsibility on the other hand, avoids the harm of criminalisation and places the emphasis on addressing the underyling causes of behaviour. A number of factors should be kept in mind.

Firstly, we must keep in mind the nature of youth offending by children aged 10 to 13.. As discussed in response to Question 2, rates of very serious offensing by young children are low and young people are generally more likely to commit property than person offences.[97]

Secondly, raising the minimum age of criminal responsibility to 14 has not been demonstrated to result in an increase in offending by children aged 10 to 13. Research into European Union crime data has shown, when compared to countries like Australia with a minimum age of 10, 'there are no negative consequences to be seen in terms of crime rates' when compared with countries have a minimum age of criminal responsibility of 14.[98]

Thirdly, the best means of keeping the community safe is addressing the underlying causes of offending-type behaviour through targeted diversion and rehabilitation. The link between community safety through diversion is recognised by the New South Wales Police Force:

> The fundamental role of police is to enfore the law and protect the community against crime. Interventions such as cautioning, conferencing and diversion into targeted rehabilitation programs are more effective that the traditional justice systems in preventing, reducing reoffending and impriving young people's life chances.[99]

As noted previously, we do not need a criminal law response in order to give children access to these mechanisms.

Fourthly, there are existing processes for keeping children in secure facilities in the rare circumstances that their behaviours pose a serious risk to the public and themselves. For example, in NSW, the Supreme Court can make orders for the detention of a young person in secure premises pursuant to its parens patriae jurisdiction if necessary for the protection and promotion of that child's welfare, with such powers extending to restraint and/or medication.[100] In

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97 Australian Institute of Health and Welfare*, 'Young people aged 10-14 in the youth justice system 2011-12',* 2013, 7.

98 Cunneen, Comparative Youth Penality Project, '*Arguments for Raising the Minimum Age*', 2017, 2 quoting Dunkel (1996) 38.

99 NSW Police Force, *'NSW Police Force Youth Strategy'*, January 2019, 12, <https://www.police.nsw.gov.au/__data/assets/pdf_file/0010/616816/YouthStrategy_D17.pdf>.

100 See for example the discussion in The Hon. Justice Brereton, '*Children's Issues in the Supreme Court: Address to the Children's Court of New South Wales Meeting*', (8 April 2016), 1-3, <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Brereton_20160408.pdf>.

addition, involuntary admission to a mental health unit is available under the *Mental Health Act 2007* (NSW) including in relation to children aged 10 to 13.[101]

9. Question 9

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?*

Repsonse: It is a matter for state, territory and Commonwealth governments to review their laws for any perceived gaps regarding the liability of persons who incite or encourage children under the minimum age of criminal responsibility to engage in criminal activity.

Each sSate and Territory have enacted laws that criminalise the act of inciting another person to commit a criminal offence. Some jurisdictions have laws that speficially criminalise the act of inciting a child to participate in criminal activity.[102] The scope of these laws differ between jurisdictions. Other provisions or principles concerning secondary or derivative liablity for offences committed by others (such as accessorial liability and joint criminal enterprise) may also be applicable.

If the age of criminal responsibility is raised to at least 14, it will be a matter for each State, Territory and Commonwealth government to carefully review the range of applicable laws in their jurisdiction to identify whether there are any gaps in relation to incitement and related offences in the case of children that fall under the minimum age of criminal responsibility.

10. Question 10

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.*

Repsonse: Nothing further.

11. Question 11

Question 9 - *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?*

Repsonse: Nothing further.

101 *Mental Health Act 2007* (NSW), pt 2.

102 See for example *Crimes Act 1900* (NSW) s 351A(2); *Crimes Act 1958* (Vic) s 321 LB.