Children in Care Collective

Submission to the Commissioner for Children and Young People Tasmania on raising the age of criminal responsibility

INTRODUCTION

The Children in Care Collective was formed in 2016 by a group of out-of-home care service providers and leading experts in working with children with complex needs in out-of-home care.

The aim of the Collective is to share experience, discuss best practice informed by research, provide advocacy and learn from policy and practitioner experts in out-of-home care. The Collective seeks to address solutions to difficult systemic practice issues faced by the sector and to improve outcomes for children and young people with complex needs living in out-of-home care. The Collective's website is at http://childrenincarecollective.com.au/.

Members of the Collective are: Allambi Care; Anglicare NSW South, NSW West and ACT; Anglicare Sydney; CareSouth; Key Assets; Life Without Barriers; Mackillop Family Services; Marist180; Settlement Services International; Institute of Child Protection Studies (ICPS) - Australian Catholic University; Australian Centre for Child Protection (ACCP) - University of South Australia.

We are making this submission because our work focuses on children with complex needs in out-of-home care and all too often these children and young people are over-represented in the juvenile justice systems of all states and territories in Australia. We welcome the opportunity to contribute to a discussion about the importance of raising the age of criminal responsibility as one way in which we can prevent children in care moving from the care system into the criminal justice system.

The Commissioner may publish, refer to or quote directly from this submission and may name the Children in Care Collective as the source of the response in relevant publications or communications with third parties.

RESPONSES TO SURVEY QUESTIONS

Question 1a.

If the minimum age of criminal responsibility is raised in Tasmania (e.g. to 14), what evidence-based alternative programs, interventions or supports would be required to effectively address the underlying needs of children aged below the minimum age who would otherwise be dealt with in the criminal justice system because of their behaviour?

Youth offending is closely linked to disadvantage. There is a wealth of evidence that children who offend are highly likely to have experienced one or more of the following adverse experiences: child abuse and neglect, disability, mental illness, drug and alcohol abuse, exposure to crime and violence,

or homelessness. Punishment of a child in these circumstances, where the question of intent cannot be established, is not justified nor does it help prevent recurrence.

Disability organisations, for example, have argued that 'the high incarceration rate for children with disability is due to the failures in mental health, child protection, housing, disability and community service systems to provide appropriate assessment and supports' (Senate Standing Committee on Community Affairs, *Protecting vulnerable children: A national challenge* (2005) chapter 5 cited in Australian Human Rights Commission *Review of the age of criminal responsibility* Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, February 2020).

The underlying needs and disadvantages of children are best addressed through investment in family support, early intervention and therapeutic/diversionary services to address the risk factors that lead to offending behaviour. The Tasmanian Child and Youth Wellbeing Framework provides a more appropriate systems framework for this work than the criminal justice system, enabling as it does support for the holistic needs of the child, the underlying causes of their offending, and the needs of their family and communities.

It is the Children in Care Collective's submission that there are a range of evidence-based programs already employed in numerous jurisdictions of Australia to divert children in their early years of adolescence from the criminal justice system. These programs often help children and families to work together to address the underlying risk factors that lead to offending behaviour and include:

- In NSW, the New Street Adolescent Services, an early intervention program delivered by NSW Health targeted to address harmful sexual behaviours displayed by children aged 10-17 years. This program has an evidence informed model of operation that involves working with the entire family unit. A 2014 evaluation of the New Street Services by KPMG found that the service has achieved significant outcomes with young people and their families, with positive impacts for both individuals and the child protection system as a whole. The evaluation included a cost benefit analysis, which identified a significant net economic benefit attached to the completion of New Street compared to all alternative scenarios.[1]
- Youth on Track, a program delivered by the NSW Department of Justice, is an early intervention scheme for children aged 10-17 that identifies and responds to young people at risk of long term involvement in the criminal justice system.
- The Rural Residential Rehabilitation Adolescent Alcohol and Other Drugs Services in Dubbo and Coffs Harbour NSW target young people aged between 13 and 18, both male and female, who are client of Youth Justice NSW and have a history of significant alcohol and other drug use and offending behaviour.[2]
- The Panyappi Indigenous Youth Mentoring Program from South Australia is an early intervention program targeting Indigenous youths aged between 10 – 18 years who are at risk or are in the early stages of contact with the youth justice system. The program employs full-time mentors

[1] KPMG, 2014. *Evaluation of New Street Adolescent Services Health and Human Services Advisory* [available online at https://www.health.nsw.gov.au/parvan/hsb/documents/new-street-evaluation-report.pdf]
[2] Legislative Assembly of New South Wales, Law and Safety Committee 2018 *The Adequacy of Youth Diversionary Programs in New South Wales* [available online at https://www.parliament.nsw.gov.au/ladocs/inquiries/2464/Report%20Adequacy%20of%20Youth%20Diversionary%20Programs%20in%20NSW.PDF]

with low caseloads to allow mentors to engage intensively with the youths to build voluntary relationships of trust.[3]

- The Tiwi Islands Youth Development and Diversion Unit offers young people aged 10-17 the opportunity to forego a criminal record in exchange for agreeing to comply with beneficial voluntary conditions such as participating in a youth justice conference, issuing apologies to the victim, attending school and undertaking community service.[4]

In addition, some promising practices and case examples of prevention and early intervention programs for Indigenous young people have been identified by Higgins and Davis. Their 2014 report identifies the following effective practices:

- programs that are designed for the right participants and address identified risk factors
- adequately resourced interventions that are based on clear program logic
- family-based programs, including behavioural parent training
- community involvement and engagement (including Indigenous-specific programs where possible)
- cultural appropriateness and cultural competence at all levels of program design and delivery
- effective collaboration across organisations and between Indigenous and non-Indigenous individuals and communities
- addressing multiple and complex needs by adopting a holistic and comprehensive approach.[5]

Question 1b.

Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (e.g. to 14), should a higher minimum age of detention be introduced (e.g. 16)? If this was to occur, what evidence-based alternative programs, interventions or supports would be required for those children aged below the minimum age of detention?

The United Nations Committee on the Rights of the Child General Comment 24 (2019) makes it clear that the leading principles for the deprivation of liberty of any child are: (a) the arrest, detention or imprisonment of a child is to be used only in conformity with the law, only as a measure of last resort and for the shortest appropriate period of time; and (b) no child is to be deprived of his or her liberty unlawfully or arbitrarily. The UNCRC also states that children should not held in transportation or in police cells, except as a measure of last resort and for the shortest period of time, and that they are not held with adults, except where that is in their best interests.

Alternatives to the detention of any child should include increased investment in and implementation of therapeutic programs and strategies that seek to address the root causes rather than symptoms of disadvantage and prevent children coming into contact with the criminal justice

[3] Ware V-A, 2013. Mentoring programs for Indigenous youth at risk *Resource sheet no 22, Closing the Gap Clearinghouse*, Australian Institute of Health and Welfare [available online at https://aifs.gov.au/publications/mentoring-programs-indigenous-youth-risk]

[4] Stewart J, Hedwards B, Richards K, Willis M and Higgins D 2014 Indigenous youth justice programs evaluation *Special report, Australian Institute of Criminology* [available online at https://www.aic.gov.au/sites/default/files/2020-05/Indigenous-Youth-Justice-Programs-Evaluation.pdf]

[5] Higgins D and Davis K, 2014. Law and justice: prevention and early intervention programs for Indigenous youth *Resource sheet no. 34, Closing the Gap Clearinghouse*, Canberra: Australian Institute of Health and Welfare & Melbourne: Australian Institute of Family Studies [available online at https://aifs.gov.au/publications/law-and-justice]

system once they reach the age of criminal responsibility. Such programs and strategies should be aimed at the particularly vulnerable groups discussed above.

Question 2.

How should the overrepresentation of Aboriginal and Torres Strait Islander children in our criminal justice system inform options for the reform of Tasmania's laws on the minimum age of criminal responsibility?

Reasons for the overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system include legal and policy factors, such as restrictive bail laws and conditions and mandatory sentencing laws, and socio-economic factors including a history of social disadvantage, cultural displacement, trauma and grief, alcohol and other drug misuse, cognitive disabilities and poor health and living conditions. (See, for more detail, Australian Human Rights Commission reports *Information concerning Australia's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (30 October 2017) and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009).*

Raising the age of criminal responsibility will, in itself, decrease the rate of overrepresentation of Aboriginal and Torres Strait Islander children under youth justice supervision and in detention.

Criminalising the behaviour of young and vulnerable Aboriginal and Torres Strait Islander children simply continues the cycles of disadvantage and makes no positive contribution. Supporting Aboriginal and Torres Strait Islander children to thrive in community and culture rather than become entrenched in the criminal justice system would benefit families and communities more broadly. Reducing the contact of Aboriginal and Torres Strait Islander children and families would also result in financial savings that could be re-invested in community-led initiatives to support children at risk of harm and harmful behaviours.

Aboriginal and Torres Strait Islander-controlled organisations must be at the centre of program design and delivery for Aboriginal and Torres Strait Islander children and their families.

Question 3a.

What might be the best approach for protecting the community from the rare cases of serious anti-social or harmful behaviours committed by children aged below the minimum age of criminal responsibility?

The reform should not allow children to escape responsibility for their actions, but in line with the *Concluding Observations of the Committee on the Rights of the Child* (2019), the Tasmanian Government should actively promote and resource non-judicial measures including therapeutic support, diversionary programs and restorative justice. There is evidence that incarceration of children is criminogenic: the Australian Institute of Health and Welfare has reported on the high levels of recidivism among children subject to custodial sentences (AIHW *Young people returning to sentenced youth justice supervision 2017-2018*, 2019 cited in Public Interest Advocacy Centre Submission to Council of Attorneys General – Age of Criminal Responsibility Working Group review). Detention of itself fails to protect the community. It is not accepted that it is the best approach even for rare cases of serious anti-social or harmful behaviours.

Question 3b.

If the minimum age of criminal responsibility is raised (e.g. to 14 years), what alternative legal frameworks may be required to ensure children aged below the minimum age who exhibit serious anti-social or harmful behaviour receive appropriate reparative interventions and supports directed at addressing the risk factors for their behaviour? (What sort of competent legal authority should make the decision about the appropriate pathway for the child to take? What criteria or factors should inform that decision?)

The Children in Care Collective submits that a specialised youth justice court staffed by judicial officers and administrative / court staff who receive additional targeted training would be well placed to make decisions in relation to the appropriate pathway for young offenders. It is our view that traditional penal methods of reducing juvenile crime including juvenile incarceration, overly strict bail conditions and trying juvenile offenders in adults courts are ineffective due to the stigmatising effect on young offenders, criminal behaviour resulting from collective detention, lack of pro-social influences and failure to address the causes of the offending behaviour.

In a study conducted by Griffith University that examined the impact of police cautioning on future youth offending on a birth cohort from 1984, controlled for key risk factors, found that young people who received cautions were significantly less likely to reoffend than young people who appeared in court. This is compelling evidence that a less intrusive youth justice response, even if it is delivered through a court system, can have a positive impact on future propensity to commit crimes.[6]

From a crime prevention perspective, diversion programs and alternative dispute resolution are useful alternative legal frameworks for children below the minimum age. The Victorian experience is that Therapeutic Treatment Orders are a useful tool for managing children for whom a therapeutic intervention is more appropriate than a justice response.

There are existing processes for keeping children in secure facilities in the rare circumstances that their behaviours pose a serious risk to the public and themselves. For example, in New South Wales, involuntary admission to a mental health unit is available under the *Mental Health Act 2007 (NSW)* including in relation to children aged 10 to 13 years.

Question 3c.

If the minimum age of criminal responsibility is raised (e.g. to 14 years), but not for all offences, in what contexts or for what offences should it not be raised — should there be 'carve outs' for serious offences like murder or sexual assault?

There should be no 'carve outs' even for serious offences.

Question 3d.

If the minimum age of criminal responsibility remains less than 14 years, or is raised to 14 for some offences only, the presumption of doli incapax would continue to have application in any criminal proceedings against children aged less than 14. Could the test for doli incapax be clarified, refined, or expressed differently in legislation to ensure that it produces more consistent results and operates as

[6] Dennison, S., Stewart, A. & Hurren, E. 2006. Police cautioning in Queensland : the impact on juvenile offending pathways*. Trends and Issues in crime and criminal justice. No 306*. Australian Institute of Criminology. [available online at https://www.aic.gov.au/publications/tandi/tandi306]

intended — in particular that it is a presumption for the prosecution to rebut, rather than a defence that must be raised by the defence?

The UN Committee on the Rights of the Child has argued against systems such as *doli incapax* that set a low minimum age of criminal responsibility but have a higher age below which sufficient maturity must be demonstrated. As quoted in the Australian Human Rights Commission (AHRC) Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, the UNCRC points out:

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

The AHRC also quotes the former Law Council President, Arthur Moses, who suggested that *doli incapa*x is extremely difficult to apply in court:

> *the presumption continues to wreak confusion as to whether the defence or the prosecution bears the burden of proving that a child knew their conduct to be wrong. This leads to errors and results in children being held in custody for lengthy periods of time before the presumption can be led or tested in court, and the child acquitted.*

The Children in Care Collective supports the AHRC recommendations set out in its submission:

> *Recommendation 2*
> That the Australian Government should commission a national review of the operation of doli incapax and its effectiveness in providing protection to children who lack the capacity to understand that what they did is seriously wrong
>
> *Recommendation 3*
> If doli incapax is retained, Australian Governments should:
>
> - fund legal education for magistrates, prosecution, defence and children in the youth justice system on doli incapax
> - adequately resource the legal system to apply the doli incapax test in all cases and ensure pretrial assessments of a child's cognitive and mental capacity are conducted.

Question 4.

What legal, federal, or other implications might arise from Tasmania raising the minimum age of criminal responsibility if other Australian jurisdictions do not?

There should be no substantive implications for any situation where jurisdictions have different (or differently worded) criminal offences. These differences have existed since time immemorial.

In relation to federal legislation, most obviously, if the age of criminal responsibility for federal offences remains at 10 years and Tasmania raises the minimum age to 14, it would be possible for a 10-year-old to be charged with a federal crime even if they lived in Tasmania. While the CCC would seek to have the federal age similarly raised as a matter of good policy, this should not be a reason to defer the Tasmanian reform.

Question 5.

Are there are any unforeseen consequences of raising the minimum age?

The members of the Children in Care Collective do not consider that there are likely to be any unforeseen consequences of raising the minimum age of criminal responsibility in Tasmania as the benefits of doing so far outweigh any disadvantages. Those who argue against raising the minimum age cite community safety as the most important criteria to support their argument, and that without criminal sanctions a child who commits a criminal offence gets the message that they can "get away" with criminal behaviour.

In its submission to the Council of Attorneys General working group review, the Public Interest Advocacy Centre strongly countered this argument:

> *In advocating for the minimum age of criminal responsibility to be raised to at least 14, we are not arguing that actions should not have consequences. Rather, that those consequences should not be harmful, counterproductive, contrary to evidence and unjust.*
>
> *The minimum age of criminal responsibility considers only the age at which a person can be charged and be held responsible for their actions by the criminal law. There are many ways in which children can be effectively supported to take responsibility for their actions which avoid the blunt, harmful and criminogenic processes of the criminal justice system.*
>
> *Engagement with diversionary and early intervention services and supports is no easy out for young children engaged in anti-social behaviour. This is particularly so considering the challenging personal circumstances many of the children in conflict with the law face. We must move away from a narrative of accountability that emphasises reactive measures and the imposition of penalties and recognise the hard work involved in engagement in diversion and restorative justice processes that address the underlying causes of offending, and ultimately, improve community safety.*

(Public Interest Advocacy Centre Submission to Council of Attorneys General – Age of Criminal Responsibility Working Group review, p15)

The Children in Care Collective submits that there is overwhelming evidence to indicate that the best way to treat youth offending is through a properly resourced public health style response that addresses underlying need and disadvantage, and that the availability of additional funding for the development of this response could be one consequence of raising the minimum age.

FURTHER QUERIES

If there are any further queries about this submission please direct them to Roderick Best, Chair of the Children in Care Collective at Roderick.Best@lwb.org.au .