Submission to the Age of Criminal Responsibility Working Group

Council of Attorneys-General

Youth Affairs Council of Western Australia
February 2020

This submission is jointly endorsed by the following organisations:

Youth Legal Service WA
Social Reinvestment WA
Aboriginal Legal Service WA

Acknowledgement of Country

The Youth Affairs Council of Western Australia acknowledges the traditional custodians of country on which this report was based, the Wadjuk people of the Noongar Nation, and their continuing connection to land, sea and community. We pay our respect to them and their cultures, and to their Elders both past and present, as well as acknowledge and celebrate the ongoing contributions of their young people in our communities.

About the Youth Affairs Council of Western Australia

The Youth Affairs Council of Western Australia (YACWA) is the peak non-government youth organisation in Western Australia. YACWA operated primarily as a human rights organisation that seeks to address the exclusion of young people in a rapidly changing society.

Our vision for Western Australia is one that celebrates and engages young people in all aspects of the community. Our role is to strengthen the trust, cooperation, collaboration, professionalism, and voice of the non-government youth service sector to better serve the young people of Western Australia.

YACWA is widely acknowledged as a leader in the field of current youth participation best practice. This reputation has a national profile and is supported by academic research, proven training and project management, and—most importantly—extensive engagement with young people. YACWA strongly believes that children and young people are the experts in their own experiences and wellbeing, and we are dedicated to ensuring that expertise is represented through equal access to community decision-making processes.

Summary of Recommendations

YACWA recommends that the laws that dictate the age of criminal responsibility in all states, territories and the Commonwealth be reformed in line with the following principles:

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

2. The Working Group ensure an increased minimum age of criminal responsibility is universal, with no 'carve outs' or exemptions due to extenuating circumstances, even for serious offences.

3. Should the minimum age of criminal responsibility be raised to age 14, the principle of *doli incapax* ceases to be relevant and should be abolished. However, young people aged 15–17 must still be provided safeguards in their contact with the justice system to ensure it is responsive and supportive of their individual circumstances and that treatment and proceedings are appropriate to their individual needs.

4. That the minimum age of detention be set at 16 years to reduce the likelihood of reoffending and provide greater opportunities for young people aged 10 to 15 years to achieve positive life-long outcomes with a view of detention as a matter of last resort for any young person under the age of 18.

5. That each state and territory develop and implement a Justice Reinvestment Strategy in partnership with community services, with the aim to shift the emphasis of youth justice from punishment to rehabilitation.

6. That funds previously allocated for the criminalisation and detention of children under 14 be re-allocated to prevention, early intervention, and diversionary responses linked to culturally safe and trauma-responsive services for this age-range.

7. That universal services in areas such as education, health, employment and other community services be integrated into the youth justice system as key drivers of early intervention.

8. Ensure that Aboriginal Community Controlled Organisations (ACCOs) are prioritised and funded to deliver the planning, design and implementation of prevention, early intervention and diversionary responses for Aboriginal and Torres Strait Islander children and young people.

9. Western Australia repeal mandatory sentencing as a priority.

10. Banksia Hill Detention Centre be urgently reformed in line with a therapeutic, trauma-informed approach to support young people in detention to avoid re-offending and have life-long positive outcomes.

Submission

Question 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? Please explain the reasons for your view and, if available, provide any supporting evidence.
Question 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)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.

YACWA supports the view that the minimum age of criminal responsibility must be increased from 10 years of age, to a minimum of 14 years of age. In this, YACWA's view aligns with international best practice, medical and health experts, legal experts, community and social service providers, and human rights advocates.

Experience of the criminal justice system is detrimental to the wellbeing of children and young people aged 10 to 13

The effects of criminalisation and/or detention on young children has been found to have a significantly negative impact on their life trajectory, with impacts on educational completion and attainment, as well as long-term employment outcomes thwarted through contact with the justice system[i].

Earlier ages of sentencing and detention are also associated with significant increases to an individual's likelihood of reoffending and justice recidivism. Research from across the nation has found a strong relationship between the likelihood of reoffending and an earlier age of sentencing;

- In Victoria, between 2008–09 and 2014–15 the rate of recidivism decreased significantly the later the age of first sentence. For children aged 10–12 the recidivism rate was 86%, compared to 42% for 18-year olds and 33% for 19–20 year olds[ii].
- National data gathered by the Australian Institute of Health and Welfare (AIHW) from 2000-01 to 2017-18 showed 94% of 10–12-year old's in detention returned to sentenced supervision before 18, compared to 18% of those aged 17[iii].

Evidence tells us that children in custody are likely to be among the most vulnerable and disadvantaged in our community. Victoria's Youth Parole Board 2018/19 Annual Report showed that high proportions of children and young people in custody were already victims of abuse, trauma and neglect, with high rates of drug and alcohol abuse, child protection involvement, school exclusion, mental health issues and intellectual disability also prominent.[iv]

The current age of criminal responsibility therefore can increase the likelihood of offending among young people aged under 14 and place young people in patterns of disadvantage and poorer justice outcomes. By raising the minimum age, we can provide young people aged under 14 greater opportunities to receive supports and change the trajectory of their behaviour, increase their likelihood to finish education, and support them to gain meaningful employment.

Raising the age of criminal responsibility will bring Australia in line with international standards

The Western Australian and national criminal age of responsibility is currently lower than the minimum standard set by a growing number of countries, many of which are leading the way in best practice in youth justice. A study of 90 countries worldwide found that 68% had a minimum age of criminal responsibility of 12 or higher, and the median and average age sits at 14 and 13.5 respectively[v]. Prominent examples include;

- Canada and the Netherlands (12)
- Austria, Germany, Italy, Japan and Spain (14)
- Denmark, Finland, Iceland, Norway and Sweden (15)
- Portugal, Belgium (16)
- Luxembourg (18)

Whilst comparisons of minimum criminal ages of responsibility cannot alone provide sufficient justification to raise the age in Australia, it is a salient point to make to demonstrate that similar countries have feasibly raised the age of criminal responsibility without a negative effect on efforts to address youth crime. Conversely, international trends show that countries such as Germany and Norway, who have implemented a higher age of criminal responsibility combined with strong early intervention and diversion programs for children and young people generally have lower rates of older youth offending, incarceration and recidivism[vi,vii].

Neuroscientific research supports an increase to the minimum age of criminal responsibility

Maintaining the age of criminal responsibility at 10 years of age, as it currently stands, is at increasing odds with the general consensus of medical and legal experts in Australia and internationally. Drawing on a significant body of research and evidence, leading groups including the Australian Medical Association, the Royal Australasian College of Physicians, the Australian Indigenous Doctors' Association, the Human Rights Law Centre, the Australian and New Zealand Children's Commissioners and Guardians, Change the Record, Amnesty International and the Law Council of Australia have all called for the age to be raised to a minimum of 14 years of age.

This consensus is strong because medical research has overwhelmingly demonstrated that children under the age of 14 are still undergoing significant neural development. The area responsible for impulse control, planning and decision making is not fully formed yet, meaning that children at that age can lack the ability to justify criminal responsibility, and therefore should be legally exempt[viii].

We also argue that there should be no exceptions or 'carve outs' for serious crimes or special cases when raising the age of criminal responsibility given the lack of uniformity of children under the age of 14's neurodevelopment.

Not only is the current age of criminal responsibility illogical from a neurodevelopmental standpoint, it also facilitates the entrenchment of children and young people with poor health

and cognitive abilities within the justice system. Research shows that children and young people with impaired cognitive ability and extensive history of trauma are especially vulnerable to criminalisation and as a result can be disproportionately incarcerated[ix]. In Western Australia, 9 out of 10 young people aged 10-17 in Banksia Hill Detention Centre have at least one form of severe brain impairment and around one third have Foetal Alcohol Spectrum Disorder (FASD)[x]. Similarly, a New South Wales study found that 46% of young people in juvenile detention had 'borderline' or lower intellectual functioning, indicating significant impairment, and 25% had left school before the age of 14[xi]. Whilst raising the criminal age of responsibility will not wholly address this issue, it will provide a critical opportunity to view youth anti-social behaviour through a therapeutic lens; prioritising public health over punitive justice. It would allow us to prevent children with impaired cognitive ability from being criminalised and entrenched within the justice system. Diverting funding from detention to collaborative early identification of at-risk children with impaired cognitive ability is required to reduce their exposure to the justice system. Justice diversion programs must work with health, education and community services to ensure that young children with impaired cognitive ability are identified early and given the support that they need.

The current minimum age of criminal responsibility unfairly impacts Aboriginal and Torres Strait Islander children and young people*

Criminalising children aged 10 to 13 primarily impacts Aboriginal and Torres Strait Islander children and young people and is detrimental to any efforts to address inequality and close the gap between Aboriginal and Torres Strait Islander and non-Indigenous Australians.

On average across the country, Aboriginal and Torres Strait Islander young people enter youth justice supervision at a younger age than non-Indigenous young people:

- On an average day in 2017–18 across Australia, 29% of children aged 10-13 under supervision were Aboriginal and Torres Strait Islander[xii].
- In 2017–18, 2 in 5 (39%) Aboriginal and Torres Strait Islander children and young people under supervision were first supervised when aged 10–13, compared with about 1 in 7 (15%) non-Indigenous children and young people[xiii].
- In New South Wales between 2006 and 2015, 73% of all males and 60% of females in the 10-12 age bracket presenting before the courts were Aboriginal and Torres Strait Islander[xiv].

One significant factor in this disproportionate level of sentencing is that Aboriginal and Torres Strait Islander children and young people receive limited and inconsistent access to diversionary programs, are more likely to be arrested (rather than receive a court attendance notice), and are more likely to be refused bail compared to non-Indigenous children and young people[xv]. This means that they are more likely to be summoned before the courts and given a criminal sentence, often leading to detention[xvi].

The tendency to over-sentence Aboriginal and Torres Strait Islander children at an earlier age further entrenches cycles of indigenous disadvantage caused by poverty, intergenerational trauma and systemic discrimination. The resultant accumulation of prior convictions which often begins with a minor offence at an early age can be debilitating for education and employment prospects as well as the overall health and wellbeing of Aboriginal and Torres

Strait Islander young people later in life. Children and young people are often severed from family, country and culture; in particular those in the regions are especially impacted as they are often flown from remote areas to metropolitan areas (e.g. Western Australia's Banksia Hill Detention Centre) to serve their sentences, limiting their access to support networks, families and trusted services.

An increased minimum age of criminal responsibility supports Australia's efforts to Close the Gap in outcomes between Aboriginal young people and non-Aboriginal young people, across a variety of domains not limited to justice. If Australia is to meet its targets under Closing the Gap, it must embrace reforms to existing systems that unfairly target Aboriginal and Torres Strait Islander young people.

Recommendation 1:

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

Recommendation 2:

The Working Group ensure an increased minimum age of criminal responsibility is universal, with no 'carve outs' or exemptions due to extenuating circumstances, even for serious offences.

Question 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? Does the operation of* doli incapax *differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of* doli incapax *be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.*

Should the minimum age of criminal responsibility be raised to 14 years of age, the principle of *doli incapax* as it currently stands becomes irrelevant and should be abolished. However, the underlying intention of *doli incapax* should be applied to young people aged 14–17 to provide a more robust and consistent safeguard for young people, given Australia's obligations under the UN Convention on the Rights of the Child (UNCRC) and align with research on the neurodevelopment of young people.

The principle of *doli incapax* does not meet Australian's international human rights obligations to protect young people

In response to recurrent criticisms from the UNCRC, Australia often points to its application the principle of *doli incapax* as justification for keeping the age of criminal responsibility below international standards and therefore mitigating its breach of the Convention in depriving young people of liberty through detention. In theory this principle puts the onus on the prosecution to determine that the child knows that their conduct was wrong in order to be found criminally responsible.

In the most recent report submitted to the UNCRC, it was argued that the principle maintains the rights of a child by acting as a "safeguard for children between 10 and 14 years and recognises each child's evolving capacity[xvii]". Rigorous examination of *doli incapax* by legal and human rights experts however, has revealed that this claim is often without merit[xviii]. In Western Australia the principle is legislated in the *Criminal Code Compilation Act 1913*, however unclear language and lack of detail leaves it just as open to interpretation as when detailed in common law in states such as Victoria. The nebulous nature of *doli incapax* and the concept of 'wrongness' means that it is often applied inconsistently, and in practice it can often have a minimal protective effect, or even a reverse effect to what was intended in theory.

As it currently stands, *doli incapax* is applied inconsistently among young people, and can result in harm to young people

By drawing on interviews with youth justice professionals and examining case studies, researchers in Victoria determined that "inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers an effective legal safeguard for very young children in conflict with the law[xix]". This study and others conducted in the Northern Territory[xx], Queensland and nationwide have demonstrated that applications of *doli incapax* in dealings with young people aged 10-14 have shifted significantly from the principle's intention. This has manifested in ways such as:

- The threshold for rebutting the principle (i.e. proving that the child knows what they did was wrong, and therefore justifying a criminal charge) is often negligible[xxi]. An examination of application of the principle in Queensland (whose legislation is identical

to Western Australia) found that the act actually creates a lower bar for young people to be found criminally responsible. They argue that the wording of the legislation is often interpreted to mean that the only determination needed is that the child has a general capacity (often based on the general intelligence and capabilities of the age group) to distinguish that an act 'ought not to have been done', however no proof of knowledge of the specific degree of wrongfulness is required to convict[xxii]. This consideration also fails to consider whether that wrongness was influenced by issues such as poverty, homelessness, abuse or neglect.

- In relation to this, courts can—and often do—accept evidence of the child's intellectual capacity as proof of criminal capacity without a further exploration of the child's broader circumstances. If the child is deemed to have acceptable mental capabilities for a child of that age, then it is assumed that they would know the wrongness of the act and be liable for criminal prosecution and no further proof is necessary[xxiii].
- Evidence from case studies in Victoria has shown that the onus of proof of *doli incapax* has informally shifted in many instances to be the responsibility of the defendant's legal team. Such occurrences pose many risks and difficulties for the child and their defence team as they must bear the significant burden and costs of psychological assessments of a child's capacity[xxiv]. This could please a strain in particular on community legal services who often represent vulnerable children as well as lengthen the time the child has to endure evaluation; potentially exposing them to further trauma. In practice this can also mean that the child can be denied the protection of *doli incapax* if the defence team cannot adequately pursue this assessment.
- An analysis of the national application of *doli incapax* determined that there is "strong empirical evidence proving that in many cases involving child defendants, the presumption of incapacity is ignored, not known of by counsel or the tribunal, or grossly manipulated by the tribunal.[xxv]"

Young people require a consistent, human rights-based safeguard to ensure any contact with the justice system is responsive to their development and individual circumstances

Medical evidence shows there is no defined age at which young people reach the ability to understand and justify criminal responsibility. Similarly, Western Australia has evidence showing high rates of undiagnosed neurodevelopmental impairment (such as FASD) of young people already in our justice system[xxvi]. Even as *doli incapax* ceases to be relevant under a raised minimum age of criminal responsibility, it is clear that criminal capability remains uncertain for young people who come into contact with our justice system.

In order to appropriately address these findings our justice system must be able to recognise and respond to young people's neurodevelopment and individual circumstances. YACWA recommends the Working Group explore options for a safeguard to ensure these circumstances are taken into account, with the wellbeing and long-term outcomes of the young person given the highest priority above sentencing and management.

YACWA acknowledges divergent opinions on the principle of *doli incapax* within the youth, legal, and community services sectors. The underlying intent of any reforms in this area must

be to ensure that the individual circumstances of any young people in contact with the legal system be taken into account to ensure they are treated fairly and appropriately.

Recommendation 3:

Should the minimum age of criminal responsibility be raised to age 14, the principle of *doli incapax* ceases to be relevant and should be abolished. However, young people aged 15–17 must still be provided safeguards in their contact with the justice system to ensure it is responsive and supportive of their individual circumstances and that treatment and proceedings are appropriate to their individual needs.

Question 4:
Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

YACWA aligns with the views and position of the submission from the Australian Youth Affairs Coalition (AYAC), supporting a minimum age of detention be set at 16 years of age, with alternatives to detention used as a matter of priority for all young people. For any young person under the age of 18, detention should be used as a matter of last resort in the case of serious and proven threat to community safety.

Detention of children under 18 is in violation of Australia's human rights obligations

The United Nations Office of the High Commissioner for Human Rights recommends that 'no child [under 18] be deprived of liberty', except only as a measure of last resort and for the shortest appropriate period of time[xxvii]. Further, the Office makes specific note that children with neurodevelopment disorders (such as Fetal Alcohol Spectrum Disorder) not be in the justice system at all, even if they have reached the minimum age of criminal responsibility.

Detention of young people is ineffective for young people's long-term wellbeing

Experience of detention is counter-productive to a therapeutic approach to justice aiming to prevent further criminal activity and anti-social behaviour. Particularly relevant is the Australian Institute of Health and Wellbeing finding that children who have earlier contact with the justice system have significantly increased likelihood of negative broader life outcomes[xxviii],including educational disadvantage, problems with gaining employment in adulthood and increased risk of depression, self-harm, suicide and other health issues[xxix].

The effects of detention on children and young people has been found to have a direct contribution to these outcomes. Harsh criminal penalties including detention, imposed on low-risk offenders such as children can often have the opposite effect to what they intended as they can cause an increased likelihood of antisocial behaviour and/or recidivism as well as a multitude of other issues[xxx]. Having such a rigid approach to youth justice is counter-productive and costly to efforts to rehabilitate children young people back into the community.

Detention is less cost-effective than proven therapeutic support-based intervention
A study on 30 years of empirical evidence from national and international youth justice system showed that not only is our current model of youth justice and detention ineffective at reducing recidivism and rehabilitating offenders, it is also one of the most costly means of dealing with youth offending[xxxi]. In Australia, the total average cost per day for each young person in detention in 2018-2019 was $1579, compared to $187 for community-based supervision and/or diversion methods[xxxii]. Further, youth workers and youth-work-based programs have been proven to reduce youth recidivism by half, with an annual cost of $1,680 per person[xxxiii].

Freeing up resources that are currently devoted to sentencing and detaining children aged 10-14 would allow them to be better spent on early intervention and diversion services. Compared to detention, these services are evidence based, cheaper on average and proven to be more

effective at addressing the underlying causes of criminal behaviour and preventing future offending.

Therefore, YACWA argues that even above the age of 16, detention should be used as a matter of last resort for young people, except where there are significant concerns for the safety of the public. In all cases, our justice system must prioritise providing young people with intervention programs, diversion, and community-based management programs over detention, in order to have the greatest effect at providing positive outcomes for the individual and community members.

An increased minimum age of detention aligns closely with the Western Australian State Government's *Our Priorities*, which set a clear target of ensuring no more than 50 per cent of young offenders return to detention within two years of release by 2022–23. Given statistics cited above linking earlier ages of sentencing and detention to increased rates of recidivism, a raised age of criminal responsibility *and* detention provide the State Government a significant opportunity to meet this target and support the long-term wellbeing of young people.

Recommendation 4:

That the minimum age of detention be set at 16 years to reduce the likelihood of reoffending and provide greater opportunities for young people aged 10 to 15 years to achieve positive life-long outcomes, with a view of detention as a matter of last resort for any young person under the age of 18.

Question 5:
What programs and frameworks (e.g. social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

Question 6:
Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

YACWA supports a justice reinvestment approach to youth justice that divests funds from incarceration and the criminal justice system into early intervention, prevention and diversion programs founded in evidence and therapeutic approaches to trauma and anti-social behaviour. Youth workers and supportive relationships are a critical component of the success of these approaches

In addition to their efficacy in achieving positive outcomes, these evidence-based approaches are often far more cost-effective than traditional detention-based and punitive approaches.

Evidence supports social reinvestment approaches are more impactful than detention-based approaches

There are many national and international examples of practical applications of justice reinvestment that can be explored and adapted to meet regional specific needs in Western Australia and other jurisdictions across the country;

- ***The Olabud Doogethu Project - Halls Creek, Western Australia:***
  Western Australia's first justice reinvestment site is an Aboriginal community owned project that channels the principles of Asset Based Community Development, Justice Reinvestment and Collective Impact into individual community plans delivering place-based solutions to the social causes of youth offending across the Shire of Halls Creek in the Kimberley[xxxiv]. The Project was informed by extensive 18 month co-design project with Aboriginal communities across the area. Despite only being in initial stages, it has already demonstrated considerable success, with the establishment of Youth Engagement Night Officers supporting the reduction offences by young people in Halls Creek reduce from 138 offenses to 44 in one month, and Learning on Country Coordinators being engaged to lead the development of culturally secure youth rehabilitation and alternative education models[xxxv].
- ***The Maranguka Justice Reinvestment Project - Bourke, New South Wales:***
  This project was the first of its kind in Australia, targeting an area with high youth incarceration rates, levels of Aboriginal unemployment and disengagement from education and low median income with the intent of providing a more effective diversion from crime. A five year review of the program in 2018[xxxvi] showed significant improvement to outcomes in the community including;

    - A 23% reduction in police recorded incidences of domestic violence and a similar reduction in youth re-offending.
    - A 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories.
    - A 14% reduction in bail breaches and a 42% reduction in days spent in custody.
    - A gross impact of $3.1 million in social reinvestment savings, which is five times greater than the operational costs of the project.
- ***Justice Reinvestment Projects in the United States of America:***
  Whilst the United States of America's overall approach to youth justice has many flaws, a number of individual states have adopted strong justice reinvestment strategies with demonstrable success. Oregon's approach to justice reinvestment is a strong example of this; previously the State Government would pay for youth imprisonment based on decisions made in local county courts, providing no incentive for local authorities to prioritise alternatives to sentencing. A legislative shift in 1997 saw the State Government provide funds to counties for every young person they placed in a community-based diversion project using the money that would have otherwise been spent in state detention. This resulted in a 72% reduction in youth incarceration; the largest ever recorded decrease in juvenile detention[xxxvii].

The evidence is clear; when we practice justice reinvestment by investing in early intervention, diversion and prevention instead of detention, we see considerable success in rehabilitation, cost saving and reducing recidivism. Australia must build on current best practice to develop a strong justice reinvestment approach that provides alternatives to sentencing for young people. This must be applied for all young people.

Recommendation 5:

That each state and territory develop and implement a Justice Reinvestment Strategy in partnership with community services, with the aim to shift the emphasis of youth justice from punishment to rehabilitation. While this can support young people under the age of 14 should the minimum age of criminal responsibility be raised, their use is critical for all young people, with sentencing used as a matter of last resort.

Recommendation 6:

That funds previously allocated for the criminalisation and detention of children under 14 be re-allocated to prevention, early intervention, and diversionary responses linked to culturally safe and trauma-responsive services.

Question 7:
If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views and, if available, provide any supporting evidence.

Question 8:
If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold?

Diversion and intervention approaches are a therapeutic and effective alternative to detention and sentencing

When we argue that children and young people under 14 should not be criminalised, we are not implying that there should be no consequences to their actions, or that nothing should be put in place to protect community safety. We instead argue that any consequences should be geared towards a wholly therapeutic approach, with the child's welfare the first priority. Despite the fact that it is incredibly rare for children aged 10 to 14 to commit serious crimes[xxxviii]; there may be some cases where children may need to be placed in supervised care in the interest of community safety. Alternatives to detention must be available to support children who have committed serious crimes that take a welfare-centred rehabilitative approach whist preventing any further harm to others in the community.

Diversion and intervention approaches are cost-effective and impactful

Diversion is a critical part of Australia's youth justice system; it is significantly less costly and more effective at rehabilitation than detention. Whilst many successful diversion programs currently exist, they are often underutilised and underfunded when compared to more punitive measures. In 2018-19 Australia spent 58.9% of its total youth justice budget on detention, compared to only 36.6% on community-based supervision and 4.5% on Group Conferencing[xxxix]. Evidence from the Royal Commission into the Detention and Protection of Children in the Northern Territory showed that the funded diversion rates are still often unused even when they are available. Only 35% of the young people apprehended in the Northern Territory in 2015-16 were diverted; despite the fact that diversion programs during this time had significantly lower rates of recidivism compared to juvenile detention (85% of those in diversion programs did not reoffend)[xl].

Diversion programs are already delivering real outcomes in Australia for young people

There are many examples of diversionary programs across Australia that are trauma informed, culturally led and provide strong alternatives to criminalisation and detention. Those that have seen success have been those that have meaningfully engaged communities in their design and implementation. The historical (and ongoing) violence of Australia's justice system against Aboriginal and Torres Strait Islander communities must be acknowledged in any justice initiative, and power meaningfully devolved to Aboriginal and Torres Strait Islander communities themselves.

Examples of effective community-based diversion programs include:

- *The Yiriman Project – The Kimberley, Western Australia:* The Yiriman Project Diversion Program is a community-based youth diversionary program run by the Kimberly Aboriginal Law and Culture Centre. The Yiriman Project in Fitzroy Crossing takes young people at risk of offending on country and supports them to undertake culturally based activities. It has demonstrated evidence in both improving the health outcomes of Aboriginal young people with FASD[xli] as well as helping to prevent their involvement in the juvenile justice system[xlii].
- *The Back on Track Program, Northern Territory:* Back on Track is an alternative sentencing program that addresses at risk behaviour, consequences and reparation, life skills and cultural connection, family capacity and responsibility. It also supports re-engagement with education, training and employment[xliii].
- *The South East Metropolitan Youth Partnership Project (YPP) – Armadale, Western Australia:* The YPP is a youth intervention framework that aims to engage State Government agencies and the community sector to work better together to improve outcomes for at-risk young people. As part of this the Armadale Youth Intervention Partnership (AYIP) has developed an early intervention model that aims to reduce the demand on the youth justice service system. Evaluations of the YPP and the AYIP have demonstrated the potential significant long-term savings to the justice system[xliv] as well as improvements to local services' ability to provide client centred support for young people with complex needs[xlv]. Working with young people at risk of transitioning from the youth to adult justice system, AYIP achieved a 50% reduction in reoffending for those who completed the program[xlvi].

When determining regional based need for early intervention and diversion programs it is especially crucial that priority is given to funding Aboriginal Community Controlled Organisations to deliver culturally appropriate, placed-based, Aboriginal-designed and led preventive and diversionary programs to address the needs of Aboriginal and Torres Strait Islander children at risk under 14 years. It is clear that for solutions to work for Aboriginal and Torres Strait Islander young people, they must be developed and delivered in partnership with Aboriginal and Torres Strait Islander communities.

Recommendation 7:

That universal services in areas such as education, health, employment and other community services be integrated into the youth justice system as key drivers of early intervention.

Recommendation 8:

Ensure that Aboriginal Community Controlled Organisations (ACCOs) are prioritised and funded to deliver the planning, design and implementation of prevention, early intervention and diversionary responses for Aboriginal and Torres Strait Islander children and young people.

Question 9:
Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered doli incapax) to participate in activities or behaviours which may otherwise attract a criminal offence?

N/A

Question 10:
Are there issues specific to states or territories (e.g. operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

Western Australia faces a number of unique circumstances related to its mandatory sentencing laws and high rates of Aboriginal and Torres Strait Islander incarceration.

The 2018 Our Priorities set by the State Government of Western Australia identified a target of reducing youth re-offending to ensure no more than 50 per cent of young people return to detention within two years, with a goal date of 2022-23 to achieve this target[xlvii]. YACWA is of the view that an increase to the minimum age of sentencing, alongside a strong social reinvestment approach to support young people in community, maintain social connections and supports, and divert them from the justice system will be a critical element of achieving this target.

In this regard, YACWA supports the submission from Social Reinvestment WA whole-heartedly, and points to its work as an example of best practice in youth justice in Western Australia.

Mandatory Sentencing of young people must be repealed

Mandatory sentencing is currently enforced in Western Australia, with application to children and young people. However, there is no evidence that mandatory sentencing is an impactful or cost-effective approach to justice, particularly for young people.

Studies of detention in Western Australia have found high rates of cognitive impairment and neurodevelopmental disorders such as Fetal Alcohol Spectrum Disorder (FASD). Mandatory sentencing is highly unlikely to support these young people with differences in their capacity for consequential thinking, as well as those with extreme social or economic disadvantage, and offers little flexibility for the justice system to respond to these circumstances.

As the previous WA President of the Children's Court, Judge Dennis Reynolds, has stated in relation to the potential impact of expanded mandatory sentencing for children:

'if a large number of more hardened, angry and disconnected young offenders are returned to the community... then they will have a wide sphere of influence on other disconnected children, including children even younger than them. That will create an ongoing multiplier effect, which over time, will sustain and increase serious offending and its human and financial cost to the community'.

Recommendation 9:
Western Australia repeal mandatory sentencing as a priority.

Banksia Hill Detention Centre requires urgent reforms to implement a therapeutic approach to justice and respond to trauma

Banksia Hill Detention Centre is Western Australia's only youth detention centre, and has a history of poor conditions, crisis management, and allegations of human rights abuses. It is critical, if we are to reduce youth recidivism in line with the Our Priorities, that we ensure this Centre is fit-for-purpose and providing appropriate care to young people.

Banksia Hill's sub-standards conditions have been well-documented and reported through numerous reviews by the Office of the Inspector of Custodial Services (OICS). The OICS has found poor education access and services, high rates of suicidal ideation and self-harm, as well as no consistent philosophy of practice behind staff management[xlviii,xlix].

While Banksia Hill Detention Centre has seen some improvement recently in reducing traumatising practices (such as strip-searching), it has been noted by the OICS that the Centre has seen repeated cycles of improvement and crisis, with little overall progress[l]. If these improvements are to be maintained, then significant reform and implementation of a therapeutic, trauma-informed approach to the Centre is required at all levels of its operation. OICS recommendations for improvements to the Centre's education system have as yet been implemented to YACWA's knowledge, and require urgent attention.

YACWA has repeatedly called for transfer of the Centre to the management of the Department of Communities, alongside close support from the Department of Education to improve the access to and quality of education services to support young people. Accountability and transparency of a therapeutic and trauma-informed operational philosophy at Banksia Hill Detention Centre will further support appropriate practice.

Recommendation 10:

Banksia Hill Detention Centre be urgently reformed in line with a therapeutic, trauma-informed approach to support young people in detention to avoid re-offending and have life-long positive outcomes.

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