**A NEW ARCHITECTURE FOR YOUTH JUSTICE**

It will be six years on 25 July since Four Corners aired the episode “Australia’s Shame” which rocked the nation’s confidence in our ability to deal justly with our vulnerable and troubled young offenders. We all watched in horror as we saw the abuse of teenagers in the Don Dale Detention Centre.

The Royal Commission that followed delved deeply into the events depicted in the program and examined systemic failings in the youth justice space and in the system of care and protection of children in the NT. Its recommendations and findings were clear.

First and foremost, the Commission found that Don Dale and the Alice Springs Detention Centre were not fit for accommodating, let alone rehabilitating, children and young people.

The children in detention in Darwin are still housed in the so-called Don Dale Detention Centre; the old unfit for purpose adult prisoner at Berrimah.

The NT government has agonised over its replacement’s location, its design and how to fund it properly. No work has started on the new facility. Contrary to the Royal Commission’s recommendations, it will be located in the same precinct as the Darwin Detention Facility many kilometres from Darwin CBD.

There has been a range of measures implemented in response to the Royal Commission’s findings but not all legislative action has led to improvements in youth justice outcomes. Most significantly, the last package of amendments to the bail laws undoubtedly led to an increase in the number of children in detention. The skyrocketing rate of detention in central Australia has led to continuing one way traffic of detainees heading north to Darwin, where they are detained far from their families and communities.

According to the Acting Children’s Commissioner’s paper at this conference, the numbers of child detainees at Don Dale have very substantially increased since the bail amendments kicked in. In May 2020 there were 31 detainees in Don Dale. In May 2021 there were 67. In May 2022 there were 100 kids in Don Dale.

In 2020/2021 there were no kids in Don Dale aged 10 or 11. So far this financial year there have been 7. Currently, there are 53 children in detention at Don Dale were aged under 14 years.

The shameful system of detention has not structurally changed since the Royal Commission reported in 2017. The rate of detention of children and teenagers in the NT continues to be a national disgrace. It is a reflection of the wider problem of the over incarceration of first nations people generally.

**The Statistics**

You can’t argue with the statistics. The over-representation of First Nations women, men and especially children is palpable.

According to the ALRC Report, “Pathways to Justice; an Inquiry into the incarceration rate of Aboriginal and Torres Strait People”, in 2016, Aboriginal and Torres Strait Islander people constituted just 2% of the Australian adult population but comprised more than one quarter (27%) of the national adult prison population. The national imprisonment rate for Aboriginal and Torres Strait Islander peoples was about 13 times higher than for non-indigenous Australians. Aboriginal and Torres Strait Islander children are 24 times more likely to detained in a juvenile detention centre than non-indigenous children.

In WA and the NT, the situation is especially dire where the rates were 3,383 per 100,000 and 2,504 per 100,000 respectively.

The imprisonment rate for Aboriginal and Torres Strait Islander people has increased 41% over 10 years, whilst for non-Indigenous people, the imprisonment rate has increased by 24% over the same period. In short, the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over the decade has widened. The trend is continuing.

The statistics concerning women are worse still. Indigenous women are 21.2 times more likely to be imprisoned than non-Indigenous women.

But, the statistics concerning young people are the most alarming. According to the Australian Institute of Health and Welfare in 2018 and 2019 64% of all 10 to 13 year olds in detention on an average night are Aboriginal or Torres Strait Islanders. Indigenous young people aged 10–17 are 24 times as likely as non-Indigenous young people to be in detention on an average night, and this percentage goes higher some nights.

It is not uncommon in the NT for every single kid in detention to be Aboriginal.

The problem is evident and obvious. It is a disgrace.

The legal profession and the judiciary are centrally placed to understand how this state of affairs has come about and why it is continuing. We are present every time someone appears in Court, is refused bail, is sent to prison and when their release from gaol is blocked. We are participants in this process. In that sense we must take responsibility for the system which causes such oppressive outcomes. If judges and lawyers do nothing about this, we are in no position to criticise others’ inaction.

In his opening speech to the Royal Commission into the Protection and Detention of Children in the NT, (the Don Dale Royal Commission), Counsel Assisting, Peter Callaghan SC (now Justice Callaghan of the Queensland Supreme Court), pointed out that there had been more than 50 reports touching on matters covered by that Commission’s terms of reference, with most produced in the previous 10 years. In fact, on the night of the *Four Corners* piece disclosing the abuse in Don Dale, the Australian Bar Association executive spoke in a telephone hook-up after the show. Everyone was shocked. We thought about calling for an Inquiry but concluded that there had been far too many already. Action was required. The next morning, the Prime Minister called a Royal Commission.

The plethora of inquiries has itself become a hallmark of the crisis. Governments routinely fail to respond – or at least fail to adequately respond to the demonstrable problems. Even the ALRC’s Report, “Pathways to Justice – Incarceration Rate of Aboriginal and Torres Strait Islander People” received next to no response from Canberra. The last government was not serious about implementing any of its recommendations.

In the NT, the response to the Don Dale Royal Commission was muted. Some system changes occurred. There has been a move away from using restraints and spit hoods – except in watch houses. Despite an outcry about the continuing use of spit hoods from lawyers and some media commentators, the NT government was persuaded to continue their use by the Police hierarchy and the Police Association.

**How did we arrive at this point?**

It is unrealistic to view our modern criminal justice system and our first nations peoples’ involvement in it in any way other than through the prism of the impacts of colonisation – a word and concept which is central to academic consideration of this topic, but which rarely sees the light of day in Court rooms in this country.

We are all too well familiar with the impacts of colonisation on Indigenous people – socio-economic disadvantage, health disadvantage, educational disadvantage and widespread interpersonal dysfunction resulting from psychological and cognitive trauma across multiple generations. Indigenous people are still dealing with harms that were generated by early colonial contact and which have been perpetuated by colonial and racist thinking over generations. There is a link between our history and modern dysfunction in Indigenous communities. Dysfunction, in turn, has surrounded offending.

All of the Royal Commissions and inquiries into Aboriginal people’s dealings with the justice system have recognised that poverty and the resulting systemic community dysfunction is a driving cause of offending and then of incarceration.

Our nation needs to respond in many ways and with energy. Action is necessary to address the underlying causes of crime arising from dysfunctional life in dysfunctional communities. It is almost certainly true that policy action on Aboriginal health, housing, education and income levels will be likely to have a much greater impact on the rates of Aboriginal incarceration than any policy changes in the justice or court systems. Urgent political intervention is required to address the myriad ways in which ATSI people are disadvantaged:

* Education levels and opportunities;
* Skills training;
* Overcrowded housing;
* Health problems, including pervasive hearing difficulties, the astounding incidence of rheumatic fever, poor diet leading to high levels of obesity and diabetes; Kidney disease and the high incidence of glaucoma;
* Widespread issues relating to impaired cognitive functioning including developmental disorders and brain damage from substance abuse such as petrol sniffing and now we are beginning to understand the significance of FASD;
* Not to forget the huge and growing problem of drug and alcohol dependence, including a surge of ice.

But it is also vital that policy makers do understand that Indigenous communities are not one-dimensional pools of helplessness. Stereotyping has to be avoided. Despite all the problems that exist, first nations people have always had and continue with strong cultural traditions and practices. Indigenous laws, community relationships and programs conceived by communities are great assets that can able ATSI people to take control of the problems in their midst.

Many Indigenous witnesses in the Don Dale Royal Commission gave evidence about the strengths and skills of Aboriginal people. Pat Anderson, the co-author of the defining report on Child Protection in the Northern Territory, “Little Children are Sacred”, told the Royal Commission that Indigenous communities know the answer for promoting their well-being. She called for Indigenous people to be respectfully engaged in research and policy making within their own communities.

Australia needs to invest heavily in Aboriginal community assets to support Indigenous people to develop their own solutions for their own people. We need to recognise that post-colonial white systems of punishment and detention are not working well, if at all – especially in Indigenous communities.

**Increasing the age of criminal responsibility and the age of detention**

One relatively modest measure that would assist with reducing the number of kids in custody would be to raise the age of criminal responsibility. The age of criminal responsibility in Australia is 10 years old. Every year thousands of primary school aged kids are dealt with in the formal, juvenile justice system. This includes children in Years Four and Five. Children that age are not even close to reaching the levels of the adult understanding of moral rights and wrongs that underpins our criminal justice system. Some of these young children are detained and many of them go on to detention before they turn 14. The majority of these very young offenders are Indigenous.

The median age of criminal responsibility around the world is 14 years of age, as endorsed by international human rights organisations, which base their recommendation on scientific studies showing that, on average, children younger than 14 are not developmentally mature enough to be criminally liable. The UN Committee on the Rights of the Child recommends 12 as the absolute minimum age for a child to be charged with a criminal offence.

The Don Dale Royal Commission made forthright recommendations that the age of criminal responsibility should be raised to 12 and that no child should ordinarily be detained before the age of 14 unless there are serious issues of public safety which require it. The then NT Chief Minister fully supported these important recommendations and quickly implemented the arrangements to ensure that the detention of kids under 14 became the exception.

I welcome the AG and Minister for Justice, Chansey Paech’s commitment this morning to raising the MACR. On June 8 he tweeted, “The age will be raised and it'll be done in this term of government. As the Northern Territory's new Attorney-General and Minister for Justice I’m going to make sure of it. Watch this space.”

The AG needs all the support he can get to achieve this mile stone break through. What follows is designed to assist him.

Raising the age would sweep away the overly complex and clumsy law that exists now about children’s criminal responsibility.

The current youth criminal responsibility laws are overly complex and work practical injustices throughout Australia – especially here in the NT.

The national legal framework that sets the criteria for children’s legal responsibility involves a rebuttable presumption that every child between the ages of 10 and 14 is incapable of being responsible for a crime because they are cognitively incapable of understanding that their otherwise criminal conduct is “seriously wrong” as opposed to merely being naughty or mischievous. In NSW and other non-code States, this presumption is sourced in the Common Law and is called “Doli Incapax”. In the code jurisdictions this principle is enshrined in the various criminal codes. In the NT there are actually two provisions in the code which cover the field.

There is a contest in the NT about the true meaning of these provisions. Section 38 is the foundation stone of juvenile criminal responsibility in the NT. But there is another provision, s.43AQ which applies to a range of more serious offences. There is a current contest playing out here in the NT about whether there are, in fact, two regimes of criminal responsibility for children – one under s.38 and a different one under s.43AQ.

1. *Common law*

*RP* now authoritatively outlines the common law position in Australia. It may

be summarised as follows:

The common law presumes that a child under fourteen lacks the capacity to be criminal responsible for his or her acts. The child is said to be doli incapax. Above the absolute age of incapacity (at common law 7 years), the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence.

Knowledge of the moral wrongness of an act or omission is to be distinguished from knowledge that the conduct is naughty or mischievous. This distinction between conduct that is ‘morally wrong’ and ‘merely naughty or mischievous’ may be ‘captured’ by stating the requirement in terms of proof that the child knew the conduct was ‘seriously wrong’ or ‘gravely wrong.’

No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child’s development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child’s education and the environment in which the child was raised.

What suffices to rebut the presumption will vary according to the nature of the allegation and the child.

In the NT, the Court of Criminal Appeal authoritatively dealt with the way in which s.43AQ should be read when it found in *KG v Firth* that the test to be applied under s 43AQ is ‘the same as, or at least very similar to, the common law test in relation to doli incapax’.

Meanwhile Justice Barr is reserved in a case in which the DPP argued that a different test applies to offences covered by s.38. In *Rigby v ND,* the DPP appealed against a decision of Judge Armitage in the Youth Justice Court where her Honour held that s.38 should be interpreted to operate in the same way as s. 43AQ.

I have skin in this game that needs to be declared. I argued KG on behalf of the young defendant and I argued ND on behalf of the 13 year old school girl who was charged with slapping a teacher. So, what is about to follow reflects the arguments about which Justice Barr is about to deliver judgment.

*Section 38 Immature age*

(1) A person under the age of 10 years is excused from criminal responsibility for an act, omission or event.

(2) A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.41

The significance of the inclusion of s 38 in Division 4 is outlined under s 23 of the Code which provides that:

A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified or *excused*. (emphasis added).

Therefore, unless it is proved that a child has the relevant capacity under s 38(2), they *cannot* be found guilty of an offence.

Section 38 is the original provision enacted under the Code relating to the criminal responsibility of children and has remained unchanged since its inception. This section enacts the Griffith Code formulation of the presumption of *doli incapax*. Section 38 is identical to provisions enacted in other Griffith Code jurisdictions, such as Queensland and Western Australia. It is also very similar to the corresponding provision in Tasmania.

Section 43AQ was introduced in 2005 as part of the ‘progressive reform’ of the Code. It was envisaged that the Part IIAA principles, including s 43AQ, would ‘eventually apply to all Northern Territory offences’, thus repealing s 38 and the Part II principles. However, due to the number of amendments required, this was to be ‘staged approach’. To properly understand how the Northern Territory came to have two provisions relating to the criminal responsibility of children is simple: *that ‘staged approach’ has not yet fully occurred*.

Section 43AQ copies s 7.2 of Chapter 2 of the Model Criminal Code, developed by the national Model Criminal Code Officers Committee and first enacted in Australia by the Commonwealth in 1995 (‘the Commonwealth Criminal Code’) and applied to all Commonwealth offences from December 2001. The Guide to the Commonwealth Criminal Code, published by the Commonwealth Attorney-General’s Department and the Australian Institute of Judicial Administration in March 2002, states clearly that s 7.2 ‘codifies the existing law’, which at that time in the Commonwealth was the common law.

Observed in context, the headings of the Part, Division, and Section are all illustrative: Part II of the Code, *Criminal responsibility*, contains Division 4, *Excuse*, which includes Section 38, *Immature age*. This is an explicit statement of the rationale for s 38: that a child under the age of 10 years is, and a child under the age of 14 years shall be presumed to be, *excused* from criminal responsible because they lack, or are presumed to lack, capacity for mens rea.

This is precisely the rationale of the principle at common law. As the majority explained in *RP*, ‘[t]he rationale for the presumption of doli incapax is the view that a child aged under fourteen years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea.’

If s 38(2) is, as the common law was, concerned with the capacity for mens rea, and if the capacity for mens rea depends upon the intellectual and *moral* development of the child, then the capacity to know that what he/she was doing was wrong must mean the difference between what is right and what is morally wrong. It indicates also that morally wrong must mean more than merely ‘naughty or mischievous’ and rather ‘seriously wrong’ because in the early common law *doli incapax* cases, just as in the early insanity cases, the question of capacity for mens rea depends not on an appreciation of the difference between right and wrong, or good and bad, but between ‘good and evil.’

A construction of s 38 that does not treat the inherent wrongness as meaning ‘seriously wrong in a moral sense’ would therefore be inconsistent with the rationale for the provision. But this highly technical argument would be quite beside the point if the MACR was raised to 14. Doli incapax would disappear.

In the real world of youth justice courts defence lawyers have an uphill battle invoking the presumption of Doli Incapax. More often than not Doli is reduced to a merely theoretical construct. The exigencies of gathering evidence of a child’s cognitive development are legend – especially in the NT and more especially in bush courts.

A child’s ability to engage meaningfully with psychologists and psychiatrists is very limited. The neuropsychological testing and assessment for cognitive functioning are expensive. Funding is woefully inadequate. When a lawyer can access testing, the history taking is hampered by language difficulties, inadequate or non-existent interpreting services, geographical isolation, parents who are unable to provide accounts of the child’s upbringing and lack of health and education records.

Diagnosing FASD requires complex assessments and accurate reports from early childhood and an accurate history of the mother’s alcohol consumption during pregnancy. This type of assessment is a luxury for most children – especially first nations’ kids represented by busy, over-stretched ALS and Legal Aid lawyers.

But this is just part of the picture. Actually, in many (if not most) cases where Doli is sought to be invoked, it is the defence lawyer who needs to actively chase the evidence that points towards their child client lacking the capacity to know that their actions were seriously wrong. This takes time and effort and money – actually, public money.

Youth court judges and magistrates usually require an indication upfront if a child defendant intends to put the prosecution to prove on Doli. This recreates tension in the court – a kind of staring match develops between the Bench and the Bar table. I hear reports of judicial passive aggression and sometimes just good old fashioned truculence when the child’s lawyer seek to raise this “defence”.

This audible sighing and rolling of eyebrows does not normally accompany the defendant putting the prosecution to prove on issues of identification or self-defence or other “conventional” or “adult-style” defences are run.

Worse still, delays in listing hearings for Doli “defences” can lead to kids being held in detention on remand for many months – perhaps longer than would be the penalty for the offending if it was ultimately to be proved. In these circumstances, lawyers and their clients often give up their legitimate right to require proof of criminal responsibility. Guilty pleas are entered.

This is where the child concerned may well have multi-layered psychological issues which make him or her a completely inappropriate vessel for most of the functions of criminal sentencing. Their age means that they have just not yet developed the neurological pathways that affect their brains’ ability to understand the “moral significance” of their acts or to control their impulses or aggression. They have not developed the important coping mechanisms that keep adults out of trouble – like remembering what happened the last time they did something like this or being able to communicate their feelings and frustrations or being able to withstand peer pressure and influences.

This is so for all children. It is particularly so for young children but it also applies to children who are 13, 14, 15 and even 16. But when a child also has cognitive impairments – FASD, ADHD, learning deficits, middle ear disease and other cognitive impairments such as mental illnesses, it is bleedingly obvious that a child with these weighty issues has next to no ability to understand the “moral” quality of their behaviour.

So, it is time to turn the rebuttal presumption which takes up scarce resources into an absolute presumption. Kids below 14 should not be criminally responsible. It is time to raise the age of criminal responsibility.

**The cohort in question: children aged 10, 11, 12 and 13**

It is important to keep in mind that these are relatively small numbers of children. According to the Australian Bureau of Statistics (**ABS**) only 4% of all people arrested are aged 10 to 14. In 2018 and 2019 there were only 21 kids under 14 sentenced to detention in the NT and only 573 throughout Australia.

Children under 14 years of age had significantly lower rates of prevalence in this ABS dataset than any other age cohort, with the exception of adults over 55 years of age.[[1]](#footnote-1) For example, the rate of alleged offending for children aged 10-14 was 969 per 100,000 persons. This was slightly lower than adults aged 50-54, whose rate was 1,141 per 100,000 persons, and slightly higher than adults aged 55-59, at 674 per 100, 000 persons. It was significantly less than any of those within the intervening age groups, which ranged from 15-19-year-olds recording rates of 3,774 per 100,000 persons to 30-34-year-olds at 2,484 and 45-49-year-olds at 1,657 per 100,000 persons.

It is also well known that ‘the involvement of children in the criminal justice system centres on less serious crimes, such as property crimes’.[[2]](#footnote-2) It is rarer for children to commit serious offences against the person.

For example, only three (or 0.415 per cent) of 723 instances in the ABS dataset where police proceeded against a person for ‘homicide and related offences’ related to children under 14 years of age.[[3]](#footnote-3) As noted, the dataset is limited in that it does not include contextual information for these three instances such as whether the child was allegedly acting alone or in a group, whether the child was charged with murder or a lesser offence, and whether the child was ultimately convicted of any offence with which they were charged.

It is also important to keep in mind that non-criminal responses to children’s offending are neither new nor novel. Children below the current minimum age of criminal responsibility (ie, children under 10) or who are considered *doli incapax* are already dealt with outside the criminal justice system, and there are existing early intervention, diversionary, rehabilitative and therapeutic programs and services that might be utilised or expanded.

**Policy Position**

The Law Council of Australia has a standing working group dealing with the problems of overrepresentation of Aboriginal and Torres Strait Islander people in custody. We have been considering the policy challenge of the minimum age of criminal responsibility for all Australian governments. The LCA has just released its position paper on raising the MACR.

The LCA has had a policy for some years that the MACR should be raised to 14. The position paper is designed to assist Australian governments to formulate a model for an alternative architecture for dealing with youth justice when the MACR is lifted to 14.

Lawyers are very well placed to assist Australian governments to construct an alternative architecture of youth justice by providing principles and policy suggestions as to how governments can raise the age of criminal responsibility. Any policy shift in this direction should be based firmly on sound principles. The detail of the policy erected will vary necessarily from State to State. There will be local variations. But there should be common foundation principles.

What follows is a summary of the Law Council’s position paper.

**Overarching Principles**

When developing responses to children under the minimum age of criminal responsibility, the following overarching principles should be adhered to.

* In all responses to children under the minimum age of criminal responsibility, the best interests of the child should be a primary consideration.
* Responses should be non-punitive and aimed at attending to the core needs of the child and their family unit through the provision of wraparound, multidisciplinary, therapeutic services.
* Responses should draw on and build upon the existing evidence base across the medical, legal and social sectors as to what works in supporting children with complex needs, including operating from a place of strength, empowerment and wellbeing.
* All levels of government should provide long-term, stable investment in early intervention, diversionary, rehabilitative and therapeutic programs and services for children under the minimum age of criminal responsibility. This includes the development of a range of support services directed at both addressing existing needs and at combatting pathways into the justice system at an older age, such as family, mental health, disability and substance abuse support, and access to safe, secure housing. Particular regard should be had to the availability of support services in regional, rural and remote areas.
* Children under the minimum age of criminal responsibility should not be primarily dealt with by police.
* Children under the minimum age of criminal responsibility should primarily be engaged with on a voluntary basis.
* Responses to children under the minimum age of criminal responsibility should avoid an over-reliance on child protection frameworks. In particular, the principle of keeping Aboriginal and Torres Strait Islander children safe within their families, communities and kinship systems should be observed.
* All sectors involved in responses to children should be required to meet certain minimum standards of training and practice, which are child-centred, trauma-informed and culturally safe.
* Services, programs, training and procedures should be designed, developed, implemented and reviewed in consultation with children, their families and communities, and in particular Aboriginal and Torres Strait Islander children, families and communities. Where ever possible, First Nations kids should be provided with services by First Nations controlled and managed organisations.
* There should be widespread recognition that children are distinct from adults in terms of their brain development, cognitive functioning and capacity for impulse control, reasoning and comprehension, and the processes and procedures of institutions, services and programs adjusted accordingly.
* Institutions, services and programs responding to children under the minimum age of criminal responsibility must avoid, at all costs, effectively resembling the juvenile criminal justice system.
* Institutions, services and programs responding to children under the minimum age of criminal responsibility should as far as possible be administratively and geographically separate from those responding to adults and children over the minimum age of criminal responsibility.
* Jurisdictions should develop clear legislation, guidelines, protocols and procedures related to the above principles, as well as the additional principles below, and have in place strong child-friendly complaints processes and independent oversight mechanisms.
* Responses to children under the minimum age of criminal responsibility should accord with Australia’s international obligations and international standards with respect to children.

**Practical Approach**

The LCA Working Group has considered a possible framework of non-criminal responses to child offending. We have a possible guide for governments to consider.

This model guidance is intended to allow flexibility within certain parameters, recognising that jurisdictions approach legal and policy implementation in different ways, and have different existing institutions, programs and services that might be utilised or expanded.

**First Response**

In addition to the overarching principles discussed above, key components of a first response to children under the minimum age of criminal responsibility might also include:

* First responders to incidents involving children should be trained and supported to assess incidents appropriately and to act in ways that avoid or minimise harm to the child.
* Referrals from first responders to secondary support services should occur within the shortest appropriate period of time.

As the overarching principles make clear, children under the minimum age of criminal responsibility should not be primarily dealt with by police. It is recognised, however, that it will often be police that are first on the scene in crisis situations and regard may need to be had to outlining an alternative police response.

Should policing form part of a first response to children under the minimum age of criminal responsibility, the following additional principles should be observed:

* Police should be highly skilled, specially trained and accompanied by experienced child support/advocacy service/social workers in their dealings with children under the minimum age of criminal responsibility. Their response to children should be an outreach, health- and welfare-based model.
* Appropriately strict legislative thresholds and safeguards must be in place around the exercise of police powers.
* Deprivation of liberty should be in conformity with the law, used only as a measure of last resort, be limited to exceptional cases, and for the shortest appropriate time.
* That is, for example, police may only detain a child under the minimum age of criminal responsibility where there is an immediate, serious risk of harm to the child or others, and only until the specialist worker arrives, using the least restrictive means possible, using no more force than is reasonably necessary.
* Children under the minimum age of criminal responsibility should not be transported or accommodated in police vehicles, police watchhouses or other types of police facilities alongside adults.
* Police should not use spit hoods or chair restraints on children under the minimum age of criminal responsibility.
* Police should not strip-search children under the minimum age of criminal responsibility.
* Police should seek to divert children towards health, social and community support services at the earliest reasonable opportunity.
* Specialist crisis accommodation should be available to children as a voluntary option where it is not safe for children to return to their usual place of residence or where children need accommodation at short notice or after hours. This must be provided outside of policing and must be separate from that provided to adults or children over the minimum age of criminal responsibility.

**Secondary Response**

In addition to the first response that would occur in crisis situations, there must be a longer-term approach to respond to the needs of children under the minimum age of criminal responsibility, as anticipated in the overarching principles. This secondary response might involve several tiers.

**TIER 1 – Children under the minimum age of criminal responsibility with complex needs**

This would be the default response to children under the minimum age of criminal responsibility.

It is normal for many children as they develop to engage in what is often referred to as minor anti-social behaviour.

It is important to recognise that such behaviour in children of all ages is generally dealt with by existing means, other than through the exercise of the criminal law – such as the child’s parents or school.

Where children do not have the support of a family unit or are disengaged from other protective environments such as schools, their behaviour is currently more likely to come to the attention of, and be dealt with by, authorities such as police and magistrates.

Many of these children have overlapping complex needs in the areas of mental and physical health and disability, poverty, insecure housing, abuse and neglect.

Implicit in arguments for raising the minimum age of criminal responsibility is the recognition that such children should not face harsher consequences than other children because of their social disadvantage. Wraparound support services designed to help them and their families address underlying issues should be the primary response.

Key components of this stage of the secondary response might include:

* The critical, basic needs of children and their families are met, such as the provision of accommodation, from affordable housing and community housing to appropriate alternative supported accommodation for children.
* Children and their families are referred to support services, such as parental support, child behavioural support, alternative education programs, substance abuse programs, and family violence prevention services.
* Children and their families are referred to health services and able to access assessment and treatment in a low-cost, timely manner for any physical or mental health issues that may be contributing to behaviours and outcomes.
* Engagement by the child and their family with services should be encouraged and supported by authorities through holistic responses, but should not be mandated.
* It is emphasised that access to wraparound support services must be provided to all children, including those who are, or who are at high risk of coming, in contact with the child protection system.
* More broadly, a significant and sustained increase in funding wraparound services outside the criminal justice system and child protection system is a necessary part of any response to children under the minimum age of criminal responsibility, if it is to be successful in reducing incarceration and removal rates and improving child and community safety long term.

**TIER 2 – Children under the minimum age of criminal responsibility with serious complex needs**

Where children under the minimum age of criminal responsibility have more serious complex needs, the secondary response might be more intensive within the parameters of the overarching principles identified above.

*Threshold for Involvement*

There should be a threshold, criteria or other assessment of suitability to determine whether this stage of the secondary response should apply to a particular child’s circumstances.

It is important to emphasise that the method of delineating between different tiers of a secondary response should not correspond to categories of criminal offending. It is the individual needs and circumstances of the particular child that should guide the response, rather than the category of offending into which the behaviour would fall were the child over the minimum age of criminal responsibility.

The threshold, criteria or assessment should be sufficiently narrow in order that it does not become the default to bring children within this elevated response, and the demands on the system can be managed and resources directed towards children most in need.

The seriousness of behaviour in causing risk, harm or damage might be one in a list of indicators used in identifying a child’s complex needs as requiring intensive intervention.

For example, one possible threshold, criterion or assessment for this level of response to apply to a child might be that:

the child has engaged in, or attempted to engage in, conduct which is reasonably considered to be seriously harmful to the child or the community; and

the child is more likely than not to place either:

the child at significant risk of serious harm to their person; or

members of the community at significant risk of serious harm to their person or property.

The evidence used to establish this threshold should be required to satisfy the civil standard of proof (‘on the balance of probabilities’).

*Decision-Making Body or Panel*

The key component in this stage of the secondary response to children under the minimum age of criminal responsibility would be a decision-making body, which would review in detail the situation of a child referred to it and develop, through the input of advice and assessment from children’s experts across different fields, a coordinated, individualised response plan for that child.

There is a preliminary issue as to whether such a body should be judicial, quasi-judicial or administrative. The Law Council notes there are advantages and disadvantages associated with each type of body, including the functions and powers that might be exercised by the body.

Examples of each type of body exist, some of which could serve as partial models in responding to children under the minimum age of criminal responsibility, such as the Youth Koori Court, as well as proposals more directly related to the present context such as the ACT independent report’s Multidisciplinary Therapeutic Panel.

In the Rangatahi court in Aotearoa New Zealand, which is similar in cohort, purpose and structure to the Youth Koori Court, the child takes an active role in developing the plan, which the court, again chaired by a judicial officer, monitors.

The 2021 ACT independent report proposes a Multidisciplinary Therapeutic Panel, which would assess and work with children and families with complex needs as well as monitor systemic issues and provide trend analysis to inform options for building capacity within existing service providers and broadening options to better serve the needs of this cohort. It would be a ‘legislated’ body, with a ‘statutorily appointed, independent Chair’ and include ‘senior decision makers from across key directorates and community organisations’, including police, child protection services, disability, mental health and education, as well as Aboriginal and Torres Strait Islander members, and may also include independent community members and experts.

Drawing on such models, the key components of this stage of the secondary response might at minimum include that:

* Responses to children under the minimum age of criminal responsibility must not fall within the criminal jurisdiction of a court, even where these responses are diversionary.
* Responses to children under the minimum age of criminal responsibility should not involve formal court proceedings.
* Special-purpose forums that are child centred, trauma informed and culturally safe should be created and used instead.
* Proceedings should be conducted with as little hierarchy, formality and technicality as possible, while affording procedural fairness to the child.
* Where this is to occur at a Children’s Court, the usual court proceedings and settings must be modified. For example, all participants in the process should sit at a round table.
* In addition, these types of matters must be kept separate from the other business of the Children’s Court, particularly its criminal matters, in terms of divisions, timings and listings.
* The decision-making body or panel should be chaired by a judicial officer, and include independent children’s experts in the legal, medical and social work fields, as well as the child and their support system, including their legal representative.
* Where the child is Aboriginal or Torres Strait Islander, the decision-making body or panel must include Elders or other respected community leaders who are well-placed to advise on culturally safe responses. This practice can extend beyond Aboriginal or Torres Strait Islander children, involving other culturally appropriate panel members for such children.
* The outcome of the proceedings is not a sentence or order, but rather the development of a response plan for the child, conceived in conversation between the child, their support system, and the independent children’s experts.
* The response plan might include elements such as attending specific intervention programs, health and other services appointments, and agreeing to certain living arrangements, as well as engaging in restorative processes, such as meeting with victims. Day-to-day, a child’s participation in the response plan should be facilitated through the support of a dedicated and specially trained caseworker and with wraparound services.
* Parts of this assessment, recommendation and referral process might trigger the involvement of the child with other non-criminal legal systems existing in the jurisdiction, including those involving mandatory responses, such as under mental health legislation, child protection legislation, or other legislation allowing for civil orders to be made.

**TIER 3 – Children under the minimum age of criminal responsibility with extreme complex needs**

An additional tier to the responses outlined above might be allowed to apply to child under the minimum age of criminal responsibility with extreme complex needs, including components such as:

• in situations where it is established that there is no alternative, some form of mandated residential supervision – eg, small scale, 4-8 bed, intensively therapeutic facility;

• the child would, as required, receive intensive psychiatric care, treatment and rehabilitation, with frequent reassessment of the child’s progress and the ongoing necessity of the mandated residential supervision;

• this must avoid, at all costs, being ‘juvenile detention’ under another name; and

• this must comply with the principles set out above regarding the deprivation of liberty of a child.

This response should be reserved for rare cases where no other responses are suitable, because an extreme threshold such as the one following has been reached:

• the child has engaged in violent conduct, including serious sexual violence, which is reasonably considered to be gravely harmful to the community, and falling within the most exceptional categories of such behaviour; and

• the child is more likely than not to place members of the community at significant risk of grave harm to their person; and

This would require an appropriate Children’s Court or Children’s Tribunal to consider:

• the interests of the child;

• the seriousness of the conduct;

• the degree of violence involved in the conduct;

• the harm caused to any victim; and

• the number and nature of any such incidents and the number of times the child has been dealt with under this Act.

**How to fund this model**

First, the current system is costing tax payers and the communities way too much.

PWC has analysed these costs. In 2016 it costed $7.9 billion dollars per annum to imprison indigenous people in Australia. PWC forecasts then that this would rise to just below $10 billion dollars by the early 2020s. Their prediction is that the cost will rise to just below $20 billion dollars by 2040. Incarceration is a massive global industry.

If custodial sentences for Aboriginal kids were replaced by cognitive behavioural therapy or holistic case management and support, detention rates are almost certainly going to drop significantly. PWC estimates that the drop in offending in such circumstances would be somewhere between 4 and 15% leading to savings of in excess of $10 billion dollars by 2040.

The best example of this kind of justices reinvention is the work of the great trailblazing program of the Maranguka Project in Bourke, NSW. That program has had time to develop, win the community’s confidence and be effective. In 2018 KPMG found that the program had led to a 14% drop in bail breaches and a 42% drop in the days spent in custody. Their survey also showed 23% less incidences of domestic violence and, magnificently, a 30% increase in year 12 retention rates. KPMG estimates that the economic impact of the Maranguka Project is upward of $3 million dollars in a single year.

It would be so much better if there were other similar justices reinvestment initiatives that I could point to. There are some in their infancy but we need to see them go viral.

**Conclusion**

It is our job to progress this. We need to find the time as practising criminal lawyers to devote to the broader picture that extends past our daily grind of individual case work. We need to work with and under the guidance of Aboriginal leaders. Our political representatives need to be convinced. This is not an easy job by any means but advocacy is our normal day job. So, I encourage everybody to get out there and start pleading this case. Let’s get the majority of the 100 or so kids in Don Dale out of there and into a safe environment.

Let’s keep in mind some of the words from the Uluru Statement from the Heart:

“Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.”

1. Ibid. [↑](#footnote-ref-1)
2. Mark Nolan and Jane Goodman-Delahunty, *Legal Psychology in Australia* (Thomson Reuters, 2015) 222. [↑](#footnote-ref-2)
3. Australian Bureau of Statistics, *Recorded Crime – Offenders, 2019-2020* (11 February 2021), ‘Table 21 Youth offenders, Sex and principal offence by age, 2019-2020’. [↑](#footnote-ref-3)