e-brief

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Age of criminal responsibility

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1 Introduction

The debate surrounding the appropriate minimum age for criminal responsibility has intensified in recent years. It has been the subject of in depth consideration by the former Council of Attorneys-General, with the Meeting of Attorneys-General agreeing in November 2021 to support the development of a proposal to increase the minimum age of criminal responsibility from 10 to 12. The ACT Government has committed to raising the age of criminal responsibility in that jurisdiction from 10 to 14 years. In NSW, David Shoebridge MLC introduced the Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill 2021 on 11 November 2021. This private member's bill seeks to raise the age of criminal responsibility in NSW to 14, in addition to providing that children under the age of 16 are not to be detained or imprisoned.

This paper provides an overview of the current law in NSW, and includes data on 10 to 14 year olds who come into contact with the criminal justice system. It refers to recent inquiries, parliamentary and otherwise, that have considered the age at which criminal responsibility should apply. It discusses issues to be considered and approaches that may be adopted should NSW pursue reform in this area.

2 Current position in NSW

The common law has long included the principle that children who commit wrong should be treated differently to adults. The principle has existed since ancient times, gradually developing into the common law presumption that children lack sufficient capacity to be guilty of a crime.[1]

In NSW, a child under the age of 10 years is considered incapable of crime. Section five of the *Children (Criminal Proceedings) Act 1987* currently states:

> It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.

Prior to the passage of the *Children (Criminal Proceedings) Act 1987*, the age of criminal responsibility in NSW was eight.[2] The

minimum age of criminal responsibility is currently set at 10 in all states and territories in Australia, as well as federally.[3]

Whilst children from the age of 10 upwards may potentially be arrested, remanded in custody, convicted by the courts, and detained, the youth justice system in NSW seeks to divert youth from the full force of the criminal justice system. The *Young Offenders Act 1997* sets out procedures such as youth justice conferences, cautions and warnings as a preferred way to deal with children who commit certain offences rather than court proceedings. Section seven of the Act sets out the principles that are to apply to children – the least restrictive form of sanction is to be applied, and criminal proceedings are not to be instituted if there is an alternative and appropriate means of dealing with a matter.

2.1 Doli incapax

Whilst there is an absolute presumption that a child under the age of 10 does not have the capacity to commit a crime, the common law rebuttable presumption of *doli incapax* applies between the ages of 10 and 14. The principle of *doli incapax* presumes that a child between the ages of 10 and 14 does not possess the necessary *mens rea* or mental element for an offence.

It should be stressed that *doli incapax* is not a defence but a rebuttable presumption. The Law Council of Australia has described the main elements of the test for rebutting the presumption as:[4]

- the prosecution bears the onus of proof for raising and rebutting the presumption;
- the prosecution must satisfy the court that the child knew the act was 'seriously wrong' as opposed to merely 'naughty' or 'mischievous';
- the prosecution cannot rely solely on evidence of the act itself to prove the child's knowledge;
- the evidence must be relevant at the time of the act; and
- the evidence must be strong and clear beyond all doubt or contradiction.

The High Court of Australia discussed the principle of *doli incapax* in *RP v The Queen* [2016] HCA 53, with Kiefel, Bell, Keane and Gordon JJ explaining (at para 8):

> 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.
>
> ….
>
> From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating

> the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong".

Doli incapax applies in all of the Australian states and territories, with it being a principle of common law in NSW, South Australia and Victoria. It is enshrined in statute in the remaining jurisdictions.

3 Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill 2021 (NSW)

On 11 November 2021, David Shoebridge MLC introduced the Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill 2021 into the Legislative Council. The Bill seeks to amend the *Children (Criminal Proceedings) Act 1987* in two ways:

1. to amend section five to raise the minimum age of criminal responsibility to 14; and
2. to provide that children under the age of 16 years are not to be detained or imprisoned as a penalty for a criminal offence (proposed section 5A). This includes not being held on remand whilst awaiting proceedings.

The Bill still allows a court to impose a non-custodial sentence as a penalty for a criminal offence. The court may also deal with a person under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* or other legislation that provides for the detention of a person because of a mental health or cognitive impairment.

Mr Shoebridge MLC, in the Second Reading speech for the Bill, argued:[5]

> Children do not belong in prisons. They belong at home, at school, playing with their friends. They deserve a chance to learn from their mistakes and they deserve the help that they need to overcome disadvantage. We should seek to reduce harm. A justice system should be based on this fundamental principle. The current one is not. The fact is the laws in place right now will see 10-year-old children being locked up. They breach our human rights obligations and are out of step with the global consensus. They do not work to keep the community safe, nor do they stop young people from offending and reoffending. Our criminal justice laws for children are broken. The youngest of those children are still losing their baby teeth. They do not have their pen licences, let alone their driver licences. Some of them spend their first night away from their families in a prison cell. They are still kids.

When explaining the rationale for the Bill, Mr Shoebridge also referred to:

- medical opinion regarding the development of children's brains;
- the number of children who are detained due to bail being refused;
- the disproportionate impact on children from disadvantaged communities;
- the over-representation of First Nations children; and
- the greater benefits that result from investing in appropriate supports rather than in detention centres.

4 Statistics

4.1 Offences

This section sets out various statistics relating to offences committed by 10 to 13 year olds (with 10 being the current age of criminal responsibility and 14 being the upper limit of the *doli incapax* presumption). According to the Australian Bureau of Statistics, 2.3% of all offenders in Australia in 2020-21 were between the ages of 10 and 14 (8,214 offenders were less than 14 years old).[6] The most common principal offences for 11, 12 and 13 year olds were acts intended to cause injury, theft, and unlawful entry with intent. For 10 year olds, the most common offences were unlawful entry with intent, property damage and environmental pollution, and acts intended to cause injury.

Table 1 shows the number of children, by age group, who went to court in NSW in 2020. This data was provided by BOCSAR to the UNSW Centre for Crime, Law and Justice.

Table 1: Number of young people aged 10 to 17 proceeded against to court by NSW Police, 2020

Table 1: Number of young people aged 10-17 years proceeded against to court by the NSW Police by age and offence type, 2020[18]						
Offence type		**10-11 years**	**12-13 years**	**14-15 years**	**16-17 years**	**Total 10-17 years**
Homicide		**0**	**0**	3	9	12
Assault	Assault common	**6**	**104**	294	353	757
	Actual bodily harm	**0**	**39**	181	251	471
	Grievous bodily harm	**0**	**4**	34	62	100
	Assault Police	**0**	**13**	41	88	142
Sexual offences	Sexual assault	**6**	**21**	58	61	146
	Indecent assault, act of indecency etc	**2**	**8**	44	41	95
Abduction and kidnapping		**1**	**2**	2	11	16
Robbery	Without a weapon	**1**	**29**	176	160	366
	Weapon not a firearm	**0**	**28**	122	111	261
	Firearm	**0**	**0**	4	6	10
Intimidation, stalking and harassment	Riot and affray	**1**	**13**	86	123	223
	Violent disorder	**0**	**0**	1	4	5
	Telecommunications offence	**0**	**5**	6	15	26
	Bullying/harassment or intimidation	**10**	**90**	364	389	853
	Stalking	**0**	**0**	1	2	3
	Threats against police	**0**	**0**	3	2	5
Other offences against the person		**0**	**3**	5	11	19
Theft	Break and enter dwelling	**2**	**33**	185	191	411
	Break and enter non-dwelling	**3**	**31**	141	126	301
	Receiving or handling stolen goods	**2**	**17**	82	105	206
	Motor vehicle theft	**0**	**25**	210	266	501
	Steal from motor vehicle	**2**	**21**	135	136	294
	Steal from retail store	**7**	**53**	307	247	614
	Steal from dwelling	**1**	**5**	21	16	43
	Steal from person	**3**	**10**	30	22	65
	Fraud	**1**	**13**	100	129	243
	Other theft	**0**	**17**	99	75	191
Arson		**0**	**0**	15	14	29
Malicious damage to property		**9**	**62**	222	224	517
Drug offences		**0**	**2**	110	284	396
Prohibited and regulated weapons offences		**0**	**12**	32	69	113
Disorderly conduct		**2**	**68**	190	169	429
Liquor offences		**0**	**0**	0	2	2
Pornography offences		**0**	**0**	3	2	5
Against justice procedures	Escape custody	**0**	**0**	3	6	9
	Breach Apprehended Violence Order	**4**	**51**	206	242	503
	Breach bail conditions	**14**	**204**	657	593	1468
	Resist or hinder officer	**0**	**4**	38	72	114
	Other offences against justice procedures	**1**	**2**	7	12	22
Driving offences		**0**	**19**	121	797	937
Transport regulatory offences		**0**	**3**	17	12	32
Other offences		**0**	**13**	53	62	128

Source: UNSW Centre for Crime, Law and Justice, Replacing the Youth Justice System for Children Aged 10 to 13 years in NSW: A 'best interests' response, September 2021, p 15.

The main offences for which matters proceeded to court for 12 to 13 year olds were:

- breach bail conditions (204 persons);
- common assault (104 persons); and
- bullying/harassment or intimidation (90 persons).

In relation to 10 and 11 year olds, the main offences that proceeded to court were:

- breach bail conditions (14 persons);
- bullying/harassment or intimidation (10 persons); and
- malicious damage to property (9 persons).

The UNSW Centre for Crime, Law and Justice highlights how the large majority of offences for which children are proceeded against are not crimes that cause immediate physical harm to others.[7] They note that theft offences, justice procedure offences, and public order offences (including property damage and disorderly conduct) account for 61% of appearances. Inflicted interpersonal violence (assaults, sexual offences) offences account for 15%, with two-thirds of these matters involving common assault.

4.2 Subject to supervision

In 2019/20, 105 children aged 10 to 13 years spent time in detention in NSW and 84 were subject to community-based supervision.[8] Indigenous children were significantly overrepresented amongst this age group, comprising 56% of 10 to 13 year olds who spent time in detention and 49% of those who were subject to community-based supervision.

According to the Australian Institute of Health and Welfare, 5% of young people under supervision in Australia in 2019-20 were aged 10 to 13.[9] Table 2 shows the number of people aged 10 to 13 years (both Indigenous and non-Indigenous) under supervision on an average day in NSW.

Table 2: Young people under supervision on an average day, NSW 2015-16 to 2019-20

Age	2015-16		2016-17		2017-18		2018-19		2019-20	
	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind
10	-	-	-	-	-	-	-	-	-	-
11	2.5	2.5	0.7	0.7	0.8	0.8	1.3	1.2	0.5	0.5
12	8.3	5.0	5.1	3.9	4.6	4.1	5.2	4.1	5.0	3.4
13	50.0	30.3	38.4	24.7	24.7	16.4	33.2	20.6	28.3	14.2

Source: Australian Institute of Health and Welfare, *Youth Justice in Australia 2019–20*, AIHW, Canberra, 28 May 2021, Supplementary tables - State and territory summary, Table 128.

Supervision may take the form of community-based supervision or detention. The following tables show this data for 10 to 13 year olds in NSW.

Table 3: Young people under community-based supervision on an average day, NSW, 2015-16 to 2019-20

Age	2015-16		2016-17		2017-18		2018-19		2019-20	
	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind
10	-	-	-	-	-	-	-	-	-	-
11	2.4	2.4	0.5	0.5	0.5	0.5	0.6	0.6	0.2	0.2
12	7.4	4.4	4	2.9	3	2.6	4.1	3.5	3.7	2.2
13	42.5	25.8	33	20.8	19.8	13	27.4	16.1	24.5	11.8

Source: Australian Institute of Health and Welfare, *Youth Justice in Australia 2019–20*, AIHW, Canberra, 28 May 2021, Supplementary tables - State and territory summary, Table 128.

Table 4: Young people in detention on an average day, NSW 2015-16 to 2019-20

Age	2015-16		2016-17		2017-18		2018-19		2019-20	
	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind	non-Ind	Ind
10	-	-	-	-	-	-	-	-	-	-
11	0.1	0.1	0.2	0.2	0.3	0.3	0.7	0.6	0.3	0.3
12	1	0.6	1.1	1.1	1.6	1.5	1.2	0.7	1.4	1.2
13	7.9	4.7	5.8	4.2	5.1	3.6	6.1	4.6	3.9	2.5

Source: Australian Institute of Health and Welfare, *Youth Justice in Australia 2019–20*, AIHW, Canberra, 28 May 2021, Supplementary tables - State and territory summary, Table 128.

4.3 Age of first contact with the criminal justice system

BOCSAR conducted a study that looked at those who came into contact with the NSW criminal justice system between the ages of 10 and 33. It found that, between the ages of 10 and 12, the proportion of Indigenous Australians who had their first contact with the criminal justice system was 30 to 56 times higher than that of non-Indigenous Australians.[10] This ratio then quickly dropped from the age of 12, to 7:1 at age 13, and then 1.1:1 by 21 years. According to BOCSAR (p 8):

> …the fact that contact with the criminal justice system before the age of 15 is a powerful signal of later persistent contact with the court and custodial systems underscores the importance of early intervention to reduce the number of people who appear repeatedly in our court and prison systems and reduce the level of demand on the criminal justice system.

5 International: age of criminal responsibility

In 2019, the UN Committee on the Rights of the Child released a general comment on children's rights in the child justice system which recommended that the age of criminal responsibility for all nations be increased to 14 (the Committee noted that this was the most common minimum age internationally).[11] Previously, the UN Committee on the Rights of the Child had recommended 12 as the minimum age of criminal responsibility. The

Committee on the Rights of the Child urged Australia in 2019 to "raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 at which *doli incapax* applies".[12]

One of the criticisms commonly made about the minimum age of criminal responsibility in Australia is that it is lower than the international standard. The table below shows the age of criminal responsibility in a number of countries:

Table 5: Minimum age of criminal responsibility

	Age
England, Wales & Northern Ireland	10 (doli incapax was abolished in 1998)
Canada	12
The Netherlands	12
Ireland	12
France	13
Poland	13
Austria	14
Germany	14
Italy	14
Russia	14
Denmark	15
Finland	15
Iceland	15
Norway	15
Sweden	15
Portugal	16
Belgium	18

Source: Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review*, 2 March 2020, p 19.

However, the UNSW Centre for Crime, Law and Justice has warned of the dangers of a simple comparison between jurisdictions, as there are various rules and exceptions that apply in a number of jurisdictions, and the interplay between these and the minimum age need to also be considered.[13] For example, whilst the minimum age of criminal responsibility in Argentina is 16, they may be detained under youth care provisions.[14] In New Zealand, a 10

or 11 year old may be prosecuted, but only in relation to murder or manslaughter.[15] They may be prosecuted for any offence from 14 years onwards.[16]

Leenknecht et al conducted a comparison of Northern Ireland, New Zealand, the Netherlands, Belgium, Austria and Argentina. They discuss how, in these countries, children under the minimum age of criminal responsibility who commit an offence are still subject to the national youth welfare or civil laws.[17] The minor must be considered to be in a state of need or have behavioural/psychological problems before measures can be imposed.

The UNSW Centre for Crime, Law and Justice argues that:

> …the specific laws and practices of overseas jurisdictions have relatively limited capacity to guide the development of a replacement response to 'offending behaviours' [of] children aged 10-13 years in NSW. There are too many variables in play – particularly when the imperative is possible 'translation' to a federation like Australia, with a colonial history and unaddressed legacies with respect to the self-determination of Aboriginal and Torres Strait Islander peoples.[18]

Nonetheless, they highlight that:

> …one thing is very clear and vitally important: in countries that manage their juvenile/youth justice systems where the minimum age of criminal responsibility is substantially higher than it is in NSW/Australia, 'it can be shown that there are no negative consequences to be seen in terms of crime rates'.[19]

6 Past inquiries

This section considers recent inquiries, parliamentary and otherwise, that have considered issues associated with the minimum age of criminal responsibility.

6.1 New South Wales

6.1.1 Committee on Law and Safety

The Legislative Assembly Committee on Law and Safety conducted an inquiry in 2017 and 2018 into the adequacy of diversionary programs to deter juvenile offenders from long-term involvement with the criminal justice system. One of the recommendations of the Committee in its 2018 report was that the NSW Government conduct a review, in consultation with all relevant stakeholders, to examine whether the current age of criminal responsibility and the age at which a child can be detained should be increased in NSW (recommendation five). The NSW Government responded in August 2019, noting that NSW was participating in a national working group examining whether the age of criminal responsibility should be raised. It advised that the NSW Government would further consider the matter once the working group had concluded. The Working Group is discussed below.

The Committee also made a number of other recommendations and findings about factors that would divert young people from contact with the criminal justice system, including:

> **Recommendation 15**: That officers of the NSW Police Force receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention.
>
> **Recommendation 16**: That the NSW Government consider whether the Bail Act 2013 should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail.
>
> **Finding 4**: The NSW Government should increase the availability of holistic, community-based programs and services in rural, regional and remote NSW that focus on diversion, early intervention and the prevention of youth offending, and address the underlying causes of crime.
>
> **Finding 13**: Early intervention is a key factor in diverting young people from the criminal justice system.

6.1.2 Legislative Council Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

The Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody recommended in its 2021 report that both the age of criminal responsibility and minimum age of children in detention be increased to at least 14 (recommendation 11). The Committee noted that "medical advice is very clear that children under this age have not yet developed the brain function to fully understand the consequences of their actions" (para 3.163) and stressed "the importance of ensuring children are diverted away from the criminal justice system and children under 14 are not placed in juvenile detention… in line with the stance taken by other countries and the United Nations Committee on the Rights of the Child" (para 3.164). The Committee clarified that it did not intend for a gap to be created and so recommended:

> That the NSW Government establish an inter-agency and inter-department taskforce to develop a cohesive, whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children between the ages of 10 and 14 (recommendation 12).

The Government's response to these recommendations stated that (p 8):

> The age of criminal responsibility is being considered at a national level and was discussed at the Meeting of Attorneys-General in March 2021. NSW supports this process, noting that any reform to the minimum age of criminal responsibility in NSW would need to be in the best interests of the community, with the safety of the community a key consideration. Appropriate alternatives to the criminal justice system would need to be available to address offending behaviour by those deemed too young to be criminally responsible for their actions.

6.2 Other jurisdictions

6.2.1 Royal Commission into the Protection and Detention of Children in the Northern Territory

The Royal Commission into the Protection and Detention of Children in the Northern Territory was established in August 2016 and considered the

treatment of children detained in detention facilities and child protection. One of the issues considered by the Royal Commission was whether the age of criminal responsibility should be increased from 10 to 12 so as to more accurately reflect current understanding of brain development and reduce the number of children before the courts.[20]

The Royal Commission subsequently recommended that the minimum age for criminal responsibility be increased to 12, with a rebuttable presumption applying to children between the ages of 12 and 14.[21] It also recommended that youth under the age of 14 years not be ordered to serve a time of detention other than where they have: been convicted of a serious and violent crime against the person; present a risk to the community; and the sentence has been approved by the President of the proposed Children's Court (recommendation 27.1).

The Northern Territory Government has indicated its in principle support for this recommendation.

6.2.2 Reviews in Queensland

Atkinson Report on Youth Justice in Queensland

Former Queensland Police Commissioner and former Commissioner on the Royal Commission into Institutional Responses to Child Sexual Abuse, Bob Atkinson, was appointed to provide advice on the progress of the Queensland Government's youth justice reforms. The Atkinson Report on Youth Justice was published in June 2018 and recommended (recommendation 68):

> That the Government support in principle raising the MACR to 12 years subject to:
>
> a. national agreement and implementation by state and territory governments,
>
> b. a comprehensive impact analysis,
>
> c. establishment of needs based programs and diversions for 8-11 year olds engaged in offending behaviour.

It further recommended that the Queensland Government "advocate for consideration of raising the MACR to 12 years as part of a national agenda for all states and territories for implementation as a uniform approach" (recommendation 69).

Queensland Community Support and Services Committee

The *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (Qld) proposed to raise the age of criminal responsibility in Queensland from 10 to 14. The Queensland Community Support and Services Committee examined the Private Member's Bill, considering the policy to be achieved by it. It published its report on the Bill in March 2022.

The Committee noted that many of the issues relating to the objectives of the Bill were of great concern to it and to the wider community. However, it recommended that the Bill not be passed (recommendation 1):[22]

> Considering all evidence before the committee and noting the importance of appropriately balancing the welfare of children with community safety, as well as the need to address the complex problems that give rise to children entering the justice system, the committee considers there is more work to be done before the minimum age of criminal responsibility is raised in Queensland.

Nonetheless, it recommended that the Queensland Government continue to work with the other Australian Attorneys-General to consider the increase of the minimum age of criminal responsibility from 10 to 12 (recommendation 3).

6.2.3 Australian Capital Territory Review

On 20 August 2020, the ACT Legislative Assembly passed a motion to raise the age of criminal responsibility in the ACT to 14.[23] Mr Rattenbury when introducing the motion noted:

> …I am asking for us to commit our in-principle support for the raising of the age of criminal responsibility, in full recognition of the need to resource new programs and implement new policy frameworks to support young offenders, and to commission preliminary work to prepare the legislative, policy and resourcing frameworks required for an incoming Assembly to legislate for raising the age of criminal responsibility from 10 to 14 years of age.[24]

Raising the age of criminal responsibility was subsequently included as an area of agreed priority legislative reform in the ACT Labor and ACT Greens Parliamentary and Governing Agreement for the 10th Australian Capital Territory Legislative Assembly.

The Legislative Assembly commissioned a review of the service system in the ACT to identify service gaps, implementation issues, and alternative models that would meet the needs of 10 to 13 year olds. A review report was published in August 2021.[25] The report emphasises the need for shared responsibility for children's wellbeing and safety, arguing that there is a need for comprehensive systems reform, "building a stronger, more coordinated service system, ensuring early identification of needs and providing more universal support to meet those needs".[26]

In June 2021, the ACT Government released a discussion paper on raising the minimum age of criminal responsibility which included the following questions for consideration:

- Should there be any exemptions or exceptions to the new minimum age of criminal responsibility for children and young people that engage in repeated or very serious harmful behaviours?
- What services should be introduced, reoriented or expanded to support children and young people who demonstrate harmful behaviours?
- How should children and young people under the minimum age of criminal responsibility be supported before, during and after crisis points?
- How should this reform consider the rights of victims?

Feedback closed on 5 August 2021 and is being considered by the ACT Government.

7 Council of Attorneys-General

On 23 November 2018, the Council of Attorneys-General agreed that "it would be appropriate to examine whether to raise the age of criminal responsibility from 10 years of age" and that a working group would be established to review this matter and report within 12 months.[27] An interjurisdictional working group of officials was subsequently established, chaired by the Western Australian Department of Justice with representation from each state, territory and the Australian Government.

On 29 November 2019, the Council of Attorneys-General (Communique):

- noted that there is strong interest in the review of the age of criminal responsibility, and recognises the importance of the views, knowledge and expertise of interested stakeholders and individuals;
- agreed that the Working Group undertake targeted and public consultation as soon as practicable;
- noted that the Working Group will continue to progress the review, taking into account stakeholder contributions, and will provide a report with recommendations to the Council of Attorneys-General in 2020.

At the Meeting of Attorneys-General on 12 November 2021, the State Attorneys-General supported the development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and discussion of implementation requirements.[28] The Communique noted that the Northern Territory will continue to work on reforms including adequate and effective diversion programs and services as part of its commitment to raising the minimum age of criminal responsibility to 12. It recognised that the ACT Government has committed to raising the age, and is currently working on its own reforms.

The NSW Attorney General, the Hon Mark Speakman MP, noted in a Budget Estimates hearing on 16 March 2022, that:

> The meeting of attorneys-general in November resolved to work up a model of what raising the age to 12 would look like. We are going through that MAG [Meeting of Attorneys-General] process at the moment. There is no decision in principle by the Government to raise the age or not to raise the age. We are looking at what a model will look like, the attitude of other States and Territories and then make a decision…. If there is a prospect for a harmonised approach across the country, that is something in the first instance I would want to explore and I think that is something that other attorneys-general want to explore as well.

The response to November 2021 announcement by the Meeting of Attorneys-General has been mixed. Whilst many commentators and stakeholders are pleased that the minimum age of criminal responsibility is to increase, a number argue that it does not go far enough. For example, the Law Council of Australia welcomed the decision to support development of a proposal to increase the minimum age of criminal responsibility from 10 to 12 "but believes an opportunity to bring Australia into step with international

human rights standard has been missed".[29] It argues "The minimum age of criminal responsibility should be raised to 14, in all jurisdictions, for all offences, without exception". It warns that a low age of criminal responsibility does not make communities safer, that it begins a cycle of criminalisation, and that children remain in cycles of disadvantage and imprisonment due to lack of early critical support services including health, disability, rehabilitation and family supports.

The Public Interest Advocacy Centre has highlighted the minimal impact of increasing the age of criminal responsibility to 12, as only six of the 105 children under 14 who were detained in NSW in the previous year were under the age of 12.[30]

The UNSW Centre for Crime, Law and Justice believes the debate should be reframed noting that:[31]

> The stated position [of the Council of Attorneys General] tends to assume that raising the MACR will yield deficits and, therefore, cannot be contemplated unless 'alternative' responses are in place to do the work of the criminal justice system. While we embrace the opportunity to contribute to the conceptualisation of a suite of responses that replace the existing youth justice system for 10-13 year olds, our starting position is quite different: raising the MACR will yield benefits, including for children, their families and the wider community.

8 Issues to be considered

There have been increasing calls in Australia for the minimum age of criminal responsibility to be raised, including a national 'raise the age' campaign. This campaign advocates for an age of criminal responsibility of at least 14 years and is supported by more than 70 organisations, including the Law Council of Australia, Australian Medical Association, Amnesty International, Public Health Association of Australia, and National Aboriginal and Torres Strait Islander Legal Services, amongst many others. Thirty-two health and medical organisations, including the Australian Medical Association, have written an open letter (6 December 2021) to the Premiers, Chief Ministers, Attorneys-General and Health Ministers setting out the various health reasons and studies that support increasing the age of criminal responsibility to a minimum of 14 years of age.

According to the Law Council of Australia:[32]

> The current low minimum age of criminal responsibility is out of step with international human rights standards and the most recent medical evidence on child cognitive development. It also ignores the large body of social research highlighting the harmful effects of early contact with the criminal justice system, including entrenchment and recidivism, and a correlation with being less likely to complete education or find employment. Further, it ignores the social determinants that lead to certain cohorts, such as First Nations children, children in out-of-home care, and children with significant health issues, being disproportionately represented in the criminal justice system.

Many commentators have highlighted the inconsistencies between the ages at which a child is considered mature enough to join Facebook, vote, get married, and leave school, compared to the young age at which they may be considered criminally responsible.[33]

The following section provides a brief overview of some of the issues relevant to the debate about raising the age of criminal responsibility. However, the intersectionality of many of these issues should be noted.

8.1 Cognitive development

The Australian Medical Association and Law Council of Australia, Minimum age of criminal responsibility: Policy Statement calls on all levels of government to increase the minimum age of criminal responsibility to 14. This is due to a belief that, amongst other things, setting the age of criminal responsibility at 10 "is out of step with medical consensus regarding child brain development".[34] They state:[35]

> Children under the age of 14 are undergoing significant growth and development, which means they may not have the required capacity to be criminally responsible. Scientific advances related to the understanding of child cognitive development favour a higher MACR, taking into account the time taken for the adolescent brain to mature. Research shows immaturity can affect a number of areas of cognitive functioning "including impulsivity, reasoning and consequential thinking".

Cunneen discusses the various developmental arguments and the research and studies which underpin it in the research report for the Comparative Youth Penality Project.[36] He refers to the neurological immaturity of youth, noting the lack of impulse control and attraction to risk that often characterises adolescent behaviour. He further outlines how the pace at which children develop the capacity for criminal responsibility differs between children. In addition, an individual child may show differences in decision-making in various circumstances.

The UN Committee on the Rights of the Child has drawn attention to developmental and neuroscience evidence, stating:[37]

> 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…. 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. State parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.

8.2 The pathway between out of home care and the criminal justice system

A number of studies have examined the links between children in out of home care and contact with the criminal justice system. The ACT Review Report described the existence of a pathway between the child protection and youth justice systems, "making children who come to the attention of child protection authorities at least 12 times more likely than other children to offend and to come under the supervision of youth justice services".[38]

McFarlane examined a sample of 160 children who appeared on criminal charges before the NSW Children's Court at Parramatta.[39] She found that

49.5% of the 160 children in the sample had spent time in out of home care, indicating a significant overrepresentation of children from out of home care.[40] She acknowledges that:[41]

> …children in care in the current study experienced greater rates of all forms of trauma compared to the non-care group, particularly in relation to abuse and neglect, mental illness and cognitive impairment, poor educational attainment and bereavement.

McFarlane describes the 'care-criminalisation' of some children in out of home care, highlighting that:[42]

> …many children in OOHC came into contact with the CJS, were arrested and charged, and subsequently remanded in custody for offences that arose out of and were unique to the care environment. This is consistent with Australian research that has found that many charges laid against the OOHC cohort comprise matters almost exclusively arising from the care environment.

She also raises the significant over-representation of Indigenous children in the cohort studied as a matter of serious concern.[43]

For further reading see: Victorian Sentencing Advisory Council, Crossover kids: vulnerable children in the youth justice system, Report 1, Melbourne, 2019. This report assesses the prevalence of sentenced and diverted children in the Children's Court of Victoria who were known to child protection. It also examines the overrepresentation of Aboriginal and Torres Strait Islander children among children known to both the youth justice and child protection systems.

8.3 Complex needs of offenders

One of the key themes identified in the ACT Review Report was the complexity of the needs of children who offend or who are at risk of offending. The report states:[44]

> Children who are at risk of offending experience multiple health and mental health challenges, often with significant underlying trauma and disability. They are known to disengage from school early and to develop problems with substance misuse and are, too often, from Aboriginal and Torres Strait Islander backgrounds or from families where parents have been incarcerated. Many of these children are involved with the child protection system and have a history of family violence (as victims and/or perpetrators), sexualised behaviours and sexual exploitation. They are also at risk of homelessness.
>
> By the time children interact with the youth justice system, unmet needs have often multiplied and become more complex.

The report stresses that:[45]

> Children who interact with the youth justice system come with a range of complex health, mental health and cognitive disabilities that are often exacerbated by those interactions. Raising the minimum age of criminal responsibility will not solve all the problems associated with the criminalisation of children with mental health disorders and/or cognitive impairments. However, it does provide an opportunity to avoid criminalising young children with complex needs and entrenching them in the youth

> justice system at an early age. It also provides an opportunity to consider more effective responses to meeting children's needs in the community.

Such a conclusion is also supported by Cunneen in the research report for the Comparative Youth Penality Project Research Report:[46]

> Our research for the Comparative Youth Penality Project shows that the needs of young people in juvenile justice are multiple and complex: they have come from communities of entrenched socio-economic disadvantage; and have fragmented experiences of education which are marked by periods of exclusion and expulsion, and result in poor educational outcomes. They have precarious living arrangements including homelessness and/or placements in Out of Home Care (OOHC). They have experienced drug and alcohol related addiction; struggle with unresolved trauma; and have one or more disabilities.

Whilst acknowledging that raising the age of criminal responsibility does not offer a quick fix for these issues, Cunneen argues that it will nonetheless:[47]

> …open a door to firstly, not criminalising young children with mental health disorders and/or cognitive impairments and entrenching them at an early age in the juvenile justice system; and, secondly, provide the space for a considered response as to how these young people should be responded to in the community. At present, 'systemic and welfare responses appear to have only limited impact on preventing early contact with the criminal justice system from escalating into a cycle of incarceration and re-incarceration'. Indeed, criminal justice agencies have become 'normalised as places of disability management and control'. Raising the minimum age will set a higher barrier and force us to consider more appropriate responses to this particularly vulnerable group of children".

See also: T Whitten et al, Children's contact with police as a victim, person of interest and witness in New South Wales, Australia, *Australia and New Zealand Journal of Criminology*, 53(3) 2020, pp 387-410.

8.4 Cementing the criminalisation pathway

One of the arguments that support an increase in the age of criminal responsibility is that it may prevent the entrenching of criminal behaviour in young offenders who would otherwise 'grow out' of such behaviour.

The UNSW Centre for Crime, Law and Justice argues that the behaviours of children that are treated as offending may be better viewed as indications of need.[48] It asserts that:[49]

> …raising the minimum age of criminal responsibility from 10 years to 14 years should be a priority for youth justice reform in NSW, and in Australia more generally. Children aged 10-13 years should not be in contact with the youth justice system because this experience is likely to compound, rather than reduce, 'offending' behaviours. That is, actions based on a child's 'criminal responsibility' actually do more harm than good. The consequences of early age criminalisation can include an increase in problematic behaviours and a greater risk of 'offending behaviours' in adulthood. International human rights standards and the research literature on best-practice responses to 'offending behaviour' by young children support a change to the MACR, and our survey of existing programs in NSW shows that non-punitive community-based responses outside the youth justice system are feasible and effective.

The Law Council of Australia has similarly addressed the counter-productiveness of a lower age of criminal responsibility:[50]

> The evidence strongly suggests that a low minimum age of 10 years old does not make our communities safer. Instead, it is likely to entrench criminality and creates cycles of disadvantage that heighten reoffending rates. Contact with the criminal justice system is criminogenic for children. The earlier a child comes into contact with the criminal justice system, the more prolonged their involvement will be, and the less positive their life choices will be. Children who come into contact with the criminal justice system are less likely to complete their education or find employment and are seven times more likely to become adult offenders.

8.5 Over-representation of Indigenous youth

A number of commentators have voiced concerns about the significant over-representation of Indigenous youth amongst those who come into contact with the criminal justice system and suggest that reducing the age of criminal responsibility may be one way of addressing this.[51] The Law Council of Australia identified the factors that contribute towards the overrepresentation of Indigenous children in the criminal justice system as including "significant rates of mental health disorders, cognitive disabilities, and hearing and language impairments, as well as discrimination, socioeconomic disadvantage and intergenerational trauma, which are the products of colonisation and successive government policies".[52] Cunneen in the Comparative Youth Penality Project Research Report refers to NSW Children's Court data for 2006 to 2015 which found that:[53]

- Indigenous children comprised the majority of young people before the courts in the 10 to 15 year old age bracket;
- Indigenous males comprised 73% of all males before the courts in the 10 to 12 year old age bracket; and
- Indigenous females comprised 60% of all females before the courts in the 10 to 12 year old age bracket.

8.6 Inadequacies of *doli incapax*

The doctrine of *doli incapax* is associated with various practical difficulties that hinder its ability to appropriately protect children from the force of the criminal justice system. According to Cunneen, there is overwhelming evidence that *doli incapax* does not protect young, vulnerable children and is not fit for purpose.[54]

Fitzgibbon and O'Brien have highlighted how scholarly analysis of, and political debate about, *doli incapax* is limited, with little known "about its operation and the extent to which it effectively delivers upon its aim of protecting very young children from criminal liability".[55] They identify some of the issues resulting from its application, including that children may be held on remand prior to a *doli incapax* assessment being completed:[56]

> This is concerning in light of the body of Australian research that documents the adverse effects experienced by children on remand, including separation from family and community, disruption to education, the negative effects of associations with sentenced young offenders and lack of access to therapeutic programs…. For a safeguard like doli incapax to be truly effective, it must ensure that children who are 'doli' are identified and

> assessed prior to being put on remand to prevent the disadvantage associated with this point of contact with the justice system. To undertake a determination of doli incapax following remand largely defeats the purposes for which the safeguard is intended.

In relation to a child to whom *doli incapax* may be later found to apply, the Law Council of Australia stresses it does not protect these children from damage from their interaction with the criminal justice system, as the potential rebuttal of the presumption of *doli incapax* does not occur until the court hearing.[57]

In its submission to the Age of Criminal Responsibility Working Group, the UNSW Centre for Crime, Law and Justice highlighted how *doli incapax* inadequately protects young people from the negative effects of criminal justice involvement. The submission identifies the following limitations of the protective function of doli incapax:[58]

- In practice the onus has shifted from the prosecution to the defence, along with the burden of funding any assessments. Legal counsel are not trained in child development. Practice is inconsistent with concerns about the discriminatory application and effects for Aboriginal children.
- It does not protect children from potentially harmful policing practices.
- It does not protect children from the effects of bail, and the intrusions and risks associated with police compliance checks.
- It does not protect children from the damaging effects of remand in juvenile detention eg separation from families and communities, loss of education and the heightened risk of recidivism. Around 60% of children in detention on an average day in 2017-18 were unsentenced.
- In NSW, the issue of young children being remanded in juvenile detention centres not because of a risk to community but because of a lack of suitable accommodation has been identified but not addressed for more than 10 years.

A joint policy statement by the Australian Medical Association and Law Council of Australia added to the criticisms of doli incapax:[59]

> …the legal presumption of doli incapax, which is used to justify the low MACR, is flawed and does not serve its purpose in practice. Both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission have expressed criticisms of this presumption.
>
> ….In practice, the presumption has proven extremely difficult to apply in court and creates confusion as to whether the defence or prosecution bears the burden of proving a child knew their conduct was wrong.

They argue that a benefit of raising the age of criminal responsibility to 14 is the removal of any need for "the confusing and complex *doli incapax* presumption".

8.7 Community safety and victims of crime

Ensuring the safety of the community and providing for those who are the victims of criminal behaviour by 10 to 14 year olds, have been raised as arguments to oppose reform. The Queensland Community Support and Services Committee summarised the concerns of stakeholders who opposed raising the age of criminal responsibility in Queensland as follows:[60]

- there are currently insufficient resources and programs to manage and support offending children, especially in regional and remote areas, and they will need to be in place before, or at the same time, there is legislative reform
- community safety may be threatened, leading to a loss of community confidence
- victims of crime will not be adequately protected or supported
- the reforms proposed could result in the creation of a cohort of undetected, at-risk children.

The need to appropriately account for these considerations has been recognised by some who argue that the minimum age of criminal responsibility be raised. The ACT Review Report stressed that changes to the age of criminal responsibility and the use of alternative models need to acknowledge the rights and interests of people who are impacted by offending behaviour. The Report states that:[61]

> …those who have been impacted by the harmful behaviours of children require access to the same or similar supports as are currently available to victims of crime. This includes access to restorative processes, assistance with recovery and access to information about the steps taken in responding to the child's harmful behaviour.

9 Possible approaches

Various options have been identified that allow for an increase in the age of criminal responsibility, whilst addressing the offending behaviour, individual circumstances, and the need for community safety. These comprise:[62]

- support services;
- treatment;
- early intervention;
- prevention;
- justice reinvestment initiatives; and
- community-led diversion programs built on Indigenous authority and culture.

The ACT Review Report identified a range of responses that would support the implementation of a higher age of criminal responsibility including:[63]

- models that respond to complex needs;
- multidisciplinary panel models (wraparound approaches and principles);

- an alternative supportive police response (eg a safe and child-friendly place where police can take a child, along with the development of clear guidelines for police);
- safe and secure accommodation options (crisis voluntary accommodation, secure welfare models);
- therapeutic jurisprudence and solution-focused courts.

The UNSW Centre for Crime, Law and Justice argues that:[64]

> Current youth justice system interventions – including those that are underpinned by damaging 'risk' assessment and 'early intervention' paradigms and a tendency towards pathologisation of child 'offenders' – should be replaced with a suite of non-criminalising responses supported by a partnership of local community organisations and multiple state agencies, across health, education, housing and child services. The replacement response which we recommend is underpinned by a community empowerment model of 'justice reinvestment' of the sort supported by the research of the Australian Justice Reinvestment Project.

They also propose that the NSW Government follow the lead of the ACT Government and:[65]

> …embark on a committed process towards raising the MACR to the international benchmark of 14 years, and replacing the youth justice system for children aged 10-13 years with a response strategy that is non-criminalising and best interests-oriented, and which involves multiple agency co-operation, across the government and NGO sectors. This process should involve wide consultation, particularly with community organisations, and scoping the feasibility and cost of capacity-building and resourcing towards a replacement approach. Aboriginal and Torres Strait Islander self-determination and leadership should be central to this process.

However, the UNSW Centre for Crime, Law and Justice acknowledges the complexities of replacing the current youth justice system:[66]

> We do not underestimate the resource re-allocation and capacity enhancements that a best interests replacement approach will require. Service delivery innovation will also be required to finds way to ensure that children engage with the organisations whose support they require, without relying on the coercive power of the state's youth justice system. Despite these challenges the evidence suggests that a government with the required political will can be confident that a replacement approach for children aged 10-13 years is both desirable and realisable.

The following are examples of evidence-based programs that currently operate in NSW and are designed to divert early adolescent children from the criminal justice system:[67]

- New Street Services: a therapeutic service delivered by NSW Health that is designed to assist a young person to understand, acknowledge, take responsibility for and cease harmful sexual behaviour. It involves working with the whole family unit and engages with other agencies and community services. It currently operates in multiple locations throughout NSW.
- Youth on Track: a NSW Department of Communities and Justice early intervention scheme for 10 to 17 year olds. It identifies and

responds to young people at risk of long term involvement in the criminal justice system. It is based on the following principles:

- Intervening earlier to divert young people from the criminal justice system;
- One-on-one case management to manage and support juvenile offenders and those at risk of offending;
- Separating treatment from punishment;
- Responding to risk and need rather than simply to crime;
- Responding promptly to enable a response to an immediate problem.

It utilises multi-agency support and provides NSW Police, Education, Youth Justice NSW, Justice Health and Forensic Mental Health, solicitors, Community Services, Out of Home Care Providers, Community Health, Family Connect and Support, Headspace and others with the opportunity to refer young persons at medium to high risk of offending to a support service. It does not require a legal mandate and participation is voluntary. Youth Justice NSW funds non-government organisations to deliver the scheme in seven locations throughout NSW.

- Maranguka Justice Reinvestment project in Bourke: an Aboriginal-led place-based model of justice reinvestment through a collaboration between Maranguka, Bourke Tribal Council and Just Reinvest NSW.

10 Conclusion

The age of criminal responsibility does not just impact those children whose behaviour results in their coming under supervision or juvenile detention, but also involves those who may be arrested and charged, or held in remand, before being deemed to not be criminally responsible by reason of *doli incapax*. Many stakeholders and commentators have argued that the age of criminal responsibility in NSW should be increased to 14 to better account for the cognitive development of adolescents and to address the often complex needs of those who offend. However, there are also the needs of victims of crime and community safety issues to be considered in determining whether the current age of criminal responsibility is appropriate or counter-productive. Some argue that increasing the age of criminal responsibility results in an ultimately safer community, as offending behaviour is more appropriately dealt with and the criminalisation pathway avoided.

The age of criminal responsibility has been considered in depth by recent Council of Attorneys-General meetings and working groups, as well as by a number of parliamentary and government inquiries. Multiple issues are involved, including how best to respond to offending behaviour by children. This paper has provided an overview of some of the issues to be considered, as well as alternative approaches that exist or have been proposed.

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