Review on Raising the Age of Criminal Responsibility: Joint Council of Social Service Network statement to the Council of Attorneys-General.

About the Councils of Social Service

The Councils of Social Service (COSSes) are the respective National, State and Territory peak bodies of the community services sector and a voice for the needs of people affected by poverty and inequality.

This submission has been prepared for the COSS Network and authorised by the Chief Executive Officer of each Council. Some Councils will also provide an individual submission, expanding on the experiences in their state/territory.

The Councils are:

- The Australian Council of Social Service (ACOSS)
- The Australian Capital Territory Council of Social Service (ACTCOSS)
- The Council of Social Service of New South Wales (NCOSS)
- The Northern Territory Council of Social Service (NTCOSS)
- The Queensland Council of Social Service (QCOSS)
- The South Australian Council of Social Service (SACOSS)
- The Tasmanian Council of Social Service (TasCOSS)
- The Victorian Council of Social Service (VCOSS)
- The Western Australian Council of Social Service (WACOSS)

Introduction

The COSS network welcomes the opportunity to provide feedback to the Council of Attorneys-General. This statement contains high level principles for raising the age of criminal responsibility.

Setting the minimum age of criminal responsibility in Australia at 10 years of age harms children, and in particular Aboriginal and Torres Strait Islander children. It is discriminatory, out of step with human rights standards and neuroscientific understanding of children's brain development.

All Australian Governments should raise the age of criminal responsibility to at least 14 years.

Youth offending is closely linked to disadvantage. Children who offend are also more likely to have experienced child abuse and neglect, disability, mental illness, drug and alcohol abuse, exposure to crime and violence and homelessness.[1] Current responses fail to respond to these disadvantages in a therapeutic and effective way that addresses the reason children are committing crimes.

[1] Jesuit Social Services and Effective Change Pty Ltd, *Thinking Outside: Alternatives to remand for children*, 2013, Richmond.

Early contact with the criminal justice system can also increase the likelihood of poor outcomes for already vulnerable young people. Involvement in the criminal justice system at a young age can cause further harm and young people aged 10–14 in the youth justice system are at risk of becoming chronic, long-term offenders,[2] through exposure to harmful environments and the isolation from family and support networks.

The United Nations Committee on the Rights of the Child has called for countries to have a minimum age of criminal responsibility set at 14 or higher and recommends that children under 16 should not be deprived of liberty.

Principles of reform

The laws that dictate the age of criminal responsibility in all states, territories and the Commonwealth need to be reformed in line with the following principles (developed by a coalition of legal, health, youth and community organisations):

1. **The minimum age of criminal responsibility must be raised to at least 14 years.**

The minimum age of criminal responsibility should be increased to 14 in all circumstances, with no exceptions, on the basis that:

- Medical evidence highlights this distinct developmental stage of adolescence and supports raising the age. The current age of criminal responsibility is inconsistent with research on brain development. Children lack the necessary components of criminal responsibility, both in terms of behaviour control and moral awareness.
- Exposure to the criminal justice system damages health and wellbeing.
- Australia is out of step with international human rights standards and the minimum age of criminal responsibilities in other countries.

Detention should also be considered a last resort for all young people who offend.

2. **There must be no 'carve outs' to this legislation, even for serious offences.**

3. **Doli incapax - fails to safeguard children, is applied inconsistently and results in discriminatory practices.**

Doli incapax is an old, common law rebuttable presumption that children lack the capacity to be criminally responsible for their acts. In order to rebut the presumption, it must be proved that at the time of an offence the child knew that his or her actions were seriously wrong in the moral sense. By the time *doli incapax* is applied in court, the child has already been exposed to many stages of criminal procedure (like arrest and detainment) and the resulting criminogenic effects of exposure to the criminal justice system.

This presumption routinely fails to safeguard children. It is applied inconsistently and it can be very difficult for children to access expert evidence, particularly children in regional and remote areas.

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[2] Australian Institute of Health and Welfare 2013, *Young people aged 10 – 14 in the youth justice system 2011 – 2012,* AIHW, Canberra, p. vi. Available at: http://www.aihw.gov.au/publication-detail/?id=60129543944

The presumption also does not reflect contemporary medical or social science knowledge of childhood development, long term health effects of criminal justice involvement, or human rights law.

Once the age of criminal responsibility is raised to 14 years, doli incapax would be redundant.

4. **Prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services including education, health and community services should be prioritised and expanded.**

It is often the most vulnerable and disadvantaged children who come to the attention of the criminal justice system.

Instead of punitive, responses to child offending must:

- Be child-centred, strengths based and trauma-informed. This includes responding to the holistic needs of the child, the underlying causes of their offending, and the needs of their family and natural supports.
- Assume shared accountability and responsibility for offending, on the basis that the majority of child offending is a consequence of the failings of the institutions intended to support the child.
- Prioritise and invest in early intervention, prevention and diversion as the most effective ways to reduce child and youth offending and re-offending.
- Commit to addressing the overrepresentation of Aboriginal and Torres Strait Island children and young people, CALD children and young people and young people who have been involved with out-of-home-care.
- Adopt a justice reinvestment framework that focuses on prevention and place-based responses to address disadvantage.

5. **In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led.**

Aboriginal and Torres Strait Islander children are over-imprisoned, making up about 60 per cent of the young children in youth jails, despite being only about 5 per cent of the population (aged 10-17).[3] Aboriginal and Torres Strait Islander peoples continue to experience the ongoing impacts of colonisation, trauma, dispossession and racism. The over-incarceration of Aboriginal and Torres Strait Islander children and young people is both a result of this ongoing trauma, and exacerbates it.

Raising the age of criminal responsibility will assist in addressing the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system, and with investment and support, will provide greater opportunities to enable and empower Aboriginal families, communities, and organisations to support children in culturally safe and appropriate ways.

[3] Australian Institute of Health and Welfare,2018, *Youth detention population in Australia 2018,* AIHW, Canberra, https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2018/contents/table-of-contents

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