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## Process to raise the age of criminal responsibility

Submission to the Council of Attorneys-General

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# I. Executive summary

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Children should grow up healthy and be supported to stay with their families and within their communities. Governments can support this, by helping children to remain in school and by building the capacity of families to provide the care and support children need. In particular children under the age of 14 years who are undergoing significant growth mentally, emotionally and physically should be dealt with in a way that fosters healthy adolescent development and positive behaviours. No child under 14 years should be exposed to the criminal legal system to deal with challenging behaviours.

Through the *doli incapax* presumption, the current law recognises that children below 14 years are in need of protection from the criminal legal system. However, this old, common law presumption is failing to safeguard children through its inconsistent application, inability to access expert evidence and judicial discretion and because it does not reflect contemporary medical knowledge of childhood brain development, social science, long term health effects, or human rights law.

Evidence shows that early contact with the criminal legal system significantly increases the chances of further offending and life-long involvement with the legal system. On the other hand, the Royal Commission into the Protection and Detention of Children in the Northern Territory (the **Royal Commission**) identified that the vast majority of children who are dealt with outside of the formal system do not reoffend, and are more likely to flourish and grow into adulthood in an environment which promotes their health, education and physical and emotional development.

There has been a chorus of calls both nationally and internationally for Australia to raise the age of criminal responsibility, including from the Royal Commission, medical bodies, academics, Aboriginal and Torres Strait Islander and human rights organisations and expert United Nations bodies, most recently, the Committee on the Rights of the Child. It is time for Australian jurisdictions to raise the age of criminal responsibility to 14 years. Raising the minimum age should be done in conjunction with measures to ensure children receive appropriate community support directed at addressing risk factors.

# II. Background and context

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## **Children should be treated differently from adults**

Children are different from adults and the criminal legal systems must reflect this. Children think and act differently. Their brains are not fully developed. They are more likely to act impulsively and with less regard for the consequences. They have greater capacity for change.

Much offending by children is impulsive and transient, rather than planned and habitual. Unlike adult offending, offences by children tend to be attention-seeking, public, episodic, unplanned and opportunistic.<sup>i</sup>

Where children and young people continue to have ongoing contact with the justice system, this is largely linked to environmental and social factors. The factors that can lead a child or young person into the justice system are largely the same as those that can lead them into child protection,<sup>ii</sup> – that is, family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage.

Just as laws in relation to voting, drinking, driving and smoking treat children differently from adults, the criminal legal system should treat them differently.

### **The number of children who commit crime is dropping**

Very few children and young people come into contact with the legal system. Recent figures from the Sentencing Advisory Council show less than 1.4% of people in Victoria aged between 10-17 years were alleged by police to have committed an offence in 2015.<sup>iii</sup> Nationally young offenders aged 10-17 years accounted for just 12% of the total offender population in Australia in 2018--19, with children aged 10-13 years accounting for just 0.02% of the total offender population.<sup>iv</sup>

Despite high profile media coverage of youth offending in certain jurisdictions, the number of children who offend and the total number of offences committed by children have both dropped significantly. In recently released statistics on recorded crime in Australia 2018-19, the ABS reported that the youth offender rate has decreased to the lowest in the time series.<sup>v</sup> In Victoria specifically, police data shows that overall crime by 10-17 year olds has dropped by around 25% over the past 5 years and that the number of 10-17 year olds committing crime has dropped by around 40%.<sup>vi</sup> Court sentencing data backs this trend.<sup>vii</sup>

## III. Raise the age without exception

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Question 1. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only?

Response: Yes, the age of criminal responsibility should be increased from 10 years to at least 14 years old in all Australian jurisdictions. There should be no 'carve out' or exceptions for certain offences.

The age of criminal responsibility in all jurisdictions in Australia is currently just 10 years old.<sup>viii</sup> This is the age at which a child can be investigated for an offence, arrested by police, charged and locked up in a prison. Such a low age is in breach of human rights standards and puts Australia out of step with the rest of the world, where the median age is 14 years.<sup>ix</sup>

It is often the most vulnerable and disadvantaged children who come to the attention of the criminal legal system at a young age.<sup>x</sup> Recent research has found that early contact with the youth legal system increases the likelihood of poorer outcomes including:

- being held on remand (in custody prior to trial or sentencing) rather than bailed;
- further offending; and
- potential life-long involvement with the criminal legal system.<sup>xi</sup>

The reasons for reforming the current minimum age of criminal responsibility are clear.

**First, the current laws are inconsistent with medical science.** The current minimum age is in contrast to medical evidence that children aged 10 to 14 years lack emotional, mental and intellectual maturity. Contemporary research shows that children's brains are still developing throughout these formative years where they have limited capacity for reflection before action.<sup>xii</sup> Children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of being labelled a criminal.<sup>xiii</sup>

**Second, social science affirms the dangers of early contact.** Criminalising the behaviour of young children creates a vicious cycle of disadvantage and forces children to become entrenched in the criminal legal system.<sup>xiv</sup> Studies show that the younger a child has their first contact with the criminal legal system, the higher the chance of future offending.<sup>xv</sup> It is well recognised that criminal legal systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future offending.<sup>xvi</sup>

The Victorian Sentencing Advisory Council has found 'that the younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to imprisonment in an adult court before their 22<sup>nd</sup> birthday'. The likelihood of reoffending was substantially higher the younger a child was at first sentence, with an 86 percent reoffending rate for children aged 10-12 year olds, more than double that of those who were first sentenced aged 19-20 (33%). The Victorian Sentencing Advisory Council also found that with each one year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending.<sup>xvii</sup>

Consistent with the research in Victoria, the Australian Institute of Health and Welfare has confirmed an increased likelihood of reoffending and ongoing involvement in the criminal legal system the younger a child is when they first come into contact. It found that the younger a child is when first sentenced to a supervised order, the more likely they are to return to the legal system at some point before they turn 18. In relation to those children aged 10-12 years whose first supervised sentence was community-based, 90% of these children returned to sentenced supervision. The likelihood of return decreased with each one year increase in age.<sup>xviii</sup> The likelihood was higher for children sentenced to detention as their first supervised sentence, with 94% of children aged 10-12 at the start of this sentence returning to some type of sentenced supervision before they turned 18. This rate of return decreased with each year of age.<sup>xix</sup>

Children who are forced into contact with the criminal legal system at a young age are also less likely to complete their education and find employment. The current criminal legal system traps children who would otherwise grow out of the behaviours and benefit from social interventions and support.

**Third, early criminal legal contact impacts on wellbeing and leads to negative ongoing health effects.** All incarcerated children may suffer from poorer health, which can be compounded or exacerbated by the detention environment.<sup>xx</sup> Youth detention has been associated with higher risks of suicide and psychiatric disorders, depression, substance use and behavioural disorders.<sup>xxi</sup>

The Australian Medical Association has stated that the effects of youth detention, "contribute to, and exacerbate, the poor health of Aboriginal and Torres Strait Islander peoples."<sup>xxii</sup> There is a clear link

between wellbeing, mental health and youth detention, given 1/3 of incarcerated youth diagnosed with depression only experienced its onset once they were incarcerated.<sup>xxiii</sup> As the Royal Commission into the Protection and Detention of Children in the Northern Territory (the **Royal Commission**) identified, children have been damaged by entry into detention.<sup>xxiv</sup>

Children who have suffered abuse, have experienced neglect and/or have been involved in the child protection system are over-represented among children and young people in custody.<sup>xxv</sup> In Victoria, the majority of young people under youth justice supervision (60.4%) also received a child protection service over a recent 4 year period, just over 10 times the rate of child protection among the general Victorian youth population.<sup>xxvi</sup> In relation to Aboriginal and Torres Strait Islander children under youth justice supervision, 69% also received child protection services.<sup>xxvii</sup>

**Fourth, human rights law is clear.** The current minimum age is in breach of international human rights law and is inconsistent with international standards. The median age of criminal responsibility worldwide is 14 years old. The United Nations Committee on the Rights of the Child (the **UN Committee**) has recently confirmed that nations should set a minimum age no lower than 14 years and that laws should ensure children under 16 years may not be legally deprived of their liberty.<sup>xxviii</sup> Australia has been repeatedly criticised by the United Nations, most recently by the Committee on the Rights of the Child during its review in September 2019, for failing to reform the current minimum age.<sup>xxix</sup>

## IV. Set the bar at 14 years

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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?

Response: As discussed above, the age of criminal responsibility in all Australian jurisdictions should be raised to at least 14 years of age. There should be no 'carve out' or exceptions for certain offences.

The median age of criminal responsibility worldwide is 14 years old. The UN Committee has recently confirmed that countries like Australia should set a minimum age no lower than 14 years and that laws should ensure children under 16 years may not be legally deprived of their liberty.<sup>xxx</sup> In recent months, the UN Committee has again called on the Australian Government to raise the age of criminal responsibility and recommended that the age be set no lower than 14 years.<sup>xxxi</sup> If Australia only raises the age to 12 years, it will continue to be out of step with global minimum standards.

In addition, the UN Committee has warned against permitting exceptions to the established minimum age of criminal responsibility, for example permitting children in younger age groups to be the subject of criminal proceedings in the case of certain serious offences.<sup>xxxii</sup> It noted that such practices are 'usually created to respond to public pressure and are not based on rational understanding of children's development.' The UN Committee 'strongly recommends' that governments instead 'set

one standardized age below which children cannot be held responsible in criminal law, without exception'.<sup>xxxiii</sup>

As mentioned above, children under the age of 14 years are undergoing significant growth and development, particularly in terms of neurocognitive development. In relation to children this young, the areas of their brain responsible for executive functions including controlling impulses, judgement, planning and foreseeing the consequences of their actions will not have fully developed and will not be fully mature until they have reach their 20s. As the Victorian Sentencing Advisory Council has noted, this immaturity in brain function is likely to contribute to adolescents' lack of impulse control and make them vulnerable to peer pressure including risk-taking behaviours.<sup>xxxiv</sup> In line with the medical science, child offending experts, psychologists and criminologists agree that children under the age of 14 years have not developed the social, emotional and intellectual maturity necessary for criminal responsibility.<sup>xxxv</sup>

## V. The failed safeguard of *doli incapax*

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Question 3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* be retained? Does the operation of *doli incapax* differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of *doli incapax* be applied more effectively in practice?

Response: *Doli incapax* fails to safeguard children aged 10 to 13 years, is applied inconsistently and results in discriminatory practices. Once the age of criminal responsibility is raised to 14 years, *doli incapax* would become redundant.

When a child is over the age of 10 but under 14, there is an old, common law presumption that the child lacks the capacity to be criminally responsible for their actions, known as *doli incapax* (incapable of crime). In order to rebut the presumption, it must be proved that at the time of the offence the child knew that their actions were seriously wrong in the moral sense.<sup>xxxvi</sup>

However, in order to determine conclusively whether a child aged 10-13 years was *doli capax* at the time of the offence, a trial or summary hearing must be held. The trial to determine capacity and guilt could take months or longer depending on court lists, case management processes and the availability of experts and other witnesses relevant to proof of knowledge and maturity. In the meantime, the young child awaiting trial will have already experienced and been exposed to certain aspects of the criminal legal process that can itself be criminogenic and reinforce the very behaviours and attitudes sought to be prevented. For example, a child suspected of committing an offence could be arrested and taken into custody by police, handcuffed, strip searched, subjected to forensic examinations including intimate procedures, interrogated, remanded in custody or subject to conditional bail, multiple court appearances and identified or labelled as a criminal through media or social media reporting. These by-products of early criminal legal contact for a young child can lead to victimisation (by adults and other children), stigmatisation and negative peer contagion.<sup>xxxvii</sup>

In addition the Australian Law Reform Commission (ALRC) noted that:

*Doli incapax* can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.<sup>xxxviii</sup>

The UN Committee on the Rights of the Child has also expressed concern as to inconsistency in the operation and discrimination in the application of such so called protective systems, particularly those with a rebuttable presumption for certain aged children. It stated that:

Initially devised as a protective system, it has not proved so in practice. Although there is some support for the idea of individualized assessment of criminal responsibility, the Committee has observed that this leaves much to the discretion of the court and results in discriminatory practices.<sup>xxxix</sup>

This archaic presumption routinely fails to safeguard children.<sup>xl</sup> It is applied inconsistently and it can be very difficult for children to access or resource quality expert assessments/evidence, particularly children in regional and remote areas.<sup>xli</sup>

Importantly, the presumption does not reflect contemporary medical knowledge of childhood brain development, social science, long term health effects or human rights law.<sup>xlii</sup>

## VI. Stop locking up young children

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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)?

Response: The age of criminal responsibility should be raised to 14 years. This would ensure children aged 10-13 years cannot be imprisoned or detained (whether on arrest, on remand or under sentence).

In addition, there should be a legislative principle that the custody of a child or young person for an offence (whether on arrest, on remand or under sentence) should be as a last resort and for the shortest appropriate period of time.

The UN Committee has recommended that 'no child be deprived of liberty, unless there are genuine public safety or public health concerns' and that governments 'fix an age limit below which children may not legally be deprived of their liberty, such as 16 years.'<sup>xliii</sup>

In addition, the UN Committee has stated that 'children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol

spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed.<sup>xliiv</sup>

When a child is incarcerated, they are removed from their home, family and other social supports. The loss of liberty, personal identity and protective factors that may have been available in the community can place great stress on a child, impair adolescent development and compound mental illness and trauma.<sup>xliv</sup> In these circumstances, children in prison are particularly susceptible to victimisation (by adults and other children), stigmatisation by the criminal legal system and negative peer contagion.<sup>xlvi</sup>

For Aboriginal and Torres Strait Islander children in particular, the social isolation and alienation from family, community and country can be more intense especially for children from regional areas. The flow on effect is also felt through family and community disharmony, impaired connection to positive family members including elders and reduced opportunities to fulfil and engage in important cultural obligations including ceremonies and initiation.

The removal of a child from their community can serve to reinforce negative behaviours and increase the influence of peers in the detention facility. It is accepted that youth prisons are 'universities of crime' that enable offenders to build and maintain criminal networks, learn and improve offending techniques and strategies.<sup>xlvii</sup> So rather than assisting a child to develop in socially responsible ways and address their needs and risk factors, incarceration itself can increase the likelihood of re-offending.

The recent review of Victoria's youth legal system confirmed the dangers of incarcerating a child, reporting that:

depriving a child or young person of their liberty is detrimental to adolescent development, dislocates young people from any protective factors they may have, and must only be an option of last resort. No evidence shows that a custodial order reduces offending – in fact, the Sentence Advisory Council (2016) found that more than 80 per cent of young people on a custodial order reoffended, reflecting among the highest rates of recidivism of all young offenders.<sup>xlviii</sup>

Young people caught in the quick sand of the criminal legal system have significantly higher rates of mental health conditions and cognitive disabilities when compared with the general youth population.<sup>xlix</sup> They are also likely to experience co-occurring mental health disorders and/or cognitive disability. Australian research suggests that these multiple factors, when not addressed early in life, compound and interlock to create complex support needs.<sup>l</sup>

In terms of objective data on the prevalence of mental health issues and other health needs, the most recent survey from the Youth Parole Board, of 209 boys and 17 girls held in detention in Victoria on 1 December 2017, found that:

- 70 per cent were victims of abuse, trauma or neglect;
- 53 per cent presented with mental health issues;
- 30 per cent had a history of self-harm or suicidal ideation; and
- 41 per cent presented with cognitive difficulties that affect their daily functioning.<sup>li</sup>

There is a clear link between wellbeing, mental health and youth detention, given one third of imprisoned children diagnosed with depression only experienced its onset once they were behind bars.<sup>iii</sup> Youth imprisonment is associated with higher risks of suicide and depression.<sup>liii</sup> Imprisoning children impacts on their immediate and future health and should be avoided.

Imprisoned children and young people are also likely to have been exposed to multiple traumatic events, socioeconomic disadvantage, family violence and poor educational opportunities.<sup>liv</sup>

However, the exact number of children and young people with disabilities or mental health issues is unknown due to limited screening and assessments tools at various stage of the youth legal system.<sup>lv</sup>

The failure to screen and assess children for cognitive impairments including FASD is also a common failing of youth legal systems across Australia. This was demonstrated by a Western Australian study of young people in detention, 74% of whom were Aboriginal children. The study found that 36% of the children assessed met the criteria for FASD and that 89% had at least one form of severe neurodevelopmental impairment.<sup>lvi</sup> Most of the young people had gone previously undiagnosed despite multiple contacts with government and other agencies, including prior engagement with child protection services and the youth legal system.

The missed opportunities for earlier diagnosis and intervention may have prevented or mitigated their involvement with criminal legal services.<sup>lvii</sup>

Even if diagnosed, custodial facilities are ill-equipped to deal with the mental health needs of young people, despite having a dedicated funded health service.<sup>lviii</sup> In a recent review of Victoria's youth legal system, experts criticised the resourcing and current services model of youth detention as insufficient to meet the vast needs of the youth detention population and the lack of staff training and skills to appropriately assess and respond to mental health presentations.<sup>lix</sup> Children in prison are also subjected to practices – like excessive use of solitary confinement and routine strip searching – that can exacerbate mental health issues. Continuing to funnel children and young people into these prisons only serves to compound experiences of trauma and exacerbate mental health challenges.

## VII. Prevention and early intervention

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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?

Response: There are a substantial number of programs and frameworks in existence that are either delivered by or funded by governments to assist children at risk or in need of assistance. Governments should undertake a process of service mapping across jurisdictions to provide baseline data and share information on the efficacy and adequacy of current services and programs directed at the prevention of harm and early intervention where there is risk of offending behaviours in children and young people.

In order to determine what is actually needed or required within given high risk communities or regions, targeted community plans should be developed to provide a snapshot of the strengths and needs of children and families in the community and give community voice about which children and family services they want to retain, change or replace.

In partnership and collaboration with families, communities and other key organisations, the departments and agencies involved in health, child protection and education should be involved in early intervention initiatives and responses to prevent and reduce problematic and offending behaviour in children and young people.

### **Service mapping and baseline data**

Instead of reinventing the wheel, a useful first step should be to acknowledge what is currently in place when it comes to responding to at-risk children and addressing problematic behaviours.

State, Territory and Commonwealth Governments are best placed and have overall responsibility for existing frameworks and strategies, including programs and services directed at assisting children and supporting families. In particular, it would be crucial to an assessment of what is working, where, why and how for governments to provide baseline data on all child and family services and programs within their state and territories that are funded to address recognised causal factors to offending behavior by children and young people, including those prevention programs that improve parenting, strengthen communities, support families at risk, address poor mental health, disability and substance misuse. This information should include a holistic list of all services and programs funded by each level of government and include information on where and what is provided, data on the children and family receiving the services and qualitative information on outcomes and experiences following engagement, including evaluations and reports to determine the accessibility and efficacy of these programs and services in meeting the objectives and desired outcomes for children and families.

It is of concern that whilst there continues to be significant expenditure on children and family services nationwide, governments are failing to see a marked reduction in harm to children and family separation nor address poor health and life expectancy outcomes, particularly for Aboriginal and Torres Strait Islander people. The Productivity Commission review into governmental funding of child and family services in the NT, found that both levels of government made funding decisions in isolation of each other leading to fragmentation, inefficiencies in service delivery, and significant overlap in expenditure effort<sup>x</sup>. In addition to a number of recommendations aimed at increased transparency and collaboration between governments, service providers and communities, the Commission recommended moving away from the top-down, siloed and fragmented approach to one that targets funding to the needs and priorities of children, families and communities. The Commission noted that in order to “effectively address the complexities faced by children and families in the Northern Territory, communities must be part of the design, delivery and evaluation of the programs and services that affect them.”<sup>xi</sup>

### **Prevention and early intervention**

In terms of what agencies should be involved in the delivery of programs and services, it is noted that certain agencies have existing responsibility and the capability to identify and respond to at risk children and young people. In particular, departments of health, human services and education would be best placed to identify children exhibiting problematic behavior earlier and to provide appropriate supports and interventions to address individual risk and need.

The criminal legal system – a system designed to control and punish – is not the right response. These children need help to get their lives back on track, not criminalization.

### **Schools and the education system**

There is a clear link between disengagement from school and poor school attendance and a child's entry into the youth legal system. In many cases, the disconnection from school results not only in removal from pro-social peers and important support structures, but also leads to low levels of education which can significantly limit a child's employment and future prospects, aspirations and self-esteem.

In Queensland, a recent review of their youth legal system drew this link.<sup>lxii</sup> It found that many children in the youth legal system had poor levels of school engagement and attendance, with a significant number not attending or enrolled in school. A recent census of children in Queensland subject to youth justice supervision confirmed high levels of education disengagement, with records showing just 30% of compulsory school aged children were regularly attending school and around one third of children were not even enrolled in school though they were of compulsory school age. The same census showed that many justice involved young people had poor levels of mental health, high disability rates, behavioural issues, substance misuse, family conflict and housing instability.

In Victoria, the recent youth detention inquiry observed that many young offenders experience significant disruption to their education, and many experience difficulties with literacy and numeracy, disabilities such as cognitive impairment, intellectual disability or language and communication disorders.<sup>lxiii</sup> It found that young people 'often have fragmented and persistently problematic contact with education services.' It noted in many cases, 'this results in low levels of education across the offender profile, significantly increasing the risk of current and future exclusion from employment. This, in turn, affects how well a young person integrates back into the community.'

The Queensland review concluded that education was key to "preventing crime and getting children back on the right track" once they come into contact with the criminal legal system.<sup>lxiv</sup>

In order to ensure all compulsory school aged children (aged 6 to 17 years) achieve better outcomes and have positive educational experiences, schools and education institutions should be focused on identifying and addressing the issues and challenges that impact or have the potential to impair attendance and engagement including poor health and learning difficulties, disability, housing instability, parental substance misuse and family violence. School environments therefore present an ideal opportunity to identify vulnerable children and families and provide targeted support.<sup>lxv</sup> In this regard education authorities and institutions should move away from opaque behavioural management practices that can lead to the suspension and expulsion of children and young people exhibiting challenging behaviours towards providing an inclusive school environment with policies and practices that are supportive of all children, particularly responsive to the unique experiences and needs of children with health, disability and learning issues.

### **Addressing harm, disability and trauma - child protection and welfare services**

The failure to identify health needs and understand the link between challenging behaviours and the traumatic impact of abuse and neglect on children can lead to children known to child protection and welfare services being forced through the criminal legal system.

Children who have suffered abuse, experienced neglect and/or been involved in the child protection system are over-represented among children and young people in custody.<sup>lxvi</sup> In Victoria, the majority of young people under youth justice supervision (60.4%) also received a child protection service over

a recent 4 year period. This is just over 10 times the rate of child protection among the general Victorian youth population.<sup>lxvii</sup> In relation to Aboriginal children under youth justice supervision, 69% also received child protection services.<sup>lxviii</sup> In relation to those particularly young children aged 10-13 years who were known to both child protection and youth legal systems, the Sentencing Advisory Council found that 1 in 2 were subject to a child protection report, 1 in 3 were subject to a protection order, 1 in 3 experienced out of home care, 1 in 4 experienced residential care.<sup>lxix</sup>

As the NT Royal Commission found:

understanding the underlying characteristics and needs of children who offend is a necessary precondition to addressing their behaviour, especially in terms of the neurobiological consequences of maltreatment and trauma, and how they affect behaviour. Screening and assessments are believed to be critical in achieving an understanding of individual needs across both the child protection and youth legal systems.<sup>lxx</sup>

The failure to appropriately assess health needs and address the link between challenging behaviours and the traumatic impact of abuse and neglect can lead to children being further re-traumatised and pushed into detention.<sup>lxxi</sup> Noting the clear link between a child's contact with child protection system and engagement in the youth legal system, child protection and welfare agencies are uniquely placed to identify and respond to children at risk through appropriate information sharing, assessments and referrals to services and supports that could ensure individualized culturally responsive interventions.

#### **Responding to problematic childhood behaviours and the role of health professionals**

The Human Rights Law Centre supports and endorses the submission by the Royal Australian College of Physicians, particularly on the role of paediatricians and other health experts to assist and support children and their families to understand health and disability needs, obtain medical and therapeutic assistance and to develop appropriate strategies to manage problematic behaviour.

## VIII. Assisting and supporting at risk youth

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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?

Response: Children under the age of 14 years lack the developmental maturity and mental capacity to fully appreciate the criminal nature of their actions or comprehend the real and potential impact of their actions on others. In relation to children this young the focus must be on identifying and addressing the causes underlying their challenging behaviours including through measures that will promote their social and emotional wellbeing and prevent the repetition of such behaviours. Invariably, it should be recognised that anti-social or problematic behaviour in very young children may well be linked to social environmental factors outside of their control. Unlike most adults, children often have limited control or agency over their lives and are to varying degrees reliant on adults with

responsibility and whom are entrusted to their care to provide the necessary protection, guidance, and support.

In states and territories across Australia there are a range of strategies, programs and services directed at assisting children and young people that are 'vulnerable' or presenting with high risk and need. For example, the Victorian government launched Positive Pathways for Victoria's Vulnerable youth - a policy framework to support vulnerable youth and their families back in August 2010. The framework was designed to ensure improved integration of services, stronger localised approaches and more effective responses including specific initiatives to enable earlier identification of young people who are showing signs of vulnerability, with a particular focus on those who are at risk of entering the youth justice system.<sup>lxxii</sup>

In addition, following the Royal Commission into Family Violence, the Victorian government launched the Roadmap for Reform in April 2016 designed to improve the lives of vulnerable children, young people and families in Victoria through building supportive and culturally strong communities and improving access to universal services, supporting children, young people and families in need with integrated wraparound supports and targeted early interventions and strengthening home-based care and improving outcomes for children in out-of home care.<sup>lxxiii</sup>

In terms of education, training and work the Victorian government has rolled out a range of education reforms that increase funding and program support for vulnerable children and young people through Skills First, Reconnect and the Navigator program.

Following the Royal Commission into the Protection and Detention of Children in the Northern Territory, the Northern Territory government has rolled out Back on Track, which includes a series of specialised early intervention programs targeting young people 'at-risk of entering the youth justice system.' The early intervention programs focus on case management, bush camps and education and training initiatives run by community organisations and businesses with a strong focus on cultural connectedness, identity and enhanced wellbeing.<sup>lxxiv</sup> Police, government agencies and non-government agencies can refer children under the age of criminal responsibility (8-9 years) to the program. In relation to some of these initiatives, there is the capacity for reparation to victims of crime or persons harmed through offending including restorative justice conferences. However the overarching focus is on ensuring individualised responses through appropriate assessment of health, educational, social and emotional needs and risks that can also result in responses that work with and build the capacity of families.

The recent review of youth justice in Queensland noted that 'integrated and coordinated responses to both children and their family have the best chance of success, specifically those involving, schools, community organisations, state government and federal and local government agencies.<sup>lxxv</sup>' The report went on to highlight partnerships, collaborations and specific programs that are achieving positive outcomes particularly the coordinated local approaches to early intervention including the Townsville Stronger Communities Action Group and Logan Together. The programs that work to address high levels of need and risk in children and young people were found to include parenting programs directed at the parents of the child, positive school engagement and retention strategies, mentoring of children at risk, and social and wellbeing programs linked to health and mental health services, substance misuse services, sport and recreation activities and cultural connection.<sup>lxxvi</sup> However the review warned against intensive intervention programs for low risk children noting that

such programs 'work best with children and young people who have a moderate to high risks and needs.' It reiterated that children presenting with low risk should have limited contact with the system (ie cautions) in order to prevent their entrenchment and exposure to other negative outcomes.<sup>lxxvii</sup>

## IX. Youth justice systems offer harmful responses

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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.

Response: It cannot be said that the majority of children brought into contact with the criminal legal system receive developmentally appropriate therapeutic services or interventions. In recent years there have been a plethora of inquiries into state and territory youth justice systems that have highlighted widespread and systematic deficiencies within these systems that abrogate child rights and put children's health, safety and wellbeing at serious risk.<sup>lxxviii</sup> Harm can still be caused by early contact with the criminal legal system regardless of how limited or seemingly inconsequential, including through the arrest of a child, formal charge and court appearance.

The Royal Commission into the Protection and Detention of Children in the Northern Territory identified that the vast majority of children who are dealt with outside of the formal criminal justice system do not reoffend, and are more likely to flourish and grow into adulthood in an environment which promotes their health, education and physical and emotional development.<sup>lxxix</sup>

In addition to the matters raised above, if children are exhibiting challenging behaviour or at risk of offending at school, more must be done to ensure they are supported to engage and remain in school. Recognising that many children who have disengaged from school may find it difficult to participate or succeed within traditional school environments, there should be more alternative and flexible education approaches to empower a child's participation within a structured environment, to develop trust and feel safe with educators and to develop an enjoyment of learning and achieve regular attendance.<sup>lxxx</sup>

In terms of specifically responding to children and young people at medium to high risk of offending and long-term involvement in the criminal legal system, consideration should be given to the accessibility and effectiveness of current voluntary initiatives like Back on Track in the NT and Youth on Track in NSW.<sup>lxxxi</sup> In relation to both programs, police and education (amongst other agencies) are able to refer at-risk children, who may or may not be involved in the criminal legal system, to specialised service providers who can provide individualised responses that are often linked to case management, restorative practices and youth and family support services.

## X. Prevent harm and promote wellbeing

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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?

Response: Much offending by children is impulsive and transient, rather than planned and habitual. Unlike adult offending, offences by children tend to be committed in small groups in public areas, and close to where they live. Further, offences tend to be attention-seeking, public, episodic, unplanned and opportunistic.<sup>lxxxii</sup>

Where children and young people continue to have ongoing contact with the justice system, this is largely linked to environmental and social factors. The factors that can lead a child or young person into the justice system are largely the same as those that can lead them into child protection<sup>lxxxiii</sup> – family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage. Children who are aged 14 years or younger at the time of their first youth justice order are more likely to come from disadvantaged communities and have higher rates of missed maternal and child health appointments and developmental vulnerability on two or more domains.<sup>lxxxiv</sup>

In relation to anti-social or problematic behaviours by particularly young children, there should be a range of responses that are proportionate to the behaviour and identified risk or need. In terms of prevention and early intervention initiatives these should be the least intensive required in the circumstances and be developmentally appropriate, human rights compliant and evidenced based. The most effective initiatives are those that build or enhance protective factors and positive skills development rather than risk mitigation. For example, family or parental training programs, structured pre-school education programs, centre-based developmental day care, home visitation services, and family support services. Some early intervention initiatives have developed frameworks of these interventions to enhance the overall developmental systems for children in high-risk communities.<sup>lxxxv</sup> It is important to recognise that many of the interventions that reduce the likelihood of a child's later involvement in the criminal legal system are the same as those identified to protect children from harm and promote their wellbeing in the child and family domain.<sup>lxxxvi</sup>

It must be acknowledged that there is likely to be some diversity amongst communities and regions in relation to the factors that contribute to or protect against anti-social or potentially criminal behaviour by young people and the types of services and levels of social capital, resources and funding.<sup>lxxxvii</sup> In light of these differences the Queensland review into youth justice and the recent draft report of the Productivity Commission into funding of children and family services in the NT have supported place-based approaches that are driven by the community and supported by genuine partnerships between community members, non-government organisations and government agencies including police, welfare, health and education.<sup>lxxxviii</sup>

## XI. Sufficient legal consequences

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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?

Response: There is no need for the creation of any new criminal offences for persons who may exploit or incite children under the minimum age of criminal responsibility to engage in or participate in activities or behaviours that could result in the commission of a criminal offence.

We anticipate that the current provisions of state, territory and Commonwealth criminal laws relating to secondary parties or the criminal liability of persons who 'aid or abet' or 'counsel or procure' the commission of an offence or are a party to 'an unlawful common purpose' are sufficient and would have application to those persons who seek to exploit or incite children under the age of criminality.<sup>lxxxix</sup>

It is understood that these laws would ensure an accessory or conspirator to an offence can be liable, charged and found guilty of an offence even where the primary offender lacks *mens rea* or otherwise has a defence, for example where the primary offender is a child under the age of criminality. There is legal precedent on the criminal liability of those who exploit or incite an 'innocent agent' in the commission of an offence.

## XII. Allow those ready to lead

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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.

Response: It is unclear what operational issues may impede individual states or territories from raising the age of criminal responsibility. However where individual states or territories are in a position to raise the age, this should be encouraged and supported.

There is no shared vision or national approach to the administration and operation of youth legal systems in Australia. Each state and territory in Australia has its own youth justice legislation, policies, and practices. As a result there is stark inconsistency across jurisdictions when it comes to a child or young person's experience and outcomes of contact with such systems, particularly in terms of access to evidenced based and effective rehabilitation programs, services and therapeutic responses.

Historically there has not always been uniformity when it came to the minimum age of criminal responsibility. It took around 24 years for Australian governments to achieve the present uniform

minimum age of 10 years in all Australian jurisdictions, with Queensland first raising the age from 7 to 10 years in 1976 and Tasmania and ACT being the final jurisdictions to raise the age from respectively 7 and 8 to 10 years in 2000.<sup>xc</sup> In relation to the application of the *doli incapax* presumption it should also be noted that there is some inconsistency across jurisdictions, with the presumption based in the common law of New South Wales, South Australia and Victoria and legislated in all other jurisdictions but with some divergence regarding the test or what must be proved to rebut the presumption.<sup>xcii</sup>

In a federal system where there is such divergence in the policies, approaches and outcomes for children and young people, there should be no impediment to individual states or territories choosing to lead this reform. Where individual states or territories are in a position to raise the age of criminal responsibility to 14 years, this should be encouraged and supported.

### XIII. Additional comments

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Question 11. Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

N/A

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<sup>i</sup> Cunneen, Chris, Rob White and Kelly Richards, *Juvenile Justice in Australia* (5th ed., Oxford University Press, 2015) 55.

<sup>ii</sup> Joint Australian Children's Commissioners and Guardians submission to the Australian House of Representatives Inquiry into the over representation of Aboriginal and Torres Strait Islander young people in the justice system (2010), 6.

<sup>iii</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria*, (2016) 2. See also Sentencing Advisory Council, *Sentencing Children in Victoria*, (2016) 1.

<sup>iv</sup> Australian Bureau of Statistics, *Recorded Crime-Offenders, Australia, 2018-19*, Data table 21 Youth offenders, Sex and principal offence by age, 2018-19.

<sup>v</sup> *Ibid.*

<sup>vi</sup> Department of Health and Human Services, *Alleged youth offender incidents, Analysis of Crime Statistics Agency data* 15 June 2016.

<sup>vii</sup> Sentencing Advisory Council, *Sentencing Children in Victoria* (2016) 13, 53.

<sup>viii</sup> Commonwealth- Crimes Act 1914, s 4M; Criminal Code Act 1995, s 7.1; Australian Capital Territory- Criminal Code 2002, s 25; Northern Territory- Criminal Code, s 38(1) & 42AP; New South Wales- Children (Criminal Proceedings) Act 1987, s 5; Victoria- Children, Youth and Families Act 2005, s 344; South Australia- Young Offenders Act 1993, s 5; Western Australia- Criminal Code Act Compilation Act 1913, s 29; Queensland- Criminal Code Act 1899, s 29(1); Tasmania- Criminal Code 1924, s 18(1).

<sup>ix</sup> Australian Human Rights Commission, National Children's Commissioner, *Children's Rights Report 2016*, 187.

<sup>x</sup> Australian Institute of Health and Welfare 2016. *Young people in child protection and under youth justice supervision 2014–15*. Data linkage series no. 22. Cat. no. CSI 24. Canberra: AIHW, 17: 'Those who were younger at their first youth justice supervision were more likely to also be in child protection in 2014-15 than those who were older at their first youth justice supervision. Three in five (60%) of those aged 10 at their first youth justice supervision were also in child protection, compared with 9.4% of those aged 17. See further Jesuit Social Services, *Too much too Young: Raise the age of criminal responsibility to 12*, October 2015, 3.

<sup>xi</sup> Jesuit Social Services, *Thinking Outside, Alternatives to Remand for Children* (Research Report) (2013), 38-41. See further the Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016), 6.

<sup>xii</sup> Judge Andrew Becroft, 'From Little Things, Big Things Grow' *Emerging Youth Justice Themes in the South Pacific*, 5 referring to Sir Peter Gluckman *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Wellington, Office of the Prime Minister's Science Advisory Committee, 2011), p 24. See also Kelly Richards, 'What makes juvenile offenders different from adult offenders? Trends & Issues in crime and criminal justice' (2011), 4. See further Laurence Steinberg 'Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science' (2007) 16 *Current Directions in Psychological Science* 55, 56.

<sup>xiii</sup> *Ibid.*

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- xiv Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW.
- xv Ibid and AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra.
- xvi Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017).
- xvii Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (December 2016), 26.
- xviii The return was 79% for those children aged 13, 67% of those aged 14, 49 % of those aged 15, 25% of those aged 16, and 4% of those aged 17- see further Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW.
- xix The rate of return was around 91% of those aged 13, 84% of those aged 14, 75% of those aged 15, 47% of those aged 16, and 18% of those aged 17- see further Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW.
- xx Evidence before the Commission established that many of the children and young people in detention in the Northern Territory during the relevant period arrived with variously: hearing loss; poor vision; fetal alcohol spectrum disorder (FASD)/cognitive impairment, and mental health disorders, including early life trauma and psychiatric disorders, including depression, substance abuse and behavioural disorders- see further Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2A, Chapter 15, 351.
- xxi Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2A, Chapter 15, 351; see further Submission, Royal Australian and New Zealand College of Psychiatrists, 28 October 2016.
- xxii Australian Medical Association (2012) "The justice system and public health", available at <https://ama.com.au/position-statement/health-and-criminal-justice-system-2012>.
- xxiii Holman, B. & Ziedenberg, J. (2006) *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, Washington DC.
- xxiv Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 27, 28.
- xxv Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (2016), 6.
- xxvi Australian Institute of Health and Welfare 2018, Young people in child protection and under youth justice supervision 1 July 2013-30 June 2017, table S4a.
- xxvii Ibid.
- xxviii Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
- xxix Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Australia, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [47-48].
- xxx Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
- xxxi Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Australia, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [47-48].
- xxxii Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019) [25].
- xxxiii Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019) [25].
- xxxiv Sentencing Advisory Council of Victoria, Sentencing Children and Young People in Victoria (2012), 11.
- xxxv Jesuit Social Services, Too much too young: Raise the age of criminal responsibility to 12 (October 2015), 4.
- xxxvi RP v The Queen [2016] HCA 53.
- xxxvii Kelly Richards, Australian Institute of Criminology, Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders? (2011), 7.
- xxxviii Australian Law Reform Commission, Seen and Heard: Priority for Children in the Legal Process, Report 84 (1997) [18.19].
- xxxix Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019), [26].
- xl See further O'Brien, W. & Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', Youth Justice, vol. 17, no. 2; and Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017).
- xli Ibid.
- xlii See, eg, Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [44]; Committee on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia, UN Doc CERD/C/AUS/CO/18-20 (29 December 2017) [25]-[26].
- xliii Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019), [89].
- xliiv Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019), [28].
- xlv Royal Australian and New Zealand College of Psychiatrists submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017). Victorian Government, Justice and

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- Community Safety, Peggy Armytage and Professor James Ogloff, Youth Justice Review and Strategy: Meeting needs and reducing offending, (July 2017), 51.
- <sup>xlvi</sup> Kelly Richards, Australian Institute of Criminology, Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders? (2011), 7.
- <sup>xlvii</sup> Kelly Richards, Australian Institute of Criminology, Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders? (2011), 6-7.
- <sup>xlviii</sup> Victorian Department of Justice, Penny Armytage and John Ogloff, Meeting needs and reducing offending, executive summary (2017), 15.
- <sup>xlix</sup> Chris Cunneen, Arguments for Raising the Minimum Age of Criminal Responsibility (Research Report, University of New South Wales, 2017).
- <sup>l</sup> Eileen Baldry, Disability at the margins: limits of the law, 23(3) *Griffith Law Review* 370 (2014); Eileen Baldry, 'People with Multiple and Complex Support Needs, Disadvantage and Criminal Justice Systems' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Sackville Report* (Sydney, 2017); Leanne Dowse, Therese Cumming, Iva Strnadova and Julian Trofimovs, Young People with Complex Needs in the Criminal Justice System, 1(2) *Research and Practice in Intellectual and Developmental Disabilities* 174 (2014); Eileen Baldry and Leanne Dowse, 'Compounding Mental and Cognitive Disability and Disadvantage: Police as Care Managers' in Duncan Chappell (ed), *Policing and the Mentally Ill: International Perspectives* (USA: CRC Press, 2013).
- <sup>li</sup> Department of Health and Human Services, Youth Parole Board Annual Report 2017–18 (Melbourne: Victorian Government, 2018) 15.
- <sup>lii</sup> Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Justice Policy Institute, 2006).
- <sup>liii</sup> Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory (Final Report, November 2017).
- <sup>liv</sup> Department of Health and Human Services, Youth Justice in Victoria Fact Sheet (2016).
- <sup>lv</sup> Victorian Government, Justice and Community Safety, Peggy Armytage and Professor James Ogloff, Youth Justice Review and Strategy: Meeting needs and reducing offending, (July 2017), 156-160.
- <sup>lvi</sup> Carol Bower, Rochelle Watkins, Raewyn Mutch, et al, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia (Telethon Kids Institute, 2018).
- <sup>lvii</sup> Senate Community Affairs Reference Committee, Parliament of Australia, Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia (2016), 23.
- <sup>lviii</sup> Victorian Government, Justice and Community Safety, Peggy Armytage and Professor James Ogloff, Youth Justice Review and Strategy: Meeting needs and reducing offending, (July 2017), 45-46.
- <sup>lix</sup> *Ibid.*
- <sup>lx</sup> Productivity Commission, Expenditure on Children in the Northern Territory, Draft Report, Canberra (2019), 2.
- <sup>lxi</sup> *Ibid.*, 13.
- <sup>lxii</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 33-37.
- <sup>lxiii</sup> Victorian Government, Justice and Community Safety, Peggy Armytage and Professor James Ogloff, Youth Justice Review and Strategy: Meeting needs and reducing offending, (July 2017), Part 1, 161.
- <sup>lxiv</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 22.
- <sup>lxv</sup> *Ibid.*
- <sup>lxvi</sup> Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (2016), 6.
- <sup>lxvii</sup> Australian Institute of Health and Welfare 2018, Young people in child protection and under youth justice supervision 1 July 2013-30 June 2017, table S4a.
- <sup>lxviii</sup> *Ibid.*
- <sup>lxix</sup> Sentencing Advisory Council, 'Crossover Kids': Vulnerable Children in the Youth Justice System (2019), 77
- <sup>lxx</sup> Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Final report, November 2017), Volume 3B, Chapter 35.
- <sup>lxxi</sup> *Ibid.* and Sentencing Advisory Council, 'Crossover Kids': Vulnerable Children in the Youth Justice System (2019), 77.
- <sup>lxxii</sup> Penny Armytage and John Ogloff, Meeting Needs and Reducing Offending, Victorian Department of Justice, (2017), 57.
- <sup>lxxiii</sup> *Ibid.*, 64.
- <sup>lxxiv</sup> See factsheet on Back on Track, sourced from the Northern Territory Government website on 13.01.20 link here: [https://www.youthjustice.nt.gov.au/system/files/uploads/files/2019/back\\_on\\_track\\_fact\\_sheet\\_early\\_intervention\\_targeted\\_programs.pdf](https://www.youthjustice.nt.gov.au/system/files/uploads/files/2019/back_on_track_fact_sheet_early_intervention_targeted_programs.pdf).
- <sup>lxxv</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 22.
- <sup>lxxvi</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018.
- <sup>lxxvii</sup> *Ibid.*, 32.
- <sup>lxxviii</sup> For example, Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017); Office of the Auditor General Western Australia, Diverting Young People Away From Court, November 2017; Penny Armytage and John Ogloff, Meeting Needs and

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Reducing Offending, Victorian Department of Justice, (2017); Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018.

<sup>lxxix</sup> Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 27, p. 413.

<sup>lxxx</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 29.

<sup>lxxxi</sup> In relation to Youth on Track, see further information accessed on the NSW Communities and Justice website 13.01.20 link here: <http://www.youthontrack.justice.nsw.gov.au/>.

<sup>lxxxii</sup> Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice in Australia* (5th ed, Oxford University Press, 2015) 55.

<sup>lxxxiii</sup> Joint Australian Children's Commissioners and Guardians submission to the Australian House of Representatives Inquiry into the over representation of Aboriginal and Torres Strait Islander young people in the justice system (2010), 6.

<sup>lxxxiv</sup> Jesuit Social Services, Thinking Outside, Alternatives to Remand for Children (Research Report) (2013), 38-41.

<sup>lxxxv</sup> *Ibid.*

<sup>lxxxvi</sup> *Ibid.*

<sup>lxxxvii</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 82.

<sup>lxxxviii</sup> Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 82; Productivity Commission, Expenditure on Children in the Northern Territory, Draft Report, Canberra (2019).

<sup>lxxxix</sup> *Director of Public Prosecutions v K & B* [1997] 1 Cr App R 36.

<sup>xc</sup> Queensland in 1976, New South Wales in 1977, South Australia in 1979, Northern Territory in 1983, Western Australia in 1988, Victoria in 1989, Commonwealth in 1995, ACT and Tasmania in 2000.

<sup>xci</sup> The Commonwealth legislation frames the question in terms of whether the child "knows that his or her conduct is wrong." The legislation in Western Australia, Queensland, Tasmania and the ACT require that it be proved the child "had the capacity to know" that he/she ought not do the act or make the omission (or cause the event).

In the Northern Territory there are two tests dependent on the nature of the offence charged, in that for most offences the prosecution will need to prove the child 'had capacity to know that he ought not to do the act, make the omission or cause the event' but for certain scheduled or declared offences they must prove that the 'child knows that his or her conduct is wrong'.