



SUBMISSION | NEW SOUTH WALES

# BAR ASSOCIATION

Council of Attorneys-General – Age of Criminal Responsibility  
Working Group Review

4 March 2020

## **Promoting the administration of justice**

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

## **The New South Wales Bar Association**

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members Judges, academics, and retired practitioners and Judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Criminal Law, Human Rights and First Nations Committees and its Joint Working Party on the over-representation of Aboriginal People in custody. If you would like any further information regarding this submission, our contact is the Association's Director of Policy and Public Affairs, Elizabeth Pearson, on 02 9232 4055 or at [epearson@nswbar.asn.au](mailto:epearson@nswbar.asn.au) at first instance.

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## A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Council of Attorneys-General (**COAG**) for the opportunity to make submissions to COAG's Working Group on the Review of the Age of Criminal Responsibility (**the Working Group**).
2. The Association strongly supports raising the age of criminal responsibility from 10 to 14 years of age in New South Wales (**NSW**) and across all state, territory and Commonwealth jurisdictions.
3. The Working Group's consultation questions (**the Consultation Questions**) are addressed in detail below in section C. In summary, the Association considers there are six compelling reasons in favour of increasing the minimum age of criminal responsibility:
  - a. First, there is a concerning nexus between early contact with the criminal justice system and subsequent juvenile and adult re-offending;
  - b. Second, a minimum age of 10 is inconsistent with consensus amongst the medical community regarding research on child brain development;
  - c. Third, Aboriginal and Torres Strait Islander children are significantly overrepresented in Australia's child protection systems and disproportionately affected by the current minimum age, which perpetuates the cycle of disadvantage;
  - d. Fourth, children with intellectual and psychosocial disabilities are also over-represented in the juvenile justice system in NSW;
  - e. Fifth, the operation of the *doli incapax* presumption in NSW is leading to the adverse involvement of children in the criminal justice system where the child is found not to have capacity; and
  - f. Sixth, the current law is inconsistent with international standards and the recommendations of peak legal and medical bodies.
4. Importantly, the Association is not asserting that there should be no response or consequences for behaviour of concern committed by children under the age of 14.
5. Rather, the Association urges COAG to adopt a response of culturally competent treatment, education and rehabilitation to address this behaviour as appropriate, as an alternative to the criminalisation of children between 10 and 14.

## B. Recommendations

6. Accordingly, the Association recommends that the Working Group advocate to COAG to:
  - a. Uniformly raise the minimum age of criminal responsibility across all Australian jurisdictions to 14;
  - b. As an alternative to the criminalisation of children between 10 and 14, investigate and adopt a response of culturally competent treatment, education and rehabilitation to address behaviour as appropriate;
  - c. Urgently implement recommendations of the Australian Law Reform Commission's 2018 *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* Final Report, including the establishment of the proposed District Court of NSW Koori Court (the Walama Court) in NSW.<sup>1</sup>

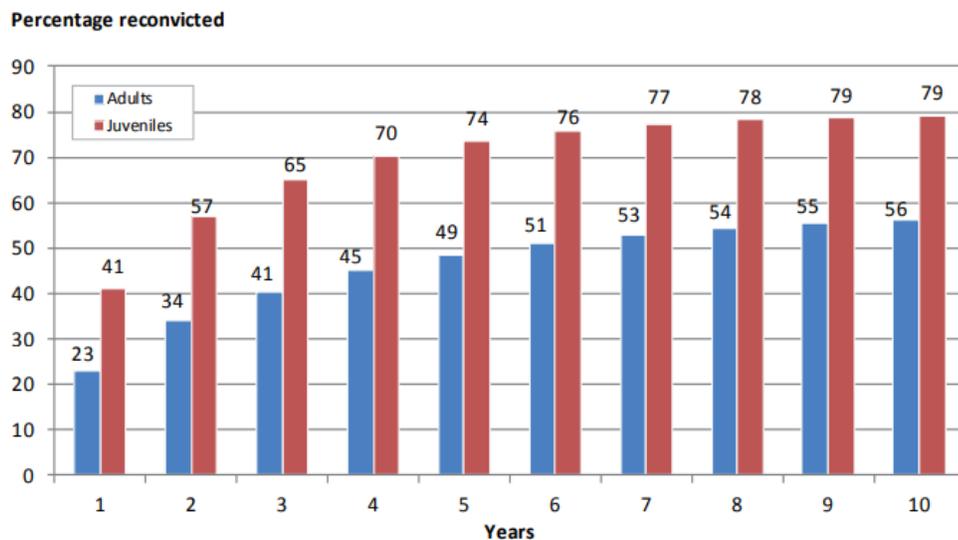
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<sup>1</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – Final Report* (2017, ALRC Report 133), [10.47]-[10.48].

## C. Responses to the Consultation Questions

*Consultation 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.*

7. The Association recommends that the minimum age of criminal responsibility be increased from 10 years of age to 14 for six reasons.
8. First, there is a concerning nexus between early contact with the criminal justice system and subsequent juvenile and adult re-offending. Early and frequent contact with the police, remand, courts and detention is a recognised pathway towards repeated criminal offending and imprisonment during adulthood.<sup>2</sup>
9. The NSW Bureau of Crime Statistics and Research reported in 2015 that almost 80 percent of juvenile offenders were reconvicted within 10 years, compared with 56 percent of adult offenders.<sup>3</sup> The following table outlines the cumulative percentage of persons convicted in 2004 who were subsequently reconvicted each year to 2014 in NSW.<sup>4</sup>



10. Breaking the nexus between criminalisation and reoffending will be of considerable benefit to the community.

<sup>2</sup> Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility', (Research Report - Comparative Youth Penalty Project, University of New South Wales, 2017), citing eg Chen et al, 'The Transition from Juvenile to Adult Criminal Careers' (Research Paper, BOCSAR, 2005); Jason Payne, 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Series No. 80, Australian Institute of Criminology, 2007); Winifred Agnew-Pauley and Jessie Holmes, *Re-offending in NSW* (NSW Bureau of Crime Statistics and Research Issue paper no 108, August 2015).

<sup>3</sup> Agnew-Pauley and Holmes, above n 2, 2.

<sup>4</sup> Ibid.

11. Criminal offending by children is generally non-violent.<sup>5</sup> More than 50 percent of crimes committed by children between the ages of 10 and 14 are theft, burglary or property related offences.<sup>6</sup> According to the Australian Bureau of Statistics, just over 20 percent are acts intended to injure.<sup>7</sup> A snapshot of children in juvenile detention facilities reveals that at any one time over 50% are on remand, not having been convicted or sentenced.<sup>8</sup>
12. Importantly, the Association is not asserting that there should be no response or consequences for such behaviour. The Association recognises that the community should be protected against violent offending and the loss of or damage to property. Rather, the Association urges Australian governments to provide culturally competent treatment, education and rehabilitation to address this behaviour as an alternative to the criminalisation of children between 10 and 14, and to better protect the community in the longer term from the adverse effects of entrenched recidivism.
13. Second, a minimum age of 10 is inconsistent with consensus amongst the medical community that a child’s brain is not sufficiently developed until the age of 14.<sup>9</sup> As children under the age of 14 undergo significant development and growth, they do not have the required intellectual capacity to be considered criminally responsible. Immaturity can affect a number of areas of cognitive functioning “including impulsivity, reasoning and consequential thinking”.<sup>10</sup> There is now extensive neurobiological evidence that adolescent brains are not fully mature until their early twenties.<sup>11</sup> Scientific research in this area supports increasing the minimum age in recognition of the time taken for the adolescent brain to mature, impacting on impulsivity and reasoning.

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<sup>5</sup> Amnesty International, *The sky is the limit: keeping young children out of prison by raising the age of criminal responsibility* (2017) 13 <<https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>> citing Australian Bureau of Statistics, *Criminal Courts Australian 2016-2017* (2018) 'Table 5 Defendants finalised by sex and age by principal offence and court level' <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02016-17?OpenDocument>>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Australian Human Rights Commission, *Children’s Rights Scorecard 2019*, 21 <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-australia-scorecard>>.

<sup>9</sup> See Australian Medical Association and Law Council of Australia, *Minimum Age of Criminal Responsibility* (2019) 2, 3, citing Cunneen, above n 2, citing Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) 11; Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1) *Current Issues in Criminal Justice* 123; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13(2) *Youth Justice* 102.

<sup>10</sup> Cunneen, above n 2, citing Nicholas Lennings and Christopher Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) *Psychiatry, Psychology and Law* 21:5.

<sup>11</sup> Cunneen, above n 9.

14. Third, Aboriginal and Torres Strait Islander children are significantly overrepresented in Australia’s child protection systems and disproportionately affected by the current minimum age.<sup>12</sup>
15. The Australian Medical Association noted in March 2019 that around 600 children under the age of 14 are imprisoned in youth jails each year, with Aboriginal and Torres Strait Islander children representing 70 percent of that cohort.<sup>13</sup> The current and inappropriate minimum age of criminal responsibility can have, and has had, the regrettable impact of creating a cycle of disadvantage that traps Indigenous people in the criminal justice system and is reflected in high and growing rates of incarceration for the adult Indigenous population, particularly for women.<sup>14</sup>
16. The Association submits that raising the minimum age would be consistent with the following principles adopted by the Law Council of Australia (**the Law Council**) in its *Policy Statement on Indigenous Australians and the Legal Profession*:<sup>15</sup>
  - “promoting, as a matter of the highest priority, methods for reducing the over-representation of Indigenous Australians in the criminal justice system;
  - promoting the development of alternative justice models involving greater participation of the Indigenous community, such as restorative justice models, Indigenous courts and community justice groups;
  - promoting substantive equality for Indigenous Australians before the law, including effective measures to ensure continuing improvement of their economic and social conditions and to ensure they are able to maintain and strengthen their institutions, cultures and traditions;
  - promoting the right of Indigenous Australians to understand and be understood in legal proceedings, at all times through the use of plain English and, where necessary, through the provision of interpreter services and other appropriate means acceptable to the individuals concerned;
  - challenging legislation, policies and practices that discriminate against and violate the human rights of Indigenous Australians, and impede

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<sup>12</sup> Australian Human Rights Commission, above n 8, 24.

<sup>13</sup> Australian Medical Association, ‘AMA calls for age of criminal responsibility to be raised to 14 years of age’ (Media Release, 25 March 2019) <<https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>>.

<sup>14</sup> As at September 2019, 24.9 percent of all male prisoners in NSW were Indigenous and a sobering 31.7 percent of all female prisoners were Indigenous, according to BOSCAR, *Aboriginal over-representation in prison – September 2019 Monthly Summary* (2019). Less than 3 percent of all people in NSW are Indigenous, according to the Australian Bureau of Statistics, *2011 Census of Population and Housing: Aboriginal and Torres Strait Islander Population* (2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2011.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Data%20Summary~10>>.

<sup>15</sup> Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (2010) 2 <<https://www.lawcouncil.asn.au/docs/971f3e13-cc39-e711-93fb-005056be13b5/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf>>.

substantive equality before the law;

- working in partnership with Indigenous communities and organisations to promote Indigenous Australians' rights and interests, respect for Indigenous Australian cultures, knowledge, perspectives and practices, and the reinvigoration and strengthening of Indigenous legal systems, laws and institutions...”

17. Fourth, children with intellectual and psychosocial disabilities are also over-represented in juvenile justice systems in NSW<sup>16</sup> and nationwide. Young people within youth justice systems have significantly higher rates of mental health conditions and cognitive impairment compared with the general population of young people, and this is particularly the case for Aboriginal and Torres Strait Islander young people<sup>17</sup> where intergenerational trauma is becoming well recognised.
18. Extensive research indicates that young people with cognitive disability are particularly vulnerable to criminalisation.<sup>18</sup> Young people with cognitive impairment also have higher rates of recidivism compared to those without cognitive impairment and are vulnerable to extended and repeat incarceration.<sup>19</sup> They are also more likely to be refused bail and held on remand because of an inability to understand or comprehend bail conditions or due to a lack of support in the community to comply with conditions.<sup>20</sup>
19. The distressing link between ‘at risk’ young people, disability, vulnerability to legal problems and involvement with the juvenile justice system was highlighted in a recent prevalence study with respect to Fetal Alcohol Spectrum Disorder (**FASD**) among youth detainees at Banksia Hill Detention Centre in Western Australia, conducted by the Telethon Kids Institute. The study revealed “unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth”.<sup>21</sup> In particular, the study found that:
  - 89 per cent - or nine out of ten - incarcerated young people have at least one form of severe neurodevelopmental impairment;

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<sup>16</sup> Australian Human Rights Commission, *Information concerning Australia’s compliance with Convention on the Rights of Persons with Disabilities* (25 July 2019); see also NSW Health and NSW Juvenile Justice, *2015 Young People in Custody Health Survey: Key Findings for All Young People* (2016).

<sup>17</sup> See, eg, NSW Health and NSW Juvenile Justice, above n 16.

<sup>18</sup> Cunneen, above n 2, citing McCausland, and Baldry, “‘I feel like I failed him by ringing the police’: Criminalising disability in Australia” (2017) 19(3) *Punishment & Society* 290-309; Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia* (2015) <[http://www.amnesty.org.au/images/uploads/aus/A\\_brighter\\_future\\_National\\_report.pdf](http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf)>; Gray et al, *Cognitive Impairment, Legal Need and Access to Justice* (Law and Justice Foundation of NSW, 2009); Kenny and Lennings, ‘The relationship between head injury and violent offending in juvenile detainees’ (2007) 107 *Contemporary Issues in Crime and Justice*, 1-15.

<sup>19</sup> Cunneen citing Baldry et al, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (UNSW, 2015).

<sup>20</sup> Cunneen citing McCausland, and Baldry, above n 18, 290-309; Legislative Assembly of Western Australia, *Report by the Education and Health Standing Committee on Foetal Alcohol Spectrum Disorder: The Invisible Disability* (Report No 15, 2012).

<sup>21</sup> Telethon Kids Institute, ‘Nine out of ten young people in detention found to have severe neurodisability’ (Media Release, 13 February 2018) <<https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/February/young-people-in-detention-neuro-disability/>>.

- two thirds have at least three forms of severe neurodevelopmental impairment;
  - 23 percent have five or more forms of severe neurodevelopmental impairment;
  - 36 percent have FASD; and
  - 25 percent have an intellectual disability.
20. Increasing the age of criminal responsibility to 14 is likely to reduce the disproportionate number of children with intellectual and psychosocial disabilities in the criminal justice system in NSW. Those children should be provided with appropriate treatment to address their intellectual and psychosocial disabilities and not drawn into the criminal justice system.
  21. Fifth, the existing *doli incapax* presumption does not serve its intended purpose as well as it could or should. Anecdotal evidence, including from those practising in the Children’s Court, reveals that children as young as 10 are being subjected to lengthy exposure to the criminal justice system,<sup>22</sup> only to find that *doli incapax* is ultimately not properly rebutted, and the matter is dismissed.<sup>23</sup> Such contact with the criminal justice system, including the process of arrest, being on bail and attending court, is in and of itself traumatic to young children. Raising the minimum age of criminal responsibility to 14 years would address concerns relating to the presumption’s operation and complexity in the state of NSW for children aged between 10 and 14.
  22. Sixth, the current law is inconsistent with international standards and the recommendations of peak legal and medical bodies. The global average age for criminal responsibility is 12.1 years<sup>24</sup> and 14 in the European Union. As outlined below in response to Consultation Question 2, the Association’s recommendation that the minimum age of criminal responsibility be raised to 14 is consistent with the views and concerns of many stakeholders, including but not limited to the Law Council<sup>25</sup> and the Australian Medical Association.<sup>26</sup>

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<sup>22</sup> See, eg, 4Corners, ‘Inside the Watch House’, ABC TV, 13 May 2019 <<https://www.abc.net.au/4corners/inside-the-watch-house/11108448>> ; Law Council of Australia, ‘Adult watch houses no place for children’ (Media Release, 14 May 2019) <<https://www.lawcouncil.asn.au/media/media-releases/adult-watch-houses-no-place-for-children-law-council>>; Fran Kelly, ‘Qld watch house scandal a national issue’, RN Breakfast (14 May 2019) <<https://www.abc.net.au/radionational/programs/breakfast/qld-watch-house-scandal-a-national-issue/11110092>>.

<sup>23</sup> See, eg, *KG v Firth* [2019] NTCA 5.

<sup>24</sup> UNICEF, Youth Policy Working Paper (2016) <[http://w.lyw.vouthpolicv.org/librarv/wpcontent/uplqads/librarv/2016\\_YPL\\_Working\\_Paper\\_4\\_Age\\_Matters\\_Eng.pdf](http://w.lyw.vouthpolicv.org/librarv/wpcontent/uplqads/librarv/2016_YPL_Working_Paper_4_Age_Matters_Eng.pdf)>.

<sup>25</sup> Law Council of Australia, ‘Commonwealth, States and Territories must lift minimum age of criminal responsibility to 14 years, remove *doli incapax*’ (Media Release, 26 June 2019) <<https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>>.

<sup>26</sup> Australian Medical Association, above n 13.

23. It is important that the minimum age of criminal responsibility is consistent across jurisdictions. As the Australian Law Reform Commission has explained:<sup>27</sup>
- All Australian jurisdictions should agree on and legislate a uniform age of criminal responsibility. A child should not be liable to be charged with a criminal offence in one State for an act which if committed in another would not attract liability only by reason of his or her age... there is an element of arbitrariness when setting age thresholds, especially given the great variations in capacity between individual children. However, setting an age provides certainty for both the law and children.
24. The experience of countries where the age of criminal responsibility is 14 or higher has been that “there are no negative consequences in terms of crime rates”.<sup>28</sup>
25. In addition to the adverse consequences for incarcerated youth and society as outlined in this submission, there is also a significant budgetary cost borne by the community. In NSW, the average cost per day per young person subject to detention-based supervision is \$1413.<sup>29</sup>
26. Nationally, the average cost per day of a young person being subject to detention based supervision was a staggering \$1455 in 2017-18,<sup>30</sup> or approximately \$531,000 per year. This increased to \$1579 in 2018-19.<sup>31</sup> During 2017-18, the Federal Government spent more than \$509 million in total on youth detention,<sup>32</sup> rising to \$539.6 million in 2018-19.<sup>33</sup> Maintaining the current minimum age of criminal responsibility is not advantageous from either a societal or a budgetary perspective.

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<sup>27</sup> Australian Law Reform Commission, *Seen and heard: a priority for children in the legal process* (Report No 84, 2010) [18.16].

<sup>28</sup> F Dunkel (1996) ‘Current Directions in Criminal Policy’, 38, quoted in Cunneen, above n 2.

<sup>29</sup> Productivity Commission, *Report on Government Services 2020* (2020), vol F, ch 17, table 17A.21.

<sup>30</sup> Productivity Commission, above n 29, vol F, ch 17, 17.25.

<sup>31</sup> *Ibid*, 17.24.

<sup>32</sup> Productivity Commission, above n 29, Table 17 A.8.

<sup>33</sup> Productivity Commission, above n 29, 17.6.

*Consultation 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.*

27. The Association recommends that the age of criminal responsibility be raised to 14 for all offences. This is consistent with the views and concerns of many stakeholders.
28. In June 2019 the Law Council’s board of directors voted unanimously to change its policy position to advocate for the minimum age of criminal responsibility to be raised to 14.<sup>34</sup> This position has been endorsed by the Bar Council of the Association.
29. The Independent Expert leading the United Nations Global Study on Children Deprived of Liberty recommended to the United Nations in July 2019 that “States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age”.<sup>35</sup>
30. Similarly, the United Nations Committee on the Rights of the Child<sup>36</sup> has called on Australia 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”.<sup>37</sup> This is in line with the Committee’s *General Comment No. 24* (2019) which called for the minimum age of criminal responsibility to be raised to 14.
31. The independent statutory NSW Advocate for Children and Young People recommended in October 2019 that “The minimum age of criminal responsibility should be raised from 10 to 14 years to ensure that this younger cohort is not detained, and additional supports should be provided to children and young people in this age range to address their underlying needs and risk factors for offending”.<sup>38</sup>
32. The Association acknowledges that some organisations, such as the Royal Australasian College of Physicians, the Public Interest Advocacy Centre, Change the Record and the Australian Human Rights Commission have taken the further step of recommending that the minimum age be raised to “**at least** 14 years”<sup>39</sup> (emphasis added).

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<sup>34</sup> Law Council of Australia, above n 4.

<sup>35</sup> M Nowak, *Report of the Independent Expert leading the global study on children deprived of liberty*, GA Report, UNGA, 74<sup>th</sup> Sess, Item 68(a), UN Doc A/74/136, [109] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/213/15/PDF/N1921315.pdf?OpenElement>>.

<sup>36</sup> Established under the UN Convention on the Rights of the Child which Australia has ratified.

<sup>37</sup> United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019).

<sup>38</sup> NSW Government Advocate for Children and Young People, *What children and young people in juvenile justice centres have to say* (2019) 18 <<https://cdn2.hubspot.net/hubfs/522228/docs/ACYP-Juvenile-justice-report-2019.pdf>>.

<sup>39</sup> See, eg, Royal Australasian College of Physicians, ‘Doctors, lawyers, experts unite in call to raise age of criminal responsibility’ (Media Release) <<https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility>>; Public Interest Advocacy Centre <<https://piac.asn.au/projects/indigenous-justice/>>; Change The Record, ‘New statistics show urgency to raise the age of criminal responsibility to at least 14 to end Indigenous over-incarceration’ (Media Release, 10 May 2019) <<https://changetherecord.org.au/blog/news/New%20statistics%20show%20urgency%20to%20raise%20the%20>

*Consultation Question 3: If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of *doli incapax* differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of *doli incapax* be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.*

33. The common law presumption of *doli incapax* is intended to operate as a safeguard, as described by Lord Lowry in *C v DPP*:<sup>40</sup>
- the purpose and effect of the presumption is still to protect children between 10 and 14 from the full force of the criminal law
34. Australia’s legal profession has raised concerns over the presumption’s operation in practice.
35. In June 2019 the Law Council noted that lifting the minimum age of criminal responsibility to 14 in all jurisdictions would “remove the need for the fraught *doli incapax* presumption”,<sup>41</sup> citing the case of *KG v Firth* as a recent example of the “uncertainty surrounding *doli incapax* and the risks of its erroneous application”.<sup>42</sup>
36. The Law Council warned that the presumption is problematic because it:<sup>43</sup>
- continues to wreak confusion as to whether the defence or prosecution bears the burden of proving that a child knew their conduct to be wrong. This leads to errors and results in children being held in custody for lengthy periods of time before the presumption can be led or tested in court, and the child acquitted.
37. Raising the age of criminal responsibility to 14 years would address concerns relating to the presumption’s operation and complexity in the state of NSW for children aged between 10 and 14.
38. The Association accepts that there may be an important discussion to be had with community as to whether there is a role for *doli incapax* to apply to children in the ages 14 to 16, in order that a court might appropriately determine that a child of that age does have the required capacity. However, the presumption would require clarification through legislation and prosecutorial guidelines to promote greater consistency in its application and certainty,<sup>44</sup> and better fulfil its intended purpose.

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[age%20of%20criminal%20responsibility%20to%20at%20least%2014%20to%20end%20Indigenous%20over-incarceration](#) ; Australian Human Rights Commission, above n 1, 36.

<sup>40</sup> *C v DPP* [1996] AC 1, 36 (Lord Lowry).

<sup>41</sup> Law Council of Australia, ‘Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove *doli incapax*’ (Media Statement, 26 June 2019) <<https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>>.

<sup>42</sup> [2019] NTCA 5, cited in Law Council of Australia, above n 14.

<sup>43</sup> *Ibid.*

<sup>44</sup> See Australian Law Reform Commission, *Seen and heard: a priority for children in the legal process* (2010, ALRC Report 84) [18.16].

*Consultation 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.*

39. The Association maintains that no child under 14 years should be sentenced to detention except in the most serious cases, consistent with the recommendation of the Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (**Northern Territory Royal Commission**) and the position of the Law Council.<sup>45</sup>
40. Recommendation 27.1 by the Northern Territory Royal Commission included that:  
Section 83 of the *Youth Justice Act* (NT) be amended to add a qualifying condition to section 83(1)(I) that youth under the age of 14 years may not be ordered to serve a time of detention, other than where the youth:
- has been convicted of a serious and violent crime against the person
  - presents a serious risk to the community, and
  - the sentence is approved by the President of the proposed Children’s Court.
41. This higher minimum age of detention should be introduced across jurisdictions including NSW even in the event that COAG is minded, despite the Association’s recommendations, to only raise the minimum age of criminal responsibility part of the way to 14.
42. Further, the Association maintains that detention should be a last resort for children of any age. The average number of young people subject to detention-based supervision in NSW on any given day in 2018-19 was 264,<sup>46</sup> more than any other state or territory. Efforts should be made to ensure that all children are afforded appropriate alternatives to detention before reaching the stage where detention is the only available option.
43. If the age of criminal responsibility is raised to 14 years, it would be anomalous for a child to be administratively detained before that age when no court would have the power to order detention for a criminal offence.
44. The Association echoes the Law Council’s statement that:<sup>47</sup>  
Raising the age of minimum criminal responsibility is not being soft on crime: it means adopting a just, proportionate approach. The evidence clearly shows those detained as children are often imprisoned as adults. This is not the trajectory we want for vulnerable children or the best way to

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<sup>45</sup> Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 46; Law Council of Australia and NT Law Society, ‘Law Council and NT Law Society support increase of NT age of criminal responsibility’ (Media release, 31 January 2019) <<https://www.lawcouncil.asn.au/media/media-releases/Law-Council-and-NT-Law-Society-support-increase-of-NT-age-of-criminal-responsibility>>.

<sup>46</sup> Productivity Commission, *Report on Government Services 2020* (2020), vol F, ch 17, 17A.21.

<sup>47</sup> Law Council of Australia, above n 14.

keep our communities safe. Children must be protected, not criminalised, and prison should never be a rite of passage.

Many children in detention have not been sentenced. There must be greater emphasis on evidence-based alternatives to detention, including intensive rehabilitative and welfare-based responses, justice reinvestment projects, early intervention, prevention, and community-led diversion programs.

45. In November 2019 the Australian Human Rights Commission released *Children's Rights in Australia: a Scorecard*, which included the recommendations that:<sup>48</sup>

Australian Governments should better implement the principle of detention as a last resort by identifying and removing barriers for young offenders accessing diversionary programs, in particular for Aboriginal and Torres Strait Islander children;

Australian Governments should expand the availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs.

The Association agrees with and reiterates both these recommendations.

46. The Association recognises that the ramifications of the proposed change to the minimum age are significant. There is limited advantage to raising the age of criminal responsibility if the criminal justice system is replaced by an administrative detention system that produces the same result – incarceration. The circumstances under which detention is warranted must be substantially narrowed in co-ordination with an expansion of supported accommodation and supervision for children who are violent or engaging in otherwise highly destructive behaviour.
47. The conditions of detention are an ongoing concern for the Association. The Northern Territory Royal Commission observed a number of features of detention centres, including limited space, harsh conditions, unclean facilities, exposure to extreme temperatures, with design features that had the potential to heighten the risk of self-harm and mental health issues.<sup>49</sup> There was also evidence that child detainees were exposed to verbal abuse and racist remarks from youth justice officers, as well as controlling behaviours, on children as young as 13 years old.<sup>50</sup>
48. There were also a number of complaints arising out of the Chisholm Behavioural Program in NSW, triggering a review by the State Ombudsman and the ultimate shutting down of the program. Detainees were given limited time out of their cell (less than two hours for some phases of detainee) and limited natural light. There were reported incidences of self-harm and harm to detainees' mental health. From its inception to closure, 66 young people, 44 of whom were Aboriginal, were referred to the program. 14 young people spent in excess of 123 days on the

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<sup>48</sup> Australian Human Rights Commission, above n 1, 36.

<sup>49</sup> *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Executive Summary, Volume 1, pp 12-13.

<sup>50</sup> *Ibid.*

program, ten of whom were Aboriginal. After the review, the decision was ultimately made to discontinue the program.<sup>51</sup>

49. Aboriginal and Torres Strait Islander children are over-represented in the youth justice system and in detention in particular, at 23 times the rate of non-Indigenous young people nationally during 2018-19.<sup>52</sup> Without appropriate safeguards to ensure that detention is the last resort, there will continue to be significant over-representation and inequality amongst those coming into contact with the criminal justice system. This is a significant concern to the Association and great care must be taken to implement measures to address this inequality for Indigenous youth of all ages, as outlined further in response to Consultation Question 5.

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<sup>51</sup> NSW Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (2018) <<http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-separation-segregation-confinement-nsw-juvenile-justice-centre.pdf>>.

<sup>52</sup> Productivity Commission, *Report on Government Services 2020* (2020) vol F, ch 17, 17.5.

*Consultation 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.*

50. The Association recognises that in NSW resourcing and funding will be a critical consideration and impact directly upon the effectiveness of diversionary or preventative strategies.
51. By raising the age of criminal responsibility, children under the age of 14 would be removed from the criminal justice system from the point of intervention. The approach to intervention for such children must reflect a welfare-of-the-child approach as the primary consideration rather than a criminal justice approach.
52. Juvenile Justice NSW has a strong association with Corrective Services NSW and, while adapted for children, still has a strong criminal and correctional ethos. Consideration should therefore be given as to how its organisational culture could evolve, to ensure the provision of culturally competent treatment, education and rehabilitation.
53. There will be considerable opportunities for transferring current funding from the criminal prosecution and detention of children to the treatment, education and rehabilitation model suggested by the Association. That may produce considerable savings across a number of portfolios including police, the courts and children's detention centres. However, the Association encourages the relocation and reinvestment of such resources to diversionary programs, for supported accommodation and supervision, and particularly for the support of Indigenous organisations and other culturally appropriate resources to undertake that work.
54. Proper assessment must occur to determine appropriate levels of funding to ensure children under 14 are appropriately supported and supervised in the way intended. However, such a structural shift would significantly counter any cost outlay and may prove to be revenue neutral in the medium to long term.
55. In its submission in 2017 to the Australian Law Reform Commission's inquiry *Pathways to Justice* in relation to the high levels of incarceration experienced by Indigenous peoples, the Association stated that:<sup>53</sup>

The Bar Association strongly supports the role of Indigenous controlled organisations in the provision of criminal justice related programs and in addressing the incarceration rates of Aboriginal and Torres Strait Islander people. There is a compelling case for the central involvement of Aboriginal and Torres Strait Islander organisations in relation to bail support, diversion, female offenders, non-custodial and community sentencing options, community corrections, mental health and drug and alcohol services. It is essential that such organisations be adequately resourced, structurally integrated and available in urban, regional and

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<sup>53</sup> Submission 88, [6] – [8], [152] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/88\\_nsw\\_bar\\_association.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/88_nsw_bar_association.pdf)>.

rural areas.

Generally, as well, the Bar Association cannot emphasise too strongly the intolerable lack of accessible drug and alcohol rehabilitation programs in regional, semi-remote and remote areas. There are even fewer that are culturally appropriate, or that are designed in consultation with and seek to address the particular requirements of Aboriginal and Torres Strait Islander communities. The almost complete absence of such programs in many parts of NSW presents a tremendous hurdle for offenders and for the courts in seeking to avoid custodial options or assist in the supervision of offenders.

Finally, the Bar Association notes with particular concern that current funding arrangements for Aboriginal and Torres Strait Islander legal services has not kept up with increased demand and the cost of service delivery. It is obvious that manifestly unacceptable incarceration rates of Aboriginal and Torres Strait Islander people cannot even begin to be addressed without adequate, consistent and reliable funding of legal services. The Bar Association urges the importance of federal funding to facilitate uniformity, and to address cross-jurisdictional issues which arise, for example, in the case of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (**NPY**) lands (Western Australia, Northern Territory and South Australia). The Bar Association also supports the fundamental premise of Justice Reinvestment that a fiscal mechanism is required to support the long-term and sustainable funding of early intervention, crime prevention and diversionary measures.

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Further, the Bar Association notes that the Productivity Commission considers diversionary programs to be "a swift and economically efficient response to offending, aimed at reducing re-offending and the negative labelling and stigmatisations of contact with the criminal justice system". The Wan, Moore and Moffatt 2013 NSW BOCSAR review of diversionary programs indicated that for all people who went through a diversionary program there was a 17.5% lowering of custodial penalties. The Bar Association strongly supports the expansion of diversionary programs such as the NSW Magistrates Early Referral into Treatment drug diversion program and the Victorian Court Integrated Services Program... (citations omitted).

56. Aboriginal and Torres Strait Islander organisations must be consulted to identify required services, service gaps, infrastructure and funding so that they may provide culturally appropriate support and alternatives to incarceration.
57. A number of diversionary and preventative schemes will be required should the age of criminal responsibility be raised, including but not limited to:
  - a. Youth-targeted drug and alcohol rehabilitation facilities, with provision for 'dual-diagnosis' facilities;

- b. Youth justice conferencing including senior Aboriginal leaders where appropriate;
  - c. Referrals to appropriate community-based youth organisations and services that provide support for young persons in areas such as mental health and social services.
58. The Association continues to support the Youth Koori Court, currently operating on limited basis in NSW, and its expansion of the program to rural and remote areas. The role of the Youth Koori Court will need to reflect the non-criminalisation of currently criminal acts by those under 14, but may, if expanded, have an important role to play in those children accepting responsibility for their actions through the involvement of both the Aboriginal and non-Aboriginal representatives of the community.
59. Further, the Association encourages COAG not to consider the age of criminal responsibility in a vacuum but to view this matter and proposed reform in a broader context of the importance of holistic, interconnected approaches to justice considerations. These considerations include the over-representation of Indigenous youth in custody, as well as the role of detention in our justice system and the value of reform that deploys community models and diversionary tactics where appropriate for all who come into contact with the justice system, including those who have only just turned 18.
60. Hodgson JA noted in *BP v R* that:<sup>54</sup>
- while I agree with the statements in *KT* at [26] that the weight to be given to considerations relevant to a person’s youth diminishes the closer the offender approaches the age of maturity, and that a “*child offender*” of almost 18 years cannot expect to be treated substantially differently from an offender who is just over 18 years of age, it does not follow that the age of maturity is 18 (albeit that for certain purposes the law does draw a line there: *Children (Criminal Proceedings) Act 1987*). In my understanding, emotional maturity and impulse control develop progressively during adolescence and early adulthood, and may not be fully developed until the early to mid twenties: see *R v Slade* [2005] 2 NZLR 526 at [43], quoted by Kirby J in *R v Elliott* [2006] NSWCCA 305; (2006) 68 NSWLR 1 at 27 [127]. As shown by *R v Hearne* [2001] NSWCCA 37; (2001) 124 A Crim R 451, youth may be a material factor in sentencing even a 19 year old for a most serious crime.
61. Rothman J agreed and added that:<sup>55</sup>
- The *Children (Criminal Proceedings) Act 1987* applied to minors and establishes a different regime than for adults. Nevertheless, a person who is 17½ years of age cannot be expected to be treated significantly differently from his cooffender who has turned 18. This does not mean that youth, who

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<sup>54</sup> (2010) 201 A Crim R 379, 381 [5] (Hodgson JA) (Rothman J agreeing).

<sup>55</sup> *Ibid*, 402 [107]-[108], quoting *MJ v r, CPD v R* [2010] NSWCCA 52, [70]-[71] (Rothman J).

are not minors, are not entitled to an assessment of sentence, that takes into account their youth and immaturity...

***Chronological age of a young offender is not solely the determining factor*** in deciding how much weight should be attributed to general deterrence, as distinct from the other factors, in assessing an appropriate sentence. Regard must be had to the mental state and circumstances of the offender at the time of the offending: *R v AN* [2005] NSWCCA 239, per Howie J, with whom James J and I agreed, at [57]. Likewise, the violence of the offence, of itself, does not necessarily establish that the juvenile is acting ‘as an adult’. In sentencing, juveniles (including minors), who act as an adult would, the function of the courts requires deterrence and retribution and they remain, or become, more significant elements in sentencing the youth: *R v AN*, supra, at [53], citing *R v Bus* (Court of Criminal Appeal, 3 November 1995, unreported). The test, in those circumstances, is whether the youth has conducted himself or herself in a way that an adult would, and that requires an assessment of the maturity and conduct, not only the degree of violence and the gravity of the offence.” (emphasis added)

62. Similarly, Davies J observed in *RP v R* that “There is no bright line between a realisation that an act or particular behaviour is simply naughty or mischievous and a realisation that it is seriously wrong”.<sup>56</sup> Age is no clear distinguishing factor: there is no immediate synchronicity between the latter realisation and the occurrence of an eighteenth birthday.
63. Intergenerational trauma and entrenched injustice does not arbitrarily discriminate according to whether an Indigenous young adult is 17 years and 11 months old, 18 years old, or 18 years and 1 day old. Similarly, meaningful policies must be available to, and accessible for, Indigenous youth at all ages.
64. Accordingly, the Association urges COAG to consider and implement recommendations of the Australian Law Reform Commission’s 2018 *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* Final Report aimed at addressing the national shame that is Indigenous over-representation in custody. This includes the establishment of the proposed District Court of NSW Koori Court (the Walama Court) in NSW.<sup>57</sup>
65. The Association reiterates its call for the establishment of the specific Indigenous Sentencing Court – the Walama Court – in NSW for Indigenous adults. It is not proposed that the Walama Court would hear matters involving children under 18. However, it is important that young adults who have recently turned 18 are not forgotten in this policy discussion.
66. The Walama Court is nonetheless an important policy initiative to consider in this context as its implementation would contribute to driving meaningful, holistic

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<sup>56</sup> [2015] NSWCCA 215, [53] (Davies J).

<sup>57</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – Final Report* (2017, ALRC Report 133), [10.47]-[10.48].

reform of the justice sector, especially with regard to the nature of engagement between Indigenous communities and the justice system more broadly. This would inevitably have indirect impacts upon services and models in place for children to likewise shift the focus from incarceration to community models and diversionary tactics where appropriate.

67. The Association has consistently advocated for a Walama Court to address the longstanding issue of the over-representation of Indigenous people in the NSW criminal justice system. The Walama Court involves a hybrid model incorporating aspects of the Victorian Koori Court and the NSW Drug Court. The model proposes a community-based option where the judge has the capacity to monitor the progress of the individual post-sentence. The monitoring will include an intensive period of monitoring including more intensive supervision by Community Corrections in the community. The Walama Court proposal is designed to reduce recidivism rates of Indigenous people through the use of more rigorous supervision orders and diversionary programs in the sentencing process, as well as increased cooperation between the criminal justice system and respected persons in the Indigenous community.
68. The Walama Court is also supported by the NSW Police Association,<sup>58</sup> the Australian Law Reform Commission and the Law Council. Stronger Communities Secretary Mr Coutts-Trotter gave evidence before the NSW Legislative Council's *Committee 5 – Legal Affairs* in September 2019 that the Walama Court proposal was being considered in the 2020-21 Budget Cycle and that “the issue is simply one of funding”.<sup>59</sup>
69. Ultimately, the Walama Court would also result in long term economic cost savings as fewer Indigenous persons will be imprisoned and rates of recidivism would be reduced. In concert with reform including raising the minimum age of criminal responsibility, the Walama Court is an important initiative that would contribute to addressing the disproportionate incarceration of Indigenous people in our justice system. The Association commends the proposal to COAG.

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<sup>58</sup> Police Association of NSW and New South Wales Bar Association, ‘Bar Association and Police Association of NSW unite to support Indigenous sentencing court’ (Media Release, 24 June 2018) <[https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb311bba3/attachment/JMR\\_24.6.18.pdf](https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb311bba3/attachment/JMR_24.6.18.pdf)>.

<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 2 September 2019, 84 (Mr Coutts-Trotter).

*Consultation 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.*

70. The Association agrees it is critical that all children and young people are encouraged and supported to take responsibility for their actions as long as such processes are appropriate to the age, gender, cultural and social background and intellectual capacity of the child.
71. The Association considers culturally competent methods of treatment, education and rehabilitation to be more effective in addressing behaviour and promoting accountability than criminalising the conduct of children between the ages of 10 and 14.
72. While schemes such as the Youth Justice Conferencing Scheme and other mechanisms available under the *Young Offenders' Act 1997* (NSW) are in some cases appropriate alternatives, these are still administered in the context of criminalising the behaviour of young persons, particularly given that these might arise after arrest and are administered by the police, in a police-related environment such as a police station or PCYC.
73. Schemes such as the current “Youth on Track” program provide early intervention and one-on-one case management for young persons referred either by police or schools. While there are a number of challenges,<sup>60</sup> including the ability to engage with complex needs clients, and the need to employ Aboriginal staff in order to assist with engaging Aboriginal young people, there is evidence to suggest that the program has a positive effect upon risk of reoffending.<sup>61</sup> For example, NSW Youth Justice reported that “In the 12 months following referral to Youth on Track, the overall rate of formal police contact decreases by half for the cohort of participants between 2017 and 2019 compared to the rate of formal police contact at their point of referral”.<sup>62</sup>
74. There is also a need for properly funded drug and alcohol rehabilitation facilities catering to the needs of young children, particularly in rural and remote areas. The use of illicit substances is intertwined with contact with the criminal justice system,

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<sup>60</sup> Legal Aid NSW, Submission to the Committee on Law and Safety, *Inquiry into Youth Diversionary Programs in NSW* (January 2018) 18-19 <[https://www.legalaid.nsw.gov.au/data/assets/pdf\\_file/0009/28476/Legal-Aid-NSW-submission-Youth-Diversion.pdf](https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0009/28476/Legal-Aid-NSW-submission-Youth-Diversion.pdf)>.

<sup>61</sup> See, eg, NSW Youth Justice, Youth on Track – Snapshot (2016) <<http://www.youthontrack.justice.nsw.gov.au/Documents/Snapshot%20YOT%20Dec%202016.pdf>>; NSW Communities & Justice – Youth Justice, Youth on Track: Snapshot Report – 2019 calendar year (2020) <<http://www.youthontrack.justice.nsw.gov.au/Documents/Youth%20on%20Track%202019%20Calendar%20Year%20-%20Snapshot%20Report.pdf>>.

<sup>62</sup> NSW Communities & Justice – Youth Justice, Youth on Track: Snapshot Report – 2019 calendar year (2020) 5 <<http://www.youthontrack.justice.nsw.gov.au/Documents/Youth%20on%20Track%202019%20Calendar%20Year%20-%20Snapshot%20Report.pdf>>.

with evidence linking substance abuse from a young age with criminal activity.<sup>63</sup> The availability of rehabilitation facilities, as well as ‘dual diagnosis’ facilities, is integral to ensuring that treatment and rehabilitation is provided from an early age and to prevent the spiral of young people’s lives into the criminal justice system, juvenile detention and adult corrective facilities.

75. It is important that encouraging children to “take responsibility” for their actions be performed in an appropriate environment and not be undertaken in the formal structure of a court room or involve the threat of incarceration or other government sanctioned punishment. Appropriate mechanisms for such a policy to be pursued include one-on-one counselling, psychological support, circle and/or family conferencing, and reliance on culturally appropriate authority such as that utilised by Aboriginal elders. Such an approach will need to be appropriately adapted where the child has intellectual abilities which limit his or her ability to understand the nature of his or her actions.

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<sup>63</sup> Australian Research Alliance for Children & Youth, *The impact of drug and alcohol misuse on children and families* (2006) <[https://www.aracy.org.au/publications-resources/command/download\\_file/id/143/filename/The\\_impact\\_of\\_drug\\_and\\_alcohol\\_misuse\\_on\\_children\\_and\\_families.pdf](https://www.aracy.org.au/publications-resources/command/download_file/id/143/filename/The_impact_of_drug_and_alcohol_misuse_on_children_and_families.pdf)>.

*Consultation 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.*

76. The answer to Question 7 builds on the answers provided to Questions 5 and 6 above.
77. With appropriate funding and support for services available for young people, it is hoped that children will be provided with the level of one-on-one case management and care required to ensure ongoing support and rehabilitation for those who fall below the higher age threshold. The provision of culturally-appropriate services will also play a significant role in the success and sustainability of their relationships with children.
78. However, there will inevitably be children who are unable to access services due to their complex needs, their being placed in multiple out-of-home care placements, or because they lack the appropriate support from parents or guardians to assist with or encourage access to services within the youth justice system. As argued above, criminalising the behaviour of children who fall through the cracks at an early age is not an appropriate nor sustainable way of addressing this issue.
79. In those circumstances, it is important that those with care and responsibility for children who fall within that gap be able to provide the necessary supports to assist them, requiring strategies such as:
  - a. Support services being made available through schools, with training of teaching staff to be able to identify issues early and provide referrals that are appropriate and needs-based;
  - b. Adequate training of police and law enforcement on how to assist, treat and support young persons who may be engaging in “anti-social” behaviours;
  - c. Significant overhauling of the out-of-home-care system, to sever the significant correlation between juvenile criminal activity and a history of being placed in care;<sup>64</sup>
  - d. Education of parents and carers as to how to appropriately support the needs of children who require early intervention.

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<sup>64</sup> The Bar Book Project, *Out-of-Home Care* (2019) 1, footnote 5 <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/pdf/BBP\\_OOHC\\_chapter-Nov2019.pdf](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_OOHC_chapter-Nov2019.pdf)>, citing Australian Law Reform Commission, Family Violence – A National Legal Response (Report No 114, 2010) 973, New South Wales, Special Commission of Inquiry into Child Protection Services in NSW Report 92008) vol 2, 556 [15.1], Australian Institute of Health and Welfare, Young People in Child Protection and Under Youth Justice Supervision 2014–15 (Data Linkage Series No 23, 2016) 11, Katherine McFarlane, ‘Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System’ (PhD Thesis, University of New South Wales, 2015) 75–86, Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (Report, August 2004) 16, ; Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2018) 485 [15.1].

*Consultation 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?*

80. The Association places significant emphasis on the need for early treatment and rehabilitation as best practice for protecting the community from anti-social or “criminal” behaviours by children who fall under the minimum age threshold. Best practice should prioritise community-based rehabilitation, particularly in circumstances where evidence suggests that children are able to “grow out” of offending.<sup>65</sup>

81. Early intervention is key. The President of the Children’s Court of NSW, His Honour Judge Peter Johnstone, summarised a body of research that demonstrates the value of early intervention as follows:<sup>66</sup>

[89] If we know that trauma impacts the ability of children to develop crucial brain functions and forge important relationships and connections, which are then critical in supporting protective factors such as education, then we already know that many children who are offending are acting out and are unable to rationalise or mitigate their actions.

[90] Punishing children by placing them in detention centres, when they have already suffered disadvantage and trauma, makes no sense from an ethical, legal, economic or welfare perspective.

[91] There is also a growing body of evidence that incarceration of children and young persons is both less effective and more expensive than community-based programs, without any increase in risk to the community.

[92] Most young persons in the juvenile justice system can be adequately supervised in community-based programs or with individualised services without compromising public safety. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality.

[93] In my experience, although a bond is a higher penalty than a Youth Justice Conference, it does not require any action or reflection on the part of the young offender, and so the deterrent effect is greatly diminished. A YJC, as I have already discussed, is an example of a community-based approach, which is more effective in helping young people to understand and make reparations for their actions, and to reduce recidivism.

[94] No experience is more predictive of future adult difficulty than confinement in a juvenile facility.

82. If there are sufficiently well resourced community-based programs or individualised services then the Association considers that the number of children

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<sup>65</sup> Children’s Court of NSW, ‘How juvenile offending differs from adult offending’, *Resource Handbook: What makes juvenile offenders different from adult offenders* (2019) <[https://www.judcom.nsw.gov.au/publications/benchbks/children/cm\\_juvenile\\_offenders\\_different.html#d5e9849](https://www.judcom.nsw.gov.au/publications/benchbks/children/cm_juvenile_offenders_different.html#d5e9849)>; K Richards, Trends & issues in crime and criminal justice, No 409 (February 2011).

<sup>66</sup> Judge Peter Johnstone, President of the Children’s Court of NSW, *Speech to the 6<sup>th</sup> Annual Juvenile Justice Summit* (5 May 2017, Sydney), quoted in Children’s Court of NSW, above n 58.

who are in need of any form of detention will be very substantially decreased. Such an approach, if implemented, will bring NSW closer to the well-recognised principle that detention of children should only be used as a last resort.

*Consultation 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?*

83. The issue of accessorial liability would need to be carefully considered on a case-by-case basis by reference to the specific wording of each statutory offence, to ensure that the common law principle of innocent agency is not unintentionally abrogated. The Association would be happy to assist COAG with any further questions it may have in relation to this issue.

*Consultation 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.*

84. The position of the Association with respect to NSW is set out above.

### *Conclusion*

85. Thank you again for the opportunity for the Association to make submission to COAG concerning this important matter. If the Association can be of any further assistance to COAG, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, on 02 9232 4055 or at [epearson@nswbar.asn.au](mailto:epearson@nswbar.asn.au) at first instance.