

## **Submission of Youth Law Australia to the Minimum Age of Criminal Responsibility (MACR) Survey**

### **Acknowledgment of Country**

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation as the custodians of the land on which we work. Youth Law Australia also acknowledges the palawa people of lutruwita as the original and ongoing custodians of the land now known as Tasmania. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

### **Introduction**

Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time and receive free and confidential legal advice and help. We are also dedicated to addressing the human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

We welcome the work of the Tasmanian Commissioner for Children and Young People on the important issue of raising the minimum age of criminal responsibility. We are delighted to have the opportunity to respond to the questions that form part of the Commissioner's survey.

Raising the minimum age of criminal responsibility is not only consistent with international human rights law, it also has the potential to result in a new approach to dealing with children and young people who engage in problematic behaviour, focused on their welfare. Such an approach has the potential to deliver great benefits not only to young people and their families, but to society more generally.

In this submission, we have responded to each of the Commissioner's survey questions. In the context of these questions, Youth Law Australia recommends that:

1. The Tasmanian Government commit to raising the minimum age of criminal responsibility to at least 14, and the minimum age of detention to 18.
2. The Tasmanian Government establish an independent review or expert working group to conduct a systematic assessment of the programs, interventions and supports that are and should be in place for at-risk children and young people, and make recommendations about a pathway forward for Tasmania. This review should have clear terms of reference, and be required to report within a defined period of time (for example, 6 months after establishment).
3. The Tasmanian Government take active steps to progress reforms to the laws and other arrangements for the sharing of information about the safety and wellbeing of children and young people, in line with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (including in partnership with the taskforce led by the National Office for Child Safety). The

Tasmanian Government should encourage this taskforce to commit to a timeframe for completing its work, which should be made public.

#### **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 Law Australia considers that raising the age of criminal responsibility should be used to recast 'offending behaviour' by young people as problematic behaviour. While programs, interventions and supports will clearly need to be age-appropriate, from a policy perspective we consider the approach to children aged between 10 and 14 (at a minimum), should be the same as for those under 10 who cannot currently be held criminally responsible for their behaviour in Tasmania. That approach should be based on prevention and early intervention by culturally-safe and trauma-responsive services (including education, health and community services).

It is critical that the development and implementation of supports and interventions for young people is evidence-based. This should be informed by research and data on the offences young people in Tasmania have been charged with, as well as the personal circumstances of young people who come into contact with the criminal justice system. There is a lack of published data and research specific to Tasmania in this area.

Notwithstanding the lack of data specific to Tasmania, data generally suggests that young people who are male, Aboriginal and Torres Strait Islander, from remote areas or from low socioeconomic areas are over-represented in the criminal justice system.<sup>1</sup> The overlap between children and young people in the child protection system and in the juvenile justice system has also been well-documented.<sup>2</sup>

Most young people who engage in criminal behaviour have disadvantaged backgrounds, and complex needs. Research and reviews have demonstrated that other relevant risk factors include substance abuse, experience of trauma, issues at home including family violence and disengagement from school (including because of suspensions or expulsions), mental health and cognitive disability.

For example, a 2005 review by the Department of Health and Human Services of resident safety at the Ashley Youth Detention Centre noted:

- in many cases, residents of [Ashley] present with significant co-morbidities; some have illicit drug additions, challenging behaviours or mental health issues;

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<sup>1</sup> See AIHW, Youth Justice in Australia, 2018-19, pages 8-11: <https://www.aihw.gov.au/getmedia/a5a364b9-fe69-4d02-9c93-1965a69a3d93/aihw-juv-132.pdf.aspx?inline=true>.

<sup>2</sup> See, for example, Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision 2015–16* Data linkage series no. 23. Cat. no. CSI 25 (2017, Canberra). <https://www.aihw.gov.au/getmedia/06341e00-a08f-4a0b-9d33-d6c4cf1e3379/aihw-csi-025.pdf.aspx?inline=true>.

- some residents on remand at Ashley are there as much for reasons such as lack of accommodation, as for their offences.<sup>3</sup>

We consider that there is a great correlation between factors that are relevant to problematic behaviour by young people, and the domains of the Tasmanian Government Child and Youth Wellbeing Framework, including being loved and safe, having material basics (such as adequate and stable housing), being healthy, and learning.<sup>4</sup> For this reason, there would be a considerable benefit in addressing this question as part of the broader wellbeing strategy for children and young people, which the Tasmanian Government has committed to introducing.

#### The need for responses that address the underlying causes of problematic behaviour

Joined-up preventative and early-intervention services for children and young people, which address the complexity of the needs of those at risk of engaging in problematic behaviour, are needed irrespective of whether the minimum age is raised.<sup>5</sup> The Australian Medical Association has stated that ‘Early intervention and prevention, rather than criminalisation, is important because it can substantially reduce the risk of secondary medical, social, emotional and behavioural problems, especially in younger children.’<sup>6</sup>

Internationally, the United Nations Committee on the Rights of the Child has called for child-friendly and multidisciplinary responses to the first signs of behaviour that would constitute an offence, and stated that these should ‘be developed to reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience’.<sup>7</sup>

There is work to be done on this front in Tasmania. A 2016 report commissioned by the Department of Health and Human Services found, for example, that ‘Tasmania does not have the breadth or depth of prevention, early intervention and diversionary services required to address the complex needs of young people.’ That report noted that Tasmania has limited residential drug and alcohol treatment facilities (and that there are no secular options) and no residential mental health places specifically for children and young people.<sup>8</sup> It also pointed to a siloed approach to service delivery across government and non-

<sup>3</sup> DHHS, *Review for the Secretary DHHS of Resident Safety at Ashley Youth Detention Centre*, September 2005 at page 10:

[https://www.health.tas.gov.au/\\_data/assets/pdf\\_file/0003/9282/Ashley\\_Review\\_Report\\_Nov.pdf](https://www.health.tas.gov.au/_data/assets/pdf_file/0003/9282/Ashley_Review_Report_Nov.pdf).

<sup>4</sup> See Tasmanian Child and Youth Wellbeing Framework:

[https://www.strongfamiliesafekids.tas.gov.au/\\_data/assets/pdf\\_file/0023/5549/1-Tasmanian-Child-and-Youth-Wellbeing-Framework-Web.pdf](https://www.strongfamiliesafekids.tas.gov.au/_data/assets/pdf_file/0023/5549/1-Tasmanian-Child-and-Youth-Wellbeing-Framework-Web.pdf).

<sup>5</sup> See for example Report by Noetic Solutions for the Tasmanian Government Department of Health and Human Services, *Custodial Youth Justice Options Paper*, October 2016 which found that Tasmania does not have the breadth or depth of prevention, early intervention and diversionary services required to address the complex needs of young people – see page 15.

<sup>6</sup> AMA submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review, 2 February 2020, page 3: <https://ama.com.au/submission/ama-submission-council-attorneys-general-age-criminal-responsibility-working-group-review>.

<sup>7</sup> United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children’s rights in the child justice system, paras 9, 11.

<sup>8</sup> Report by Noetic Solutions for the Tasmanian Government Department of Health and Human Services, *Custodial Youth Justice Options Paper*, October 2016 at page 15.

government organisations, which has meant that young people ‘have not been able to access the right services at the right time’.

### The need for a systematic approach

Youth Law Australia considers that the question of what interventions and supports are needed to respond to problematic behaviour by young people is a complex and important one, that must be approached systematically. In our view, issues papers, while informative, are not an appropriate mechanism for answering this question.

We understand that the Australian Capital Territory has commissioned an independent review to examine the impact of raising the age of criminal responsibility on young people, their families and support services, which is due to report in July 2021 in preparation for introducing a bill by the end of the year. This review should inform the consideration of this issue in Tasmania.

However, we consider there would be merit in Tasmania establishing its own independent review or expert and community working group to make recommendations and create a pathway for these reforms.

Such a review should include mapping of existing services and identification of gaps or limitations with reference to Tasmanian-specific research and data on young people who exhibit problematic behaviour, as well as consultation with on-the-ground service providers. It should also:

- review the efficacy of alternative programs, interventions and supports in other states and territories, and overseas which could be implemented in Tasmania
- consider systemic issues, such as breaking down silos and barriers to information sharing between organisations and government departments (including those responsible for child protection, health and education)
- address practical, economic and financial considerations<sup>9</sup>
- take a child rights approach to its terms of reference.

While we consider that such a review is critical, it should have short and defined time limits to ensure it does not become an excuse to delay this important reform. We would encourage the Tasmanian government to commit to raising the minimum age of criminal responsibility when announcing such a review.

### **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?**

Youth Law Australia strongly supports a separate, higher minimum age of detention.

The International Convention on the Rights of the Child requires Australia to ensure that detention or imprisonment of a child is used as a measure of last resort, and for the shortest

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<sup>9</sup> See the criticisms about a previous proposed Justice Reinvestment Framework for Tasmania in Matthew Willis and Madeleine Kapira, Australian Institute of Criminology, *Justice reinvestment in Australia: A review of the literature*, AIC Research Report 09, page 38.

appropriate period of time.<sup>10</sup> The best and most reliable way to achieve this, is to withdraw detention as an option for young people altogether.

There are numerous and compelling other reasons for keeping young people out of detention, including:

- the disproportionate number of Aboriginal and Torres Strait Islander children who are in detention across Australia, including in Tasmania<sup>11</sup>
- the research indicating the poor (mental and physical) health profiles and outcomes for children in detention<sup>12</sup>
- the high rates of recidivism for young people who spend time in detention,<sup>13</sup> and the widely recognised risk that incarceration fosters further criminality, particularly for young people<sup>14</sup>
- the costs of detention for children – in 2016 it was reported that the cost of running the Ashley Youth Detention Centre was more than \$9.4 million per year, despite accommodating only ten young offenders on any given day.<sup>15</sup>

As the Royal Commission into the Protection and Detention of Children in the Northern Territory observed:

*There are many considerations which, singly and in combination, establish that any apparent punishment and deterrent value of detention is far outweighed by its detrimental impacts, particularly for the minority group of pre-teens and young teenagers. The reality of this cohort's developmental status; the harsh consequences of separation of younger children from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth justice can interrupt the normal pattern of 'aging out' of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism.<sup>16</sup>*

It is important to underline that the Committee on the Rights of the Child has recommended that the minimum age of criminal responsibility be raised to **at least** 14 years. There are

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<sup>10</sup> United Nations, Convention on the Rights of the Child, article 37(b).

<sup>11</sup> Australian Institute of Health and Wellbeing, Youth Justice in Australia, 2018-19 at page 27.

<sup>12</sup> See discussion in Manfred Nowak, United Nations Global Study on Children Deprived of Liberty (November 2019) at 137.

<sup>13</sup> A 2016 report by Noetic Solutions for the Tasmanian Government Department of Health and Human Services, *Custodial Youth Justice Options Paper*, stated that the majority of young people in Tasmania reoffend within 6 to 12 months, and that the current custodial model does not effectively divert young people away from the custodial system. See page 11:

[http://www.health.tas.gov.au/\\_data/assets/pdf\\_file/0018/268020/99010\\_Custodial\\_Youth\\_Justice\\_Options\\_Paper\\_October\\_2016\\_-\\_Report\\_for\\_the\\_Tasmanian\\_Government.pdf](http://www.health.tas.gov.au/_data/assets/pdf_file/0018/268020/99010_Custodial_Youth_Justice_Options_Paper_October_2016_-_Report_for_the_Tasmanian_Government.pdf).

<sup>14</sup> See for example Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 Trends & issues in crime and criminal justice 3; Report by Noetic Solutions for the Tasmanian Government Department of Health and Human Services, *Custodial Youth Justice Options Paper*, October 2016 at page 11.

<sup>15</sup> See Report by Noetic Solutions for the Tasmanian Government Department of Health and Human Services, *Custodial Youth Justice Options Paper*, October 2016 at page 5.

<sup>16</sup> *Final report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Volume 2B, Chapter 27, page 419.

persuasive arguments for ensuring that detention, as the most severe response to problematic behaviour, is only an option for those who are much older than 14, or even better, those aged 18 or over.

## **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?**

The overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system in Tasmania, and elsewhere in Australia, is a national disgrace and in itself a persuasive argument in favour of raising the minimum age of criminal responsibility (and detention).

This overrepresentation points to the need for culturally-safe services designed specifically for young Aboriginal and Torres Strait Islander people by or in partnership with them and their communities. We note in the context of NSW, the observation that 'Top-down policy interventions and programmatic approaches developed by agencies without regard to or input from communities for whom the interventions are intended are not working.'<sup>17</sup>

New South Wales' recent experience with the Maranguka Justice Reinvestment Project, the first major pilot in Australia to implement an Aboriginal-led place-based model of justice reinvestment,<sup>18</sup> is instructive. A KPMG review of the outcomes of this project for 2017 found, among other outcomes, a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories.<sup>19</sup>

Assessing the project's outcomes for youth development, as well as outcomes for family strength and adult empowerment, KPMG identified the considerable impact of the project in economic and other terms. It estimated that the savings to NSW from this project were in the order of \$3.1 million in 2017, through impacts on the justice system and the broader local economy. The savings made were five times this project's operating costs in the same year.<sup>20</sup>

Reform of programs, services and interventions should occur in accordance with the principles of the national *Closing the Gap* agreement. Genuine engagement and reform in this area has the potential to assist Tasmania to meet its *Closing the Gap* targets.

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<sup>17</sup> Submission by Just Reinvest NSW to the NSW Legislative Council Select Committee Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody, September 2020, page 3: <https://www.justreinvest.org.au/wp-content/uploads/2020/10/JRNSW-submission-to-Select-Committee-Sept-2020-FINAL-.pdf>.

<sup>18</sup> See KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment*, 27 November 2018, page 6: <https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, page 24.

### 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?**

This question clearly raises definitional issues: what constitutes serious anti-social or harmful behaviours, and what offences would this include?

The evidence indicates that it is very rare that very serious offences (such as murder) are perpetrated by young people.<sup>21</sup> In our view, this is so rare that it shouldn't drive or skew the policy approach to raising the minimum age of criminal responsibility, although it is clearly an important issue.

Our view is as outlined earlier. Problematic behaviour by young people should be viewed as a health and welfare issue, with social services rather than legal institutions determining the appropriate response. There should be clear frameworks in place to identify at-risk behaviour early, and appropriate service pathways for young people at risk. The policy goal is to try and prevent young people from reaching the point where they engage in this behaviour.

In very serious cases, there are already existing legal frameworks in place for protecting young people and the community (including child protection and mental health frameworks). While these could undoubtedly be reformed and improved, additional frameworks should only be added when supported by a strong evidence base.

### 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?)**

In our view, and for the reasons set out earlier and in other literature on this issue, risk factors for anti-social or harmful behaviour are best addressed by therapeutic (encompassing health, education and wellbeing), rather than legal responses. In addition, we don't see a justification for approaching this question differently for those aged between 10 and 14, and those aged under 10 who cannot currently be held criminally responsible for their behaviour in Tasmania.

We note that there are already some legal frameworks in place that allow an authority to intervene where a child is at risk. For example, under the *Children, Young Persons and Their Families Act 1997* (Tas), the Secretary of the Department can carry out an assessment if he or she believes a child is at risk, and obtain information for that purpose.<sup>22</sup> A child can be at risk under this Act if for example, their guardian is unable or unwilling to exercise adequate

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<sup>21</sup> Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 Trends & issues in crime and criminal justice 3; Australian Bureau of Statistics, Record Crime 2019-20 financial year, Youth offenders.

<sup>22</sup> *Children, Young Persons and Their Families Act 1997* (Tas), s 18.

supervision and control, or if a child under 16 is not going to school regularly.<sup>23</sup> There are also provisions in that Act about short-term custody by the Secretary of a child, family group conferences, and care and protection orders.<sup>24</sup>

There is therefore a strong rationale for ensuring the child protection system is adequately resourced to intervene early where a child is at risk, and that there are adequate services and pathways for at risk children and young people, rather than new legal frameworks.<sup>25</sup>

There are also provisions under the *Mental Health Act 2013* (Tas) for various interventions. This includes, for example, the power of certain officials to take a person, including a child, into protective custody if they reasonably believe the person has a mental illness, may need to be assessed, and that their safety or the safety of others is likely to be at risk if they aren't taken into protective custody.<sup>26</sup>

### Improved information sharing arrangements

Information sharing between and within organisations is a critical part of ensuring that risk factors for young people are identified early, and that services work collaboratively and effectively to provide appropriate supports and interventions. Services, programs and interventions will only be effective in supporting young people with complex needs if they are able to work collaboratively and share information. Information sharing is also a critical aspect of preventing silos and duplication of service delivery.

As the Tasmanian Government noted in its response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse:

*The proactive sharing of information relevant to child safety and wellbeing has been a consistent theme of Child Protection and related inquiry recommendations over the last decade, including inquiries in Tasmania.*

*Sharing of information not only informs more timely risk assessment and decision-making, it also has capacity to drive earlier intervention and appropriate targeting of support services for at-risk children and families.<sup>27</sup>*

The Royal Commission's Final Report contained detailed discussion of and recommendations for reform of information sharing laws. That report noted that unlike some other jurisdictions, the information sharing laws in Tasmania are confined to the sharing of information about children who have already come to the attention of, or are

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<sup>23</sup> See *Children, Young Persons and Their Families Act 1997* (Tas), s 4.

<sup>24</sup> *Children, Young Persons and Their Families Act 1997* (Tas), s 21 and part 5.

<sup>25</sup> For discussion on the 'history of connection and separation between welfare and justice considerations', see for example Travers M., White R., McKinnon M (2013) *The Children's Court in Tasmania*. In Sheehan R., Borowski A (eds) *Australia's Children's Courts Today and Tomorrow. Children's Well-Being: Indicators and Research*, vol 7. Springer. For research on the 'cross-over' between youth justice and statutory child protection schemes, see, for example, Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision 2015–16* Data linkage series no. 23. Cat. no. CSI 25 (2017, Canberra). <https://www.aihw.gov.au/getmedia/06341e00-a08f-4a0b-9d33-d6c4cf1e3379/aihw-csi-025.pdf.aspx?inline=true>.

<sup>26</sup> See for example section 17.

<sup>27</sup> Tasmanian Response, Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, page 36: [https://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0010/418186/Tasmanian-Response-Child-Abuse-Royal-Commission.pdf](https://www.justice.tas.gov.au/_data/assets/pdf_file/0010/418186/Tasmanian-Response-Child-Abuse-Royal-Commission.pdf).



involved in the child protection system.<sup>28</sup> This does not assist in the identification of risk, or in early intervention and prevention.

We note that the Tasmanian Government told that Royal Commission that its key legislation relating to information sharing for the safety and wellbeing of children ‘have only broad references to information sharing and may, actively or passively, act as a barrier to contemporary information sharing needs’.<sup>29</sup> The Tasmanian Government has accepted in principle the Royal Commission’s recommendations, and has stated that it will work with the Australian Government-led National Taskforce to progress these reforms.<sup>30</sup>

Over three years have passed since the Royal Commission’s recommendations were handed down, and there does not appear to have been any notable progress in implementing the information sharing recommendations through this forum, or otherwise.<sup>31</sup> We note that some jurisdictions have taken steps to enhance information sharing in the interim.<sup>32</sup>

We consider there is a role for the Commissioner in advocating for reform in this area, including as part of measures put in place to ensure a successful transition to a higher age of criminal responsibility in Tasmania.

### **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?**

Youth Law Australia considers the minimum age of criminal responsibility should be raised to 14 for all behaviour that constitutes a criminal offence. There should be no ‘carve outs’. The reasons which support raising the minimum age apply equally to serious offences.<sup>33</sup>

Youth Law Australia agrees with the observations of the United Nations Committee on the Rights of the Child that:

*The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children’s development. The Committee strongly recommends that States parties*

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<sup>28</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Ch 3, Improving information sharing across sectors, page 210; *Children, Young Persons and Their Families Act 1997* (Tas), s 53B.

<sup>29</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Ch 3, Improving information sharing across sectors, page 163.

<sup>30</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Ch 3, Improving information sharing across sectors, page 163.

<sup>31</sup> See Tasmanian Government, Second Annual Progress Report and Action Plan 2020: Implementing the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, pages 12-13: [https://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0008/554849/Tasmanian-Government-Child-Abuse-Royal-Commission-Second-Annual-Progress-Report-and-Action-Plan-2020-FINAL.pdf](https://www.justice.tas.gov.au/_data/assets/pdf_file/0008/554849/Tasmanian-Government-Child-Abuse-Royal-Commission-Second-Annual-Progress-Report-and-Action-Plan-2020-FINAL.pdf).

<sup>32</sup> See for example Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, page 9; Victorian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse, page 9.

<sup>33</sup> See research into brain development and maturity of children, and capacity to engage with the criminal justice system. For example: Elly Farmer, ‘The age of criminal responsibility: developmental science and human rights perspectives’ (2011) 6(2) *Journal of Children’s Services*, 86, 87.

*abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.*<sup>34</sup>

Existing research and publicly available data suggest it is extremely rare that a young person under the age of 14 commits a very serious offence such as murder.<sup>35</sup> Harmful sexual behaviour by children and young people, such as a sexual assault, is a complex issue. Unsurprisingly, research suggests that many (but not all) children who engage in harmful sexual behaviours have experienced prior trauma or abuse.<sup>36</sup>

The Royal Commission into Institutional Responses to Child Sexual Abuse considered how to respond to children with harmful sexual behaviours in its final report. The Commissioners were of the view that the public health approach – encompassing three tiers of intervention – can be applied to preventing these behaviours.<sup>37</sup> It noted that research suggests that therapeutic interventions can reduce or eliminate children’s harmful sexual behaviours. The best practice principles developed by that Royal Commission provide a useful guide to addressing this behaviour.

#### **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 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 problems with the presumption of *doli incapax* (including its statutory manifestations) have been well-documented, and were the subject of a submission by Youth Law Australia to the Australian Council of Attorneys-General in February 2020.

We note also the comments of the United Nations Committee on the Rights of the Child that *doli incapax* and similar presumptions:

- were initially devised as a protective system, but have not proved so in practice
- leave much to the discretion of the court, and can result in discriminatory practices
- risk becoming a retrogressive position regarding the minimum age of criminal responsibility.<sup>38</sup>

Tasmania is one of a number of jurisdictions with a legislated presumption, instead of relying on the common law presumption. On its face, s 18(2) of the *Criminal Code Act 1924* (Tas) (entitled ‘Immature age’) requires a lower bar of proof than the common law test, in

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<sup>34</sup> United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children’s rights in the child justice system, para 25.

<sup>35</sup> Kelly Richards, ‘What makes juvenile offenders different from adult offenders?’ (Australian Institute of Criminology February 2011) 409 Trends & issues in crime and criminal justice 3.

<sup>36</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 20.

<sup>37</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 13.

<sup>38</sup> United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children’s rights in the child justice system, para 25.

that it only requires proof that a child has a capacity to know that an action was wrong (rather than actual knowledge).<sup>39</sup>

There are undoubtedly improvements that could be made to the statutory principle in Tasmania (and other jurisdictions). However in our view, the impact of the intractable practice issues in applying *doli incapax*, is that the principle is an inadequate justification for refusing to increase the minimum age of criminal responsibility in Australia. Any legislative reform would have to be tested in the courts over a period of time before problems or unintended consequences become apparent.

In addition, one of the insurmountable problems with this principle, however formulated, is that it does not prevent children from becoming involved in the criminal justice system in the first place. Commentators note that: 'while the presumption is in itself designed to remove children who lack the necessary capacity from the justice system, for this to be an effective safeguard such a response must occur at the earliest point and without requiring the child to spend prolonged periods of time within the bounds of the criminogenic justice system institutions'.<sup>40</sup>

#### **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?**

Plainly, differing ages of criminal responsibility in different jurisdictions is undesirable. However, this should not be a cause or excuse for delaying reform in this important area in Tasmania. Other states have indicated a willingness to raise the minimum age in the absence of national agreement. In addition, there is already inconsistency in the approach to the criminal responsibility of young people among jurisdictions, with a mixture of common law and statutory tests applying to those between the ages of 10 and 14.<sup>41</sup>

It should be noted that Tasmania has previously had a minimum age of criminal responsibility that was different from other jurisdictions. Until 2000, Tasmania had a minimum age of criminal responsibility of 7 – the lowest anywhere in Australia at the time.<sup>42</sup>

#### **Question 5.**

##### **Are there any unforeseen consequences of raising the minimum age?**

As with any reform, raising the minimum age of criminal responsibility will need to be accompanied by transitional measures. For example, services available to young people who are serving existing sentences or who are pre-sentence should not be withdrawn without adequate replacement. Other considerations include how the criminal records of people

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<sup>39</sup> See Ben Mathews, *Children's Criminal Responsibility in Australia: Some Legal, Psychological and Human Rights Issues*, (2000) 5 *Australia & New Zealand Journal of Law & Education*, 27-44 at 28. We note that there is case law suggesting that provision should be interpreted in the common law sense that if a child is proved to have the capacity to know, he or she is presumed to know in fact. See *M v AJ* (1989) 44 A Crim R at 383.

<sup>40</sup> Wendy O'Brien 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.

<sup>41</sup> Youth Law Australia, Submission regarding *Doli Incapax* and raising the minimum age of criminal responsibility for the Australian Council of Attorneys-Genera, February 2020.

<sup>42</sup> See Ben Mathews, *Children's Criminal Responsibility in Australia: Some Legal, Psychological and Human Rights Issues*, (2000) 5 *Australia & New Zealand Journal of Law & Education*, 27-44 at 28. This was amended by the Youth Justice (Consequential Amendments) Act 1999 (Tas).

who have been convicted of offences when they were below the minimum age of criminal responsibility should be treated or amended. These matters should be addressed by the review we have recommended be established.