



Faculty of Arts and Social Sciences
Faculty of Law

Comparative Youth Penalty Project

Submission to the Royal Commission into Victoria's Mental Health System

Raising the Age of Criminal Responsibility in Australia

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Dear Commissioners,

Thank you the invitation to provide a written submission to the *Royal Commission into Victoria's Mental Health System*. This submission is informed by the authors' experience in the criminalisation of people with mental health disorders and cognitive disability.

We are delighted to share our views and focus our submission on one aspect relevant to the Royal Commission Terms of Reference. Specifically, we draw on empirical research conducted by the authors to illustrate the negative impact of a low minimum age of criminal responsibility on the health and mental wellbeing of children in Victoria. Our submission recommends the age of criminal responsibility be raised to 14 years.

Yours sincerely,

Professor Eileen Baldry

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Youth Justice in Australia

1. On an average night in 2018, there were 980 children held in juvenile detention centres across Australia. A total of 54 per cent of them were Aboriginal and/or Torres Strait Islander children who are 26 times more likely than non-Indigenous children to be in detention.¹ A significantly larger number flow through police cells and juvenile detention centres each year.
2. Each year, hundreds of Australian children under the age of 14 years are placed in youth detention. In 2016-17, 35 children aged 10-13 were detained in Victorian prisons. According to recent data from the Australian Institute of Health and Welfare, 2 of these children were aged 10, 6 were aged 12 and 27 were aged 13 years.² This is facilitated by the age of criminal responsibility being 10 years of age. This low age of criminal responsibility in Australia particularly adversely affects Aboriginal and Torres Strait Islander children. They make up more than two-thirds of children under 14 years who come before Australian courts and are sentenced to either detention or a community-based sanction.³
3. Most children in detention, and virtually all children held in police cells (a largely invisible aspect of holding children in custody), are unsentenced – they have not been found guilty of an offence.⁴ The most common offences children are charged with are theft (over one-third of all offences), common assault, illicit drugs and public order.⁵ There are no national or state or territory data on children held in police cells. Evidence from NSW shows many of the children held in police cells have cognitive disability, mental health issues and challenging behaviour. Children are held in police cells sometimes because they have offended, often for their own safety or because no service or agency is willing or able to accommodate them. The large majority of children with cognitive disability caught in the criminal justice system also have a mental health disorder. Most of these children are known to police as victims, or highly vulnerable to exploitation, before their arrest and detention.⁶
4. Our research from the Comparative Youth Penalty Project shows that the needs of young people in juvenile justice are multiple and complex: they have come from communities of entrenched socio-economic disadvantage; and have fragmented experiences of education which are marked by periods of exclusion and expulsion, resulting in poor educational outcomes. They have precarious living arrangements including homelessness and/or placements in Out of Home Care (OOHC). They have experienced drug and alcohol related addiction; struggle with unresolved trauma; and have one or more disabilities.⁷

¹ Australian Institute of Health and Welfare (2018) *Youth Detention Population in Australia 2018*. Canberra: AIHW.

² Australian Institute of Health and Welfare (2018) *Youth Justice in Australia 2016-17*. Cat. no. JUV 116. Canberra: AIHW.

³ Australian Institute of Health and Welfare (2019) *Youth Justice in Australia 2017-18*. Cat. no. JUV 129. Canberra: AIHW.

⁴ Australian Institute of Health and Welfare (2018) *Youth Detention Population in Australia 2018*. Canberra: AIHW.

⁵ Australian Bureau of Statistics (2018) *Recorded Crime - Offenders, 2016-17*. Cat. no. 4519.0. Canberra: ABS.

⁶ Baldry, E., McCausland, R., Dowse, L. and McEntyre, E. (2015) *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. Sydney: UNSW.

⁷ Baldry, E. (2014) 'Disability at the Margins: Limits of the Law', *Griffith Law Review*, 23(3): 370-388; Baldry, E., Briggs, D.B., Goldson, B. and Russell, S. (2017) "'Cruel and Unusual Punishment': an inter-jurisdictional study of the criminalisation of young people with complex support needs", *Journal of Youth Studies*, 21(5): 636-652; Dowse, L., Cumming, T., Strnadova, I., Lee, J.S., Trofimovs, J. (2014) 'Young People with

The Age of Criminal Responsibility Should be Raised to 14 Years

5. To support especially vulnerable children and prevent early criminalisation, which can be a precursor, contributing and aggravating factor for mental illness in children, a major reform the Royal Commission should recommend is that the Victorian Government raise the age of criminal responsibility to 14 years old.
6. The age of criminal responsibility is the primary legal barrier to criminalisation and thus entry into the criminal justice system. The age of criminal responsibility across all Australian states and territories, including Victoria, is ten years of age.⁸ From this age, children can be investigated for an offence, arrested by police, held in police cells, charged and detained in a youth prison.
7. Where a child is over the age of ten but under the age of 14, there is a common law rebuttable presumption that the child lacks the capacity to be criminally responsible for his or her actions, known as *doli incapax* (incapable of crime). In order to rebut the presumption, it must be proved that at the time of the offence the child knew that his or her actions were seriously wrong.⁹
8. In practice, the presumption of *doli incapax* has limited capacity to protect children under the age of 14 years. Research indicates it is applied inconsistently, and leaves much to the discretion of the police, court and judge which can lead to discriminatory practices, particularly for children in regional and remote areas.¹⁰ The principle of *doli incapax* also fails to reflect contemporary medical knowledge on brain development and maturation. The Australian Law Reform Commission (ALRC) has noted that:

Doli incapax can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.¹¹

9. Criminalising the behaviour of young and vulnerable children creates a vicious cycle of disadvantaged and entrenches children in the criminal justice system. There is overwhelming evidence that managing children through the criminal justice system does not lead to rehabilitation and reformation, but works to entrench them in an offending culture. Research from the Australian Institute of Health and Welfare shows that the younger a child is at their first contact with the criminal justice system, the higher their likelihood of returning to youth detention.¹²
10. The current minimum age of criminal responsibility in Australia is against medical evidence that children aged ten to 14 years lack emotional, mental and intellectual

Complex Needs in the Criminal Justice System', *Research and Practice in Intellectual Developmental Disabilities*, 1(2): 174-185.

⁸ In Victoria this is legislated under the *Children, Youth and Families Act 2005* (Vic), s 344.

⁹ *RP v The Queen* [2016] HCA 53.

¹⁰ O'Brien, W. and Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, 17(2): 134-152; Crofts T (2015) 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', *Current Issues in Criminal Justice* 27(1), 123-31.

¹¹ Australian Law Reform Commission (ALRC) (1997) *Seen and Heard: Priority for Children in the Legal Process*, Report 84, Canberra: ALRC, 18.19.

¹² Australian Institute of Health and Welfare (2013) *Young people aged 10-14 in the youth justice system 2011-12*. Canberra: AIHW.

maturity. Immaturity can affect a number of areas of cognitive functioning including impulsivity, reasoning and risk-taking. This pertains especially to children with mental and cognitive disability. Research indicates children's brains continue to develop throughout adolescence.¹³

11. Detaining young children in criminal justice custody negatively affects their development. Among other things, it increases children's risk of trauma, depression, suicide and self harm; leads to poor emotional development; results in poor education outcomes and further fractures family relationships.¹⁴ When children are held in isolation, the effects on their health and wellbeing can be severe, long-term and irreversible. Many children in detention have been victims of abuse, and there is significant potential for re-traumatisation. The low age of criminal responsibility gravely affects children with cognitive disability who may be highly vulnerable to exploitation and persuasion, have low impulse control and a lack of understanding of the impact of their actions.¹⁵
12. Research from the UNSW Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Project (MHDCD) (www.mhdcd.unsw.edu.au) provides further evidence to support the argument that the minimum age of criminal responsibility should be increased.¹⁶ The MHDCD dataset contains lifelong administrative information on a cohort of 2,731 persons who have been in prison in NSW and whose mental health and cognitive impairment diagnoses are known. Of this group, 766 people (or 28 per cent of the total cohort) were first charged by police when they were under the age of 14 years. Some 54 per cent of the 766 individuals charged by police under the age of 14 years were Aboriginal and/or Torres Strait Islander.¹⁷ This research looked at the pathways of children with disability into the criminal justice system and shows the earlier these children have contact with police, the greater their likelihood of being held in police cells and then juvenile justice detention. They are likely to not receive appropriate disability and health services, or other supports such as disability-appropriate education and counselling. They are also more likely to transition into adult prison. They have significantly lower educational outcomes than their peers and are much more likely to develop further mental illness and chronic health problems. Data from the MHDCD Project shows this is highest for children in OOHC and Aboriginal and Torres Strait Islander children.¹⁸

¹³ Newton, N. C., and Bussey, K. (2012) 'The Age of Reason: An Examination of Psychosocial factors involved in delinquent behaviour', *Legal and Criminological Psychology*, 17(1), 75–88; Delmage, E. (2013) 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective', *Youth Justice* 13(2): 102–110.

¹⁴ AMA (2012) *Health and the Criminal Justice System* <https://ama.com.au/position-statement/health-and-criminal-justice-system-2012>

¹⁵ Baldry, E., McCausland, R., Dowse, L., and McEntyre, E. (2015) *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW: Sydney.

¹⁶ Baldry, E. and Dowse, L. (2013) 'Compounding Mental and Cognitive Disability and Disadvantage: Police as Care Managers' in D Chappell (ed), *Policing and the Mentally Ill: International Perspectives*, USA: CRC Press; Baldry, E., Dowse, L. and Clarence, M. (2014) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, University of New South Wales, Sydney; Baldry, E., McCausland, R., Dowse, L., and McEntyre, E. (2015) *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW: Sydney.

¹⁷ Baldry, E. and Winley, N. (2017) 'Young people under 14 years: police charges and court outcomes in the MHDCD data bank'. Sydney: UNSW School of Social Sciences.

¹⁸ Baldry, E., McCausland, R., Dowse, L., and McEntyre, E. (2015) *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW: Sydney.

13. In Australia there have been calls to raise the minimum age of criminal responsibility by academics,¹⁹ various non-government organisations including members of the Child's Rights Taskforce,²⁰ Jesuit Social Services,²¹ Amnesty International,²² the Smart Justice for Young People (SJ4YP) Coalition in Victoria, the Australian Medical Association, the Royal Australian College of Physicians, and the Australian Indigenous Doctor's Association.²³ Calls to increase the minimum age have also been made by the President of the NSW Children's Court, criminal lawyers, and State, Territory and Federal Children's Commissioners and Public Guardians.²⁴ The Royal Commission into the Protection and Detention of Children in the Northern Territory has recommended increasing the minimum age of criminal responsibility to 12 years, retaining the protection of *doli incapax* for 12-14 year olds, and limiting the circumstances that youth under the age of 14 years can be sentenced to detention.²⁵
14. There was widespread agreement among those professionals working with young people who we interviewed in NSW and Queensland for the Comparative Youth Penalty Project for raising the minimum age of criminal responsibility.²⁶ As a QLD Detention Centre Manager stated, children under 14 years '*can and should be dealt with in another way*'. Other interviewees noted:

We should be looking at what the best practice is around the world... and most of the world would tell us that it's much higher than 10 [years old] ... If you're saying that a 10 year old is responsible for criminal behaviour and activity and they understand what they are doing, then I think you don't take human rights very seriously (NSW Policy Officer)

I think it's very young... The youngest person who has been in one of our centres was 11 and... Whilst that young person might have had a chronological age of being 11, he could have just been 7 or 8... We really need to be looking at where these young people are functioning (NSW Juvenile Justice Regional Director)

We're recognising that young people, their brains don't mature until quite late... I've got 12 year-olds, 13 year-olds there that can't really link behaviour

¹⁹ O'Brien, W. and Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, 17(2): 134-152; Crofts T (2015) 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', *Current Issues in Criminal Justice* 27(1), 123-31.

²⁰ Child Rights Taskforce (2011) *Listen to Children. Child Rights NGO Report Australia*. Sydney: National Children and Youth Law Centre, pp. 31-32.

²¹ Jesuit Social Services (2015) *Too much too young: Raise the age of criminal responsibility to 12*, Melbourne: Jesuit Social Services.

²² Amnesty International (2015) *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia*. Sydney: Amnesty International.

²³ Australian Medical Association (2019) *AMA Calls for the Age of Criminal Responsibility to be Raised to 14 Years of Age*, 25 March 2019 <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years>

²⁴ Mitchell, M. (2016) *Children's Rights Report 2016*. Sydney: Australian Human Rights Commission; Zillman, S. (2017) 'Hopes Resting on Royal Commission to Recommend Raising Age of Criminal Responsibility', *ABC News*, 25 September 2017 <http://www.abc.net.au/news/2017-09-25/criminal-responsibility-age-should-be-raised-advocates-say/8986474>

²⁵ 2017: vol 2b, 418 - Recommendation 27.1; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol. 2B, 420.

²⁶ See Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney. Available at <http://cyp.p.unsw.edu.au/node/146>

*and consequences... So I think that 10 is very, very young. I'd hate to see a 10 year old in here (NSW Detention Centre Manager)*²⁷

15. At 10 years, the minimum age of criminal responsibility is inconsistent with prevailing practice internationally, where research shows that the average age of criminal responsibility across 84 countries is 14 years, and the average age in the European Union is also 14 years.²⁸
16. The current minimum age of criminal responsibility is a breach of the rights of the children. It is inconsistent with international human rights law and standards. Although the United Nations (UN) Convention on the Rights of the Child does not specify an appropriate minimum age of criminal responsibility, 12 years has been recommended as the absolute minimum age for states to implement, and the UN Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.²⁹ As an affluent, sophisticated country that was instrumental in human rights and the rights of the child charters, Australia and its states and territories should be at the leading edge of ensuring children's rights and mental well being.

Recommendation

17. That the Royal Commission recommend that section 344 of the *Children, Youth and Families Act 2005* be amended to raise the age of criminal responsibility to 14 years.

²⁷ We interviewed 30 youth justice practitioners, lawyers, and judicial officers in NSW and Queensland as part of the Comparative Youth Penalty Project. See Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney. Available at <http://cyp.unsw.edu.au/node/146>

²⁸ Goldson, B. (2013) "'Unsafe, unjust and harmful to wider society': grounds for raising the minimum age of criminal responsibility in England and Wales", *Youth Justice*, 13(2): 111-130; Hazel, N. (2008) *Cross-national comparison of youth justice*, London: Youth Justice Board.

²⁹ Committee on the Rights of the Child, General Comment No 10, 44th session, UN Doc CRC/C/GC/10 (25 April 2007), para 32-33.