



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Justice (Age of Criminal Responsibility)
Legislation Amendment Bill 2023

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

ENQUIRY INTO:

JUSTICE (AGE OF CRIMINAL RESPONSIBILITY) LEGISLATION AMENDMENT BILL 2023

5 June 2023

To Committee Chair

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From CHRIS DONOHUE

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PREFACE

This submission is made by me in my personal capacity only. The views expressed are mine alone, and I do not purport to represent the views of the ACT Law Society or of any of its members or committees.

I do however draw on knowledge gained through my association with the Society, particularly from my two years as President.

This submission is primarily directed to the need to raise the age to 14 without exceptions and to not wait until the proposed date of **1 July 2025**. In addition, I address the difficulties of applying “doli incapax” in further support of not having exceptions.

My reasoning for not agreeing to the alternatives include, but are not limited to:

- Based on all the empirical evidence available, children under the age of 14 years are considered not to have the cognitive ability to form criminal intent
- The rebuttable “doli incapax” is likely to have inconsistent application. Retaining it makes children subject to damaging interrogative processes to determine if it applies
- If a child is assumed to not have the mental maturity to commit one crime, then they have the same maturity in relation to all crimes

EMPIRICAL EVIDENCE

The empirical evidence is generally well known and encapsulated below.

Joint Policy statement by the **Law Council of Australia (“LCA”) and the Australian Medical Association (“AMA”) (December 2019)** - amended by an addendum (“LCA Addendum”) of the LCA on 25 June 2022.

The Policy Statement says children under the age of 14 should not be subject to the criminal justice system:

- . *“Children under the age of 14 are undergoing significant growth and development, which means they may not have the required capacity to be criminally responsible. Scientific advances related to the understanding of child cognitive development favour a higher MACR, taking into account the time taken for the adolescent brain to mature. Research shows immaturity can affect a number of areas of cognitive functioning “including impulsivity, reasoning and consequential thinking”.” P2*

Also, there should be no carve outs and the principle of “doli incapax” should not apply:

- . *“In addition, the legal presumption of doli incapax, which is used to justify the low MACR, is flawed and does not serve its purpose in practice. Both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission have expressed criticisms of this presumption. Doli incapax means the law presumes a child under the age of 14 does not possess the necessary knowledge required to have criminal intent. However, it can be disproved or rebutted by leading evidence to show a child knew his or her actions were morally wrong. In practice, the presumption has proven extremely difficult to apply in court and creates confusion as to whether the defence or prosecution bears the burden of proving a child knew their conduct was wrong. Raising the MACR to 14 would remove the need for courts to consider the confusing and complex doli incapax presumption”.* P2

The criminal justice promotes recidivism:

“Research indicates the younger a child is when first having contact with youth justice, the more likely it is the child will become entrenched in the justice system. Early contact with the criminal justice system is one of the key predictors in juvenile and adult offending.” P3

The LCA Addendum reinforces the overall policy:

Under the Law Council’s policy, the minimum age of criminal responsibility would be raised from 10 years old to 14 years old without exception. This would mean that children aged 10, 11, 12 and 13 years old would no longer be charged with a criminal offence in Australia” P3

The **United Nations Committee on the Rights of the Child** in its report of 1 November 2019 **attached** in relation to Australia stated that:

“Administration of child justice

47. *The Committee again regrets that its previous recommendations have not been implemented and remains seriously concerned about:*
 - (a) *The very low age of criminal responsibility;*
 - (d) *The high number of children in detention, both on remand and after sentencing;*
48. *The Committee urges the State party to bring its child justice system fully into line with the Convention and:*
 - (a) *To raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which doli incapax applies; “*

DOLI INCAPAX

With the removal of exceptions and raising to 14, “doli incapax” would become unnecessary.

Government intends that the prosecution may seek to rebut the *doli incapax* presumption for the next two years for children aged 12 and 13 years.

To rebut, prosecution has to prove (beyond a reasonable doubt) that the child knew that what they were doing was “wrong”. Cases and commentators suggest that the test is, or should be, “seriously wrong and show *mens rea*.” Simply saying “wrong” is not sufficient, despite interpretations that might say it means “seriously wrong”.

In addition, it is the state of the child’s mind at the time of committing the offence that is to be considered, not after the child has been apprehended, brought to the Police station, and interrogated. Children who find themselves in this situation are likely to be afraid and will say what the Police appear to want them to say, especially if they are homeless, intellectually disabled, suffering other trauma, have limited English speaking skills, or fear disproportionate treatment because they have Aboriginal or Torres Strait Island background. Leading questions, in that setting, such as “Did you know it was wrong?” are likely to have the child answer “Yes” because by that time (after arrest and confinement) the child’s state of mind has changed dramatically.

The prosecution should not be permitted to adduce evidence gained in those kind of circumstances to prove the rebuttal. Instead, the legislation should state that an independent child psychologist be involved at the earliest possible time, and that police evidence (so far as it is to be used to prove the rebuttal of the *doli incapax* presumption) should not be admitted. Proposed section 501Q could be amended to say that referring entities must refer, rather than relying on the discretionary “may”. Whichever way it is done, the legislations should make this clear.

Prosecution under the criminal justice system has been shown to cause trauma, and distress. For a child to be prosecuted, but later found to not have the mental capacity to commit the crime is to punish the child capriciously, as the process itself is a punishment, and likely to cause long term effects.

It is instructive to consider the case of RP v The Queen (2016) HCA 53; 91 ALJR 248, where a boy at the age of 11.5 years was prosecuted for a serious crime. In the High Court the only substantive issue to decide was whether the presumption had been rebutted. It was held to have not been, but by that time the boy was round 17 years of age, and had endured 5-6 years of anxiety and trauma. A proper and early assessment of whether *doli incapax* applied might have saved all that. (A summary of that case is attached)

Further reasoning as to its difficulty of operation is set out in the attached paper written by Phillipa J Daniel titled

“The role of Police interviews in the assessment of children’s moral culpability under the doctrine of Doli Incapax: - psychological perspectives”

In essence it sets out the processes followed, the effective reversing of the onus, the problematic nature of questions like “did you know it was wrong”, and suggests changes to the police interviewing methods, plus the possibility of transferring the interview process to psychologists.

PROGRESS TO REFORM

COUNCIL OF ATTORNEYS GENERAL (CAG)

On 23 November 2018, the Council of Attorneys-General (CAG) agreed that 'it would be appropriate to examine whether to raise the age of criminal responsibility from 10 years of age.' The CAG announced that a working group would be established to review the matter, drawing from relevant jurisdictional and international experience and would report back within 12 months.

The Age of Criminal Responsibility Working Group (Working Group) was established in February 2019 chaired by the Western Australian Department of Justice. The Working Group is comprised of policy officers from each State, Territory and the Commonwealth. Its report of 2020 and its prime recommendation that the MACR across Australia should be raised to 14, was never accepted.

CAG, as a body, has shown no stomach for a change to the current Australia wide MACR of 10 years old. They have procrastinated and deferred - meeting after meeting. The reason appears to be that there are people and organisations that oppose any change in the MACR. CAG was fairly easily persuaded to the view that it would not be appropriate for jurisdictions to take independent action, and that all jurisdictions should do so at the same time. That is, no one moves until the most recalcitrant agrees to.

On 2 March 2020, the LCA provided CAG with a submission in support of the MACR of 14.

<https://www.lawcouncil.asn.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>

Despite the very convincing nature of this and other submissions, CAG has continued to procrastinate.

ACT GOVERNMENT RESPONSE

The ACT Greens had been continuously on side to raise to age 14.

On 18 August 2020, a Greens media statement notified the intention to raise the matter in the Assembly. There followed the next day business in the Assembly where the then Labour Attorney General, Gordon Ramsey, replaced the Greens motion with a Labour motion that was passed. A reading of the motion and the media which followed might easily give the impression that ACT Labour were committed to raise to age 14. However, they were not. They did however commit to proceeding to legislate without waiting for the other jurisdictions. This was good news, but subsequently watered down by the Chief Minister saying it would take a "long time" – ie, sometime in 2021.

In June 2021, the ACT Government released a discussion paper "Raising the minimum age of criminal responsibility"

https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4516/2433/2390/Discussion_Paper_-_FINAL.pdf

Final Report 11 October 2021

https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2716/3428/0940/Independent_Review_-_Final_Report.PDF

See attached Media regarding process and delays: – C Times July 2020, August 2020, Feb 2021 and May 2022

On 22 September 2022, a C Times news item was headed “**Criminal Age to be Raised to 14**”. Apparently wonderful news, and, sadly, a lot of people jumped in saying so publicly.

However the article included:

“The ACT’s cabinet has agreed to raise the territory’s minimum age of criminal responsibility to 14, but the age will first increase to 12 years old.

“Work is underway to draft the proposed legislation The age would immediately increase to 12 when the legislation passed, but it would take another two years for the age to be raised to 14.

“We don’t have an exact time frame on the legislation, but in this next phase we’re about to get into some serious consultation.”

IMPLICATIONS

Other Australian legislatures are watching the ACT, and will be encouraged not to raise to 14. That is, our failure will have a knock on effect into regions where the number of children incarcerated is much greater than in the ACT.

As a result children will remain in detention when it should be abundantly clear to legislators that doing so is initiating and perpetuating their criminal behaviour.

If the ACT wants to be seen as a leader, it should be setting a better behaviour.

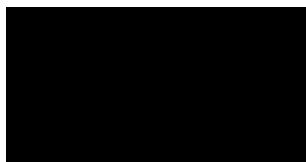
See Attached media from Northern Territory, NSW, Victoria and Queensland

Note the contrasting position in New York where the age is 18

[Raise the Age | NYCOURTS.GOV](https://www.nycourts.gov/raise-the-age/)

SUBMISSION

- Delete the two staged approach to raise to 12 and then to 14, and raise instead to 14 now
- Alternatively change the date of **1 July 2025** to a date much sooner – eg: **31 December 2023**
- Delete all carve outs/ exceptions.



CHRIS DONOHUE

5 June 2022

REFERENCES

AMA and LCA Policy Statement on Minimum Age of Criminal Responsibility.pdf

<https://www.lawcouncil.asn.au/publicassets/20fb2a76-c61f-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>

LCA Addendum - Responses to children under the MACR.pdf - 25 June 2022

<https://www.lawcouncil.asn.au/publicassets/6fdc725a-60f7-ec11-945c-005056be13b5/Position%20Paper%20-%20Responses%20to%20children%20under%20the%20MACR.pdf>



Convention on the Rights of the Child

Distr.: General
1 November 2019

Original: English

Committee on the Rights of the Child

Concluding observations on the combined fifth and sixth periodic reports of Australia**

I. Introduction

1. The Committee considered the combined fifth and sixth periodic reports of Australia (CRC/C/AUS/5-6) at its 2402nd and 2403rd meetings (see CRC/C/SR.2402 and 2403), held on 9 and 10 of September 2019, and adopted the present concluding observations at its 2430th meeting, held on 27 September 2019.

2. The Committee welcomes the submission of the combined fifth and sixth periodic reports of the State party and the written replies to the list of issues (CRC/C/AUS/Q/5-6/Add.1), which allowed for a better understanding of the situation of children's rights in the State party. The Committee expresses appreciation for the constructive dialogue held with the multisectoral delegation of the State party.

II. Follow-up measures taken and progress achieved by the State party

3. The Committee welcomes the progress achieved by the State party in various areas, including the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 21 December 2017. The Committee notes with appreciation the legislative, institutional and policy measures adopted to implement the Convention on the Rights of the Child, in particular the creation of the position of Assistant Minister for Children and Families in 2018 and the establishment of the National Children's Commission within the Australian Human Rights Commission in 2012. Furthermore, it welcomes the establishment of the Royal Commission into the Detention and Protection of Children in the Northern Territory in 2016.

III. Main areas of concern and recommendations

4. The Committee reminds the State party of the indivisibility and interdependence of all the rights enshrined in the Convention and emphasizes the importance of all the recommendations contained in the present concluding observations. The Committee would like to draw the State party's attention to the recommendations concerning the following areas, in respect of which urgent measures must be taken: violence, including sexual violence, abuse and neglect (para. 30), children deprived of a family environment (para. 34),

* Reissued for technical reasons on 29 November 2019.

** Adopted by the Committee at its eighty-second session (9–27 September 2019).



mental health (para. 38), the impact of climate change on the rights of the child (para. 41), asylum-seeking, refugee and migrant children (para. 45) and administration of child justice (para. 48).

5. The Committee recommends that the State party ensure the realization of children's rights in accordance with the Convention, the Optional Protocol on the involvement of children in armed conflict and the Optional Protocol on the sale of children, child prostitution and child pornography throughout the process of implementing the 2030 Agenda for Sustainable Development. It also urges the State party to ensure the meaningful participation of children in the design and implementation of policies and programmes aimed at achieving all 17 Sustainable Development Goals as far as they concern children.

A. General measures of implementation (arts. 4, 42 and 44 (6))

Reservations

6. The Committee, in line with its previous recommendations on reservations (CRC/C/AUS/CO/4, para. 10, and CRC/C/15/Add.268, para. 8) and given the State party's acceptance of the principle of separation and the existence in the State party of many facilities separating children from adults, again recommends that the State party consider withdrawing its reservation on article 37 (c) of the Convention.

Legislation

7. The Committee recalls its previous recommendations on legislation (CRC/C/AUS/CO/4, para. 12) and again recommends, also as proactive measures, that the State party:

(a) Enact comprehensive national child rights legislation fully incorporating the Convention and providing clear guidelines for its consistent and direct application throughout the states and territories of the State party;

(b) Ensure that the resources of the Parliamentary Joint Committee on Human Rights are adequate and sufficient to effectively examine, including in consultation with the National Children's Commissioner and other interested parties, all proposed legislation and its impact on children's rights;

(c) Guarantee that all proposed legislation is fully compatible with the Convention.

Comprehensive policy and strategy

8. The Committee recalls its previous recommendations on a national plan of action for implementing the Convention (CRC/C/AUS/CO/4, para. 16) and recommends that the State party adopt a national comprehensive policy and strategy on children that encompasses all areas of the Convention, with sufficient human, technical and financial resources for its implementation.

Coordination

9. The Committee urges the State party to provide the Assistant Minister for Children and Families with a clear mandate and sufficient authority to coordinate all activities related to the implementation of the Convention at the cross-sectoral, federal, state, territory and local levels and with the necessary human, technical and financial resources for its effective operation.

Allocation of resources

10. With reference to its general comment No. 19 (2016) on public budgeting for the realization of children's rights, the Committee recalls its previous recommendations on the allocation of resources (CRC/C/AUS/CO/4, para. 20) and recommends that the State party:

(a) Allocate adequate human, technical and financial resources, at all levels of government, for the implementation of all policies, plans, programmes and legislative measures for children and implement a system for tracking and ensuring the efficient use of resources so allocated;

(b) Conduct regular assessments of the distributional impact of government investment on sectors supporting the realization of children's rights with a view to addressing the disparities in indicators related to children's rights, paying particular attention to Aboriginal and Torres Strait Islander children;

(c) Establish appropriate mechanisms and inclusive processes through which civil society, the public at large and children specifically may participate in all stages of the budget process, including formulation, implementation and evaluation.

Data collection

11. The Committee welcomes the creation of the Office of the National Data Commissioner in July 2018 and, with reference to its general comment No. 5 (2003) on general measures of implementation of the Convention, recalls its previous recommendations on data collection (CRC/C/AUS/CO/4, para. 22) and recommends that the State party:

(a) Ensure that data collected on children's rights cover all areas of the Convention, in particular those relating to violence, alternative care, natural disasters and children in conflict with the law, that they are disaggregated by age, sex, disability, geographic location, ethnic origin, national origin and socioeconomic background, and that they identify children in situations of vulnerability, such as Aboriginal and Torres Strait Islander children, children with disabilities and asylum-seeking, refugee and migrant children;

(b) Ensure that the data and indicators are shared among the ministries concerned and used for the formulation, monitoring and evaluation of policies, programmes and projects aimed at implementing the Convention;

(c) Ensure that the Office of the National Data Commissioner has the resources necessary for its effective functioning.

Independent monitoring

12. The Committee recommends that the State party:

(a) Ensure that the National Children's Commissioner has adequate and sufficient human, technical and financial resources to implement and monitor the application of the Convention;

(b) Establish by law mandatory consultations between the National Children's Commissioner and children on issues that affect them and ensure that the results of those consultations and any other recommendations made by the Commissioner are taken into consideration in law and policymaking;

(c) Ensure effective coordination between the National Children's Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner on relevant policies and measures.

Dissemination, awareness-raising and training

13. The Committee recommends that the State party strengthen its programmes to raise awareness of the Convention, for example by engaging more with the media, including social media, in a child-friendly manner, and by promoting the active involvement of children in public outreach activities, including in measures targeting parents, social workers, teachers and law enforcement officials.

14. Furthermore, the Committee recalls its previous recommendations on dissemination, awareness-raising and training (CRC/C/AUS/CO/4, para. 24) and recommends that the State party include mandatory modules on human rights and

the Convention in the school curriculum and in training programmes for all professionals working with or for children, including all law enforcement officials, teachers, health personnel, social workers and personnel of childcare institutions, as well as State and local government officials.

Cooperation with civil society

15. The Committee recommends that the State party strengthen its support to:

(a) Aboriginal and Torres Strait Islander organizations, including through capacity-building initiatives and increased resource allocation, and that it prioritizes them as service providers;

(b) Organizations working with asylum-seeking, refugee and migrant children, as well as organizations working on climate change and environmental issues.

International cooperation

16. The Committee recommends that the State party adopt a child rights-based approach in respect of its trade agreements and development aid policy and programmes, with the rights of children and their engagement included in programme design, delivery and evaluation.

Children's rights and the business sector

17. With reference to its general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, the Committee recalls its previous recommendations (CRC/C/AUS/CO/4, para. 28) and recommends that the State party:

(a) Ensure the legal accountability of Australian companies and their subsidiaries for violations of children's rights, including in relation to the environment and health, committed within the State party or overseas by businesses domiciled in its territory, and establish mechanisms for the investigation and redress of such abuses;

(b) Require companies to undertake assessments and consultations and to make full public disclosure of the environmental, health-related and children's rights impacts of their business activities and their plans to address such impacts;

(c) Strengthen its support to the Australian Human Rights Commission for the implementation of the Guiding Principles on Business and Human Rights and make information available on the work of the Australian National Contact Point to implement the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development;

(d) Undertake campaigns to raise the awareness of those working in the tourism industry and the public at large on the harmful effects of the sexual exploitation of children in the context of travel and tourism and widely disseminate the Global Code of Ethics for Tourism of the World Tourism Organization.

B. Definition of the child

18. The Committee recommends that the State party review the Marriage Act of 1961 (Commonwealth of Australia) to eliminate any exception to the minimum age of marriage of 18 years for girls and boys.

C. General principles (arts. 2, 3, 6 and 12)

Non-discrimination

19. Taking note of target 10.3 of the Sustainable Development Goals, the Committee recalls its previous recommendations on non-discrimination (CRC/C/AUS/CO/4, para. 30) and urges the State party:

(a) To address disparities in access to services by Aboriginal and Torres Strait Islander children, children with disabilities, children in alternative care and asylum-seeking, refugee and migrant children, regularly evaluate the enjoyment by those children of their rights and prevent and combat discrimination;

(b) To strengthen its awareness-raising and other activities aimed at preventing discrimination, including through school curricula, and take affirmative action for the benefit of the groups of children mentioned above.

Best interests of the child

20. With reference to its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration and recalling its previous recommendations on the best interests of the child (CRC/C/AUS/CO/4, para. 32), the Committee recommends that the State party:

(a) Ensure that procedures and criteria guiding all relevant persons in authority for determining the best interests of the child and for giving it due weight as a primary consideration are coherent and consistently applied throughout the State party;

(b) Make publicly available all judicial and administrative judgments and decisions regarding children, specifying the criteria used in the individual assessment of the best interests of the child.

Right to life, survival and development

21. The Committee recommends that the State party ensure the development and effective implementation of the national injury prevention strategy for 2018–2021 with a view to targeting the underlying causes of child deaths and continue to support the work of the Australian and New Zealand Child Death Review and Prevention Group.

Respect for the views of the child

22. With reference to its general comment No. 12 (2009) on the right of the child to be heard, the Committee recalls its previous recommendations on respect for the views of the child (CRC/C/AUS/CO/4, para. 34) and recommends that the State party:

(a) Amend the Family Law Act of 1975 (Commonwealth of Australia) to provide all children, in accordance with their age and maturity, the opportunity to have their views heard in all matters concerning them, including in “non-court-based family services”;

(b) Amend the Migration Act of 1958 (Commonwealth of Australia) to guarantee respect for the views of the child at all stages of the migration process;

(c) Provide training and support to independent children’s lawyers so as to ensure that such lawyers have direct contact with the children they represent in the family courts;

(d) Enhance children’s meaningful and empowered participation in the family, in the community and in schools, paying particular attention to girls, children with disabilities and Aboriginal and Torres Strait Islander children;

(e) Develop toolkits for holding public consultations with children on issues that affect them, including on climate change and the environment.

D. Civil rights and freedoms (arts. 7, 8 and 13–17)

Birth registration, name and nationality

23. Taking note of target 16.9 of the Sustainable Development Goals, the Committee urges the State party:

(a) To ensure that all children, in particular Aboriginal and Torres Strait Islander children, children living in remote areas and children in child protection services, are registered at birth and receive free birth certificates;

(b) To revoke the December 2015 amendments to the Citizenship Act that allow for children under 18 years of age to lose their Australian citizenship if they engage in or are convicted of certain foreign fighting or terrorism-related conduct;

(c) To ensure that children born through international surrogacy arrangements can obtain Australian nationality through a clear process and rules applied uniformly throughout the country.

Right to an identity

24. The Committee recalls its previous recommendations on the preservation of identity (CRC/C/AUS/CO/4, para. 38) and recommends that the State party:

(a) Ensure full respect for the rights of Aboriginal and Torres Strait Islander children, including those placed for adoption, to their identity, name, culture, language and family relationships;

(b) Ensure that children born through assisted reproduction technologies, in particular through surrogacy, are able to access information about their origin and that all involved are provided with appropriate counselling and support.

Freedom of expression

25. The Committee recommends that the State party promote the right to freedom of expression, paying particular attention to Aboriginal and Torres Strait Islander children, children with disabilities, children with a refugee or migrant background and children living in rural or remote areas.

Freedom of association and peaceful assembly

26. The Committee recalls its previous recommendations on freedom of association (CRC/C/AUS/CO/4, para. 40) and recommends that the State party review its legislation so as to ensure respect for children's rights to freedom of association and peaceful assembly, particularly regarding Aboriginal and Torres Strait Islander children.

Access to appropriate information

27. The Committee recommends that the State party:

(a) Expand access to information, including through the Internet, in the relevant languages, to children in rural or remote areas;

(b) Promote children with disabilities' access to online information by making available audio description and captioning;

(c) Ensure that children, their parents and other caregivers are taught appropriate online behaviour, including preventive strategies, against online abuse and/or exploitation.

E. Violence against children (arts. 19, 24 (3), 28 (2), 34, 37 (a) and 39)

Corporal punishment

28. **The Committee recalls its previous recommendations on corporal punishment (CRC/C/AUS/CO/4, paras. 44–45) and urges the State party:**

(a) **To explicitly prohibit corporal punishment in law in all settings, including in the home, in public and private schools, in detention centres and in alternative care settings, and to repeal the legal defence of “reasonable chastisement”;**

(b) **To develop awareness-raising and education campaigns that promote positive and alternative forms of discipline and that underscore the adverse consequences of corporal punishment.**

Violence, including sexual violence, abuse and neglect

29. The Committee welcomes the creation in 2018 of the National Office for Child Safety; the financial commitment made in March 2019 towards the establishment of the National Centre for the Prevention of Child Sexual Abuse; the adoption of the National Framework for Protecting Australia’s Children 2009–2020; the adoption of the National Plan to Reduce Violence against Women and their Children 2010–2022; the report of the Royal Commission into Institutional Responses to Child Sexual Abuse of December 2017; and the Prime Minister’s National Apology to Victims and Survivors of Institutional Child Sexual Abuse on 22 October 2018. However, the Committee remains seriously concerned:

(a) About the high rates of violence against children in the home, the fact that the third action plan under the National Plan to Reduce Violence against Women and their Children 2010–2022 focuses on young people between the ages of 12 and 20 years when violence affects children of all ages and the fact that girls between the ages of 10 and 19 years suffer the highest rate of sexual abuse, an increasing amount of which is perpetrated by their partners;

(b) That the National Redress Scheme, which was set up for people who have experienced institutional child sexual abuse, excludes some groups of victims, such as non-citizens and non-permanent residents, persons sentenced to five years of imprisonment or longer and children who were under 8 years of age in 2018;

(c) That victims and survivors of abuse committed by religious personnel of the Catholic Church who participated in two internal church processes – “Towards healing” and “The Melbourne response” – have been required to sign “deeds of release” preventing them from pursuing redress through independent secular justice mechanisms;

(d) About the limited information available on the support provided to child victims of family and domestic violence, including sexual violence;

(e) That Aboriginal and Torres Strait Islander children continue to be disproportionately affected by family and domestic violence, including sexual violence, both as victims and witnesses, that there are significant gaps in the responses to such violence within these communities and about the limited involvement, leadership and participation of these communities in the development of solutions;

(f) That children with disabilities are more vulnerable to violence, neglect and abuse, including sexual abuse, and, in particular, that girls with disabilities are forced to undergo sterilization procedures;

(g) About the limited information available regarding violence against children in remote areas, children with culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex children.

30. **With reference to its general comment No. 13 (2011) on the right of the child to freedom from all forms of violence and taking note of target 16.2 of the Sustainable Development Goals, the Committee recalls its previous recommendations on violence against children and women (CRC/C/AUS/CO/4, paras. 47–48) and urges the State party:**

(a) To review the action plans under the National Framework for Protecting Australia's Children 2009–2020 and the National Plan to Reduce Violence against Women and their Children 2010–2022 with a view to prioritizing the implementation of key prevention measures and responses to violence against children of all ages, including sexual violence, in particular against girls;

(b) Ensure that the National Centre for the Prevention of Child Sexual Abuse establishes a comprehensive standard with regard to intervention in cases of child sexual abuse, including child-friendly, multiagency measures and appropriate therapeutic services to avoid secondary trauma or the retraumatization of child victims;

(c) Review the National Redress Scheme to include non-citizens and non-permanent residents, persons sentenced to five years of imprisonment or longer and children who were under 8 years of age in 2018;

(d) Disregard the “deeds of release” signed by the victims and survivors of abuse by religious personnel of the Catholic Church who wish to pursue redress through an independent and secular process;

(e) Provide child-specific therapeutic interventions and counselling to child victims of violence, in addition to the support provided to families;

(f) Substantially increase family violence prevention and responses related to Aboriginal and Torres Strait Islander children, including through the indigenous family safety programme;

(g) Review the National Framework for Protecting Australia's Children 2009–2020 and the National Plan to Reduce Violence against Women and their Children 2010–2022 with a view to adequately preventing violence against children with disabilities and prohibit by law the sterilization of girls with disabilities without their prior, fully informed and free consent;

(h) Encourage community-based programmes to address violence in all its forms against children in remote areas, children with culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex children.

Harmful practices

31. The Committee welcomes the criminalization of forced marriage and, taking note of target 5.3 of the Sustainable Development Goals, urges the State party:

(a) To strengthen its measures to raise awareness of the harmful effects of child marriage on the physical well-being and mental health of girls;

(b) To enact legislation explicitly prohibiting coerced sterilization or unnecessary medical or surgical treatment, guaranteeing the bodily integrity and autonomy of intersex children and providing adequate support and counselling to families of intersex children.

F. Family environment and alternative care (arts. 5, 9–11, 18 (1) and (2), 20, 21, 25 and 27 (4))

Family environment

32. The Committee recalls its previous recommendations on a family environment (CRC/C/AUS/CO/4, para. 50) and urges the State party:

(a) To provide the necessary human, technical and financial resources for family support services to provide children and their families, particularly Aborigines and Torres Strait Islanders, with the support needed to prevent violence, abuse and neglect;

(b) To extend paid maternity leave to six months to support the appropriate care of newborn children.

Children deprived of a family environment

33. The Committee notes the efforts undertaken by the State party to improve the situation of children in alternative care but remains seriously concerned about:

- (a) The persistently high number of children in alternative care;
- (b) The continuing overrepresentation of Aboriginal and Torres Strait Islander children in alternative care, often outside their communities;
- (c) Different criteria being used across jurisdictions in making decisions on child removal and placement in care;
- (d) The fact that, despite the 25 enquiries conducted since 2012, the child protection systems still do not have sufficient human, technical and financial resources and are still unable to provide adequate professional support to children, which often results in:
 - (i) Badly trained and poorly supported staff;
 - (ii) Children of different ages, experiences and backgrounds, in particular child offenders and child victims of abuse, being placed together;
 - (iii) An excessive reliance on the police and the criminal justice system when dealing with children's behavioural problems and an insufficient reliance on appropriate therapeutic services;
- (e) Children with disabilities being more at risk of maltreatment in institutions than other children;
- (f) Children in alternative care having limited access to mental health and therapeutic services.

34. **Drawing the State party's attention to the Guidelines for the Alternative Care of Children (see General Assembly resolution 64/142, annex), the Committee recalls its previous recommendations on children deprived of a family environment (CRC/C/AUS/CO/4, para. 52) and urges the State party:**

- (a) **To strongly invest in measures for children and their families aimed at avoiding the removal of children from their families; to limit removal, when it is deemed necessary, to the shortest time possible; and to ensure that children, their families and communities participate in decision-making in order to guarantee an individualized and community-sensitive approach;**
- (b) **To harmonize, make transparent and publicize across jurisdictions the criteria for removing and placing children in alternative care with a view to providing the highest level of protection;**
- (c) **To ensure adequate human, technical and financial resources to child protection services and proper training to those working with and for children in alternative care and in particular to enhance preventive measures in order to avoid children drifting from care into crime;**
- (d) **To strongly invest in measures developed and implemented by Aboriginal and Torres Strait Islander children and communities to prevent their placement in out-of-home care, provide them with adequate support while in alternative care and facilitate their reintegration into their families and communities;**
- (e) **To provide adequate training to child protection carers on the rights and needs of children with disabilities to prevent their maltreatment and abuse;**
- (f) **To ensure that children in alternative care have access to the mental health and therapeutic services necessary for healing and rehabilitation.**

G. Disability, basic health and welfare (arts. 6, 18 (3), 23, 24, 26, 27 (1)–(3) and 33)

Children with disabilities

35. The Committee welcomes the establishment of the National Disability Insurance Scheme in 2013 and, recalling its previous recommendations on children with disabilities (CRC/C/AUS/CO/4, para. 58) and other recommendations contained in the present concluding observations, further recommends that the State party:

(a) Make clear the eligibility criteria and the types of support covered by the Scheme and ensure that the Scheme has the human, technical and financial resources necessary for its optimal and timely implementation;

(b) Conduct awareness-raising campaigns aimed at government officials, the public and families to combat the stigmatization of and prejudice against children with disabilities and promote a positive image of such children.

Health and health services

36. With reference to its general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health and recalling its previous recommendations on health and health services (CRC/C/AUS/CO/4, paras. 60–61), the Committee urges the State party:

(a) To promptly address the disparities in health status of Aboriginal and Torres Strait Island children, children with disabilities, children living in remote or rural areas and children in alternative care;

(b) To address the increasing rate of child obesity.

Mental health

37. The Committee is seriously concerned that the number of children with mental health problems is increasing and, while welcoming the adoption in 2017 of the Fifth National Mental Health and Suicide Prevention Plan, is concerned that the Plan does not include enough child-specific measures. The Committee is also particularly concerned:

(a) That almost one in seven children have been assessed to have mental health problems, with suicide being the leading cause of death among those aged 15–24;

(b) That the State party is among the countries in the world with the highest rate of children aged 5–14 years diagnosed with attention deficit hyperactivity disorder and that the number of psychostimulant drugs prescriptions has increased dramatically;

(c) That children themselves have identified mental health as a main issue of concern, one that affects in particular Aboriginal and Torres Strait Islander children, children in alternative care, homeless children, children living in rural and remote areas, asylum-seeking children, children from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex children;

(d) That despite the increase in mental health services for children, such as the headspace and youth early psychosis programme, children, in particular those under 14 years of age, still have limited access to services.

38. Taking note of target 3.4 of the Sustainable Development Goals, the Committee recalls its previous recommendations on mental health (CRC/C/AUS/CO/4, para. 65) and urges the State party:

(a) To invest in addressing the underlying causes of suicide and poor mental health among children, to improve knowledge about mental health with a view to promoting children's awareness and access to support services and to ensure that the Fifth National Mental Health and Suicide Prevention Plan has a clear focus on children and that children's perspectives are included in the development of the response services provided;

(b) To prioritize mental health service delivery to children in vulnerable situations, in particular Aboriginal and Torres Strait Islander children, children with disabilities, children in alternative care, homeless children, children living in rural and remote areas, asylum-seeking, refugee and migrant children, children from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex children;

(c) To strengthen measures to ensure that psychostimulant drugs are prescribed to children with attention deficit hyperactivity disorder only as a measure of last resort and only after an individualized assessment of the best interests of that child and to ensure also that children and their parents are properly informed about the possible side effects of this medical treatment and about non-medical alternatives;

(d) To increase the availability of online mental health services and web-based counselling, while making in-person mental health services child-friendly and accessible to children, including those under 14 years of age, throughout the territory of the State party.

Adolescent health

39. With reference to its general comments No. 4 (2003) on adolescent health and development in the context of the Convention and No. 20 (2016) on the implementation of the rights of the child during adolescence, the Committee recommends that the State party:

(a) Strengthen measures to prevent teenage pregnancies among Aboriginal and Torres Strait Islanders girls, including by providing culturally sensitive and confidential medical advice and services;

(b) Continue providing children with education on sexual and reproductive health as part of the mandatory school curriculum, paying special attention to preventing early pregnancy and sexually transmitted infections.

Impact of climate change on the rights of the child

40. The Committee is very concerned about the State party's position that the Convention does not extend to protection from climate change. The Committee emphasizes that the effects of climate change have an undeniable impact on children's rights, for example the rights to life, survival and development, non-discrimination, health and an adequate standard of living. It is also concerned that the State party has made insufficient progress on the goals and targets set out in the Paris Agreement and about its continuing investment in extractive industries, in particular coal. The Committee expresses its concern and disappointment that a protest led by children calling on government to protect the environment received a strongly worded negative response from those in authority, which demonstrates disrespect for the right of children to express their views on this important issue.

41. The Committee draws attention to target 13.5 of the Sustainable Development Goals and urges the State party:

(a) To ensure that children's views are taken into account in developing policies and programmes addressing climate change, the environment and disaster risk management and to increase children's awareness and preparedness for climate change and natural disasters;

(b) To promptly take measures to reduce its emissions of greenhouse gases by establishing targets and deadlines to phase out the domestic use and export of coal and to accelerate the transition to renewable energy, including by committing to meeting 100 per cent of its electricity needs with renewable energy.

Standard of living

42. The Committee urges the State party to address the high rate of homelessness among children, particularly focusing on children leaving alternative care, and to include children under 12 years of age in the Reconnect Programme.

H. Education, leisure and cultural activities (arts. 28–31)**Education, including early childhood education and care**

43. The Committee is still concerned that the efforts made to close the gap for Aboriginal and Torres Strait Islander children remain insufficient. The Committee, taking note of target 4.1 of the Sustainable Development Goals, urges the State party:

(a) To address the shortcomings of the Closing the Gap measures for Aboriginal and Torres Strait Islander children and to reach the targets on school attendance, retention rates, literacy and numeracy standards by paying particular attention to these children in remote areas and investing in teachers' cultural competency of these communities' history;

(b) To invest more in improving education at the early childhood, primary and secondary levels, paying particular attention to children living in remote areas, Aboriginal and Torres Strait Islander children, children with disabilities, children in marginalized and disadvantaged situations, children in alternative care and children from refugee and migrant backgrounds;

(c) To ensure that all children with disabilities have access to inclusive education in mainstream schools and are provided with the support they need and to address the use of restraints and seclusion;

(d) To strengthen the school-based Respectful Relationships initiative to promote gender equality and respect;

(e) To intensify its efforts to prevent and address bullying in schools, including online bullying, through the eSafety Commissioner and provide support to child victims, in particular lesbian, gay, bisexual, transgender and intersex children.

I. Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37 (b)–(d) and 38–40)**Asylum-seeking, refugee and migrant children**

44. The Committee notes that since 28 February 2019 there are no asylum-seeking, refugee or migrant children in regional processing countries but remains seriously concerned that:

(a) The State party "is not intending to establish an independent guardianship entity for unaccompanied children" (CRC/C/AUS/Q/5-6/Add.1, para. 59) even though the Minister for Home Affairs is also responsible for granting immigration visas and approvals;

(b) The Migration Act still prescribes mandatory detention for persons, including children, involved in irregular migration and that the State party "is not currently considering prohibiting the detention of children in all circumstances" (CRC/C/AUS/Q/5-6/Add.1, para. 60);

(c) The amended Migration Act and the amended Maritime Powers Act of 2013 allow for the return of vessels carrying children who may be in need of international assistance;

(d) The policy of utilizing regional processing countries and detaining children has not been revoked;

(e) The best interests of the child are not a primary consideration in asylum, refugee and migration processes, leading to children going through lengthy assessment and

determination procedures, and that the 286 children transferred from Nauru and the many thousands of children before them (the “legacy caseload”) “will not be settled in Australia and are encouraged to engage in third-country migration options” (CRC/C/AUS/Q/5-6/Add.1, para. 62), leaving them in limbo for an undetermined period of time;

(f) There is limited information on access to protection, education and health services, including mental health services, for all these children;

(g) Migration laws and policies still allow disability to be the basis for rejecting an immigration request;

(h) Inadequate mechanisms for monitoring the well-being of children involved in asylum, refugee and migration processes exist.

45. **The Committee refers to its general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin and to joint general comments No. 3 and No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families / No. 22 and No. 23 (2017) of the Committee on the Rights of the Child on the human rights of children in the context of international migration and recalls its previous recommendations on asylum-seeking and refugee children (CRC/C/AUS/CO/4, para. 81). The Committee urges the State party immediately:**

(a) **To amend the Immigration (Guardianship of Children) Act of 1946 (Commonwealth of Australia) to create an independent position of guardian for children;**

(b) **To amend the Migration Act (Commonwealth of Australia) to prohibit the detention of asylum-seeking, refugee and migrant children;**

(c) **To amend the Migration Act and the Maritime Powers Act to ensure respect for the State party’s non-refoulement obligations, particularly in the course of maritime interceptions and returns;**

(d) **To enact legislation prohibiting the detention of children and their families in regional processing countries;**

(e) **To ensure that the best interests of the child are a primary consideration in all decisions and agreements related to the relocation of asylum-seeking, refugee and migrant children within Australia or to other countries;**

(f) **To ensure that children who have been detained in regional processing countries have access to adequate child protection, education and health services, including mental health services;**

(g) **To review migration laws and policies with a view to withdrawing disability as a criterion for rejecting immigration requests;**

(h) **To implement durable solutions, including financial and other support, for all refugee and migrant children to ensure their early rehabilitation, reintegration and sustainable resettlement;**

(i) **To introduce adequate mechanisms for monitoring the well-being of children involved in asylum, refugee and migration processes.**

Indigenous children

46. **The Committee urges the State party to ensure that:**

(a) **Aboriginal and Torres Strait Islander children and their communities are meaningfully involved in the planning, implementation and evaluation of policies concerning them;**

(b) **The Joint Council of Australian Governments and Aboriginal and Torres Strait Islander People on Closing the Gap established in March 2019 has a clear mandate and the human, technical and financial resources necessary to function effectively.**

Administration of child justice

47. The Committee again regrets that its previous recommendations have not been implemented and remains seriously concerned about:

- (a) The very low age of criminal responsibility;
- (b) The enduring overrepresentation of Aboriginal and Torres Strait Islander children and their parents and carers in the justice system;
- (c) Reports that children in detention are frequently subjected to verbal abuse and racist remarks, deliberately denied access to water, restrained in ways that are potentially dangerous and excessively subjected to isolation;
- (d) The high number of children in detention, both on remand and after sentencing;
- (e) Children in detention not being separated from adults;
- (f) The continuing existence of mandatory minimum sentences applicable to children in the Northern Territory and Western Australia;
- (g) The continuing overrepresentation of children with disabilities in the justice system;
- (h) Children's lack of awareness about their rights and how to report abuses.

48. **With reference to its general comment No. 24 (2019) on children's rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and:**

- (a) **To raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies;**
- (b) **To immediately implement the 2018 recommendations of the Australian Law Reform Commission to reduce the high rate of incarceration among indigenous persons;**
- (c) **To explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion or to discipline children under supervision, promptly investigate all cases of abuse and maltreatment of children in detention and adequately sanction the perpetrators;**
- (d) **To actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial sentences such as probation or community service;**
- (e) **In cases where detention is unavoidable, to ensure that children are detained in separate facilities and, for pretrial detention, to ensure that detention is regularly and judicially reviewed;**
- (f) **To review its legislation to repeal mandatory minimum sentences for children in the Northern Territory and Western Australia;**
- (g) **To ensure that children with disabilities are not detained indefinitely without conviction and that their detention undergoes regular judicial review;**
- (h) **To provide children in conflict with the law with information about their rights and how to report abuses.**

Child victims and witnesses of crime

49. **The Committee urges the State party:**

- (a) **To apply a child-friendly and multisectoral approach to avoid the retraumatization of child victims and ensure that cases are promptly recorded and investigated and that perpetrators are prosecuted and duly sanctioned;**

(b) To put in place child-sensitive mechanisms to facilitate and promote the reporting of cases and ensure that complaints mechanisms are child friendly and available both online and offline, paying particular attention to alternative care settings, detention facilities and locations for asylum-seeking, refugee and migrant children;

(c) To ensure that the national mechanism for the prevention of torture has access to places where children are placed;

(d) To ensure the development of programmes and policies for the full recovery and social reintegration of child victims;

(e) To guarantee child victims' access to adequate procedures to seek compensation for damages;

(f) To ensure that all child victims and witnesses of crime have access to adequate support, irrespective of whether they assist in police investigations, prosecutions or trials.

Follow up to the Committee's previous concluding observations on the Optional Protocol on the sale of children, child prostitution and child pornography

50. The Committee welcomes developments to fight slavery and trafficking in persons and the establishment of the Australian Centre to Counter Child Exploitation in March 2018. With reference to its guidelines on the implementation of the Optional Protocol (CRC/C/156), the Committee urges the State party:

(a) To define and criminalize child prostitution and child pornography (child sexual exploitation) for all children in accordance with articles 1–3 of the Optional Protocol and to harmonize legislation across its states and territories;

(b) To ensure that all crimes under the Optional Protocol, not just cases of trafficking in children, are investigated and that perpetrators are prosecuted and sanctioned;

(c) To ensure that all children subject to any form of sexual exploitation, sale or trafficking are treated as victims and not subject to criminal sanctions;

(d) To amend its legislation to exercise extraterritorial jurisdiction over the sexual exploitation of all children under 18 years of age, including the sexual exploitation in travel and tourism of child victims between 16 and 18 years of age;

(e) To further strengthen its measures to combat and prevent sexual exploitation of children online, including through the criminalization of online grooming of children;

(f) To strengthen training programmes on the identification and referral of child victims of sale, sexual exploitation and trafficking.

Follow up to the Committee's previous concluding observations on the Optional Protocol on children in armed conflict

51. The Committee urges the State party:

(a) To develop mechanisms for the early identification of asylum-seeking, refugee and migrant children who may have been recruited or used in hostilities abroad, to conduct training for personnel responsible for the identification and referral of such children to protection services and to provide child victims with appropriate assistance for their full physical and psychological recovery and social reintegration;

(b) To make the National Firearms Agreement binding on all states and territories, allowing firearms licences to be issued only to people over 18 years of age;

(c) To strengthen measures prohibiting the sale of arms to countries known to be or suspected of being involved in the recruitment or use of children in armed conflict or hostilities.

J. Ratification of the Optional Protocol on a communications procedure

52. The Committee recommends that the State party, in order to further strengthen the fulfilment of children's rights, ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

K. Ratification of international human rights instruments

53. The Committee recommends that the State party, in order to further strengthen the fulfilment of children's rights, consider ratifying the following core human rights instruments to which it is not yet a party:

(a) International Convention for the Protection of All Persons from Enforced Disappearance;

(b) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

L. Cooperation with regional bodies

54. The Committee recommends that the State party cooperate, among others, with regional organizations such as the Pacific Community and the Pacific Islands Forum.

IV. Implementation and reporting

A. Follow-up and dissemination

55. The Committee recommends that the State party take all appropriate measures to ensure that the recommendations contained in the present concluding observations are fully implemented. The Committee also recommends that the combined fifth and sixth periodic reports, the written replies to the list of issues and the present concluding observations be made widely available in the languages of the country.

B. National mechanism for reporting and follow-up

56. The Committee welcomes the creation by the State party of a standing national human rights mechanism and emphasizes that it should be adequately and continuously supported by dedicated staff in order to enable it to engage with international and regional human rights mechanisms and implement treaty obligations and the recommendations and decisions emanating from the mechanisms.

C. Next report

57. The Committee invites the State party to submit its seventh periodic report by 15 January 2024 and to include therein information on the follow-up to the present concluding observations. The report should be in compliance with the Committee's harmonized treaty-specific reporting guidelines adopted on 31 January 2014 (CRC/C/58/Rev.3) and should not exceed 21,200 words (see General Assembly resolution 68/268, para. 16). In the event that a report exceeding the established word limit is submitted, the State party will be asked to shorten the report in accordance with the above-mentioned resolution. If the State party is not in a position to review and resubmit the report, translation thereof for the purposes of consideration by the treaty body cannot be guaranteed.

58. The Committee also invites the State party to submit an updated core document, not exceeding 42,400 words, in accordance with the requirements for the common core document contained in the harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents (see HRI/GEN/2/Rev.6, chap. I) and paragraph 16 of General Assembly resolution 68/268.

PROVING THE CRIMINAL RESPONSIBILITY OF CHILDREN: RP v The Queen¹

Hament Dhanji SC, Julia Roy and Sally McLaughlin²

INTRODUCTION

Discussions in this area frequently commence with the observation “No civilised society regards children as accountable for their actions to the same extent as adults”.³ The observation of course begs the question as to whether that differentiation should be made with respect to liability or penalty or both and as to how any differentiation should be made. The purpose of this paper is to discuss how the law deals with liability.

The age of criminal responsibility may be regarded as the age at which the law considers that a person “has the capacity and a fair opportunity or chance to adjust his behaviour to the law”.⁴

Criminal offences are, at their core, prohibitions on interference with the rights of others. Adults, as full members of society, have rights and can be expected to respect the rights of others. Children do not have the same rights, either to property or personal autonomy. The extent of a child’s rights in this regard will depend on his or her age, maturity and determinations of caregivers.

Having limited rights and being at an earlier stage of development, children will have limited personal experience to draw upon in understanding the rights

¹ *RP v The Queen* [2016] HCA 53; 91 ALJR 248

² With acknowledgement and appreciation to Shaun Croner who assisted in compiling the paper in its current form.

³ Colin Howard, *Criminal Law* (Law Book Co, 4th ed, 1982) 343, cited in *R (A Child) v Whitty* (1993) 66 A Crim R 462 (**Whitty**), 462 (Harper J), *C v DPP* [1996] AC 1 (**C v DPP**), [73] (Lord Lowry) and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (**CRH**).

⁴ HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 181 and see also 152, and Mathew Hale, *History of the Pleas of the Crown* (Vol 1, 1736) 14-15.

of others. This fundamentally distinguishes children from adults. Importantly for present purposes it highlights the need to eschew adult value judgments in determining whether children can be held responsible for a particular crime.

1. CRIMINAL RESPONSIBILITY OF CHILDREN

Minimum age of criminal responsibility

The common law recognised that children below the age of seven (often termed ‘the age of discretion’) were not criminally responsible for their acts. The common law also long distinguished a second age range for liability, above the absolute minimum, in which the individual child may be assessed for sufficient capacity (since at least the reign of King Edward III, 1327-1377).⁵ The upper threshold of 14 years was set around the first half of the seventeenth century.⁶ A child over seven but less than 14 was presumed to be ‘*doli incapax*’, or incapable of forming a criminal intent.

In New South Wales (and all Australian jurisdictions) the minimum age of criminal responsibility has been set by statute at 10 years: *Children (Criminal Proceedings) Act 1987* (NSW) s 5.⁷ The legislature has not otherwise interfered with the common law position. The result is that in New South Wales, the common law rebuttable presumption of *doli incapax* is applied to children between 10 and 13 years of age (inclusive): *BP v R* [2006] NSWCCA 172 (**BP**) at [27]. It is also applied in Victoria and South Australia: *R v ALH* (2003) 6 VR 276 (**ALH**) at [20], [24] and [86]; *The Queen v M* (1977) 16 SASR

⁵ Sir William Blackstone, *Commentaries on the Laws of England* (Vol 4, 1769) 23.

⁶ *C v DPP* at 24 citing Sir Edward Coke

⁷ *Criminal Code Act 1995* (Cth) s 7.1, *Criminal Code Act 1899* (Qld) s 29, *Criminal Code Act Compilation Act 1913* (WA) s 29, *Criminal Code Act 1924* (Tas) s 18 *Criminal Code Act 1983* (NT) s 38, *Criminal Code 2002* (ACT) s 25. Ten is towards the lower end of the scale internationally. The most common age of criminal responsibility around the world (below which there is absolute protection) is 14, the median age is 13.5 years, and the average is 11.9. Excluding four countries that do not set a minimum age, the mean is 12.5 and the median is 14: Neal Hazel, *Cross-National Comparison of Youth Justice* (Youth Justice Board, 2008) 31. And see UN Committee on the Rights of the Child, *Concluding Observations on the Rights of the Child: Australia* (1997) CRC/C/15/Add.79 [29], and UN Committee on the Rights of the Child, *General Comment No. 10* (2007) CRC/C/GC/10 [30]-[33].

589 (*M*). In the remaining Australian jurisdictions the presumption has been replaced with statute.⁸ The language used varies between jurisdictions, but the provisions have either been accompanied by an express legislative intention to “repeat” the common law or else silence as to the desired effect of the provision.⁹

In *RP v The Queen* [2016] HCA 53; (2016) 91 ALJR 248 (*RP*) the High Court noted that “[t]he rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea.”¹⁰

The case of *RP v the Queen*¹¹

In *RP* the appellant was convicted, after a judge alone trial, of two counts of sexual intercourse with a child under 10 years. The complainant was the appellant's half-brother. At the time of the offending, the appellant was aged approximately 11 years and six months and the complainant was aged six years and nine months. The only issue at trial was whether the prosecution had rebutted the presumption of *doli incapax* by proving that the appellant knew that his actions were seriously wrong in a moral sense.

⁸ *Criminal Code Act 1995* (Cth) s 7.2, *Criminal Code Act 2002* (ACT) s 26 Crimes Act s 4N; Criminal Code (Tas) s 18(2); Criminal Code (WA) s 29; Criminal Code (Qld) s 29(2); *Childrens Services Act 1986* (ACT) s 27(2); Criminal Code (NT) s 38(2). In NSW, SA and Vic the presumption continues to be based on the common law: eg *IPH v Chief Constable of New South Wales* [1987] Crim LR 42. *Doli incapax* also applies in NZ: *Crimes Act 1961* (NZ) s 22. Around the common law world, the presumption continues to operate in (at least) Hong Kong, Ireland, New Zealand, South Africa, India, Malaysia and Singapore (the last three set the range at 10-12 years): Thomas Crofts, ‘Reforming the Age of Criminal Responsibility’ [2016] *South African Journal of Psychology* 1, 4, and Don Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate, 2009) 187-224. The presumption for children between 10 and 14 years of age was abolished in England and Wales in 1998.

⁹ Eg “This provision also repeats the law as it currently stands in the ACT and the rest of Australia”: Explanatory Memorandum to the *Criminal Code 2002* (ACT) Clause 26 (which provision is in the same terms as the Commonwealth Code), and see *M v J* [1989] Tas R 212

¹⁰ At [8].

¹¹ This summary is taken from the High Court case note dated 21 December 2016.

The first offence took place in circumstances where there were no adults in the house; the appellant grabbed the complainant and held him down; the complainant was crying and protesting; the appellant put his hand over the complainant's mouth; and the appellant stopped the intercourse when he heard an adult returning to the house and told the complainant not to say anything. The second offence took place a few weeks later, in circumstances where: the appellant and complainant were again without adult supervision; the appellant took hold of the complainant; and the appellant stopped intercourse when he heard an adult returning. There was also evidence that, when the appellant was aged 17 and 18 years old, he was twice assessed as being in the borderline disabled range of intellectual functioning and was found by the trial judge to be of "very low intelligence". The trial judge held that the circumstances surrounding the first offence proved beyond reasonable doubt that the presumption was rebutted in relation to that offence. His Honour found that it logically followed that the presumption was rebutted in relation to the second offence.

The Court of Criminal Appeal dismissed the appellant's appeal against his two convictions. The Court unanimously held that the presumption was rebutted in relation to the first offence. A majority of the Court held that it was also rebutted in relation to the second offence, finding that the appellant's understanding of the wrongness of his actions in the second offence was informed by the finding that he knew his actions in the first offence were seriously wrong. The appellant was granted special leave to appeal to the High Court of Australia. The appeal raised fundamental questions regarding the principle of *doli incapax* which are dealt with below.

2. REBUTTING THE PRESUMPTION OF *DOLI INCAPAX*

In *RP* the High Court restated the principles in relation to the presumption of *doli incapax*. Those principles had previously been set out in *C v DPP* (1996) AC 1 (particularly at 38). Whilst essentially restating the existing law, the decision in *RP* is useful in its statement of the principles, its emphasis on the

moral quality of what is to be proved and the need for evidence to be adduced in order to prove it. The test can be summarised as follows:

1. The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;
2. Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child's awareness that his or her conduct was merely naughty or mischievous;
3. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction; and
4. The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be.

2.1 The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;

The onus is on the prosecution to prove that the child is *doli capax* (that is, not *doli incapax*). Accordingly, the prosecution must call evidence to prove, to the criminal standard, that the presumption does not apply.¹² The determination of whether the presumption has been rebutted is a matter for the tribunal of fact.

*“No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.”*¹³ If at the end of the prosecution case, no evidence has been called to rebut the presumption, the prosecution has failed to establish their case. The defence may make a no case submission in this circumstance.¹⁴

¹² *RP v The Queen* at [32].

¹³ *RP v The Queen* at [9].

¹⁴ *C v DPP* at [36]-[37].

Where evidence relevant to rebutting the presumption is adduced, the defendant may choose to call evidence in response. However, there is no requirement for the defendant to establish that the presumption applies.

2.2 Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child’s awareness that his or her conduct was merely naughty or mischievous

It has been repeatedly said that in a case in which the presumption of *doli incapax* applies, the prosecution must prove beyond reasonable doubt that when doing the act charged the child “knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief”.¹⁵

It had been observed that this test is simply stated but difficult in application: *RP v the Queen* [2015] NSWCCA 215 at [129] (***RP CCA Decision***) per Hamill J and, see also, *C v DPP* at [53](3) and [73].

In *RP*, the High Court made clear that the test is directed to “[k]nowledge of moral wrongness”.¹⁶ Whilst not new, this stress is an important part of the decision in *RP*. A child’s acknowledgment that he or she understood that an act was “seriously wrong” will not, of itself, provide an indication that the child appreciated the moral wrongness of the act or omission. That is, a child might view conduct as “seriously wrong” in the sense that he or she is likely to be in serious trouble if found out, without the requisite understanding of the act for the purposes of criminal responsibility. Focussing on the child’s belief that the act was more than mischievous or naughty may tend to obscure what it is that has to be established.

Further the evidence must concern the particular child. In *RP* the High Court noted at [12]:

¹⁵ *Ibid.*

¹⁶ At [9].

The only presumption which the law makes in the case of child defendants is that those aged under 14 are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

In relation to the specific offences in that matter, the Court said at [35]:

The conclusion drawn below that the appellant knew his conduct, in having sexual intercourse with his younger sibling, was seriously wrong was largely based on the inferences that he knew his brother was not consenting and that he must have observed his brother's distress. It cannot, however, be assumed that a child of 11 years and six months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding that the presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding.

Assuming a child within a certain age range has a proper understanding of which intrusive acts are permissible, in what circumstances, and by whom, and which might be seriously wrong as opposed to frowned upon, naughty or merely wrong, fails to give effect to the presumption and may reverse the onus of proof. It is also contrary to the psychological and neurological understanding of the moral development of children and adolescents. Knowing something is “seriously wrong” involves:

more than a child-like knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge.¹⁷

2.3 The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction

To rebut the presumption, the prosecution must adduce evidence that proves, beyond all doubt, that the child knew that his or her actions, in committing the offence, were seriously wrong. In *C v DPP* Lord Lowry described the quality of the evidence that the prosecution was bound to adduce, at [38C]:

¹⁷ N J Lennings and C J Lennings, ‘Assessing serious harm under the doctrine of *doli incapax*: A case study’ (October 2016) *Psychiatry Psychology and Law* 1, 2.

... What is required has variously been expressed, as in Blackstone, 'strong and clear beyond all doubt or contradiction', or in *Rex v Gorrie* (1919) 83 JP 136, 'very clear and complete evidence' or in *B v R* (1958) 44 Cr App R 1 at 3 per Lord Parker CJ, 'it has often been put this way, that ... "guilty knowledge must be proved and the evidence to that effect must beyond all reasonable possibility of doubt.

As noted above, it is essential to focus on the child's capacity and not that of a hypothetical child. In this regard, it has been recognised that in jurisdictions where the protection of the absolute presumption is not available to children over 10 years, the rebuttable presumption at least allows for the "vast differences" in the development of the capacities necessary for criminal responsibilities between individuals of the same biological age to be taken into account and, in theory, for children under 14 lacking adult capacity to be protected.¹⁸

The ability of children, even at the upper end of the presumption age range, to understand the "serious wrongness" of an act (or omission), cannot be presumed, and, if anything, from a modern neurological perspective, remains presumptively in doubt throughout adolescence.

In *RP*, apart from evidence of the acts said to constitute the offences themselves, and the circumstances surrounding those events, the only evidence of the appellant's capacity was contained in experts' reports addressed to the appellant's capacity at ages 17 and 18, in relation to different issues, (themselves made some five to six years after the offending conduct).

The circumstances around the events established that the appellant knew the conduct was wrong in at least some sense. (He was anxious to avoid parental scrutiny of the acts.) He also, from the reaction of the complainant, could be inferred to have known that he was causing his brother significant distress. This latter fact was regarded as being of particular significance in

¹⁸ Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 *Current Issues in Criminal Justice* 123, 126.

the determination in the CCA. The Court, however, had no evidence directed to the appellant's intellectual or moral development at ages 11-12. As such, the appellant submitted that the CCA misconceived the nature of the presumption and the quality of evidence necessary to rebut it beyond a reasonable doubt in finding that the presumption was rebutted.

The appellant in *RP* also submitted that various aspects of the Crown's evidence tended to cast doubt on the appellant's capacity; namely, that the appellant may have thought the actions were not seriously wrong because he had been himself subjected to sexual abuse or else had been inappropriately exposed to pornography. The expert reports served to underscore this possibility.

The report of a psychologist, Mr Champion, raised the possibility that the appellant may have been experiencing PTSD type issues which may have flowed from "past adverse events such as possible molestation or exposure to violence in earlier years", stated that the appellant "does not have the level of understanding of the proceedings that a person of his age with average intelligence would have"; and noted his disadvantage "by reason of his intellectual limitations": At the time of the report the appellant fell within the "borderline disabled range" (albeit towards the top of that range), meaning his IQ was 79 or less. A Job Capacity Assessment Report, conducted two years earlier, was also tendered in the Crown case. This also cast doubt on the appellant's capacity. The evidence suggestive of molestation, considered together with the act itself and use of the condom, also gave rise to a strong inference that the appellant had himself been inappropriately sexualised.

In relation to that evidence Davies J said (*RP* CCA Decision at [67]):

Reliance on the report of Mr Champion has a number of difficulties. His examination of the Applicant was conducted in January 2012 which was more than six years after the events complained of. It is not easy to determine, for example, what violence the Applicant was exposed to nor how it had affected him at the relevant time. Certainly a reading of paragraph 29 of Mr Champion's report leads to the strong inference that the violence was not directed towards the Applicant. Moreover, Mr Champion speaks of "possible molestation" without the Applicant having suggested it or made complaint

about it, and despite there being no other evidence of it. Contrary to the Applicant's submission it cannot be concluded on the evidence that he was highly sexualised.

Davies J's criticisms of the report can be accepted. However, it was not for the appellant to prove a lack of capacity. The High Court ultimately accepted that the reports served to highlight the gap in the prosecution evidence.

Importantly, the High Court accepted that the conduct itself (far from proving that the presumption was rebutted), raised a real question as to the appellant's understanding of his act. The plurality said (at [34], footnotes omitted):

The evidence of the appellant's use of the condom is significant. Given the way the appeal was conducted, it was an error for Davies and Johnson JJ to disregard it in determining whether, upon the whole of the evidence, it was open to the trial judge to be satisfied that the presumption had been rebutted and the appellant's guilt of the offence charged in count two established beyond reasonable doubt. The fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference. Mr Champion's report did not serve to allay the latter suggestion.

The High Court agreed that the prosecution had not established, to the criminal standard, that the appellant knew his actions were "seriously wrong", as at [36]:

...In relation to the offences charged in counts two and three, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development. The circumstance that at the age of 11 years and six months he was left at home alone in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant's performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct, charged in counts two and three, in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.

Importantly, the fact that the appellant may have been aware he was causing great distress to another human being was not sufficient to establish that he

was aware that what he was doing was seriously wrong for the purposes of rebutting the presumption (see *RP* at [35]; cf the approach of the trial judge in *RP* set out by the CCA at [34]; and Hodgson JA in *BP* at [30]). The absence of evidence as to *RP*'s development meant that the necessary inference could not be drawn from this circumstance.

2.4 The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be

In *C v DPP* Lord Lowry commented that, apart from evidence of what the child has said or done (in addition to the alleged act), the prosecution must rely on interviewing the child or having him or her psychiatrically examined, or on evidence from someone such as a teacher: at [70]. To this might be added a requirement that the evidence address the moral maturity (which Lord Lowry distinguished from mental development: at [70]) of the child at the time of the offending.

There had been a divergence between NSW and Victoria as to whether the act constituting the offence could be sufficient (together with the child's age) to rebut the presumption beyond reasonable doubt. It was held in *C v DPP* and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (***CRH***), that although the act is relevant, there must be more than proof of the act charged. In Victoria, Cummins AJA held in *ALH* that the requirement "that mere proof of the act charged cannot constitute evidence of requisite knowledge" (at [86], Callaway JA and Batts JA agreeing at [20] and [24]):

doubtless is founded upon the danger of circular reasoning. But proper linear analysis could have regard to the nature and incidents of the acts charged without being circular. What is required is the eschewing of adult value judgments. Adult value judgments should not be attributed to children. If they are not, there is no reason in logic or experience why proof of the act charged is not capable of proving requisite knowledge. Some acts may be so serious, harmful or wrong as properly to establish requisite knowledge in the child;

others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the acts themselves were seriously wrong. Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society.

The High Court resolved this divergence in *RP* stating, at [9]:

... No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts¹⁹. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in R v ALH²⁰ suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised

It is, therefore, insufficient for the prosecution to solely rely on the nature of the charged act, or an impression of the child's state of mind gleaned from the commission of the act, to rebut the presumption of *doli incapax*.

CONCLUSION

While the case of *RP* confirms the law relating to *doli incapax*, the judgment highlights the heavy burden that the prosecution bears when prosecuting children, reiterating that “[t]he starting point... is that [a child] is presumed in law to be incapable of bearing criminal responsibility for his acts.”

The case underscores the importance of proving the child's knowledge of the moral quality of his or her act and makes clear that the inquiry will involve an analysis of the child's capacity through an examination of the child's background and psychological history, rather than the application of adult

¹⁹ *R v Smith (Sidney)* (1845) 1 Cox CC 260 per Erle J; *C v DPP* at 38; *BP* at [29]; *R v T* [2009] AC 1310 at 1331 [16] per Lord Phillips of Worth Matravers.

²⁰ (2003) 6 VR 276 at 298 [86]; see also at 280-281 [19], 281 [24].

value judgments on the child's behaviour or undue regard to the abhorrent nature of the alleged crime itself.

A review of the decision of the House of Lords in *C v DPP* (some 20 years ago) against the recent exposure of the treatment of children in custody alerts us to the fact that we are not as enlightened as we would sometimes give ourselves credit for. The High Court's decision in *RP* provides a timely reminder that the State's exercise of power over children through prosecution (and imprisonment) should not be approached lightly and can only be appropriate where criminal responsibility has been properly established.

Hament Dhanji, Julia Roy, Sally McLaughlin

**THE ROLE OF POLICE INTERVIEWS IN THE ASSESSMENT OF CHILDREN'S
MORAL CULPABILITY UNDER THE DOCTRINE OF DOLI INCAPAX:
PSYCHOLOGICAL PERSPECTIVES**

PHILLIPA J DANIEL

Which interviewing methods do police use to assess accused children's knowledge of 'serious wrong' under the doctrine of doli incapax? Do these methods accurately assess accused children's moral culpability? How could current interviewing methods be reformulated to provide more accurate assessments? Discuss in reference to research surrounding children's psychological development.

ABSTRACT

This essay critiques current methods used by police to assess accused children's moral culpability under the doctrine of doli incapax. I examine psychological studies to suggest that current police interviewing methods may not accurately assess the child's knowledge of the act as 'seriously wrong' at the time of the alleged offence. Leading questions play on the child's 'interrogative suggestibility' during the police interview. Open-ended questions, while holding the potential to elicit more accurate responses than leading questions, are ultimately staged in the context of a police interview. The police interview suggests wrongfulness to the child and alters the child's previous knowledge of wrong in relation to the act, thus eliciting inaccurate responses. To illustrate these processes, I draw on Gísli Gudjonsson's theory of 'interrogative suggestibility', and Jean Piaget and Lawrence Kohlberg's theories of children's 'moral development'.¹ I use psychological research to show how current police interviews need to be reformulated in order to operate more fairly. I suggest that current police interviewing methods must assess the child's understanding at the time of the act in a more delicate and careful fashion. I explore the role of video recording and third party presence in encouraging police accountability, different question styles and the possibility of transferring the interview process from the purview of the police to that of psychologists. Overall, this essay will illustrate how current questioning methods cause inaccurate statements of moral culpability and, unwittingly, miscarriages of justice.

INTRODUCTION

The significance of records of police interview cannot be overstated in regards to the doctrine of doli incapax. When doli incapax is raised in court, considerable probative value is attributed to statements made in interviews that suggest the child's appreciation of 'serious wrong' at the time of the alleged act.² Often, a child's answer of 'yes' to the question 'did you know it was wrong?' in a police interview is adduced as evidence to prove moral culpability.³ Likewise, more general statements made in response to open questions are admitted as proof of the child's knowledge of 'serious wrong'. In the Victorian case of *R (a*

¹ Jean Piaget, *The Moral Judgment of the Child* (The Free Press, 1932); Lawrence Kohlberg, *The Psychology of Moral Development* (Harper & Row, 1984); Gísli Gudjonsson, *The Psychology of Interrogations and Confessions* (Wiley, UK, 2003).

² Thomas Crofts, 'Rebutting the Presumption of Doli Incapax' (1998), 62(2), *Journal of Criminal Law* 187.

³ Terry Bartholomew 'Legal and clinical enactment of the doli incapax defence in the Supreme Court of Victoria, Australia' (1998), 5(1), *Psychiatry, Psychology and Law* 100.

child) v *Whitty*, a 12-year-old child's statement 'I stole' in a police interview soon after a shoplifting incident was interpreted to indicate knowledge that the act of stealing was wrong.⁴ Ambiguous statements such as this and positive answers to the question 'did you know it was wrong?' often preclude the defence counsel from even raising the doctrine of *doli incapax* in court.⁵

In this essay, I suggest that the prosecution's emphasis on statements made by children in police interviews, as they are currently conducted, is problematic. Current interviewing methods risk eliciting inaccurate responses that do not meet the requirement, as set out by Lord Lowry in *C (A Minor) v DPP*, of being 'strong and clear beyond all doubt or contradiction.'⁶ Police interviewing methods currently work counter to widespread psychological understandings of the suggestibility of children in interviews and moral development theory. As will become clear throughout this essay, psychological research holds tremendous potential to shape public policy pertaining to interviewing children, and to inform the development of evidence-based interviewing strategies that achieve law-enforcement goals while simultaneously protecting the rights of youthful suspects.⁷

In Part I, I explain the presumption of *doli incapax* and the evidence required to rebut it. I draw the reader's attention to the subjective nature of the test requiring the prosecution to prove what the child was thinking *at the time* of the alleged act. I explore how this subjective test creates a challenge for police officers, as they must retrospectively assess the child's state of knowledge. I also briefly explore the statutory protections in place in the *Evidence Act 2008* aimed at protecting children from unfairly obtained evidence. I note that these statutory protections are not utilised to their full potential due to lack of understanding and dialogue around police interviewing techniques that elicit inaccurate statements of moral culpability.

In Part II, I explain the most common interviewing methods police use to gather evidence about the child's knowledge of the act being 'seriously wrong'.⁸ I draw on practical police resources (operational police manuals from NSW and Victoria) as well as the legislative framework of the *Crimes Act 1958* and the *Evidence Act 2008*. I also draw on empirical studies conducted by criminologists, psychologists and legal scholars. From all these sources, I conclude that it seems police adopt two main interviewing techniques: leading questions like 'did you know it was wrong?' and 'open questions' which are intended to encourage children to tell their story in open narrative form.

In the latter half of Part II, I consider the effectiveness of leading question like 'did you know it was wrong?' and open questions in eliciting accurate statements about the child's appreciation of their act as 'seriously wrong' in light of three widely acknowledged psychological theories: Piaget and Kohlberg's theories of 'moral development' and Gudjonsson's theory of 'interrogative suggestibility'. According to research measuring individuals' 'interrogative suggestibility', children acquiesce more readily to police suggestions implied in leading questions during questioning than adults.⁹ Open-ended questions, while holding the potential to elicit more accurate responses and allowing the

⁴ *R (a child) v Whitty* (1993) 66 A Crim R 462, Harper J.

⁵ Bartholomew, above n 3.

⁶ *C (A Minor) v DPP* [1995] 2 WLR 383, 38.

⁷ Hayley M.D Cleary, 'Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases' (2013), 3(2) *Law and Human Behavior* 281.

⁸ *C (A Minor) v DPP* [1995] 2 WLR 383, 401.

⁹ Gisli Gudjonsson, *The Psychology of interrogations and confessions* (Wiley, UK, 2003).

child's knowledge to arise naturally, ultimately elicit responses from children that are contaminated by the implication from police that the act was wrong. Piaget and Kohlberg's moral development theories show how the child may assume moral responsibility only after the time of the alleged offence, though this evidence is tendered to the court as evidence of the child's understanding at the moment of the alleged offence.¹⁰ I also consider the effectiveness of leading questions for vulnerable children such as intellectually disabled and Aboriginal youth in light of research around 'interrogative suggestibility' and the cultural tendency of 'gratuitous concurrence'. I conclude that given the psychological research, police's current use of the leading questions like 'did you know it was wrong?' and open questions does not accurately assess accused children's moral culpability under the doctrine of *doli incapax*.

In Part III, I discuss how police interviews and procedure could be reformulated in light of psychological research. I firstly consider the role of a parent or other third parties' presence, and video recording, in increasing police accountability and fairness in interviews. Secondly, I propose different interview questions which enable qualitative judgments about the maturity and moral sophistication of young people, and their capacity not only to respond to 'yes' to the leading question 'did you know it was wrong?' but to provide a reason why the act was wrong to explore the dimension of moral reason and 'seriousness' of the wrong.¹¹ I also explore the importance of friendly rapport and 'ground rules' in reducing the 'challenge and negative feedback' underpinning children's 'interrogative suggestibility'. I finish by discussing the role of police in assessing children's state of mind retrospectively. I cast a critical eye on the accepted role of the police, whom are not trained in clinical child psychology, to conduct these interviews. I explore the possibility, and limitations, of the interviewing process being taken outside the duties of the police force, and transferred into clinical psychology.

Throughout this essay, it will become clear that police interviewing methods, as they stand, inaccurately assess children's moral culpability under the doctrine of *doli incapax*. Inaccurate police interview records have far reaching implications in terms of the young person's opportunities for a just outcome.¹² Despite this, there is an apparent lack of research on the topic. It is in the interests of justice for considerable research to be conducted into this area in Australia. While this essay is limited in scope, I hope to demonstrate the importance of further research into this topic.

I THE ROLE OF POLICE INTERVIEWS IN REBUTTING THE DOLI INCAPAX PRESUMPTION

A Setting the Scene: The Doli Incapax Presumption

'Doli incapax' is a Latin term which translates as 'incapable of doing wrong'. In Victoria, as in other Australian states and territories, the principle of *doli incapax* declares that no child

¹⁰ Jean Piaget, *The Moral Judgment of the Child* (The Free Press, 1932); Lawrence Kohlberg, *The Psychology of Moral Development* (Harper & Row, 1984).

¹¹ Nicholas J. Lennings & Chris J Lennings 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014), 21(5) *Psychiatry, Psychology and Law* 793 quoting Alex Apler 'Naughty or bad? The role of expert evidence in rebuttal of *doli incapax* presumption' (2000), 7 *Psychiatry, Psychology and Law* 206.

¹² Bartholomew, above 3, 103.

under the age of 10 years can be guilty of an offence.¹³ The legal presumption that a child under 10 years old is incapable of doing wrong relates to the limited developmental capacity of a child to understand right from wrong and act in accordance with that appreciation.¹⁴ Doli incapax relates to the basic principle of criminal responsibility, in which criminality is based upon moral blameworthiness.

Between the ages of 10 and 14, the child is theoretically capable of committing a crime, but the burden of proof rests firmly with the prosecution to satisfy the court beyond reasonable doubt that the child knew that the action was 'seriously wrong', and not just 'naughty and mischievous'.¹⁵ Although abolished in England, the presumption has been strongly affirmed in Australia, notably by the Victorian Court of Appeal in *R v ALH*.¹⁶ The meaning of 'serious wrong', while conceptually obscure, is reasonably clear when contrasted with 'merely naughty or mischievous'.¹⁷ The concept of knowing something is 'seriously wrong' involves complex definitions of moral thought involving the capacity to understand an event and the ability to judge whether one's actions are right or wrong (moral sophistication).¹⁸ At the outset, I will note that any referral to a 'child' or 'children' in this essay is a referral to an individual within the doli incapax presumption age of 10-14, unless otherwise specified.

As noted by Lord Lowry in *C v DPP*, when rebutting the doli incapax presumption 'very little evidence is needed but it must be adduced as part of the prosecution's case, or else there will be no case to answer'.¹⁹ Lord's Lowry, however, notes that though 'little evidence is needed', the evidence 'must be strong and clear beyond all doubt or contradiction'.²⁰ These same principles apply in Australia.²¹ As will soon come to light, statements made by children in interviews are not necessarily 'strong and clear beyond all doubt or contradiction' due to the ineffectiveness of current police interviewing methods.

B *The Subjective Test: a Challenge for Police Interviewers*

The test to rebut the presumption of doli incapax is subjective.²² Proving that the child could distinguish right from wrong at the time of the act is insufficient to rebut the presumption.²³ Rather, it must be clear that the child knew what she/he was doing was 'seriously wrong' within the context of the facts of the case.²⁴

The subjective nature of the doctrine underscores the importance of police interviews, as the interview is often the child's first formal opportunity to show their inward appreciation of the act. Without interview evidence, police rely on second-hand evidence that does not directly assess the child's state of mind during the act (for example circumstances surrounding the

¹³ *Children, Youth and Families Act 2005* (Vic) s 344.

¹⁴ Anthony L Pilay 'Criminal capacity in children accused of murder: challenges in the forensic mental health assessment' (2006), 18(1) *Journal of Child and Adolescent Mental Health*, 18.

¹⁵ *C (A Minor) v DPP* [1995] 2 WLR 383, 401-402.

¹⁶ [2003] 6 VR 276.

¹⁷ *C (A Minor) v DPP* [1995] 2 WLR 383.

¹⁸ Lennings & Lennings, above 11,792.

¹⁹ (1996) 1 AC 38, 4.

²⁰ (1996) 1 AC 38, 64.

²¹ *R v CRH* (1996) NSWCCA 60390/96 (18 December 1996), Newman J.

²² *RH v DPP* [2013] NSWSC 520 (10 May 2013).

²³ Pilay, above 14.

²⁴ *Ibid.*

commission of the act and the child's criminal history).²⁵ A direct assessment of the child's subjective state of mind is necessary because psychological research shows that the child's normal cognitive level can be altered by the 'hot' surrounding circumstances at the time of the act, when there is high emotional stimulation. Therefore an objective test of the child's normal moral reasoning, in 'cold conditions', is not appropriate in the context of *doli incapax*.²⁶ While the subjective test makes sense in terms of child psychology, it undoubtedly creates a challenge for police officers, as they must retrospectively assess what the child was thinking at the time of the act, after the act has occurred.

C Evidential Protections Relating to Doli Incapax Evidence

The *Evidence Act 2008* recognises that youth is a vulnerability, or risk factor, that is relevant to evaluating the reliability of accounts and answers given in police interviews. Statutory protections are available to child suspect interviewees under the *Evidence Act 2008*. For example, s 85(2) states that evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected, and 'age' is considered a 'circumstance'.²⁷ The court may also take into account the nature of the questions and the manner in which the questions were put if an admission was made in response to questioning.²⁸ Furthermore, the court may refuse to admit evidence of an admission if having regard to the circumstances in which the admission was made it would be unfair to the accused to use the evidence.²⁹

However, statements made by children about their understanding of wrong are rarely challenged by defence counsel using these statutory protections.³⁰ It seems that in Australia, there is little questioning by the judiciary and defence counsel alike as to the reliability of statements made by children in relation to *doli incapax* in police interviews. As will be shown in the next section, the nature of the questions and the manner in which the police put the questions risk adversely affecting the truth of these statements. It is therefore problematic that the court so readily accepts statements made by children in police interviews in relation to *doli incapax*.

II ANALYSIS OF POLICE INTERVIEWING METHODS TO ESTABLISH THE CHILD'S KNOWLEDGE OF 'SERIOUS WRONG'

Despite a growing body of psychological literature about youths' interrogation-related capacities, we still know very little about what actually transpires when police question youths.³¹ Police privacy rules prevent law professors, psychologists, and criminologists who write about interrogation from accessing the places where police question criminal suspects.³² Most of the research around police interviewing of children focuses on child victims and

²⁵ *Ibid.*

²⁶ Brenda Midson 'Risky Business: Developmental Neuroscience and the Culpability of Young Killers' (2012), 19(5) *Psychiatry, Psychology and Law* 700.

²⁷ *Evidence Act 2008*, s 85 (3)(a).

²⁸ *Ibid.*, s 85(3)(b)(i).

²⁹ *Ibid.*, s 90(b).

³⁰ Bartholomew, above 3.

³¹ Cleary, above 7, 271.

³² Barry C. Feld, *Kids, Cops, and Confessions* (The New York University Press, 2013) 3

witnesses.³³ There is a smaller amount of research around interviewing child suspects, however this research mainly looks at techniques police use to elicit confessions that the child committed the *physical act*.³⁴ There is only a limited amount of research on techniques that police use to elicit a child's knowledge of their moral culpability.³⁵ This is an apparent gap in the research as it stands.

For this reason, adopting a broad approach of analysing case law, policy framework, police manuals as well as academic research studies helps to refine the most common techniques police use to question child suspect in regard to *doli incapax*. What follows is an analysis of these sources to reveal the most common techniques police use to assess knowledge of 'serious wrong': 'leading questions' and 'open questions'.

A Current Police Interviewing Methods

1 Case Law

(a) *Leading questions*

In *IPH v Chief Constable of South Wales*, Woolf LJ proffered the guidance that the police officer, when interviewing the suspect child, should incorporate some questions designed to probe the issue of whether the suspect child knew his actions were seriously wrong.³⁶ He suggested that the most appropriate way to determine the *doli incapax* issue is for investigating police to ask the child 'did you appreciate that what you were doing was seriously wrong?'.³⁷ He suggested the officer in the case did not go far enough, in that he asked only whether the suspect whether he realised that damage would result from his action, leaving the rest to inference.³⁸

The question 'did you appreciate that what you were doing was seriously wrong?' is a leading question. Leading questions suggest the desired response. They impose the questioner's viewpoint on the suspect's response and can cause a person to produce an inaccurate response.³⁹ As will be shown, children's higher level of 'interrogative suggestibility' means they will most likely respond 'yes' to 'did you know it was wrong', even if they did not appreciate their act to be wrong at the time of the act.

In Australia, courts have accepted this leading question approach. In *R and T (Minors) v DPP*, the police officer asked a child the following questions and the answers were admitted

³³ See for example, Karen J. Saywitz & Lorinda B. Camparo, 'Contemporary Child Forensic Interviewing: Evolving Consensus and Innovation over the Years' in Bette L. Bottoms et al (eds), *Children as Victims, Witnesses and Offenders* (The Guilford Press, 2009), 102; S Krähenbühl & M Blades 'The effect of interviewing techniques on young children's responses to questions' (2006), 32(3) *Child Care Health Development*, 321.

³⁴ Feld, above 32; Cleary, above 7; Brendan O'Mahony et al, 'To Challenge, or not to Challenge? Best Practice when Interviewing Vulnerable Suspects', (2012), 6(3), *Policing* 301.

³⁵ Barthomoew above, 3; Feld above 32.

³⁶ [1987] Crim-LR 42.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Gavin E. Oxburgh 'The question of question types in police interviews: a review of the literature from a psychological and linguistic perspective' (2010), 17.1, *The International Journal of Speech, Language and the Law* 50.

to court as evidence of knowledge of moral wrong:

Police: Would you agree with me that you were aware that whilst throwing the rock off (the bridge) there was a good possibility that you were going to cause serious harm or even kill somebody?

A: Yes

Police: Were you aware that what you were doing was wrong?

A: Yes

Police: And even though you were aware of that, you still continued and went and threw a second one (rock)?

A: Yes

(Office of Public Prosecutions, 1995)⁴⁰

The appropriateness of asking leading questions, such as these, is settled in the case law. Likewise, lawyers in Australia accept this approach.⁴¹

(b) Open questions

In the absence of such a direct question as 'did you know it was wrong?', the Court is required to interpret what was the understanding of the child. As stated by Basten JA in *RH v DPP* 'It is ... the actual words used by the plaintiff which I consider are of particular significance in determining his (the child's) state of knowledge'.⁴² The police generally ask 'open questions' to assess this understanding, and the child's responses are taken to indicate their knowledge at the time of the act. Open-ended questions are aimed at constructing a narrative without feeding suspects crucial facts to enhance the credibility of a statement for judges and juries.⁴³ Open questions start with the words such as 'tell,' 'explain,' and 'describe' and contain no verbal implications or leads.⁴⁴

In the Victorian case of *R (a child) v Whitty (1993)*, the child's statement 'I stole' in response to being asked what she had done at the plaza where the shop was located (an open question) after a shoplifting incident was interpreted to indicate knowledge that the act of stealing was wrong.⁴⁵ Harper J gave weight to the fact that no one else has mentioned the word 'stole' before the interview; this meaning the child used it deliberately and appropriately and knew

⁴⁰*R and T (Minors) v DPP, Unreported, Supreme Court of Victoria, 1995* quoted in Terry Bartholomew 'Legal and clinical enactment of the doli incapax defence in the Supreme Court of Victoria, Australia' (1998), 5(1), *Psychiatry, Psychology and Law* 100.

⁴¹*NSW Legal Aid, The Criminal Capacity of Children (2004)*

<http://www.legalaid.nsw.gov.au/data/assets/pdf_file/0006/6486/Criminal-Capacity-of-Children.pdf>

⁴²*RH v DPP (NSW)* [2014] NSWCA 305 (4 April 2014), 32.

⁴³Barry C. Feld 'Police Interrogation of Juveniles: An Empirical Study of Policy and Practice' (2006), 97(219) *Journal of Criminal Law and Criminology* 106.

⁴⁴*Ibid.*

⁴⁵*R (a child) v Whitty (1993)* 66 A Crim R 462.

what it meant.⁴⁶ Likewise, in *RH v DPP*, a 12-year-old Aboriginal suspect was found to have knowledge of 'serious wrong' when she described that she 'broke' into a fire station.⁴⁷

As will be shown, however, children can come to realise their act was wrong *after* the act regardless of the language used by police officers, and answer questions accordingly. Indeed, responses to open questions can reflect the child's reaction to the punitive context of the police, and recent developments in their moral understanding.

2 Police Manuals and Training Materials

Most Australian states and territories' police training manuals are inaccessible to the public, despite their access helping to ensure the transparency of the police force. The Tasmanian police manual is controversially not available. This has rightfully been subject to public outcry.⁴⁸

In the publically available police manuals, it would seem that there is a lack of procedural guidelines setting out questions police should ask children in regard to *doli incapax*. The Victoria Police Manual is not particularly prescriptive in terms of interviewing techniques – it does not specify interrogation procedures for youth beyond direction for how to ensure statutory requirements set out in the *Crimes Act 1958* (parental or third party presence, and video recording) and the *Evidence Act 2008*.⁴⁹ All available state and territory police operational guidelines, apart from the NSW Police Service 'Code of Practice', only provide this level of non-specific interviewing method guidance.⁵⁰ In the absence of such material, and for the sake of this essay, I will work on the assumption that police in each state and territory follow the case authorities of asking questions like 'did you know it wrong?' as well as more open question interviewing techniques.

The NSW Police Service is extremely clear on the types questions police should ask in regard to *doli incapax*. It reminds officers in its Code of Practice: 'Remember, when interviewing children between 10 and 14 you need to obtain evidence that they knew what they were doing was wrong (as opposed to mischievous or naughty).'⁵¹ The manual then advises police to ask questions to determine the child's understanding of right, wrong and what a crime is. The manual provides examples of questions for police to ask, including 'did you know that it is wrong to (allegation)?' and 'do you know what a crime is? What is a crime? When you (allegation) did you think it was a crime? What do you think happens to people who commit crimes?'. The guide also tells police to question in regard to *doli incapax* when the child denies the offence – '...put the allegation to them and invite comment: For example, do you

⁴⁶ *Ibid.*

⁴⁷ *RH v DPP* (NSW) [2013] NSWSC 520, 33.

⁴⁸ Isla McGregor, 'Police Minister supports continued secrecy over Tasmania Police Manual', *The Tasmanian Times* (online), 19 February 2014
<http://www.tasmaniantimes.com/index.php/article/police-minister-supports-continued-secrecy-over-tasmania-police-manual>.

⁴⁹ Victoria Police, 'Victoria Police Manual', 2014, part 2.2 (*Interviews with Vulnerable People*), part 2.5 (VPM Guidelines).

⁵⁰ See for example, the Queensland Police Operations Procedures Manual, part 5.4 Children (General Information).

<https://www.police.qld.gov.au/corporatedocs/OperationalPolicies/Documents/OPM/Chapter5.pdf>

⁵¹ NSW Police 'Code of Practice for CRIME', last updated April 2015, p 84.

http://www.police.nsw.gov.au/data/assets/pdf_file/0007/108808/Code_CRIME_29_April_2015.pdf

think it would be wrong to (allegation)'.⁵² Here, the police are instructed to use a series of leading questions to establish *doli incapax* evidence. These procedural guidelines therefore match with the authority in the case law. The abovementioned statutory protections in the *Evidence Act 2008* are also intended to guide police in their questioning.⁵³

3 Summary of Sources: Police Interviewing Methods

While there have been no recent empirical studies conducted into how often the question 'did you know it was wrong?' is asked by police in Australia, its prevalence is suggested by its acceptance in the case law and the NSW police handbook. The case law also suggests the significance of general statements made in response to open questions. The preference for open questions is also reflected in the academic literature. In Oxburgh's 2010 study, it was found that there is now overwhelming acceptance of using open-ended questions to encourage interviewees (adults and children) to freely recall events.⁵⁴ In summary, framing questions as open questions and leading questions appear to be the most prevalent methods police use to assess a child's knowledge of 'serious wrong' under the doctrine of *doli incapax*.

B Leading and Open Questions: Reflections in the Academic Research

I will now explore psychological perspectives on the effectiveness of leading and open questions in accurately assessing a child's subjective knowledge of 'serious wrong'.

1 Leading questions: 'Did you know it was wrong?'

Leading questions such as 'did you know it was wrong?' can elicit inaccurate answers by suggesting the desired response. The psychological literature suggests that children may acquiesce more readily to leading police suggestions during questioning.⁵⁵ The psychological theory of 'interrogative suggestibility' shines light on how this happens.

The concept of 'interrogative suggestibility' is well-established and validated for identifying vulnerabilities relevant to assessing statements made in interviews.⁵⁶ Gudjonsson and Clark define 'interrogative suggestibility' as 'the tendency of an individual's account of events to be altered by misleading information and interpersonal pressure within interviews'.⁵⁷ 'Interrogative suggestibility' is mainly concerned with past experiences, events, recollections - and most relevantly to *doli incapax* - remembered states of knowledge.⁵⁸ Clear and consistent research shows that age and 'interrogative suggestibility' are negatively related:

⁵² Ibid.

⁵³ *Evidence Act 2008*, s 85 (3)(a), s 85(3)(b)(i), s 90(b).

⁵⁴ Oxburgh above 39, 49.

⁵⁵ Feld, above 43, 46.

⁵⁶ Allison D. Redlich and Saul M. Kassin 'Police Interrogation and False Confessions: The Inherent Risk of Youth' in Bette L. Bottoms et al (eds), *Children as Victims, Witnesses and Offenders* (The Guilford Press, 2009) 282.

⁵⁷ Gisli Gudjonsson & Noel Clark 'Suggestibility in police interrogation: A social psychological model' (1986), 1 *Social Behaviour* 83.

⁵⁸ Gudjonsson, above 9.

only as age increases, does a person's suggestibility decrease.⁵⁹

Leading questions can produce distorted responses by causing interviewees to 'yield' to a question that is phrased in a way that suggests the wanted or expected answer.⁶⁰ Gudjonsson introduced the idea of another type of 'interrogative suggestibility'. He found that interviewers are able to 'shift' unwanted but perhaps accurate answers by using 'challenge and negative feedback'.⁶¹ Police may give 'challenge and negative feedback' during question time through their demeanor (for example, giving the child disproving looks as they question), direct verbal criticism (for example, stating that the child is in serious trouble) and various other interrogation tactics.⁶² A leading question within an interview may cause children to accept erroneous material as plausible, particularly, if they find themselves in a stressful situation such as a police suspect interview receiving this 'challenge and negative feedback'.⁶³

Richardson, Gudjonsson and Kelly compared the 'interrogative suggestibility' of adolescents and adults and found that the two groups did not differ significantly in the number of times they 'yielded', (succumbed) to leading or misleading questions, but adolescents were significantly more likely to 'shift' (change) their answers after receiving negative feedback.⁶⁴ These results suggest that whereas teens and adults do not differ in the cognitive-based component of suggestibility (i.e. memorial abilities), teens are more malleable when it comes to the social component of suggestibility (i.e. influence from examiners and stress).⁶⁵ So, if the leading question 'did you know it is wrong?' is accompanied by 'challenge and feedback', then adolescents are more likely to acquiesce. Psychologically coercive strategies such as these contribute to 'interrogative suggestibility' when leading questions are asked.

In summary, the method of asking leading questions like 'did you know it was wrong?' does not accurately assess accused children's moral culpability under the doctrine of *doli incapax* because of children's higher 'interrogative suggestibility', particularly in situations with negative police feedback. A limitation of these findings for children in the context of *doli incapax* is that these studies were conducted on leading questions used to ascertain whether the child was involved in the physical act, rather than whether they possessed the knowledge of 'seriously wrong'. That said, the research findings can be applied in this context, as 'did you know it was wrong?' is certainly a leading question.

(a) 'Interrogative Suggestibility' and Vulnerable Children

Children with lower intellectual ability are likely to be more suggestible than children with normal cognitive development.⁶⁶ Gudjonsson has reviewed the relationship between IQ, memory and suggestibility and concluded that low IQ and poor memory are positively

⁵⁹ Maggie Bruck and Stephen J Ceci 'The suggestibility of children's memory' (1999) 50 Annual Review of Psychology, 419.

⁶⁰ Gisli H. Gudjonsson, 'Interrogative Suggestibility and Compliance' in Anne M. Ridley et al (eds), *Suggestibility in Legal Contexts*, (Wiley, 2013) 46.

⁶¹ *Ibid*, 48.

⁶² *Ibid*.

⁶³ Brendan O'Mahony et al, 'To Challenge, or not to Challenge? Best Practice when Interviewing Vulnerable Suspects', (2012), 6(3), *Policing* 303.

⁶⁴ Redlich, above 60, 282

⁶⁵ *Ibid*.

⁶⁶ G Richardson & TP Kelly 'The relationship between intelligence, memory and interrogative suggestibility in young offenders' (1995) 1(14) *Psychology, Crime & Law*. Vol.1(4), 1995, 764.

correlated with suggestibility.⁶⁷ This may be for several reasons, according to the research. Cognitive factors including poorer memory in intellectually disabled children can mean difficulties encoding and retrieving memory for an event.⁶⁸ Poorer memory can then lead to increased suggestibility through feelings of uncertainty, at which point social factors come into play. For example, individuals with an intellectual disability tend to be more reliant on authority figures for information, and have a greater desire to please.⁶⁹ This research suggests that intellectually disabled children are more likely to answer 'yes' to the leading question 'did you know it was wrong?'

Aboriginal children may be more vulnerable to leading questions for cultural reasons. Siegal explains how Aboriginal youths respond more passively to leading questions than non-Aboriginal children due to the cultural phenomenon of 'gratuitous concurrence'.⁷⁰ This term has been used to describe the behaviour of some Aboriginal people in situations of formal interaction such as police interviews and court proceedings. Gratuitous concurrence involves agreeing to all propositions, often without understanding the meaning or the significance of the question and the implication of their answers. This may be due to interviewees' belief that if they provide their interrogator with what he or she wants, they will emerge unscathed from the situation.⁷¹ It should be noted that a desire to respond in an appropriate way is not limited to Aboriginal groups but also occurs in other disadvantaged populations. This is a problem worthy of note due to the high levels of Aboriginal children entering into the criminal justice system and being questioned by police. Open questions, and the avoidance of leading questions, have been recognised as a solution to these problems. Narration is a central style in Aboriginal social discourse, so Aboriginal children are likely to be more at ease with open-ended forms of questioning, provided they are given sufficient time to respond to questions.⁷²

In summary, children of normal cognitive development levels are more susceptible to leading questions when accompanied with 'challenge and negative feedback', such as police's demeanor and criticism. Intellectually delayed children are vulnerable to leading questions in and of themselves because their cognitive ability means they are more easily led, regardless of feedback from police. Finally, cultural norms may affect how Aboriginal youths respond to leading questions. It would seem that in these ways, children of differing cognitive levels and cultural backgrounds in Australia are highly likely to give inaccurate responses to the question 'did you know it was wrong?'. Part III will discuss some improvements that could be made in light of these conclusions.

2 Open Ended Questions: Constructing Culpability

Children often 'construct their own culpability' without being directly asked the leading question 'did you know it was wrong?'. Barry Feld suggests that youths' extended narratives and rationalisations prompted through open questioning provide motives and explanations

⁶⁷ Gudjonsson above 60, 51.

⁶⁸ Kate L Maras & Rachel Wilcock 'Suggestibility in Vulnerable Groups: Witnesses with Intellectual Disability, Autism Spectrum Disorder, and Older People' in in Anne M. Ridley et al (eds), *Suggestibility in Legal Contexts*, (Wiley, 2013) 150.

⁶⁹ Ibid.

⁷⁰ Michael Siegal 'Culture, Social Knowledge, and the Determination of Criminal Responsibility in Children: Issues in Justice for Aboriginal Youth' (1988), 23(2) *Australian Psychologist* 174.

⁷¹ Ibid.

⁷² Michael Cooke 'A Different Story: Narrative versus "question and answer" in Aboriginal evidence' 3(2), 1996 *Forensic Linguistics* 273.

and typically include general and specific 'crime knowledge'.⁷³ This occurrence was seen in *RH v DPP and R (a child) v Whitty*.⁷⁴

However, such statements do not necessarily mean the child knew the act was wrong at the time. The process that unfolds after the offence may have tainted the truth of statements given by a child after the offence. It is likely that the child has come to the moral appreciation that he or she has done something wrong after being arrested, taken to a police station and placed in an interview room.⁷⁵ This understanding may not be consistent with the child's state of mind at the time of the alleged offence.⁷⁶ Even if the interview is conducted immediately after the act in question, either by police or an expert witness, the act of interviewing itself can suggest to the perpetrator the wrongfulness of his or her behaviour and alter knowledge of wrong in relation to the act.⁷⁷

Moral development theory offers some explanations as to how this happens. Moral development refers to children's acquisition of attitudes and beliefs that help them determine what is right and wrong.⁷⁸ The research shows that often children assume, and express, moral responsibility only after the time of the alleged offence, especially when the child is in a cognitive development phase whereby their moral understanding is based purely on punitive consequences and disapproval.

The highly influential moral development psychologist, Piaget, proposed that children passed through three stages in their moral development: the 'pre-moral stage' when there is no sense of obligation to rules; the stage of 'moral realism' when right and wrong is based primarily on the consequent punishment; and the stage of 'autonomous morality' when rules are arrived at through social agreement and right and wrong are understood by considering intentions, consequences and the perspectives of others.⁷⁹

Likewise, Kohlberg, a well-known child development psychologist, said that children go through distinctive stages of moral development. Very simply, the stages begin in childhood when the decision to obey rules is based essentially on the avoidance of punishment, and progress through to the point of the child developing a sense of universal justice and fairness. The second ('conventional') stage of Kohlberg's theory is characterised by/as the desire to live up to the roles and expectations others place on the individual, and to be 'good'. The child at this stage of development only knows his behaviour is wrong if it is contrary to others' expectations, displeases others or is met with disapproval. A child in this stage has not yet developed the ability for independent abstract moral reasoning.⁸⁰

Children in the Piaget's stage of 'moral realism' or Kohlberg's 'conventional' stage, are more susceptible to forming ideas of wrongness based on the disapproval of others and punishment. The police undoubtedly symbolise punishment (children learn this from a young age), and the child is sure to feel a sense of disapproval from the police. It is likely that once a child sights the police, is taken into custody and treated like a suspect, they will come to

⁷³ Feld, above 32, 154-155.

⁷⁴ See Part I.

⁷⁵ Matthew Johnston, 'Doli Incapax - The Criminal Responsibility of Children' (Paper presented at The Children's Magistrates' Conference, Forbes Chambers, 1 February 2006) 10.

⁷⁶ Ibid.

⁷⁷ Apler above 11, 206.

⁷⁸ Pilay above 14, 18.

⁷⁹ Jean Piaget, *The Moral Judgement of the Child*, (The Free Press, 1932).

⁸⁰ Lawrence Kohlberg *Essays on Moral Development*, (Harper & Row, 1981).

some type of understanding that they are in trouble. If police, who are authority figures in the child's mind, show disapproval towards the child and their actions, through body language and conversation, then by the time the interview takes place the child in this impressionable moral development stage will probably have figured out that their behaviour is contrary to others' expectations, and therefore, wrong. They will answer questions accordingly.

Applying moral development theory in the determination of criminal capacity does pose certain difficulties. For example, Piaget and Kohlberg's theories do not take into account the child's ability to execute moral understandings (the nonnative aspect).⁸¹ Also, individual choices to behave in a moral way may be determined more by the specific situation and a variety of social context influences (for example, feelings of threat and person safety) than the child's state of moral development.⁸² Another problem is that the theory is precisely that – a theory. The courts are generally not impressed with theory, preferring facts and clear-cut evidence in black and white. Moral development theory, with its lack of precise age and other numerical points, results in much *grey*.⁸³

Despite these limitations, moral development theory points to the cognitive factors which indicate to the individual that his or her behaviour is wrong, and in particular how a child may come to accept something is wrong *after* the event.⁸⁴ The child's statements made to open questions will be contaminated with this new knowledge. In this way, statements prompted by open questioning may not accurately depict what the child was thinking at the time of the act.

III REFORMULATING METHODS POLICE USE TO OBTAIN DOLI INCAPAX EVIDENCE

In this Part, I suggest how police interviews and procedure could be reformulated in light of psychological research so as to not induce the child into making false admissions of moral culpability in the ways discussed in Part II. I discuss three approaches: firstly, putting more measures in place to keep police accountable. Secondly, tackling the problem at the source – changing the nature of the questions asked and the context in which the police ask the questions. Thirdly, I question the role of the police and explore the possibility of trained clinical psychologists conducting these interviews.

A Increasing the Accountability of Police in Interviews

Adolescents' developmental differences to adults warrant different procedural safeguards during interrogations.⁸⁵ Video recording can ensure higher police accountability during interviews as police perform their duties in the knowledge the interview could be inadmissible or the defence could raise an objection to it. A third-party presence during the interview has the two-fold function of ensuring police accountability and also helping to calm and support the child and reduce the effect of 'negative feedback' on the child's suggestibility.

1 *Video-recording*

⁸¹ Pilay above 14, 20.

⁸² Ibid

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Feld, above 32, 2.

The importance of video-recording rests in enabling statement's admissibility to be challenged at a later point.⁸⁶ When an interview or interrogation is electronically recorded from start to finish, police have a complete record that can be used to ensure statements are reliable and voluntary.⁸⁷ The Victoria Police Manual states that police should consider using Visual Audio Recorded Evidence when taking statements from children or young people who are victims or witnesses to certain offences.⁸⁸ However, this is just a recommendation. s 464H of the *Crimes Act 1958* states that admissions and confessions made by a suspect are inadmissible unless recorded.⁸⁹ However, 'admissions and confessions' do not necessarily include general statements made by children that are interpreted to show moral culpability. Recording the entire interview should be compulsory, given the prosecution's use of general statements to prove the child's moral culpability.

2 Parents and Independent Third Parties

The Victoria Police Manual suggests that a parent should be available during the interview, and if not there should be an independent person present for interviews where a child or young person is a suspect, the accused or an offender.⁹⁰ The *Crimes Act 1958* also requires that if a person in custody is under 18, a parent/guardian or independent person must be present before any interview is conducted and that they must be given an opportunity to speak in private with the child before the interview.⁹¹ Parental presence may serve some function of calming the child down, and help to reduce the effects of negative feedback from police affecting 'interrogative suggestibility'. However, Feld's study provides strong evidence of parents' limited ability to assist their child during interrogation. He suggests that parental presence does not increase children's ability to assert their rights, most parents provide little advice, and they often encourage children to cooperate with police.⁹²

Though parental presence and video recording provide a degree of protection for children through increasing police accountability, these measures alone are not robust enough.

B Changing Police Interviewing Techniques

The better approach is to fundamentally rethink police interviewing methods. Police interviewing methods must assess the child's understanding at the time of the act in a more delicate and careful fashion. Changes to current methods must address the problem of the child developing an understanding of 'serious wrong' during the time between the act and interview, and the children's suggestibility within the interview. What follows are some proposals to achieve this.

⁸⁶ Feld, above 32, 246.

⁸⁷ The International Association of Chiefs of Police and Office of Justice Program: Department of Justice (America), 'Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation' (2012), 12.

<<http://www.theiacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>>.

⁸⁸ *Victoria Police Manual*, part 2.2.

⁸⁹ *Crimes Act 1958*, s 464H.

⁹⁰ *Victoria Police Manual*, p 3, s 2.5.

⁹¹ For example, when the accused is not in custody and immediate action is being taken to investigate an alleged offence; *Crimes Act 1958*, s 464E(2).

⁹² Feld, above 32, 253-4.

1 *Abolish Leading Questions, Ask Open Questions*

Most importantly, leading questions like ‘did you know it was wrong?’ must be abolished from police’s usage and replaced with questions that do no play on children’s ‘interrogative suggestibility’. The idea of abolishing leading questions is well acknowledged – in fact, the amount of research on this front makes current *doli incapax* interviewing practices seem archaic. It is internationally accepted that interviewers need to gain as much detailed information as possible from the interviewee using effective, non-coercive, questioning techniques. There is a general recognition and practice guidelines internationally that ‘investigative interviewing’, which excludes leading questions and focuses on open questions and non-confrontation, is best practice. For example, the International Association of Chiefs of Police (IACP) recommends that police officers should never ask leading questions.⁹³

Likewise, England and Wales have adopted a new ethos of interrogation beginning with the *Police and Criminal Evidence (PACE) Codes of Practice* in 1984 - an approach that emphasises planning and preparation, training and supervisions, open questioning styles, evaluation once the interview is over and mandatory taping of all suspect interviews.⁹⁴ Likewise, the National Institute of Child Health and Development (NICHD) Investigative Interview Protocol aims to restrict the possible opportunities for fall into the ‘suggestibility trap’ of leading questions.⁹⁵ The quality of interviews based on these protocols has been compared against a range of interview outcomes, and they have been found to be associated with the securing of full and accurate accounts.⁹⁶

Though the inappropriateness of leading questions and merits of open questioning are accepted in these international protocols, there is seemingly little research into how the child’s understanding of ‘serious wrong’ should be assessed retrospectively using interview questions. The only research I have found which addresses this problem is Apler’s (2002) proposal. Apler’s questions aim to prompt the child to describe their understanding of wrong without asking leading questions. These questions also avoid a reliance on interpretation on the child’s general statements to open questions. These questions attempt to address the specific behaviour with which the Court is concerned, without leading the child. For example:

1. How do you think the victim felt as a result of your behaviour?
2. How would you feel if you were subjected to this behaviour?
3. How did you feel before, during and after the behaviour? (i) when with others (ii) on your own?
4. Did you think your behaviour would affect anyone else? If so, how?

⁹³ OJJDP Guide, above 87 , p 11.

⁹⁴ *Police and Criminal Evidence Act 1984 (UK) (PACE Codes of Practice)*.

⁹⁵ David J. La Rooy ‘Suggestibility and Witness Interviewing using the Cognitive Interview and NICHD Protocol’ in in Anne M. Ridley et al (eds), *Suggestibility in Legal Contexts*, (Wiley, 2013) 206.

⁹⁶ Dave Walsh & Ray Bull ‘What really is effective in interviews with suspects? A study comparing interviewing skills against interviewing outcomes’ (2010), 13 *Legal and Criminological Psychology* 305.

5. Would you change anything about the way you behaved? If so, why?⁹⁷

These questions are based on making qualitative judgments about the maturity and sophistication of young people, their capacity not only to respond to 'yes' to a leading question 'did you know it was wrong?' but to provide a reason why it was wrong and to explore the dimension of moral reason and 'seriousness' of the wrong.⁹⁸ These questions strike the balance between being open enough not to put ideas of wrongfulness in the child's head, while still guiding them towards speaking about their appreciation of the act. However, there is a need for further research and empirical studies to assess the effectiveness of such questions in assessing moral culpability under the doctrine of *doli incapax*.

2 Addressing 'Interrogative Suggestibility': Reducing Negative Feedback

Another problem that must be overcome in relation to children's suggestibility is negative feedback from police during the interview. Again, though police are trained in non-confrontation techniques, extra measures are necessary, for example, special training for police officers to question youth in developmentally appropriate, non-intimidating ways.⁹⁹ Police need to be highly informed about the importance of not providing explicit or implicit cues to children that might pressure them to change their responses.¹⁰⁰ An important focus should be on the pre-substantive part of the interview before the police officer starts to ask questions in regard to the act and moral culpability.¹⁰¹ At this early stage, the police officer should establish friendly rapport. It is important for the child to experience trust, warmth, empathy and comfort in order to be able to accurately disclose private information to strange adults.¹⁰² This part of the interview might also serve to explain some 'ground rules' of truth telling, to allow the child to say 'I don't know' and to correct the interviewer. This stage also gives the interviewer a limited opportunity to assess the child's cognitive competencies.¹⁰³ Studies show that police are aware of strategies such as this to reduce negative feedback, however, even trained interviewers find it difficult to apply the recommended questioning techniques. Interviewers could improve their interviewing strategies if given intensive training, ongoing supervision over an extended period, feedback and a structured protocol.¹⁰⁴ Police training must be focused on these methods to reduce negative feedback and consequently minimise the risk of children's interrogative suggestibility.

3 Development of Moral Knowledge after the Act: Avoiding Implications of Wrong

Apler's questions are certainly an improvement on the leading questions espoused by the case law and police manuals alike. However, as has been shown, it is not only the wording of the question that affects a child's understanding of wrong. According to moral development theory, the punitive connotation of the police, and their disapproval may play a significant

⁹⁷ Apler above 11, 210.

⁹⁸ Lennings and Lennings above 11, 793.

⁹⁹ Feld above 32, 143.

¹⁰⁰ *Ibid.*

¹⁰¹ Christian Thoresen et al 'Theory and practice in interviewing young child: A study of Norwegian police interviews 1985-2002' (2006), 12(6) *Psychology, Crime & Law* 629.

¹⁰² *Ibid.*

¹⁰³ Debra A Poole & Michael E. Lamb 'Investigative interviews of children. A guide for helping professionals' (American Psychological Association, 1998).

¹⁰⁴ *Ibid.*

role in the child's statement relating to their moral knowledge. Even if police do adopt friendly interviewing methods and avoid negative feedback, ultimately, the mere presence of a police officer has the potential to contaminate the child's responses. Even if the interview is conducted immediately after the act in question, either by police or an expert witness, the act of interviewing itself can suggest to the perpetrator the wrongfulness of his or her behaviour and alter knowledge of wrong in relation to the act.¹⁰⁵ This is a problem that is not easily overcome. More research is needed to assess the effectiveness of questions such as those proposed by Apler in light of this problem.

Another way to avoid implications of wrong may be to change the environment of the interview with the aim of reducing the punitive connotations and feelings of disapproval for the child. One approach may be to interview child suspects outside the intimidating environment of the police station, for example in the familiar environment of the child's home. Furthermore, police officers could dress in casual clothes. There are of course practical limitations on this, especially in the aftermath of a serious crime when suspects need to be kept in custody and questioned immediately.

4 Questioning the Role of the Police: Should a Trained Clinical Psychologist Conduct Doli Incapax Investigations?

Specially trained child psychologists offer advantages for doli incapax interviewing. They are trained to avoid leading questions, intimidation tactics and negative feedback. However, the abovementioned problems aren't necessarily overcome by taking police out of the equation. Psychologists represent the same things as police to children: adults with power and authority. A psychologist will not necessarily fix the problems pertaining to adoption of ideas of wrong, though they may be trained to deal with this issue in a more delicate fashion than the police. Ideally, the investigating interview would be conducted in an authority vacuum – no police, no psychologists, no one suggesting wrongness. Unfortunately this is impossible. Even if police do change their methods of questioning, or a psychologist takes on the role of interviewer, ultimately children will learn of the wrongness of their actions once they enter the criminal justice system in any capacity.

In the common case of there being a significant time between the act and interview, psychologists are certainly more qualified than police in assessing moral culpability retrospectively. However, as has been shown, the complexity of assessing a child's state of mind retrospectively is immense. It takes into account the complex areas of human development, human behaviour, individual variation, and such non-specific concepts as intelligence and moral development.¹⁰⁶ Clearly, the task of conducting assessing doli incapax needs to be approached with extreme care and caution, by police and psychologists alike.¹⁰⁷ While psychologists have long been involved in the forensic assessment of adults, their role in the assessment of accused children is less well documented.¹⁰⁸ As a result there is still a great deal of development and refinement needed in this area, in order for the task to be executed with more clarity and precision. There needs to be more research into best practices for police and psychologists alike.¹⁰⁹

¹⁰⁵ Apler above 11, 210.

¹⁰⁶ Pilay above 14, 21.

¹⁰⁷ Pilay above 12, 21.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

CONCLUSION

The investigative interview is a central and significant aspect of the criminal justice process and the information it collects must be accurate.¹¹⁰ Evidence adduced by the prosecution to rebut *doli incapax* 'must be strong and clear beyond all doubt or contradiction.'¹¹¹ However, as this essay has illustrated, assessments of children's moral culpability as set out in practical police resources, case law and legislation alike fall dramatically short of this standard.

Firstly, I considered how the widespread acceptance of leading questions like 'did you know it was wrong?' is particularly problematic. Gudjonsson's theory of 'interrogative suggestibility' explains how children acquiesce more readily to police suggestions in leading questions during questioning.¹¹² In particular, children are more malleable when it comes to the social component of suggestibility, due to the stress caused by 'challenge and negative feedback' from police interviewers. Research also shows that this leading question is inappropriate for investigating intellectually disabled and Aboriginal children's moral culpability. The reliance on children's general statements as prompted through open questioning is also problematic. Such retrospective statements may be contaminated by the child's new knowledge of wrong that they have developed since the act due to the punitive connotations associated with and disapproval of the police. Piaget and Kohlberg's moral development theories suggest how this process occurs.

Secondly, I suggested how police interviewing methods could be reformulated in light of these findings to ensure the prosecution adduces more accurate information in court. Recording and third parties presence serve to encourage police accountability, however are limited in addressing the fundamental problems posed by the child's moral development between the time of the act and interview. Reformulating question styles does offer some potential for accurately assessing moral knowledge. In particular, Apler's proposed questions offer an innovative reformulation. However, more research needs to be conducted in the effectiveness of such questions. Along with changing the subject matter of questions, police must work to reduce 'challenge and negative feedback' in interviews. Special training for police officers to learn how to question youth in developmentally appropriate, non-intimidating ways using rapport-building and 'ground rules' is necessary. I am mindful that I have extrapolated my conclusions by applying general psychological theories to current police *doli incapax* interviewing methods in Australia, and that my conclusions may be limited by the lack of supporting research. However, there simply is very little research into this topic. I propose that the intersection of moral development theory, investigative suggestibility and current *doli incapax* interviewing methods demands significant research.

Finally, I considered the possibility of transferring the interview process from the purview of the police to that of psychologists. While psychologists may be more qualified than police officers to conduct *doli incapax* questioning, ultimately the problem of children learning ideas of wrongness after the act is not overcome by taking police out of the equation. Retrospective assessment of the child's state of mind is clearly a highly complex task. There would also be substantial policy implications for the criminal justice process if the interviewing process were to be removed from the purview of the police, however it is not within the bounds of this essay to address this issue. As stated by Harper J in *R (A Child) v*

¹¹⁰ Oxburgh, above 39.

¹¹¹ (1996) 1 AC 38, 64.

¹¹² Gudjonsson, above 60.

Whitty 'the wisdom of protecting young children against the full rigour of the law is beyond argument'.¹¹³ Current police interviewing methods unfairly deprive children of this intended protection, and contradict the principle that criminality is based on moral blameworthiness. The full protection and function of *doli incapax* will only be realised once current police interviewing methods are dramatically reformulated.

¹¹³ (1993) A Crim R 462.

BIBLIOGRAPHY

A Articles/Books/Reports

- Apler, Alex 'Naughty or bad? The role of expert evidence in rebuttal of doli incapax presumption' (2000), 7 *Psychiatry, Psychology and Law* 206
- Bartholomew, Terry 'Legal and clinical enactment of the doli incapax defence in the Supreme Court of Victoria, Australia' (1998), 5(1), *Psychiatry, Psychology and Law* 100
- Baxter, James 'The Suggestibility of Child Witnesses – A Review' (1990), 3 *Applied Cognitive Psychology* 93
- Bottoms, Bette L, Cynthia J Najdowski, Gail G Goodman (eds), *Children as Victims, Witnesses and Offenders* (The Guilford Press, 2009)
- Bruck ,Maggie and Stephen J Ceci 'The suggestibility of children's memory' (1999) 50 *Annual Review of Psychology*, 419
- Bryan-Hancock, Claire, Sharon Casey 'Young People and the Justice System: Consideration of Maturity in Criminal Responsibility' (2011), 18(1) *Psychiatry, Psychology and Law*, 69
- Carson, David, Ray Bull, *Handbook of Psychology in Legal Context*, (Wiley-Blackwell, 2003)
- Cleary, Hayley M.D 'Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases' (2013), 3(2) *Law and Human Behavior* 271
- Cooke, Michael 'A Different Story: Narrative versus "question and answer" in Aboriginal Evidence' 3(2), 1996 *Forensic Linguistics* 273
- Crofts, Thomas 'Rebutting the Presumption of Doli Incapax' (1998), 62(2), *Journal of Criminal Law* 187.
- Eisen , Mitchell, *Memory and suggestibility in the forensic interview*, (Lawrence Erlbaum Associates, 2001)
- Feld, Barry, *Kids, Cops, and Confessions* (The New York University Press, 2013)
- Feld, Barry 'Police Interrogation of Juveniles: An Empirical Study of Policy and Practice (2006), 97(219) *Journal of Criminal Law and Criminology* 106
- Gudjonsson, Gísli, *The Psychology of Interrogations and Confessions* (Wiley, UK, 2003)
- Gudjonsson . Gísli , Noel Clark, 'Suggestibility in police interrogation: A social psychological model' (1986), 1 *Social Behaviour* 83
- Kapardis, A, *Psychology and Law: A Critical Introduction*, 3rd Edition (CUP, 2010)
- Kohlberg, Lawrence, *Essays on Moral Development*, (Harper & Row, 1981)
- Kohlberg, Lawrence, *The Psychology of Moral Development* (Harper & Row, 1984)

- Krähenbühl, S, M Blades 'The effect of interviewing techniques on young children's responses to questions' (2006), 32(3) *Child Care Health Development*, 321
- Lennings Nicholas J, Chris J Lennings 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014), 21(5) *Psychiatry, Psychology and Law* 793
- Loke, Chiu, 'Children's understanding of intentional causation in moral reasoning about harmful behaviour' Dissertation, University of Toronto, 2010
- Maroney, Terry, 'The False Promise of Adolescent Brain Science in Juvenile Justice' (2010), 85(2010) *Notre Dame Law Review* 89
- Midson, Brenda 'Risky Business: Developmental Neuroscience and the Culpability of Young Killers' (2012), 19(5) *Psychiatry, Psychology and Law* 700
- O'Mahony, Brendan, Becky Milne, Tim Grant 'To Challenge, or not to Challenge? Best Practice when Interviewing Vulnerable Suspects', (2012), 6(3) *A Journal of Policy & Practice* 301
- Oxburgh, Gavin, 'The question of question types in police interviews: a review of the literature from a psychological and linguistic perspective' (2010), 17.1, *The International Journal of Speech, Language and the Law* 46
- Piaget, Jean, *The Moral Judgment of the Child* (The Free Press, 1932)
- Pilay, Anthony L, 'Criminal capacity in children accused of murder: challenges in the forensic mental health assessment', *Journal of Child and Adolescent Mental Health*, (2006), 18(1) 18.
- Poole, Debra, Michael E. Lamb 'Investigative interviews of children. A guide for helping professionals' (American Psychological Association, 1998)
- Richardson G & TP Kelly 'The relationship between intelligence, memory and interrogative suggestibility in young offenders' (1995) 1(14) *Psychology, Crime & Law*. Vol.1(4), 1995, 764
- Ridley, Anne, Fiona Gabbert, David J La Rooy (eds), *Suggestibility in Legal Contexts*, (Wiley, 2013)
- Siegal, Michael 'Culture, Social Knowledge, and the Determination of Criminal Responsibility in Children: Issues in Justice for Aboriginal Youth' (1988), 23(2) *Australian Psychologist* 174
- Thoresen, Christian, 'Theory and practice in interviewing young child: A study of Norwegian police interviews 1985-2002' (2006), 12(6) *Psychology, Crime & Law* 629.

Walsh, Dave, Ray Bull 'What really is effective in interviews with suspects? A study comparing interviewing skills against interviewing outcomes' (2010), 13 *Legal and Criminological Psychology* 305

B Cases

C (A Minor) v DPP [1995] 2 WLR 383

IPH v. Chief Constable of South Wales [1987] Crim LR 42

R (A Child) v Whitty (1993) 66 A Crim R 462

R and T (Minors) v DPP, Unreported, Supreme Court of Victoria, 1995

R v ALH [2003] 6 VR 276

R v CRH (1996) NSWCCA 60390/96 (18 December 1996)

RH v DPP (NSW) [2014] NSWCA 305 (4 April 2014)

RH v DPP (NSW) [2013] NSWSC 520 (10 May 2013)

C Legislation

Children, Youth and Families Act 2005 (Vic)

Crimes Act 1958 (Cth)

Evidence Act 2008 (Cth)

D Other

NSW Police "Code of Practice for CRIME", last updated April 2015, p 84
http://www.police.nsw.gov.au/_data/assets/pdf_file/0007/108808/Code_CRIME_29_April_2015.pdf

NSW Legal Aid, *The Criminal Capacity of Children* (2004)
<http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0006/6486/Criminal-Capacity-of-Children.pdf>

Matthew Johnston, 'Doli Incapax - The Criminal Responsibility of Children' (Paper presented at The Children's Magistrates' Conference, Forbes Chambers, 1 February 2006) 10

McGregor, Isla, 'Police Minister supports continued secrecy over Tasmania Police Manual', *The Tasmanian Times* (online), 19 February 2014
<http://www.tasmaniantimes.com/index.php/article/police-minister-supports-continued-secrecy-over-tasmania-police-manual>

Victoria Police, 'Victoria Police Manual' 2014, part 2.2 (*Interviews with Vulnerable People*),

part 2.5 (VPM Guidelines).

Queensland Police Operations Procedures Manual, part 5.4 Children (General Information)
<https://www.police.qld.gov.au/corporatedocs/OperationalPolicies/Documents/OPM/Chapter5.pdf>

The Aboriginal and Torres Strait Islander Social Justice Commissioner ('the Commissioner'), 'Submissions Of The Aboriginal And Torres Strait Islander Social Justice Commissioner On Common Difficulties Facing Aboriginal Witnesses', Submission in Christina Giblett and others v State of Queensland and Uniting Church of Australia Inc, QUD300/2005 to the Federal Court of Australia, 20 March 2007

The International Association of Chiefs of Police and Office of Justice Program: Department of Justice (America), 'Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation' (2012)
<<http://www.theiacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>>

Victorian Law Reform Commission, 'Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997' (Report, June 2014)

Open letter calls for urgent action around child incarceration

By CityNews - July 23, 2020

Share Canberra's trusted news:



ACTCOSS CEO Dr Emma Campbell... "There is substantial medical and social research to support raising the minimum age of criminal responsibility." Photo: Holly Treadaway

IN an open letter to the ACT government, a collective group of local legal, human rights and service delivery organisations are seeking urgent action to raise the age of criminal responsibility in the ACT.

Currently in the ACT, children as young as 10 can be arrested by police, put before a court and detained in youth detention facilities.

"As organisations, we are concerned about the damaging effects of incarceration on children and young people, particularly Aboriginal and Torres Strait Islander children, and the potentially lifelong ramifications of early contact with the criminal legal system," the letter says.

"We are aware that the 'Age of Criminal Responsibility Working Group Review' will be presented at the Council of Attorneys-General on 27 July 2020. We understand that there will be discussion about raising the age of minimum criminal responsibility from 10 years old to 14 years old.

"As the service providers and organisations who work with children and young people, and who would be primarily impacted by such a change, we strongly support raising the age to 14 years old and keeping children out of prisons. We should be supporting kids to thrive in family, community and culture, not forcing them into the quicksand of the criminal legal system."

Signed by a group of prominent Canberrans such as the ACT Human Rights Commissioner, Dr Helen Watchirs, the ACT Public Advocate and Children and Young People commissioner, Jodie

Griffiths-Cook, the executive director of the Gagan Gulwan Youth Aboriginal Corporation, Kim Davison, and the ACT Law Society president, Chris Donohue, collectively they urge the government to lead the nation on this issue.

ACTCOSS CEO Dr Emma Campbell says: "There is substantial medical and social research to support raising the minimum age of criminal responsibility."

"Criminalising children as young as 10 can lead to a lifetime of harmful consequences, including sustained contact with the justice system," she says.

"The justice system is not rehabilitative, therapeutic or trauma-informed – it does not and cannot address the needs of children. It is a community failure when children are involved in crime, and we should respond with community solutions."

Share this:

Thursday 23 July 2020

Law Society signs open letter calling on ACT Government to stop imprisoning children

The ACT Law Society has joined with a collective of service delivery, human rights, legal, and representative organisations to call on the ACT Government to raise the age of criminal responsibility in the territory.

An open letter, coordinated by Aboriginal-led justice organisation Change the Record, has been sent to ACT ministers today.

"The Law Society believes that it is simply unacceptable to put children in prison," said President of the ACT Law Society Chris Donohue. "Australians should be ashamed of the number of children held in prisons around the country, and especially of the extraordinary over-representation of Aboriginal and Torres Strait Islander children in detention.

"The Law Society applauds recent reductions in the rate of incarceration for Aboriginal children in our territory, but there is still a long way to go. In the ACT, Aboriginal children are still being imprisoned at eight times the rate of non-Indigenous children.

"Putting vulnerable children in a prison environment causes life-long harm, and drives recidivism rates up.

"The damaging effects of incarceration on young people, especially Aboriginal and Torres Strait Islander children, and the extensive negative social ramifications of early contact with the criminal justice system, are well-known.

"We strongly support raising the age of minimum criminal responsibility from 10 years old to 14 years old, and we are urging the ACT Government to take urgent action locally to introduce legislative changes to this effect.

"This issue is on the agenda of the Council of Attorney-Generals meeting on 27 July, but the ACT has been a leader on social issues before, and we are asking our government to lead once again.

"We don't have to wait for the other states and territories to do the right thing. The ACT Government could take action now, raise the age of criminal responsibility to 14, and keep our children out of prison."

For further information contact:

Chris Donohue, President, ACT Law Society, [REDACTED]

x x x

The email sent from a war talkback shows, comment- and can lose our job if we memorial staff member to ing in the newspaper such are found to have breached at the ANU's Centre for In- he said. be more strenuous attempts to silence public servants."

ACT slammed over criminal age call 29/7/20

Sally Whyte

LEGAL, health and community advocates are dismayed at the ACT government's response to calls to raise the age of criminal responsibility from 10 to 14, saying the territory should be taking the lead in reform.

Calls to change the age have been led by Indigenous groups, with Indigenous children overwhelmingly affected by the law, accounting for 65 per cent of those incarcerated below the age of 14.

Aboriginal Australians are 24 times more likely to be in juvenile detention than non-Indigenous Australians.

While the Council of Attorneys-General didn't decide against raising the age of re-

sponsibility, a decision was delayed until 2021 and NSW Attorney-General Mark Speakman said he remained to be convinced of the need to change the law.

ACT Attorney-General Gordon Ramsay has not committed the territory to changing the law here, only to supporting a national position and the process of considering it at the Council of Attorneys-General.

Advocates say Monday's decision means children will continue to be jailed.

President of the ACT Law Society Chris Donohue said that he was "sick with disappointment" over the ACT's position, despite commitments from the territory government to avoid sending children as young as 10 to jail.

"That's like saying 'I agree to have my program to save children from jail derailed by the Attorneys-General of the other states' and that's just not good enough for the ACT," he said.

"It's abhorrent to say children as young as that should be treated in the criminal justice system, children need to be taught. If they are taught by going to jail they will become criminals and perpetuate the cycle of criminality." Mr Donohue said the ACT couldn't allow its policy to be set by the NSW government's position.

"It is the absolute antithesis. The ACT should say 'no you are wrong, we know what's right, we'll do what right in the ACT, what you in NSW should follow and the

rest of Australia should follow'. If our Attorney-General wants to be a champion and hero that's what he should do."

Chief executive of Aboriginal Legal Service NSW/ACT Karly Warner said the ACT could easily make the change.

"We're disappointed by the lack of action at yesterday's meeting of Attorneys-General, but that shouldn't stop the ACT government from leading on this issue. Every child deserves to be healthy and to reach their potential," she said.

"With just the flick of a pen, the ACT government could stop forcing kids into the quicksand of the criminal justice system and ensure kids thrive in community and culture."

THE ANGLICAN SCHOOL GOOGONG

ANGLICAN SCHOOL GOOGONG

Enrollment

ident in the Canberra house market is it does seem to be in a bit of a bubble because when you have a look at all of our capital cities, most of them are declining over the June quarter and Canberra really did buck that trend," said Domain senior research analyst Dr Nicola Powell.

"The strong quarterly growth pushed median

house values to a record high, breaking the \$800,000 mark. This is also the first time Canberra house prices have pushed above the median value of the combined capitals since 2013." Dr Powell attributed the strong growth to a "resurgence of first-home buyers".

"The low-interest rates and government incentive

schemes have helped many on to the property ladder and supported housing activity," she said.

"Stamp duty waivers on land and off-the-plan purchases, together with the HomeBuilder grant, could continue to lure buyers."

Andrew Chamberlain of Blackshaw Manuka said the strong growth in the last

quarter was evident with the number of buyers he'd seen in the market over the past three months.

Mr Chamberlain described Canberra's position as "unique", noting that the capital had a "relatively stable workforce and employment environment, compared to other cities".

"We started the year with a

hovering around 80 per cent but the number of homes scheduled under the hammer in June was 36 per cent lower compared with June 2019. For the month of June, Canberra achieved an overall clearance rate of 72 per cent, a 10 percentage point rise from May. One Canberra resident who sold their property in May was Jack Cartwright.

I expected."

After selling his property, Mr Cartwright and his partner Jane Brouwers were on the hunt for a new house in the Inner North and Inner South regions. Houses in the Inner North had the strongest growth with an increase of 3.6 per cent over the quarter to \$953,000, a 6 per cent increase year-on-year.

CRIME Territory figures call for commitment to lift age of criminal responsibility from 10 to 14

ACT government urged to 'raise the age'

Blake Foden

LEADERS in the ACT's youth, health, legal and community sectors have jointly penned a powerful letter urging the territory government to lift the age of criminal responsibility to 14.

At present in all Australian jurisdictions, children as young as 10 can be arrested, hauled before courts and held in youth detention.

Aboriginal children be-

tween 10 and 14 are disproportionately affected, with the ACT locking them up at eight times the rate of their non-Indigenous peers. Nationally, Aboriginal children account for 65 per cent of those incarcerated under 14.

The Council of Attorneys-General is set to discuss the prospect of changing the age of responsibility to 14 when it meets next Monday.

In an open letter to several ACT government ministers,

leading local figures have called on the territory government to lead the charge by making a commitment ahead of the meeting to raise the age. The 20 signatories include ACT Human Rights Commissioner Helen Watchirs, Children and Young People Commissioner Jodie Griffiths-Cook, and Winnunga Nimmityjah chief executive Julie Tongs.

"Doctors agree that children do not have the cogni-

tive capacity to be held criminally responsible at 10 years old," the letter says, citing the Australian Medical Association's position on the issue.

"Moreover, they have found that sending children to prison can cause them lifelong harm, increase rates of mental illness, trauma, and even lead to early death.

"We should be supporting kids to thrive in family, community and culture, not forcing them into the quicksand

of the criminal legal system."

The letter notes that China and a number of European countries do not incarcerate children under 14.

"Australia is lagging behind the rest of the world - and our children are paying the price," it says.

Ms Griffiths-Cook said criminalising children as young as 10 was simply punishing kids with complex needs and trauma.

ACT Law Society president

Chris Donohue is also in favour of raising the age, saying that imprisoning such young children should be a source of national shame.

ACT Council of Social Service chief executive Emma Campbell said the justice system was not equipped to meet the needs of children.

"It is a community failure when children are involved in crime, and we should respond with community solutions," she said.

Donohue and Co.

From:
Sent:
To:
Subject:

[REDACTED]
FW: RATTENBURY: Australian first as Greens secure commitment to raise the age of criminal responsibility in the ACT

[REDACTED]
Sent: Thursday, 20 August 2020 11:47 AM

Subject: RATTENBURY: Australian first as Greens secure commitment to raise the age of criminal responsibility in the ACT

MEDIA RELEASE
Shane Rattenbury MLA, ACT Greens leader

Australian first as Greens secure commitment to raise the age of criminal responsibility in the ACT

Thursday 20 August 2020

The ACT Greens have secured a commitment from the ACT Government to support raising the age of criminal responsibility from 10 to 14 years - an Australian first.

The ACT Greens' motion commits the ACT Government to undertake policy work to enable the next Assembly to consider legislation after the ACT's upcoming election.

The motion was supported by the Greens and Labor. The Canberra Liberals moved an amendment to defer this work until there is national agreement, but that amendment was not supported.

Comments attributable to ACT Greens leader Shane Rattenbury:

"The ACT Greens are pleased today to have secured this important commitment from ACT Labor today.

"Children as young as 10 simply don't belong in prison.

"Where children are imprisoned, it sets the trajectory for the rest of their lives and increases the risk they will be involved in the adult criminal justice system as they

mature. We can better support these children by providing them with the help they need to stay on the right path.

"The ACT will be leading the nation in this important reform, and we now call on other states and territories to follow suit, to support children across the country.

"Australia's minimum age of criminal responsibility of 10 is well and truly out of step with the rest of the world, and we have been chastised for this by the United Nations Committee on the Rights of the Child.

"With the right supports in place, and a well-resourced youth sector, we can provide better alternatives to custody for children under 14."

Media alert: Mr Rattenbury will address the media at 12:15pm today at the Legislative Assembly Public Entrance. Third party stakeholders will also attend the press conference. Audio and photos will be made available on request.

Statement ends

Media contact:

[Redacted]

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[Redacted]

Subject: RE: ACT - RTA next steps

20/8/20

Hi everyone,

A quick and confidential update (until 12:15pm today)

As you know Shane Rattenbury tabled a motion earlier this week (to be debated today) calling for the Assembly to begin work to legislate to raise the age in the next term. We now know that the Attorney will support that motion **with the amendments below – so it stops short of committing to raise the age, but nonetheless acknowledges that the ACT can go at it alone and expresses a desire to move in the right direction.**

Justin will be speaking to the media at 12:15pm with Minister Rattenbury supporting the motion and calling for the age to be raised. Karly Warner of ALS NSW/ACT will also be doing some media on it this afternoon. If you put your contact details on the media release we sent out earlier this week you may also be contacted – so please read the motions below.

I think it is important we emphasise:

- We support raising the age to 14 (not 12)
- We believe all jurisdictions have a responsibility to end the damaging practice of incarcerating children as soon as possible
- Governments must invest in services that help, not harm, our kids.

Sophie

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

AMENDMENT

Gordon Ramsay Attorney General -

Amendment to Mr Rattenbury's motion No. 3 on the Notice Paper.

Notice

That this Assembly:

- (1) notes that:
 - (a) the minimum age of criminal responsibility across all Australian jurisdictions is 10 years, with the principle of *doli incapax* applying to children between 10 and 13 years;
 - (b) The United Nations Committee on the Rights of the Child has recommended the age of criminal responsibility should be 14;
 - (c) In Australia, groups including, but not limited to, Amnesty International, the ACT Human Rights Commission, ACTCOSS, the Aboriginal Legal Service (NSW/ACT), Winnunga Nimmityjah Aboriginal Health and Community Services, Gugan Gulwan Youth Aboriginal Corporation, Anglicare NSW South/ACT, the Law Society, the Youth Coalition of the ACT, Law Council of Australia and the Australian Medical Association have called on the ACT Government to raise the age of criminal responsibility from 10 to either 12 or 14 years of age to further protect vulnerable children in our community; and
 - (d) on 27 July 2020, the Council of Attorneys-General noted that the Working Group on the minimum age of criminal responsibility had identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour in advance of making a recommendation to the Council raising the age and agreed to provide a progress report within 12 months;
 - (e) the Council of Attorneys-General Working Group on the minimum age of criminal responsibility has considered:
 - (i) representations about medical evidence on cognitive capacity; and
 - (ii) options to shift the age with different presumptions for more serious criminal offences;
 - (f) there is desirability of national consensus on the minimum age of criminal responsibility but that this does not prevent a jurisdiction from making an independent decision to raise the age;

and
- (2) further notes that:
 - (a) the *Blueprint for Youth Justice in the ACT 2012-2022* has resulted in a significant reduction in the number of young people coming into contact with the Territory's youth justice system;
 - (b) the ACT Government has invested in a number of programs to support at-risk young people, including through justice reinvestment initiatives such as Yarrabi Bamirr, the introduction of Functional Family Therapy, After-Hours Crisis and Bail Service, the Safe and Connected Youth project, the Intensive Diversion Program and the Muliyan flexible education program;
 - (c) in the 11 years from 2008-09 to 2018-19, only one young person under the age of 14 has been sentenced to a term of detention at Bimberi Youth Justice Centre;
 - (d) the detention of children under 12 is extremely rare, with four instances of unsentenced detention between 2008-09 and 2018-19; and
 - (e) the Attorney General has approved the use of funds from the Confiscated Asset Trust to undertake a gap analysis to enable successful implementation of any change to the minimum age; and
- (3) calls on the ACT Government to:

- (a) support raising the age of criminal responsibility to 14 years of age taking into account medical and other relevant evidence and with consideration given to exemptions for serious offences;
- (b) ensure that reform in this complex area engages with and enhances support services identified through the gap analysis, noting that keeping young people safe and diverting them from the justice system is a whole-of-government and whole-of-community responsibility; and
- (c) continue to progress policy work and consider programs and resources that may be required in order for the tenth Assembly to consider legislation raising of the age of criminal responsibility.

Gordon Ramsay Attorney General

20 August 2020

ORIGINAL MOTION

Notice

*1 **MR RATTENBURY:** To move—That this Assembly:

(1) notes that:

(a) the ACT minimum age of criminal responsibility of 10 is well and truly out of step with the rest of the world;

(b) Australia has been chastised by the United Nations Committee on the Rights of the Child, which recommends raising the age to 14;

(c) groups including, but not limited to, the ACT Human Rights Commission, ACTCOSS, the Aboriginal Legal Service (NSW/ACT), Winnunga Nimmityjah Aboriginal Health and Community Services, Gugan Gulwan Youth Aboriginal Corporation, Anglicare NSW South/ACT, the Law Society, the Youth Coalition of the ACT and the Australian Medical Association have called on the ACT Government to raise the age of criminal responsibility from 10 to 14 years of age to further protect vulnerable children in our community; and

(d) on 28 July 2020, the Council of Attorneys-General meeting deferred a decision on raising the age at which children can be held criminally responsible, despite extended consideration of the issue; and

(2) calls on the ACT Government to:

(a) support the raising of the age of criminal responsibility from 10 to 14 years of age;

(b) recognise the need to resource new programs and implement new policy frameworks to support young offenders under the age of 14; and

(c) commission preliminary work to prepare the legislative, policy and resourcing frameworks required for an incoming government to legislate for raising of the age of criminal responsibility from 10 to 14 years of age. (Notice given 17 August 2020. Notice will be removed from the Notice Paper unless called on within 4 sitting weeks – standing order 125A).

From: President ACTLaw <president@actlawsociety.asn.au>

Sent: Tuesday, 18 August 2020 12:02 PM

MEMBERS ON THE *move*



Hanaan Indari
Promoted to Managing Partner
Carrol O'Dea Lawyers



Samira Friis
Joined as Lawyer
Edwards Family Lawyers



Elise Fordham
Joined as Associate Lawyer
Edwards Family Lawyers



Claire Tota
Promoted to Partner
HBA Legal Sydney



Chris Nielsen
Promoted to Partner
McCullough Robertson Sydney



Jeremy Perier
Promoted to Special Counsel
McCullough Robertson Sydney



Alison Walshe
Promoted to Senior Associate
McCullough Robertson Sydney



Catherine Williams
Joined as Senior Solicitor in Family Law
Mullan & Lindsay



Elaine Clarke
Joined as Senior Associate
Newnhams Solicitors



Maryann Melhem
Joined as Associate
Newnhams Solicitors



Vince Baudille
Appointed as Co-Head of Global Real Estate Practice
Bird & Bird Australia



Anneka Frayne
Promoted to Director
Stacks Law Firm, Tamworth

COURTS

ACT votes to raise the age



The Australian Capital Territory has made the nation's first tentative steps towards raising the age of criminal responsibility for children from 10 to 14 years.

The state's Legislative Assembly voted in favour of the change when a Greens motion was introduced to the Parliament on 20 August. The Labor government agreed to start early planning on legislation to support the change but warned it could take some time.

"It's certainly not a stroke-of-the-pen sort of thing," Attorney-General Gordon Ramsay told *The Canberra Times*.

Ramsay said he preferred a national approach through the Council of Attorneys-General.

"It's very clear that the best outcome for the children of Australia ... would be for us to have national consensus on this matter," Ramsay said.

"I will continue work with other jurisdictions and we want to make sure that children are diverted from the criminal justice system."

ACT Law Society President Chris Donohue said he was "cautiously optimistic" about the decision.

"The proposal, brought before the Assembly by Shane Rattenbury MLA, brings us one step closer to this much-overdue reform. We should be treating children like children, not criminals," Donohue said. ■

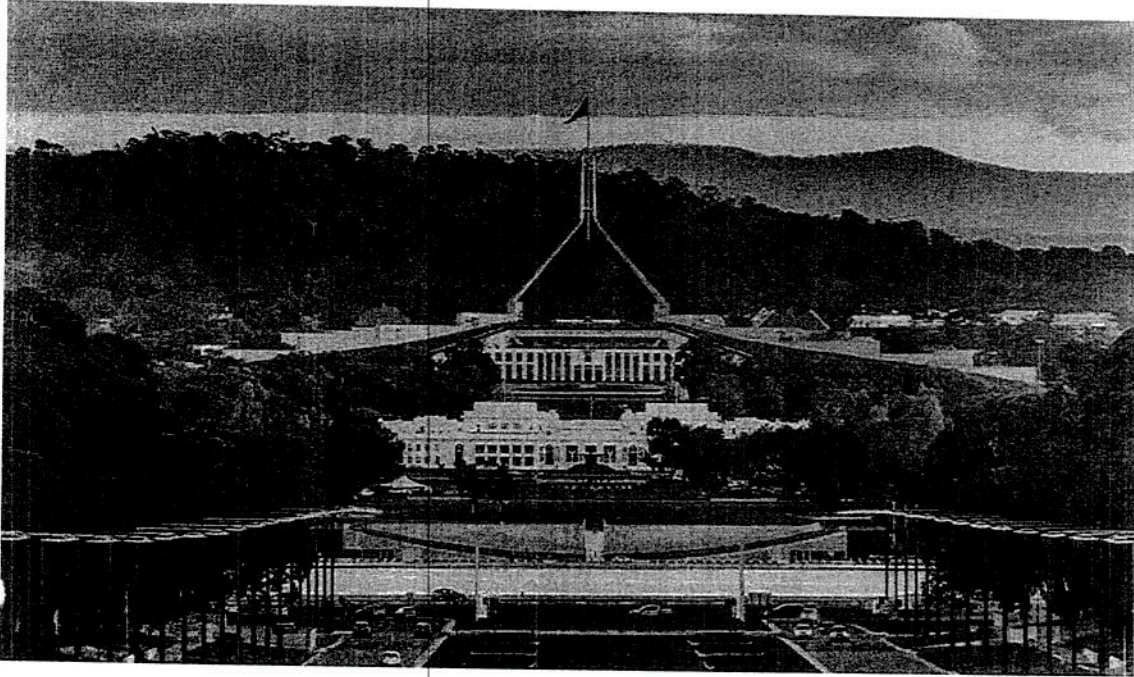
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NSW LS

Law Society welcomes ACT decision to raise criminal age of responsibility

By Naomi Neilson | 23 August 2020



The ACT has become the first Australian jurisdiction to vote to raise the age of criminal responsibility, bringing its laws in line with the United Nations standards.

The vote before the Legislative Assembly is the first tentative step towards raising the age of criminal responsibility from 10 to 14 years, but the ultimate responsibility to alter the laws will be with whichever party forms government after the October elections.

The ACT Law Society has welcomed the vote and said it is "cautiously optimistic" that the laws will come to fruition: "The proposal brings us one step closer to much-overdue reform. We should be treating children like children, not criminals."

The Legislative Assembly motion said in amending any legislation, consideration could also be given to medical evidence on cognitive capacity of children over 14, and there should be options to shift the age or provide exemptions for serious offences.

"The Law Society welcomes Attorney-General [Gordon] Ramsay's public support of a reform and for identifying a clear way forward. We are pleased to see the ACT taking a leadership role in this very necessary change," president Chris Donohue said.

"However, there is a need for action on this reform to be taken more quickly. The Law Society and our specialist legal committee stand ready to assist the ACT government."

The United Nations committee on the rights of the child recommended age of criminal responsibility should be at 14. The ACT Parliament agreed that "there is desirability of national consensus on minimum age of criminal responsibility, but it does not prevent a jurisdiction from making an independent decision to raise the age."

Big Law

0 Comments

JUSTICE Greens' motion passes in Assembly 21/8/20

ACT voices support for raising criminal age of responsibility

Daniella White

THE ACT government has voiced its support for raising the age of criminal responsibility from 10 to 14 for the first time.

Law reform advocates say it's a tentative step towards keeping children out of prisons.

A Greens motion calling on the government to support the change passed the ACT Legislative Assembly on Thursday. The government agreed to start early planning so the next government could legislate raising the age of criminal responsibility.

Attorney-General Gordon Ramsay said he still supported a national approach, through the Council of Attorneys-General. The group has delayed a decision about whether to support raising the age until 2021.

"It's very clear that the best outcome for the children of Australia ... would be for us to have national consensus on this matter," he said.

"I will continue work with other jurisdictions and we want to make sure that children are diverted from the criminal justice system. It's certainly not a stroke of the pen sort of thing.

"It's been talked about a couple of times in some of the advocacy that it's a very simple legislative amendment.

"It might be the stroke of a pen in terms of turning 10 to 14 in legislation, but this is a complex area and for the sake of the children ... we have to make sure it's done well, it's done correctly, and not done in a half thought out way."

The government said there should be exemptions for more serious offences.

Greens leader Shane Rattenbury called on other states and territories to follow the ACT's lead. "Children as young as 10 simply don't belong in prison," he said.

"Where children are imprisoned, it sets the trajectory for the rest of their lives and increases the risk they will be involved in the adult criminal justice system as they mature. We can better support these children by providing them with the help they need to stay on the right path.

"Australia's minimum age of criminal responsibility of 10 is well and truly out of



ACT Attorney-General Gordon Ramsay.
Picture: Karleen Minney

step with the rest of the world, and we have been chastised for this by the United Nations Committee on the Rights of the Child.

"With the right supports in place, and a well-resourced youth sector, we can provide better alternatives to custody for children under 14."

ACT Law Society president Chris Donohue said it was a first tentative step towards changing the law. "We are cautiously optimistic about today's decision," he said.

"The proposal, brought before the Assembly by Shane Rattenbury MLA, brings us one step closer to this much-overdue reform.

"We should be treating children like children, not criminals."

Mr Donohue said the changes needed to happen sooner rather than later.

"The Law Society welcomes Attorney-General Ramsay's public support of this reform and for identifying a clear way forward," he said.

"We are pleased to see the ACT taking a leadership role in this very necessary change.

"However, there is a need for action on this reform to be taken more quickly."

In July, leaders in the ACT's youth, health, legal and community sectors have jointly penned a letter urging the territory government to lift the age of criminal responsibility.

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NEWS

Raise the age bill by the end of the year

Lucy Bladen

A BILL to raise the age of criminal responsibility in Canberra could be brought to the ACT Legislative Assembly before the end of the year.

The government has taken the first steps to change the age of criminal responsibility to 14. The current law allows children as young as 10 to be locked up.

The ACT is the first Australian jurisdiction to commit to raising the age and the territory's Attorney-General Shane Rattenbury said the legislation was a "very high priority".

"The ACT is committed to leading the nation in this area of a vital reform and I want to bring this legislation to the assembly in the latter half of this year," he said.

The territory government has commissioned a six-month independent review that will look at the impact of raising the age of

criminal responsibility on young people and their families.

As well, it will examine its impact on support services and the justice system.

Criminal justice agencies, Aboriginal and Torres Strait Islander services, children protection agencies, youth justice services and legal agencies will be consulted as part of the review.

The independent review is being led by Australian Catholic University Emeritus Professor Morag McArthur in consortium with Aboriginal consultancy, Curjio and Australian National University research fellow Dr Aino Soumi.

Emeritus Professor McArthur is the founding director of the Institute of Child Protection Studies and was a chief investigator on research projects commissioned by the Royal Commission into Institutional Response into Child Sexual Abuse.

The review will cost \$119,000.

"When we raise the minimum age of criminal responsibility to 14, we'll need to have the right systems in place to make sure those younger kids are looked after," Mr Rattenbury said.

"Careful planning is essential so that we can ensure that children and young people who engage in harmful behaviours, as well as impacted community members and service-provision agencies, are effectively supported when the age is raised.

"As part of this planning, the ACT government has committed to an independent review of the service system needs and implementation requirements."

The review team will deliver a report on its findings in July 2021.

Labor and the Greens committed to raising the age of criminal responsibility in August last year. It followed a motion

delivered by the Greens. A deal was officially inked between the parties in the parliamentary and governing agreement.

The ACT government has previously come under pressure from leaders in the territory's youth, health, legal and community changes to raise the age.

An open letter from the leaders warned very young children could be exposed to lifelong harm and early death if they are imprisoned.

The Council of Attorneys-General shied away from the commitment to raise the age nationally at its meeting last year.

In 2019, the United Nations Committee on the Rights of the Child recommended 14 as the minimum age of criminal responsibility.

Last month Australia faced international pressure after 31 UN member states called on the country to raise the age.

■ Letters: Page 30



Disease outbreak

Capital's 'raise the age' legislation stalls

Lucy Bladen

THE ACT government has refused to say when legislation to raise the age of criminal responsibility will be put forward, despite an earlier declaration laws would be introduced early this year.

Labor and the Greens are understood to be divided on when to introduce legislation and the form it will take.

Attorney-General Shane Rattenbury said he had presented possible options of how the age could be raised to the territory's cabinet and said discussions were ongoing.

Mr Rattenbury said he had presented these options with Youth Justice Minister Emma Davidson. He did not mention Family and Community Services Minister Rachel Stephen-Smith, who also worked on the legislation.

"The ACT government's commitment to

raising the age of criminal responsibility is in the Parliamentary and Governing Agreement between the ACT Greens and Labor," he said.

"My Greens colleague Emma Davidson, Minister for Youth Justice, and I remain strongly committed to this reform and have presented a series of options to ministerial colleagues. These are still the subject of detailed and ongoing discussions within government."

Mr Rattenbury did not answer questions around when legislation was expected. Last year, the Attorney-General indicated legislation to raise the age could be introduced in early 2022.

The Greens are pushing for the reform to be delivered as a matter of priority.

Ms Stephen-Smith said she was still committed to the reform and work was under way.

"I'm closely engaged in the policy work to progress this important reform, with a focus on ensuring that it genuinely delivers better outcomes for children, young people and the community," she said.

"That means thinking deeply about what the new system will look like for children and young people who engage in harmful behaviour that brings them to the attention of police, especially when that behaviour has serious consequences for other people."

But Ms Stephen-Smith also did not give a timeline for legislation, saying it was the responsibility of the Attorney-General. She did say substantial reforms would be needed to the Children and Young People Act.

When asked if the legislation was a priority for Labor she replied: "Yes."

A new report on the ACT's Bimberi Youth Justice Centre showed in the most recent quarter there were four people between

10-13 in the centre. The Labor-Greens power-sharing agreement has committed to raising the age of criminal responsibility but it does not specify an age.

The Greens want the age raised to 14. It is part of the party's policy platform. Ms Stephen-Smith has also previously been on the record as wanting the age to be raised to 14.

In the previous Assembly, Labor supported a motion put forward by Mr Rattenbury calling for the age to be raised to 14.

But other states are only considering raising the age to 12 following a meeting of attorneys-general last year where it was agreed to support the development of a proposal to increase the age. A territory government-commissioned report, released last year, found sweeping reforms of the ACT's services system would be needed when the age of criminal responsibility is raised.

"After the beginning of the year we were feeling a little bit demoralised ... just seeing the city empty out, investing in "the experience" of local shopping -- bringing back live music and tastings -- helped to remind fatigued

On every weekend evening in April, foot traffic was between 47 and 86 per cent above average, with visitors

bit more of a swell in terms of general customers and people on the street," Mr Trew said.

past, seeing the shop.

"A lot of people didn't even really know that I was here or didn't know where I was

ary and February recorded downturns of 22 and 5.7 per cent, respectively.

Groups renew ACT raise the age push

Lucy Bladen

MEMBERS of Canberra's community, legal and youth sectors have called on the ACT government to put politics aside and move to progress a reform to raise the age of criminal responsibility to 14.

Legislation to raise the age of criminal responsibility in the territory has stalled, despite strong momentum earlier in the parliamentary term and declarations that laws would be introduced in early 2022.

Labor and the Greens are understood to be divided on when to introduce legislation and the form it will take. There is a commitment in the Labor-Greens power-sharing agreement to raise the age but an exact age

is not specified.

The Greens want the age raised to 14, as do community advocates, but the territory's police have called for the age to be only raised to 12. Other states are also only considering raising the age to 12.

The government commissioned an almost \$120,000 review last year to look at the impact of raising the age of criminal responsibility on young people and their families, which was led by Australian Catholic University Emeritus Professor Morag McArthur, who was the founding director of the Institute of Child Protection Studies.

The report found sweeping reforms of the ACT's services system would be needed when the age of criminal responsibility

is raised.

ACT Children and Young People Commissioner Jodie Griffiths-Cook said there were no excuses for delaying legislation as the report provided a road map on how to raise the age of criminal responsibility.

"Our community rightly expects children to be supported in age-appropriate and therapeutic ways," Ms Griffiths-Cook said. "Because we don't have an adequate system to provide the supports that are needed, we are seeing these children end up in the criminal justice system."

Aboriginal-led justice coalition Change the Record has called on Chief Minister Andrew Barr to make good on the promise in the power-sharing agreement.

"The ACT holds itself out as a progressive leader on social justice and human rights - so why is it dragging its feet on a reform that would ensure 10- to 13-year-old children are looked after in community and kept out of prison?" Change the Record executive officer Sophie Trevitt said. "The legal, human rights, First Nations and child service sectors here in the ACT are united behind the need to raise the age to at least 14 years old."

Youth Coalition of the ACT executive director Justin Barker said there were no intervention services outside of the criminal justice system for children aged between 10 to 14 who needed support. He said raising the age would help to ensure these services could be implemented.



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Office of the President

30 November 2021

Our ref: [BDS/KS:MC]

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: CSSC@parliament.qld.gov.au

Dear Committee Secretary

Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

Thank you for the opportunity to provide feedback on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (**the Bill**).

This submission has been compiled with the assistance of the Queensland Law Society (**QLS**) Children's Law Committee, First Nations Legal Policy Committee, Human Rights and Public Law Committee, Access to Justice and Pro Bono Law Committee, and the Criminal Law Committee, whose members have substantial expertise and involvement in this practice area and in representing and supporting children and young people through the youth justice system.

1. Community safety

QLS recognises the importance of Queenslanders to be and feel safe in their community. We acknowledge the concerns held by community members and those who have been impacted by youth crime in Queensland. The Society considers that the safety and security of all Queenslanders should be front of mind when considering any legislative reform.

In order to address safety concerns and better facilitate understanding of the issues relating to youth crime, the community must have ready access to accurate and reliable information and data. It is the role of the Queensland legal profession to assist the public and the media in its understanding of legal processes (such as bail and sentencing) as they apply to children and young people and the Society takes this role very seriously.

2. QLS position

QLS strongly supports the proposed amendments to raise the minimum age of criminal responsibility to 14 years. The Bill aligns with QLS's longstanding position that the minimum age of criminal responsibility should be raised to at least 14 years. Through proactive advocacy to

Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

the Government and Opposition and through our State and Federal Call to Parties Statements, the Society has been a strong advocate for raising the minimum age of criminal responsibility.

QLS welcomes the proposed amendments contained in the Bill, including those provisions that:

- Raise the age of criminal responsibility to 14 years;¹
- End proceedings and punishment against a child where they committed an offence under 14 years;²
- End the detention of a child in a detention centre or a watch-house where a child committed an offence under 14 years;³
- Allow the destruction of any identifying particulars and evidence collected for an offence that committed when the child was under the age of 14 years;⁴ and
- Expunge the criminal history of a child who committed an offence under 14 years.⁵

QLS holds some reservations regarding the transitional provisions in the Bill that amend the *Youth Justice Act 1992*. Those concerns are addressed below.

3. Background

Currently, the minimum age of criminal responsibility is 10 across all Australian jurisdictions (subject to the rebuttable presumption of *doli incapax*, which is discussed below).⁶ However, we note that the ACT Government has committed to raising the minimum age of criminal responsibility with public consultation which was undertaken earlier this year.⁷ We also note that raising the age has also been considered at the Federal level, through the Council of Attorneys-General Age of Criminal Responsibility Working Group.

QLS understands community concerns regarding how children and young people who commit serious or violent offences are dealt with in the youth justice system if these amendments were enacted. Whilst QLS recognises this as a genuine concern, the evidence demonstrates that it is rare for children aged 10 to 14 to commit serious or violent offences.⁸ The data indicates that

¹ Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 cl 3.

² *Ibid* cl 5.

³ *Ibid* cl 5.

⁴ *Ibid* cl 5.

⁵ *Ibid* cl 5.

⁶ *Criminal Code Act 1899* (Qld) s 29; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Children, Youth and Families Act 2005* (Vic) s 344; *Criminal Code 2002* (ACT) s 25; *Young Offenders Act 1993* (SA) s 5; *Criminal Code Act Compilation Act 1913* (WA) s 29; *Criminal Code Act 1924* (Tas) s 18; *Crimes Act 1914* (Cth) s 4M.

⁷ See: <https://yoursayconversations.act.gov.au/raising-minimum-age-criminal-responsibility>.

⁸ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 38.

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young offenders tend to be underrepresented when it comes to serious offences.⁹ In countries where the minimum age of criminal responsibility is 14 years or higher, research indicates there are no negative consequences in terms of crime rates.¹⁰

Further, QLS notes that children and young people who commit serious or violent offences are unlikely to have the necessary capacity to understand the criminal nature of their offending (this is discussed further below). It is also unlikely that serious or violent offences committed by children and young people will satisfy the principle of *doli incapax*, provided it is administered appropriately (this is discussed further below).

By contrast, low minimum ages for criminal responsibility can contribute to early criminal pathways for young people. Early contact with the criminal justice system is one of the key predictors of youth and adult offending; children who come into contact with the criminal justice system are seven times more likely to become adult offenders.¹¹ A low age of criminal responsibility can therefore entrench criminality, heighten reoffending rates and create cycles of disadvantage.¹²

4. *Doli incapax*

Children aged between 10 and 14 are subject to a rebuttable legal presumption known as *doli incapax*, which provides that children under the age of 14 are presumed not to possess the necessary knowledge required to have criminal intent.¹³ *Doli incapax* can be rebutted by evidence indicating that a child knew their actions were morally wrong.¹⁴

The principle of *doli incapax* has been criticised as ineffective and discriminatory. For example, the United Nations Committee on the Rights of the Child has criticised systems such as *doli incapax*, as it can lead to discriminatory practices.¹⁵ The Atkinson Report on Youth Justice observed that the 'presumption is rarely a barrier to prosecutions', with many in the profession reporting that the threshold to rebut the presumption is 'too low'.¹⁶ As a result, many children

⁹ Chris Cunneen, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) 57.

¹⁰ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 38.

¹¹ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 9, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹² Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 9, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹³ *Criminal Code Act 1899* (Qld) s 29(2).

¹⁴ *Ibid* s 29(2).

¹⁵ Australian Human Rights Committee, *Review of the age of criminal responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 15.

¹⁶ Bob Atkinson AO, *Report on Youth Justice* (8 June 2018), <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/reform/youth-justice-report.pdf>>.

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are being held criminally responsible, despite lacking the cognitive maturity required to understand the criminal nature of their behaviour.¹⁷

Further, the presumption has been criticised for its complexity, which leads to errors and inconsistencies in its application, both procedurally and substantively.¹⁸ While the onus of rebutting the presumption lies with the prosecution, reports suggest that in practice, the defence often bears the onus of raising and establishing incapacity.¹⁹ For example, if the defence wishes to rely on the presumption, the prosecution or the Court may request that a psychological assessment of the child be undertaken and prepared by the defence in order to establish their capacity.²⁰ Not only does this reverse the onus, but it also presents a barrier for those in the youth justice system who do not have access to funding to undertake capacity assessments and to obtain the necessary reports to diagnose mental health issues or neurological disorders bearing on their capacity. This is a significant access to justice issue.

In order to overcome the complexity in rebutting the presumption, the Australian Human Rights Commission has observed that in some cases the prosecution has been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible.²¹

Moreover, children are subject to criminal processes, including detention, while they wait to have the presumption of capacity heard and determined in a court hearing.²² This is the case even where children are eventually found not to have the necessary knowledge for criminal intent. QLS has received member feedback that there are significant delays associated with progressing matters where *doli incapax* is an issue. In part, this can be contributed to the complexity of *doli incapax* and the fact that the defence is required to collate material to substantiate the presumption. This consequence is of particular concern given that research demonstrates that custody has damaging effects on children, including by separating them from family and community and disrupting their education and access to therapeutic programs.²³ The presumption of *doli incapax* is intended to remove children who lack the capacity for criminal behaviour from the criminal justice system. However, the experience of children on remand can

¹⁷ Ibid.

¹⁸ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 21, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹⁹ Australian Human Rights Committee, *Review of the age of criminal responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 15; Kate Fitz-Gibbon and Wendy O'Brien, *A Child's Capacity to Commit Crime: examining the Operation of Doli Incapax in Victoria (Australia)*(2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 22-23.

²⁰ National Legal Aid, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (28 February 2020) 30, <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-nla-submission-cag-age-of-criminal-responsibility-review-28-feb-2020.pdf>>.

²¹ Australian Human Rights Commission, *Review of the age of criminal responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 15.

²² Amnesty International, *Raise the Age: Kids belong in community* (May 2020), <<https://www.amnesty.org.au/wp-content/uploads/2020/05/Raise-the-Age-Kids-Belong-in-Community-2020.pdf>>.

²³ Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project', *Research and public policy series no. 125*. Canberra: Australian Institute of Criminology <<https://aic.gov.au/publications/rpp/rpp125?>>.

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defeat this purpose and exacerbate the underlying issues that contribute to the offending behaviour.²⁴

Raising the age of criminal responsibility to 14 removes the need to apply *doli incapax*, and addresses the problematic consequences associated with its application. For this reason, QLS supports the amendments contained in the Bill that increase the age of criminal responsibility to 14 years.

5. The science of cognitive development in young people

Raising the minimum age of criminal responsibility is supported by neuroscience and child development research, which indicates that brains mature gradually over adolescence, nearing complete maturity at 25 years.²⁵ In particular, the capacity for abstract reasoning is still undergoing significant development in children aged 12 to 13 years.²⁶ Ongoing neurodevelopment in early adolescence can affect a range of areas of cognitive functioning including impulsivity, reasoning and consequential thinking.²⁷ Research studies establish that a 'law and order' morality is generally not achieved until mid-teens,²⁸ and logical thinking and problem-solving abilities develop considerably between the ages of 11 and 15.²⁹

It is largely for these reasons that Federal, State and Territory laws recognise adolescence as an indicator of the ability of a young person to make decisions about their lives. For example, children do not have legal capacity to enter into a contract, rent a home, apply for a passport, get married, vote, sit on a jury or make other long-term decisions about their care. There is a significant disparity between these laws and the current criminal law that permits children as young as 10 to be charged, convicted and incarcerated.

Further, as a consequence of ongoing neurodevelopment, children in their early adolescence are unlikely to adequately understand the impact of their actions nor comprehend criminal

²⁴ Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project' (2013) 125 AIC Reports: Research and public policy series.

²⁵ Royal Australian College of Physicians, *RACP submission to the Council of Attorneys General Working Group reviewing the age of criminal responsibility* (July 2019), 3, <https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review_final-gm-approved.pdf?sfvrsn=b384e61a_6>, citing Sara B. Jonson et al., 'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy' (2009) *Journal of Adolescent Health* 45(3), 216 – 221. See also Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales' (2016) 67 Northern Ireland Legal Quarterly 269, 277.

²⁶ Australian Institute of Health and Welfare, *Youth Justice in Australia 208-19* (2020) 42, <<https://www.aihw.gov.au/getmedia/a5a364b9-fe69-4d02-9c93-1965a69a3d93/aihw-juv-132.pdf.aspx?inline=true>>; Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) quoting Nicholas Lennings and Chris Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

²⁷ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

²⁸ UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018) 3.

²⁹ Michael Lamb and Megan Sim, 'Developmental Factors Affecting Children in Legal Contexts' (2013) 13(2) *Youth Justice* 131.

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proceedings. In addition, child development, including the capacity for reasoning and consequential thinking, can be profoundly impacted by the environment in which a child is raised. Young people who come into contact with the criminal justice system typically have higher levels of neurodevelopmental impairment owing to experiences of childhood adversity, including neglect, physical and sexual abuse, family disruption, poverty and homelessness, and trauma.³⁰

In this context, Queensland's low age of criminal responsibility is out of step with current medical, behavioural and psychological research which suggests that young people, particularly those from disadvantaged backgrounds, largely do not have the cognitive capacity for the consequential thinking necessary to impute criminal intent. Accordingly, the Bill's proposal to raise the age of criminal responsibility to 14 years goes some way in bringing the law in Queensland in line with contemporary science and research.

6. The 'crossover' with the child protection system

QLS also highlights the considerable crossover between youth detention and child protection services, with 55% of young people in detention having received child protection services.³¹ This is of particular concern as child protection correlates with earlier contact with the criminal justice system.³² The crossover from care to crime is multifaceted, however, there is evidence to suggest that for children in care there is a practice of relying on police and the justice system in lieu of adequate behavioural management.³³ The result of this is that challenging behaviour of children in out-of-home care, such as property damage, is often criminalised, where the same behaviour by other children would not have elicited a criminal justice response.

Reducing the criminalisation of children in care requires a therapeutic response, which can be facilitated in part by raising the minimum age of criminal responsibility.

7. Human rights considerations

Australia is a party to the United Nations Convention on the Rights of the Child, which requires State parties to establish a minimum age below which children are presumed not to have the capacity to infringe penal law.³⁴

In 2019, the United Nations Committee on the Rights of the Child (the UN Committee) issued an update recommending the minimum age of criminal responsibility be raised to at least 14

³⁰ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 12, 16, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

³¹ Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 1 July 2014 to 30 June 2018*, (Report, 2019) 19.

³² Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 1 July 2014 to 30 June 2018*, (Report, 2019) 17.

³³ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 14, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

³⁴ United Nations Convention on the Rights of the Child, art 40.

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years, and commending State parties with minimum ages set at 15 and 16.³⁵ The UN Committee also recommended that no child be deprived of liberty unless there are genuine public safety or public health concerns and encouraged State parties to set a minimum age for deprivation of liberty at 16 years.³⁶ In its concluding observations on Australia, the UN Committee expressed concern at the low age of criminal responsibility. It recommended that Australia raise the minimum age of criminal responsibility to an internationally accepted level of at least 14 years, after which the presumption of *doli incapax* would apply.

Additionally, section 32(3) of the *Human Rights Act 2019* (Qld) provides that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. Section 33(3) further states that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age. Incarcerating children under the age of 14 years fails to account for the mental, physical and emotional needs of a child, as required by the *Human Rights Act 2019* (Qld), and in our view, imposes a penalty that is inappropriate for a child of that age.

8. Cohort impacted by the Bill

The Bill amends section 29 of the *Criminal Code 1899* (Qld) to raise the criminal age of responsibility to 14 years.³⁷ The Bill also contains a number of transitional provisions that will divert or provide for the release of young offenders already held in detention centres or watch-houses, provided they committed the offence under the age of 14 years.³⁸

Accordingly, the Bill has the capacity to divert a number of young offenders from interacting with the criminal justice system. Recent data from 2019-2020 indicates that approximately 9% of Queensland's youth detention centre population is comprised of young people aged between 10 to 13 years.³⁹ Data from the same period indicates that there were, on average, 17 children aged 10 to 13 held in watch-houses each day.⁴⁰ There is also a concerning rate of incarceration for young First Nations young people, with Aboriginal and Torres Strait Islander children 22 times more likely to be in detention than their non-Indigenous counterparts.⁴¹

³⁵ United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in juvenile justice* (CRC/C/GC/24, 18 September 2019) [22], accessed at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>>.

³⁶ United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in juvenile justice* (CRC/C/GC/24, 18 September 2019) [89], accessed at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>>.

³⁷ Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 cl 3.

³⁸ *Ibid* cl 5.

³⁹ Department of Children, Youth Justice and Multicultural Affairs, *Youth Justice annual summary statistics: 2015-16 to 2019-20*, <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/resources/yj-annual-summary-stats-detention.pdf>>.

⁴⁰ Explanatory Note, Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, 4 – 5.

⁴¹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19* (Report, 15 May 2020) <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/contents/summary>>.

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Raising the age of criminal responsibility to 14 years will therefore divert a small but significant number of young offenders from the criminal justice system.

9. Release from detention and watch-houses

As noted above, the Bill amends the *Youth Justice Act 1992* to allow for the release of children in detention or watch-houses, provided they are being detained for an offence they committed under 14 years.

Where a child is held in a watch-house, the watch-house manager must arrange for the person to be released from custody as soon as reasonably practicable to do so but no later than three days after the commencement of the provision or the time the person would have otherwise been released from custody. In deciding when it is reasonably practicable to release the person from custody, section 409(3) provides that the watch-house manager *must* have regard to the welfare of the person, including whether the child will have access to appropriate accommodation, support from a parent or guardian, or any health or other services the person required while in custody. However, section 409(4) states that subsection (3) does not prevent the watch-house manager releasing the person from custody merely because the person will not have access to a thing mentioned in that subsection. The wording of this provision is concerning as a child could be released without appropriate accommodation, a parent or guardian, or a health or other service. Accordingly, the provision should be amended to ensure that children who are released from watch-houses are provided with the things mentioned in section 409(3).

A similar set of provisions and exceptions are contained in section 410 as they relate to releasing children from detention where they committed an offence under 14 years. For the reasons provided above, namely that a child could be released from custody without appropriate accommodation, a parent or guardian, or a health or other service, QLS is of the view that these provisions should be amended to ensure that a child who is released from custody is provided with the things mentioned in section 410. In our view, it is essential that support services are appropriately funded.

10. Alternatives to criminal proceedings

Prevention and early intervention strategies that aim to address the underlying factors which lead to criminality would better protect young people and the community. An effective response to youth offenders must combat the underlying factors that produce criminal behaviour, including poverty, homelessness (often because of lack of safety at home due to family and domestic violence), lack of educational engagement and attainment, physical and mental health conditions, including those that often manifest in challenging and difficult behaviours, and problems of addiction or substance abuse. This requires a whole of government response that invests in services directed towards family support, health support, disability support, educational strategies to support at risk youth, youth engagement and rehabilitation.

It is the experience of our members that children do not have sufficient access to suitable health and rehabilitation services and educational services once placed in youth detention. By placing children in the youth justice system, particularly in detention, government is not meeting its

Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

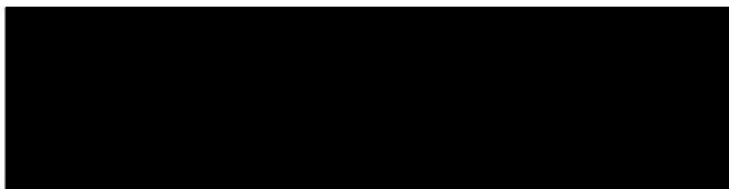
responsibility to address the underlying factors that contribute to criminal offending by children. This ultimately leaves the socio-economic drivers of crime unaddressed, which will lead to the behaviours continuing.

Raising the age of criminal responsibility from 10 to 14 and treatment of the underlying causes of crime will provide greater protection for the community, in that it will result in fewer recidivist young offenders, whilst also preventing the entrenchment of children and young people in the youth justice and adult criminal justice systems.

We look forward to the public hearing on the Bill.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED].

Yours faithfully

A large black rectangular redaction box covering the signature area.

Elizabeth Shearer
President

Northern Territory Council of Social Service (NTCOSS)'s Post



Northern Territory Council of Social Service (NTCOSS)

736 followers

5mo

NTCOSS salutes the Victorian Greens this week reintroducing a bill to raise the age of criminal responsibility from 10 to 14. This is an issue we are passionate about at NTCOSS. We welcomed the changes in the NT this year that raised the age to 12 to stop 10 and 11-year-old children from being locked up, brutalised and traumatised in detention centres. But it is a small step and NTCOSS supports the UN Committee on the Rights of the Child which states that the age of criminal responsibility should be at least 14, which is most common around the world. [Australian Greens Victoria Samantha Ratnam](#)

[#raisetheage](#)



[Victorian Greens to push for raising criminal age to 14, banning solitary confinement for children](#)

MEDIA RELEASE

URGENT CALLS TO INCREASE AGE OF CRIMINAL RESPONSIBILITY TO 14



NEW SOUTH WALES
BAR ASSOCIATION

16 November 2022

The NSW Bar Association is renewing calls for the New South Wales Government to raise the age of criminal responsibility from 10 to 14.

A disturbing ABC Four Corners story has highlighted the brutal conditions in which children are held in youth detention, particularly in the Banskia Hill Detention Centre in Western Australia where some children are being placed in unlawful solitary confinement. It is unsurprising that locked up in this way, children have self-harmed and attempted suicide.

“Sending ten-year old children into the criminal justice system is exposing them to trauma. It is not stopping them committing crimes nor is it making our community safer in the long-term,” says Gabrielle Bashir SC, President of the NSW Bar Association. “Vulnerable children need support, without undermining community safety, to ensure that any problems can be addressed swiftly, at a critical time in the child’s development.”

“The staged approach articulated by the Law Council on Raising the Age is supported by the NSW Bar and offers a template for change.

“The Association calls on the Council of Attorneys-General (CAG) Age of Criminal Responsibility Working Group Review to release a long-suppressed report, which reportedly endorses lifting the minimum age to 14 and apparently makes recommendations in similar terms to the position of the Bar Association and the Law Council.

“State governments and politicians have now dragged their feet for far too long, despite this report, ignoring reams of expert medical and legal advice that confirms criminalising children aged 10, 11, 12 and 13 does not work,” says Ms Bashir. “Jailed children – often the most marginalised in our community – are set on a path of lifetime damage.”

ABS data that may be looked to by governments in relation to children under 14 must be treated with caution as it defines “young offenders” as including those in this State who have not been tried, some who have not even been charged, and in relation to all of whom there is a presumption that they do not know right from wrong. The true data reveals that children under 14, and particularly First Nations children, are being subject to the criminal justice system, including being bail refused in detention awaiting hearings, despite in 2019, around 99% of matters before the courts ultimately resulting in a non-custodial outcome.

The NSW State Government recently told a Budget Estimates hearing that the daily cost of detaining one child or teenager in NSW had risen to nearly \$2,000 per day.

Children who have contact with police, courts and jails are more likely to reoffend and commit crimes as adults. This further clogs up a prison system which is costing the Australian taxpayer an estimated \$5.4 billion and more each year.

“Youth detention centres are the classrooms for crime and the gateway to adult prison,” says Ms Bashir.

In previous submissions, the Association has outlined a raft of reasons for increasing the minimum age of criminal responsibility to 14:

- Medical community consensus is that a child's brain has not properly developed at the ages of 10-14.
- First Nations children are significantly overrepresented in Australia's child protection systems and disproportionately affected by the current minimum age. The NSW Government has committed to closing the gap on youth detention by reducing the rate of Aboriginal and Torres Strait Islander young people in detention by 30 per cent by 2031. Raising the age to 14 would have an immediate impact.
- Children with intellectual and psychosocial disabilities are also over-represented in the juvenile justice system in NSW.
- Police are charging children with offences but when they get to court, their cases are thrown out because they are too young to understand what is right and wrong – what is known as doli incapax. Children are often damaged by this unnecessary exposure to the criminal justice system.
- The current law is inconsistent with international standards, where the average age of criminal responsibility is 14. Australia is one of the only developed countries in the world to jail children as young as 10.

Media contact:



More than 60,000 people sign petition urging NSW to raise the age of criminal responsibility

Aboriginal Legal Service seeks urgent ban on the strip-searching, handcuffing and arrest of children as young as 10

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Sarah Collard

[@Sarah Collard](#)

Thu 11 Aug 2022 16.11 AEST

More than 60,000 people have signed a petition urging the [New South Wales](#) government to raise the age of criminal responsibility to 14, and stop the practice of allowing children as young as 10 to be arrested, handcuffed and even strip-searched.

It is part of a national campaign to raise the age, which last year saw the attorneys general of all Australian states and territories [agree to move toward raising the age of criminal responsibility from 10 to 12](#). That step has been criticised as too small by justice advocates, who say raising the age to 12 will have a minimal impact on youth imprisonment rates.

The Aboriginal Legal Service NSW is using the campaign to raise the age of legal responsibility to urgently ban the strip-searching, handcuffing and arrest of young children.

The legal service's CEO, Karly Warner, said the current law, which allowed for the arrest and strip-search of children as young as 10, was out of step with community views.

Police officers are only permitted to conduct strip-searches of people aged between 10 and 18 if they are in the presence of a parent or guardian, or, if the child does not agree to a parent or guardian being present, in the presence of someone else who is not a police officer who represents their interests.

"It's basic decency and common sense that children need support, love and second chances – they belong in their homes, in schools and in playgrounds, not behind bars," Warner said.

Raising the age would also reduce youth incarceration rates, which is part of the NSW government's Closing the Gap commitments, she said.

“The NSW government has promised to reduce the rate of Aboriginal children and young people in detention by at least 30%,” she said.

The NSW attorney general, Mark Speakman, was served with a petition of more than 63,000 signatures – including from lawyers and human rights experts – calling for the law to be changed.

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Figures released by the NSW Bureau of Crime Statistics and Research [in April](#) showed that 43% of children in detention in the state were Indigenous.

Similar petitions are expected to be handed to the attorneys general of South Australia, Queensland and Victoria in the coming weeks.

The ACT is the only jurisdiction to have confirmed it will increase the age of criminal responsibility, but so far no legislation has been introduced.

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Cheryl Axleby, the CEO of Change the Record, said it was time for governments to act on commitments to reduce the incarceration rates of both children and adults.

“The current institutions aren’t working,” Axleby said. “We just see more intergenerational incarceration in the current institutions ... They just drive our kids and our people further into the system.”

She said raising the age of criminal responsibility, listening to Indigenous voices and working together was in line with the federal government’s stated aims in improving the lives of First Peoples.

“We talk about the voice to parliament, recognising us and closing the gap – there are all these commitments being made – this is just one way that the government can be brave and break that cycle of incarceration,” she said.

The issue will be on the agenda again at the council of attorneys general meeting this month.

“This has been on the agenda for over three years sitting at their table,” Axleby said. “The time has come for us to be creative and to try and create a new pathway for the future generations of young Australians.”

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Single

Sophie
12 Oct 2022



Today the Change the Record Coalition has slammed the NT Government's decision to only raise the minimum age of criminal responsibility to 12 years old, leaving twelve and thirteen year olds behind bars instead of at school and at home where they belong.

The NT Government's decision comes despite overwhelming calls from medical and legal experts, social services, Aboriginal controlled community organisations and families calling for the age to be raised to at least 14 years old.

Attributable to Cheryl Axleby, Chair of Change the Record:

"We are bitterly disappointed that the NT Government has thrown away another opportunity to get very young children out of police and prison cells, and support them in community where they belong.

"The NT Government has accepted the minimum age of criminal responsibility is far too low. What is disappointing is that the NT Government has chosen to kowtow to the pressure of the NT Police Association, rather than listen to the medical and child development experts who have been crystal clear that governments must raise the age to 14 as a bare minimum.

"Until governments are brave enough to put the interests of Aboriginal people, our children and the safety of the whole community above law-and-order politics, we are going to see decades more of failed government policies and broken lives.

"There is still time for the NT Government to do the right thing and amend this legislation to raise the age to at least 14 years old and invest in health and youth services that actually meet the needs of these kids, instead of locking them away."

Victoria ‘lagging’ on justice reform, former advisory chair says

By [Rachel Eddie](#) and [Sumeyya Ilanbey](#)

Updated February 16, 2023 — 6.09pm first published at 11.42am

The former chair of Victoria’s independent Sentencing Advisory Council says the government is lagging on critical reforms to the criminal justice system, despite the premier’s promise to start work on raising the age of criminal responsibility within weeks.

Daniel Andrews on Thursday said Victoria would raise the age of criminal responsibility from 10 even if state and territory governments failed to reach a national consensus.

Monash University Emeritus Professor Arie Freiberg, who left his role at the sentencing council in October, welcomed the comments but said decisive action was urgently needed on broader justice reforms, such as bail and drug laws, to keep vulnerable people out of prison.

“We are supposed to be a progressive jurisdiction, we ought to be in the lead, not lagging, especially when we’ve got such an enormous empirical base for all of these,” Freiberg told *The Age* this week.

“Sometimes you’ve got to take the initiative.”

Freiberg said the government should not wait any longer to overhaul the Bail Act, after a damning coroner’s report in January into Veronica Nelson’s avoidable death in custody found the Indigenous woman’s [human rights were repeatedly breached](#).

Coroner Simon McGregor said the laws were incompatible with the Charter of Human Rights and discriminatory towards First Nations people.

A [parliamentary inquiry handed down 11 months ago](#) also called for sweeping changes to reduce the number of people in jail on minor non-violent charges before sentencing.

Andrews has committed to [overhauling the law](#) in the first half of this year, but said it needed to be done right after 2018 reforms responding to [the Bourke Street attack](#) made it harder to get bail. In December, 40.8 per cent of people in Victorian prisons were unsentenced.

Child protection and a youth justice bill will also be on the agenda for the coming months, he said.

The government is separately decriminalising public drunkenness in November after a 12-month delay.

Freiberg said that should have happened 140 years ago and that it was time to treat drug possession as a health issue rather than a criminal one because the war on drugs had been “a colossal failure”.

“While we deal with these in a criminal justice fashion, we’re going to invest resources in the wrong places, mainly in jails.”

Freiberg’s views were shared by Victorian Aboriginal Legal Service chief executive Nerita Waight, who said the government should stop dithering on raising the age of criminal responsibility.

She said Victoria should lift the age to at least 14 with no exceptions.

“This is also something that stakeholders have been briefing the government on a near constant basis when it comes to justice issues, just like we have with bail [reforms],” Waight said.

“Let’s just move.”

As of this month, there were no children aged 10 to 12 in Victoria’s youth justice system, but there were eight aged 13 or 14.

Andrews said he was not prepared to wait until the next Council of Attorneys-General meeting in April to start the process. He refused to say whether he supported lifting the age to 12 or 14, but said there could be a different age for serious crimes.

Aboriginal and Torres Strait Islander children aged 10 to 17 are six times more likely than non-Indigenous children, on a per-capita basis, to be in youth detention in Victoria.

Nationally, 10-year-olds can be considered criminally culpable, but federal, state and territory attorneys-general late last year released a draft report that recommended raising the [age of criminal responsibility](#) to 14. Attorneys-general previously agreed to consider lifting the minimum age to 12.

The Northern Territory government will raise the age of criminal responsibility to 12 from next year, the ACT will gradually increase it to 14 by

2027, and the Tasmanian government said it would lift the minimum age on incarcerating youth to 14, but keep the age of criminal responsibility at 10.

The Queensland government ruled out raising the age in the foreseeable future as part of its tough-on-crime 2020 election campaign.

The Greens and the Law Institute of Victoria also said the state should raise the age to 14, not 12, with extra investment in intervention and prevention.

Law Institute of Victoria president Tania Wolff said that was the minimum standard set by the United Nations and was backed by medical research about the cognitive development of children.

The Greens spokeswoman for justice, Katherine Copsey, said incarcerated children were more likely to have ongoing contact with the prison system, “not due to their own complex needs, but because of the way our society chooses to respond”.

But shadow attorney-general Michael O’Brien said there were already significant protections to limit the prosecution of children and the government should not race ahead of the rest of the country.

“There are many constructive things the Victorian government can and should be doing to keep children out of the justice system.”