



The Chair  
Age of Criminal Responsibility Working Group  
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Dear Chair

### **Council of Attorneys-General – Age of Criminal Responsibility Working Group review**

The Commission for Children and Young People (Victoria) is pleased to make this submission to the Council of Attorneys-General Working Group's review of the minimum age of criminal responsibility. This submission accompanies the joint submission by the Australian and New Zealand Children's Commissioners and Guardians, which is endorsed by this office.

The Commission is an independent statutory body focused on protecting and promoting the rights, safety and wellbeing of children and young people in Victoria, with a particular focus on children involved with Victoria's youth justice, child protection and out-of-home care systems. Our functions include oversight of Victoria's two youth justice centres.

We also advocate for evidence-based responses to children and young people who come into contact with the criminal justice system and are currently conducting a comprehensive inquiry into the over-representation of Aboriginal children and young people in the criminal justice system.<sup>1</sup>

Like other Children's Commissioners and Guardians, we strongly support the age of criminal responsibility increasing to at least 14 years of age, nationally. The evidence for this important change is strong. In this brief submission, we highlight key reasons the Working Group should recommend raising the minimum age to at least 14 years.

As the UN Committee on the Rights of the Child recently noted, holding a child under the age of 14 years as criminally responsible is incompatible with the current research into children's brain development. At these young ages, children generally do not have a fully formed ability to think through the consequences of their actions. Rapid brain development during adolescence influences risk-taking behaviours, emotional regulation, certain decision-making and impulse control. For these reasons, the Committee on the Rights of the Child recommends that all countries raise the age of criminal responsibility to at least 14 years, to ensure these laws reflect the current scientific knowledge and to comply with the Convention on the Rights of the Child.<sup>2</sup>

The current age of criminal responsibility in Australia is 'unacceptably low' by international standards.<sup>3</sup> The most common minimum age internationally is 14 years and this age is now regarded as the 'internationally accepted level'.<sup>4</sup> In some countries, the minimum age is higher – it is 15 years in Finland and Iceland and 16 years in Argentina and Cuba.<sup>5</sup>

Recent Victorian data demonstrates that criminalising younger children is not an effective response to offending behaviour and indicates that early involvement in the criminal justice system increases the likelihood of further involvement in criminal behaviour.

In 2016, Victoria's Sentencing Advisory Council found that, consistent with other research, '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 22nd birthday'.<sup>6</sup>

Re-offending was highest among children aged 10 to 13 years at their first sentence. Children aged 10 to 12 years at their first sentence re-offended at a rate of 86 per cent, while children aged 13 years at their first sentence re-offended at a rate of 84 per cent. The likelihood of re-offending decreased with 'each additional year in age at entry into the criminal courts'.<sup>7</sup> Those aged 18 years at their first sentence re-offended at half the rate of the children aged 10 to 13 years (42 per cent).<sup>8</sup> These findings suggest a low age of criminal responsibility does not make the community safer.<sup>9</sup>

Critically, it is also known that 'the youngest offenders are more likely to have been exposed to violence, abuse, neglect, and chaotic, dysfunctional lifestyles'.<sup>10</sup> Recent findings in Victoria reinforce this and highlight the particular vulnerability of children aged 10 to 13 years. The Sentencing Advisory Council recently found that, of children sentenced in 2016 and 2017, the 'younger children were at [their] first sentence, the more likely they were to have a child protection background' and to have experienced out-of-home care and, in particular, residential care.<sup>11</sup> Among children aged 10 to 13 years at their first sentence:

- one in two were the subject of at least one child protection report
- one in three experienced out-of-home care
- one in four experienced residential care.<sup>12</sup>

As the Sentencing Advisory Council noted, these children, particularly those in residential care, are among 'the most vulnerable, traumatised and disadvantaged children in our community'.<sup>13</sup>

Research recently published by the Australian Institute of Criminology also showed that children subject to child protection orders were over-represented in 'early police involvement' and 'about three times more likely than other Victorian children to be first sentenced under the age of 14'.<sup>14</sup> Within this group of vulnerable children, 'a younger age at first police charge was associated with greater and cumulative maltreatment, adversity and co-occurring challenges'.<sup>15</sup> We note with particular concern that the research found that 'intellectual disability was associated with a significantly younger age of first police charge'.<sup>16</sup>

Further, the Royal Commission into the Protection and Detention of Children in the Northern Territory found that 'if a child can be kept out of the formal criminal justice system', through effective prevention, early intervention and diversion options and an appropriate age of criminal responsibility, 'the prospects of staying out are considerably enhanced'.<sup>17</sup>

These points are significant. They indicate that the children most likely to be involved in the criminal justice system at a young age have experienced significant harm and/or neglect. As a result of this trauma, their brain development is disrupted, further affecting their consequential thinking and capacity to self-regulate.<sup>18</sup>

Instead of criminalising these children, we submit that legislation and government policies should provide specialised support outside the criminal justice system to address their complex needs and the causes of their behaviours. The current age of criminal responsibility (and lack of comprehensive or sophisticated early intervention support) is acutely harming these children, failing to arrest their cycles of behaviour, and potentially increasing the likelihood of more severe re-offending in future.

Further, raising the age of criminal responsibility is essential to reduce Aboriginal children and young people's shocking over-representation in the criminal justice system. Across Australia in 2017-18, Aboriginal children made up two-thirds of children aged 10 to 13 years under community supervision or in detention, and almost 70 per cent of children aged 10 to 13 years at their first supervision order.<sup>19</sup> In Victoria, less than two per cent of Victorian children aged 10 to 13 years are Aboriginal,<sup>20</sup> but in 2017 to 2019, nearly 30 per cent of the children under the age of 14 years in Victoria's youth justice centres were Aboriginal.<sup>21</sup>

Victoria's Koorie Youth Council has called for the age of criminal responsibility to increase to at least 14 years, to 'give youth support services in communities the best chance to connect and support children who need them'.<sup>22</sup> We urge the Working Group to support this recommendation made by young Aboriginal people, and the similar calls of other Aboriginal organisations.<sup>23</sup>

It is our strong view that *doli incapax* is not an effective safeguard for children aged 10 to 13 years. The presumption is inconsistent with the modern understanding of children's brain development and not supported by the Committee on the Rights of the Child.<sup>24</sup> Recent Victorian research demonstrates that, in practice in Victoria, the presumption is applied inconsistently and in problematic ways.<sup>25</sup> It is complex, confusing and difficult to apply.<sup>26</sup> The process prolongs a child's involvement in the court system, which 'can be psychologically and criminologically stigmatising'.<sup>27</sup> In our view, trying to 'fix' *doli incapax*, rather than increasing the age of criminal responsibility, would be a flawed approach.

Raising the age of criminal responsibility to 14 years and strengthening prevention, early intervention and appropriate diversionary responses for children under that age, including Aboriginal community-led responses, would be the better approach. This would better serve the community, better protect children and be the better investment. We strongly encourage the Working Group to consider the evidence and recommend that the age of criminal responsibility in all jurisdictions increase to at least 14 years.

Yours sincerely



Liana Buchanan  
Principal Commissioner

28/2/20



Justin Mohamed  
Commissioner for Aboriginal  
Children and Young People

28/02/2020

- <sup>1</sup> See <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/>. In this submission, the term 'Aboriginal' refers to both Aboriginal and Torres Strait Islander individuals, people and communities. 'Koorie' is retained when it is part of the title of a report.
- <sup>2</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, paragraph 22; *Concluding observations on the combined fifth and sixth periodic reports of Australia* (1 November 2019), paragraph 48.
- <sup>3</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24*, paragraph 21.
- <sup>4</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24*, paragraph 21; *Concluding observations on the combined fifth and sixth periodic reports of Australia*, paragraph 48.
- <sup>5</sup> *Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory 2017*, volume 2B, pages 418-419; AIHW 2019, *Youth Justice in Australia 2017-18*, page 40.
- <sup>6</sup> Sentencing Advisory Council 2016, *Reoffending by Children and Young People in Victoria*, pages xiii, 52.
- <sup>7</sup> Sentencing Advisory Council 2016, *Reoffending by Children and Young People in Victoria*, pages xiii, 52.
- <sup>8</sup> Sentencing Advisory Council 2016, *Reoffending by Children and Young People in Victoria*, page 26.
- <sup>9</sup> As also noted by the AMA and Law Council of Australia in its policy statement, *Minimum Age of Criminal Responsibility*.
- <sup>10</sup> Sentencing Advisory Council 2016, *Reoffending by Children and Young People in Victoria*, page 52.
- <sup>11</sup> 'Crossover kids': Offending by child protection-involved youth, page 2.
- <sup>12</sup> Sentencing Advisory Council 2019, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court*, pages 86-92, 94.
- <sup>13</sup> Sentencing Advisory Council 2019, *'Crossover Kids': Vulnerable Children in the Youth Justice System*, page xxiv.
- <sup>14</sup> Sentencing Advisory Council 2019, *'Crossover Kids': Vulnerable Children in the Youth Justice System*, page 93.
- <sup>15</sup> Baidawi, S, Sheehan, R 2019, 'Crossover kids': Offending by child protection-involved youth', *Trends & issues in crime and criminal justice*, No. 582 December 2019, Australian Institute of Criminology, pages 17 and 19.
- <sup>16</sup> Page 17.
- <sup>17</sup> *Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory 2017*, volume 2B, page 410. Also see pages 411-417. While this Royal Commission recommended increasing the age of criminal responsibility to 12 years, this reflected the previous recommendation of the UN Committee on the Rights of the Child in General Comment No. 10.
- <sup>18</sup> Sentencing Advisory Council 2019, *'Crossover Kids': Vulnerable Children in the Youth Justice System*, pages xxv, 94.
- <sup>19</sup> AIHW 2019, *Youth Justice in Australia 2017-18*, Tables S7b and S19.
- <sup>20</sup> According to ABS figures: *Australian Demographic Statistics*, Jun 2019 (cat. no. 3101.0) and *Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2006 to 2031* (cat. no. 3238.0).
- <sup>21</sup> Department of Justice and Community Safety (Victoria) data, custodial population in youth justice centres as at end of the month, provided to the Commission on 13 February 2020.
- <sup>22</sup> Koorie Youth Council 2018, *Ngaga-dji (hear me) – young voices creating change for justice*, page 51.
- <sup>23</sup> Including (for example) the Victorian Aboriginal Community Controlled Health Organisation, Victorian Aboriginal Legal Service and Change The Record.
- <sup>24</sup> General Comment 24, paragraphs 26 and 27.
- <sup>25</sup> Fitz-Gibbon K and O'Brien W (2019) A child's capacity to commit crime: Examining the operation of *doli incapax* in Victoria (Australia). *International Journal for Crime, Justice and Social Democracy* 8(1):18-33; O'Brien, W & Fitz-Gibbon, K 2017, 'The minimum age of criminal responsibility in Victoria

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(Australia): Examining stakeholders' views and the need for principled reform' *Youth Justice*, vol. 17, no. 2, pp. 134-152.

<sup>26</sup> AMA and Law Council of Australia Policy Statement, *Minimum Age of Criminal Responsibility*; Law Council of Australia Media Release, *Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax* (26 June 2019). Speech by Law Council President; Speech delivered by Arthur Moses SC, President, Law Council of Australia at the Human Rights Commission Forum, Canberra, 10 December 2019.

<sup>27</sup> Fitz-Gibbon K and O'Brien W (2019) A child's capacity to commit crime: Examining the operation of *doli incapax* in Victoria (Australia). *International Journal for Crime, Justice and Social Democracy* 8(1):18-33.