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The Chair  
Age of Criminal Responsibility Working Group  
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Dear Chair,  
Thank you for the opportunity to make a submission to the Age of Criminal Responsibility Working Group.

This submission addresses questions 1, 2, and 3 of the terms of reference but has relevance to other questions.

*1. Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only?*

There is a compelling case for raising the age of criminal responsibility across Australia to at least 14 years, and substantial evidence that dealing with young children within the current framework of the juvenile justice system is ineffective, unfair and harmful. There is an urgent need to ‘minimise the social harm’ that arises from criminal justice involvement and ‘decriminalise social need’ of children (Goldson 2013, 121-2).

Comprehensive overviews of this evidence are available in a number of recent reports (Cunneen 2020; Jesuit Social Services, 2019a).

Raising the age of criminal responsibility does not mean abandoning children and failing to address their needs. Pathways to support outside the criminal justice system can and must be developed (O’Brien and Fitz-Gibbon 2017). International research indicates that there are alternative models available to respond to young people outside the criminal justice system, and also that there are sub-optimal models that are best avoided (Cunneen 2020).

Australian inquiries (Royal Commission into the Protection and Detention of Children in the Northern Territory 2017; NSW Parliament Committee on Law and Safety 2018) have documented feasible alternative approaches, such as diversionary programs, and good practice in the form of multi-disciplinary programs that address factors that

underly behaviours that at present are dealt with by criminalisation (see also Jesuit Social Services, 2019a).

**The age of criminal responsibility should be raised to at least 14 years, for the following reasons:**

**i) The age of criminal responsibility in Australia is low, and out of step with global norms**

Comparative research indicates that the age of criminal responsibility in Australia is low, and out of step with global norms (Cunneen 2020; Urbas 2000). Hazel (2008) found that the median age of criminal responsibility across 86 countries was 14, and that there has been a trend for countries to increase the age of criminal responsibility. Experience also demonstrates that the higher age of criminal responsibility in European countries is not associated with higher crime rates (Goldson 2013).

**ii) Human Rights: Australia does not fully conform to the UN Convention on the Rights of the Child.**

The UN Committee on the Rights of the Child, in their concluding observations about Australia, expressed serious concern about the ‘very low age of criminal responsibility in Australia’ and recommended that it be raised to 14 years (2019, 13 [47, 48]). Further, it urged the use of non-judicial measures such as diversion, mediation and counselling for children accused of criminal offences.

The UN Global Study on Children Deprived Of Liberty has recommended to the General Assembly that ‘States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age’ (Nowak, 2019, [109]).

**iii) Child development and health**

Reviews of research concerning neuro-science and cognitive development have argued that the current legal position is a poor fit with developments in those disciplines and incoherent (Delmage, 2013; Van der Kolk B 2003, 2007 as cited by O’Brien and Fitz-Gibbon 2017). Insights from those disciplines point to the need to increase the age of criminal responsibility to at least 14 years in recognition that brain development, cognitive function and moral reasoning develop over time and that differences among children of a similar age are more marked for younger children.

The AMA (2102) has pointed to the high levels of ill-health and social disadvantage, and the distinctive needs of children in the criminal justice system and especially those in custody. One WA study (Bower *et al* 2018) found very high levels of FASD and severe neurodevelopmental impairment among children in detention, especially Aboriginal children, most of which had not been diagnosed previously. Criminal justice involvement risks exacerbating pre-existing conditions.

The AMA (AMA and Law Council of Australia n.d.) and the Royal Australasian College of Physicians (RACP 2019) strongly advocate raising the age of criminal responsibility to 14 years.

#### **iv) Vulnerability**

Children under 14 years old in contact with the criminal justice system are among the most vulnerable. Many have complex needs (Baldry, Briggs, Goldson, and Russell, 2018) that may arise from factors such as disability, disrupted education, trauma, abuse or neglect, or the loss or incapacity of a parent.

Children in out of home care are over-represented in the criminal justice system (McFarlane 2017) and Indigenous children are especially over-represented among those children that ‘cross-over’ between out of home care and criminal justice (Jesuit Social Services 2019b, 10; Victorian Sentencing Advisory Council 2019).

Victorian research indicates that the younger children were when first sentenced, the more likely they were to be known to child protection, and this was the case for 54% of children aged 10-13 years (Victorian Sentencing Advisory Council 2019, 27).

The criminal justice system is not equipped to deal with complex needs. Moreover, contact with the criminal justice system can be criminogenic and exacerbate disadvantage (O’Brien and Fitz-Gibbon 2017). There is an urgent need to ‘decriminalise social need’ (Goldson 2013).

#### **v) Early contact with the criminal justice system is associated with ongoing involvement with the criminal justice system**

Criminal justice system involvement at an early age does not benefit young people and does not contribute to making the community safer.

The Australian Institute of Health and Welfare report, *Young people returning to sentenced youth justice supervision* (AIHW 2019a, 8), demonstrates that the younger a child when they received a supervised community order or youth detention, the more likely they were to return to youth detention.

Of children whose first community-based supervision occurred at age 10-12 years, a staggering 90% returned to a supervised sentence by age 18yrs; the percentage among children who were 13 years at their first community-based supervision was 79%. These figures were even higher for children who were first sentenced to detention at a young age; 94% of those sentenced to detention at age 10-12 years returned a supervised community order or youth detention by age 18 years.

The figures were much higher for Indigenous children than for other children.

NSW research reinforces the need for diversion of young people from the criminal justice system. Weatherburn and Ramsey (2018) found that young people whose first contact with the criminal justice system occurred between ages 10-14 years had significantly more subsequent court appearances and custodial penalties than others and that this difference was much greater for Aboriginal children.

#### **vi) Indigenous children: The low age of criminal responsibility in Australia has a disproportionate impact on Indigenous children**

While the number and rate of young people receiving a supervised community order or youth detention across Australia has been falling over the past 5 years, the level of over-

representation of Indigenous children has increased (Australian Institute of Health and Welfare (2019b, 33). They were 17 times more likely than other children to be receiving a supervised community order or youth detention; in 2017-18, Indigenous children accounted for almost half (48%) of all children on supervised community orders and 56% of those in detention (AIHW 2019b, 9).

The age profile for Indigenous children in detention, or on supervised community orders is younger than for non-Indigenous children, and Indigenous children make up the overwhelming majority of those aged less than 14 years in detention, or on supervised community orders (AIHW 2019b, Tables s5a, s 5b).

A current inquiry by the Victorian Commission for Children and Young Peoples is examining the over-representation of Aboriginal children and young people in Victoria's youth justice system and receiving submissions on alternative approaches that are more culturally appropriate and likely to be more effective responses to Indigenous young people (e.g. Jesuit Social Services 2019b).

Weatherburn and Ramsey (2018,5) found that the proportion of Aboriginal children in NSW making their first contact with the criminal justice system at ages 10-12 years was between *30 and 56* times higher than other children. Contact with the criminal justice system for Aboriginal children in NSW rises from age 10 and peaks at age 14, before declining and by age 22 is little different from that for non-Aboriginal people. Among those aged 10-14 years at their first contact with criminal justice, the average number of further custodial sentences over the next 25 years was six for Aboriginal people and four for others (Weatherburn and Ramsey 2018, 7).

These data indicate the potential for substantial benefits – to children, families, communities and cost savings for governments - arising from prevention and forms of early intervention that divert Aboriginal children, especially in the 10-14 year age range, from the criminal justice system. Indigenous, community- led initiatives such as Just Reinvest NSW show great promise (<http://www.justreinvest.org.au/>).

#### **vii) Inconsistencies between civil and criminal provisions**

Goldson (2013) provides examples of the absurdity and incoherence of the differences between a myriad (higher) civil age thresholds (e.g. with respect to work, medical treatment, driving, banking, entering a contract) and the lower age of criminal responsibility in England and Wales. The same argument can be applied to Australia and there are many examples that could be used to demonstrate that point.

*2.If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)?*

For the reasons set out above the age of criminal responsibility should be raised to at least 14 years. This should apply to all criminal offences. There is no acceptable principled basis for drawing distinctions based on offence types.

*3.If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of doli incapax (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained?*

**Doli incapax does not adequately protect young people.**

Research in NSW (Cunneen 2020) and Victoria has demonstrated that doli incapax is inadequate to protect young people from the negative effects of criminal justice involvement (O'Brien and Fitz-Gibbon, 2017).

There are differences between statutory and common law constructions of doli incapax across Australia and disparities in its use and application within jurisdictions. It is not used for all children aged 10-13 years (O'Brien and Fitz-Gibbon, 2017, 142).

Other problems identified by research include, inter alia, that in practice the onus has shifted from the prosecution to defence, along with the burden of funding any assessments and that the assessments are discretionary; legal counsel are not trained in child development; practice is inconsistent, especially in regions without magistrates and practitioners with expertise relevant to children and there are concerns about the discriminatory application and effects for Aboriginal children (Cunneen 2020).

Even if these very significant failings of doli incapax could be addressed, there are other very substantial concerns about the negative effects of criminalisation of young children that are not addressed by doli incapax.

Doli incapax does not protect young people from potentially harmful policing practices.

Recent research in NSW has demonstrated police use of strip searches (Grewcock and Sentas 2019) and oppressive policing against children as young as 11 years associated with the Suspect Target Management Program (Sentas and Pandolfini 2017, 13-4; Law Enforcement Conduct Commission 2020). A disproportionate number of Indigenous children were the targets of STMP.

Doli incapax does not protect children from the effects of bail, and the attendant intrusions and risks associated with police compliance checks and breach of conditional bail.

Doli incapax does not protect children from the damaging effects of remand in juvenile detention such as separation from families and communities, loss of education and they are at heightened risk of recidivism. In 2017-18, on an average day around 60% of children in detention were unsentenced (AIHW 2019, 16).

In NSW the problem of young children being remanded in juvenile detention centres, not because they pose a risk to the community, but because they lack suitable accommodation was identified more than a decade ago but has not yet been addressed (NSW Parliament Committee on Law and Safety 2018, 48-51). The problem was identified as being greater among the very young, and for girls (Noetic 2010, 22; Wood 2008, 559).

Raising the age of criminal responsibility would mitigate against young children being placed in juvenile detention facilities for want of safe housing and ensure that the obligation to house children is directed to more appropriate agencies.

**Conclusion**

The criminalisation of young children is counter-productive and does not make the community safer. Raising the age of criminal responsibility should proceed along with opening up more productive pathways to assist and support young children and their

families and address underlying factors that make them vulnerable to criminalisation. Indigenous children and families will be best served where these alternatives to criminalisation are community-led. The available evidence and the growing consensus across legal, criminological, medical sectors, and among non-government agencies supports this approach.

Yours sincerely,



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