

Submission

Council of Attorneys-General

Review of Age of Criminal Responsibility

About the NHLF

The National Health Leadership Forum (NHLF) was established in 2011. The NHLF is a collective partnership of 12 national organisations who represent a united voice on Aboriginal and Torres Strait Islander health and wellbeing with expertise across service delivery, workforce, research, healing and mental health and social and emotional wellbeing. We provide a range of advice and direction to the Australian Government on the development and implementation of policies, programs or services that contribute to improved and equitable health and life outcomes, and the cultural wellbeing of Aboriginal and Torres Strait Islander people.

The NHLF was instrumental in the formation of the Close the Gap Campaign and continues to lead the Campaign as the senior collective of Aboriginal and Torres Strait Islander health leadership. Committed to achieving health equality, the NHLF draws strength from cultural integrity, the evidence base and community. The NHLF provides advice and direction to the Australian Government on the development and implementation of informed policy and program objectives that contribute to improved and equitable health and life outcomes, and the cultural wellbeing of Aboriginal and Torres Strait Islander people.

The NHLF shares a collective responsibility for the future generations of Aboriginal and Torres Strait Islander people and we pay our respect to our Elders who came before us.

Health is a noted human right, it is an underpinning to everyday life, and key factor in economic (and environmental) sustainability. Our vision is for the Australian health system is free of racism and inequality and all Aboriginal and Torres Strait Islander people have access to health services that are effective, high quality, appropriate and affordable.

The NHLF Membership

- Aboriginal and Torres Strait Islander Healing Foundation
- Australian Indigenous Doctors' Association
- Australian Indigenous Psychologists' Association
- Congress of Aboriginal and Torres Strait Islander Nurses and Midwives
- Indigenous Allied Health Australia
- Indigenous Dentists' Association of Australia
- The Lowitja Institute
- National Aboriginal and Torres Strait Islander Health Workers' Association
- National Aboriginal and Torres Strait Islander Leadership in Mental Health
- National Aboriginal Community Controlled Health Organisation
- National Association of Aboriginal and Torres Strait Islander Physiotherapists
- Torres Strait Regional Authority

Introduction

The NHLF welcomes the opportunity to respond to the request for submission by the Council of Attorneys-General Review of age of criminal responsibility. This Review is critical to recalibrating how our justices' systems deal with children whose behaviour is attracting responses from law enforcement and justice systems which is placing children onto the path of criminal behaviour rather than addressing the underlying causes and prevent further interactions with the justice system.

Systemic racism is a factor in the overrepresentation of Aboriginal and Torres Strait Islander peoples in our justice systems. Without addressing the systemic issue of racism within our society we will not improve the social determinants of health which are key influences in why Aboriginal and Torres Strait Islander children are in out of home care and youth justice.

The NHLF support the work by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). These Legal Services provide legal advice; assistance; representation; community legal education; advocacy; law reform activities, and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system is vital in delivering effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples.

Response to the Inquiry's Questions

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.

1. The NHLF calls on the Attorneys-General to the prevent the criminalisation of children between 10 and 13 years of age by: raising the minimum age of criminal responsibility in all Australian jurisdictions to at least 14 years of age.
2. The NHLF believes is important to note that consideration of this issue encompasses both youth in detention as well as those on community-based supervision orders, both forms of supervision result from interaction with the criminal justice system.
3. The disproportionate impact that the minimum age of criminal responsibility has on Indigenous young people is well known.¹ The Australian Institute of Health and Welfare Youth Justice in Australia report 2017-18 presents some very disturbing statistics concerning the representation of Indigenous children in the youth justice system. The report states that a total of 5513 young

¹ AMA and LCA Statement on the Minimum Age of Criminal Responsibility, 2019 <https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-ea11-9403-005056be13b5>

people aged 10 and over were under youth justice supervision on an average day in 2017-18. Of these, almost half (49%) were Indigenous.² This is despite Indigenous youth comprising just 5% of young people aged 10-17 in Australia.³ In 2017-18, the rate of Indigenous young people aged 10-17 under supervision on an average day was 187 per 10,000, compared with 11 per 10,000 for non-Indigenous young people.⁴ The level of Indigenous over-representation was higher in detention (23 times more likely) than in community-based supervision (17 times as likely).⁵

4. The common law presumption of *doli incapax* is often argued to be a sufficient safeguard for young children (aged 10-14) who come into contact with the criminal justice system despite there being significant evidence to the contrary. This issue is further addressed under the response to question 3.
5. It is widely acknowledged internationally and within Australia that responses to youth offending must reflect the unique circumstances of young people, including:
 - the developmental nature of adolescence and its link to offending;
 - the criminogenic effect of imprisonment; and
 - the public interest rehabilitation of young people.⁶
6. The Parliamentary Library and Information Service within the Department of Parliamentary Services, Victoria highlights the ‘criminogenic effect of custody on a young person whose brain is still developing: findings from several studies indicate that a young offender who participates in a diversion program is far less likely to reoffend than a young person whose case is determined in court and who is subsequently incarcerated. This includes controlling for various factors likely to influence recidivism.’⁷
7. The Human Rights Law Centre (HRLC) state that: “Children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children’s brains are still developing throughout these formative years where they have limited capacity for reflection before action. Children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of criminalisation.”⁸

² Australian Institute of Health and Welfare 2019. Youth Justice in Australia 2017-18. Cat. No. JUV 129. Canberra: AIHW.

³ Ibid

⁴ Ibid at page 9.

⁵ Ibid at page 9.

⁶ Parliamentary Library and Information Service, Department of Parliamentary Services, Parliament of Victoria, Grover, C 2017. Youth Justice in Victoria: <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13806-youth-justice-in-victoria>

⁷ Ibid

⁸ HRLC. 2019. Our Youth, Our Way. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice. 31 October. <https://www.hrlc.org.au/submissions>.

8. Australia's laws concerning the age of criminal responsibility are in conflict with global human rights standards. The *Convention on the Rights of the Child* (CROC), to which Australia is a signatory, requires that states establish 'a minimum age below which children shall be presumed not to have the capacity to infringe penal law'⁹ and that States should 'whenever appropriate and desirable, [develop] measures for dealing with such children without resorting to judicial proceedings...'.¹⁰
9. The Committee on the Rights of the Child provides more specific guidance, stating that a minimum below 12 years of age is unacceptable and that while 12 is the absolute minimum, states should 'continue to increase this to a higher age level'.¹¹
10. Raising the minimum age of criminal responsibility requires a principled decision to align Australian state and territory criminal laws with international legal norms that balance the child's best interests with the broader interests of crime prevention and community safety.¹²
11. In addition, there is a well-recognised link between the overrepresentation of Aboriginal and Torres Strait Islander children in the Child Protection System and the overrepresentation of children in the Justice system. As NATSILS¹³ note that young people placed in out of home care (OOHC) are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year. For young people in OOHC, there is also a recognised increased risk of involvement with the criminal justice system after leaving OOHC.
12. The majority of children in detention, around 60%, are on remand waiting for their trial or sentence. These statistics reveal a system that is geared towards imprisoning children, rather than addressing the underlying causes of 'problematic' behaviour, particularly through prevention and early intervention programs and services that are therapeutic, rehabilitative and youth specific.¹⁴ Raising the age would break the cycle of early entry into, and entanglement within, the criminal justice system. Children arrested before 14 years of age are three times more likely than those arrested after 14, to reoffend as adults.¹⁵

⁹ Article 40(3)(a)

¹⁰ Article 40(3)(b)

¹¹ CRC/C/GC/10 para. 32

¹² O'Brien, Wendy and Fitz-Gibbon, Kate 2017, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform, *Youth Justice*, vol. 17, no. 2 pp. 158.

¹³ NATSILS 2017 Submission to the Law Council of Australia's National Justice Project. October. Sydney. See also the Australian Institute of Health and Welfare 2017. *Youth justice in Australia 2015–16*. Bulletin 139. Cat. no. AUS 211. Canberra: AIHW; and Baidawi s. and Sheehan, R. 2019. 'Crossover Kids': Offending by child protection-involved youth. *Australian Institute of Criminology: Trends & Issues in crime and criminal justice*. No. 582. December. Canberra.

¹⁴ The Human Rights Law Centre. 2019. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice.

¹⁵ Croft T. 2019. A new bill keeping 10 years old out of jail is a good start, but it needs to go further. *The Conversation*. Australia retrieved from <https://theconversation.com/a-new-bill-keeping-10-year-olds-out-of-jail>.

13. The inconsistency between the view that children aged 10 are capable to be held criminally responsible for their actions yet young people at 16 years of age are deemed to lack the requisite capacity to be empowered to vote. At the age of 18 years, a person can sign contracts, get married without parental consent, be held criminally responsible for one's actions and serve a sentence in adult jails and vote. 18 years of age marks the developmental stage of sentience and therefore responsibility is assumed.¹⁶ These perspectives on age and capability illustrate the contradictions based on social/cultural values rather than use of evidence in the designing of laws and their application.
14. Within the criminal justice system, like any other system, its management is dependent on the attitude of those working within the system and as noted by the Human Rights Law Centre¹⁷ the "massive inequality exists not because Aboriginal children commit more crimes, but because of the operation of discriminatory laws and policies that result in Aboriginal children being targeted by police, stigmatised and harmed by contact with the system and subsequently denied culturally relevant and community based support."
15. It is not just the aforementioned contradiction that is concerning, more importantly it is the longer term impact on the mental health of children and the setting up of a lifetime of disadvantage resulting from early interactions with the criminal justice system. Children's brains and patterns of behaviour are still developing until their late teens. Locking up children during their developmental years affects this development. It increases the risks of depression, suicide, self-harm, leads to poor emotional development, poor education outcomes and further fractures family relationships.¹⁸ Furthermore, children in incarceration are more likely to exhibit developmental disorders. Developmental and cognitive disabilities, evident through communication difficulties, cognitive delay, learning disabilities, emotional and behavioural problems and lack of inhibition, are more prevalent in the juvenile justice sector than in the general population.¹⁹

¹⁶ Chapman, S. 2016. When is a smoker an adult? Why we shouldn't raise the legal smoking age to 21. The Conversation: <https://theconversation.com/when-is-a-smoker-an-adult-why-we-shouldnt-raise-the-legal-smoking-age-to-21-56985>

¹⁷ Human Rights Law Centre. 2019. Our Youth, Our Way – submission to the inquiry into the overrepresentation of Aboriginal children and young people in your justice. <https://www.hrlc.org.au/submissions/2019/11/1/our-youth-our-way>

¹⁸ Baldry E. Cunneen C. 2019. Locking up kids damages their mental health and sets them up for more disadvantage. Is this what we want? The Conversation: <https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674>; and Hughes, N. 2014. Neglecting neuroscience has criminal consequences for youth. The Conversation: <https://theconversation.com/neglecting-neuroscience-has-criminal-consequences-for-youth-34872>.

¹⁹ Croft T. 2019. A new bill keeping 10 years old out of jail is a good start, but it needs to go further. The Conversation. Australia retrieved from <https://theconversation.com/a-new-bill-keeping-10-year-olds-out-of-jail>

16. The Baidawi and Sheehan Study for the Criminal Research Advisory Council and the Victorian Department of Justice and Regulation²⁰ found that “children with Child Protection involvement are disadvantaged at several stages of criminal justice system contact. Systemic disadvantage in this context can be understood as crossover children’s disproportionate exposure to criminogenic environments and the criminal justice system, compared to peers residing with family or a responsive guardian, coupled with a lack of Youth Justice system responsivity to the unique needs of this group.” This study concluded that it was more important to provide better support for “cross-over” children as they are overall younger, more violent, offend persistently more than their peers. This group of young people have a level of complexity of needs that reinforces the necessity for a whole-of-government response to avert the care to custody trajectory.
17. There are many underpinning issues that drive children to crime and an established link between poor out of home care, residential care system and children going into the justice system. Much of this is due to a poor welfare social support system creating a criminal environment rather than preventing.²¹ Having a low age of criminal responsibility means that we are responding to welfare issues with criminal justice responses and potentially damaging the prospects of young people and their potential future contribution to society²² and their community. The Police should not be the front line and covering over the faults within our protection and community services systems.²³

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.

18. The NHLF call for the age of criminal responsibility to be increased to 14 years of age in all jurisdictions across all types of offences.
19. Currently the age of criminal responsibility across Australia is 10 years old. Children as young as 10 and 11 have been detained by police for alleged crimes as petty as breaching bail by missing school and arriving home moments after a bailed imposed curfew. The Committee on the

²⁰ Baidawi s. and Sheehan, R. 2019. ‘Crossover Kids’: Offending by child protection-involved youth. Australian Institute of Criminology: Trends & Issues in crime and criminal justice. No. 582. December. Canberra.

²¹ McFarlane, K. 2017. The faulty child welfare system is the real issue behind our youth justice crisis. The Conversation: <https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>

²² Little, R. 2018. Congratulations, you’re ten! Now you can be arrested. The Conversation: <https://theconversation.com/congratulations-youre-ten-now-you-can-be-arrested-106115>

²³ HRLC. 2019. Our Youth, Our Way. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice. 31 October. <https://www.hrlc.org.au/submissions>.

Rights of the Child²⁴ and the National Children’s Rights Commissioner²⁵ consider the age of criminal responsibility as unacceptably low. The low age of criminal responsibility impacts disproportionately on Indigenous children because of their over-representation in the criminal justice system²⁶.

20. On the whole, juveniles are more frequently apprehended by police in relation to offences against property than offences against the person. Certain types of offences (such as graffiti, vandalism, shoplifting and fare evasion) are committed disproportionately by young people. Conversely, very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles. In addition, offences such as white-collar crimes are committed infrequently by juveniles, as they are incompatible with juveniles’ developmental characteristics and life circumstances.²⁷
21. As previously mentioned in the introduction, the AIHW²⁸ have reported on the overrepresentation Aboriginal and Torres Strait Islander young people in the youth/criminal justice system compared to non-Indigenous children, and the fact that non-Indigenous children are more likely to go into diversionary programs than Aboriginal and Torres Strait Islander Children. The AIHW also point out that Aboriginal and Torres Strait Islander children in the child protection system are more likely to end up in the youth justice system. Child protection is becoming a pipeline to the justice system and prison, particularly for Aboriginal and Torres Strait Islander children and youth. Australia needs to move away from traditional ‘tough on crime’ approach and take an approach that wants to prevent crime by assisting young people in need and taking the view that their behaviour or actions is a call for help and an opportunity for early intervention to prevent re-offending later in life.
22. Accordingly increasing the age to which a child will come into the justice system along with having a thoroughly implemented diversionary process will help to reduce contact with police and the legal system. “Diversion is an essential ingredient of an effective youth justice system. The philosophy of diversion recognises the negative consequences of exposing young people to the criminal justice system, and offers young people a pathway out of crime, without exposing

²⁴ UN Committee on the rights of the Child. 2019. Committee on the rights of the Child review the report of Australia. 10 September: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24974&LangID=E>

²⁵ Australian Human Rights Commission. 2018. Submission to the Committee on the Rights of the Child: Information relating to Australia’s joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict. Pp60-61.

²⁶ NATSILS and Amnesty International Written Statement: The Crisis of Indigenous Youth Detained in Australia, Item 3: Interactive Dialogue with the Special Rapporteur on the Rights of Indigenous Peoples, UN Human rights Council Thirty-Six Session September 2017.

²⁷ K. Richards (2011) ‘What makes juvenile offenders different from adult offenders?’, Trends & Issues in Crime and Criminal Justice, No. 409, Australian Institute of Criminology, Canberra, p. 3.

²⁸ Australian Institute of Health and Welfare 2019. Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018. Data linkage series no. 25. Cat. no. CSI 27. Canberra: AIHW.

them to the stigma and alienation of the criminal justice system. Diversion also recognises the reality that most young people ‘grow out of crime’ when exposed to positive interventions.”²⁹

*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.*

23. As previously mentioned, it is contradictory to argue that a child between the ages of 10 to 14 years can be held accountable in criminal law for their actions as if they are adults, yet no such allowance is made for children under 18 years to prove their competence for the purpose of voting. These two legislative decisions illustrate inconsistency in the application of evidence concerning the cognitive capacity of persons aged under 18 years. This inconsistency is compounded by research which suggests the application of the presumption *doli incapax* is perhaps not being implemented as intended and often fails to safeguard children.³⁰
24. A study conducted by O’Brien and Fitz-Gibbon in 2017 revealed that the common law principle of *doli incapax* is, in Victoria at least, incorrectly applied in practice. The onus is ordinarily on the prosecution to rebut the presumption of *doli incapax* however that study found that ‘the onus for *doli incapax* now falls, informally to the defence, who must initiate (and bear the cost of) psychological assessments of a child’s capacity in instances where they think this is appropriate.’³¹ This presents a number of problems in practice including funding for such assessments, the availability of appropriate psychologists and the fact that ‘children are vulnerable to the discretion of legal counsel, who, after all, are trained in law rather than developmental psychology’.³²
25. This study demonstrates significant erosion of the principle of *doli incapax* in practice in the criminal justice system in Victoria and raises concerns about whether the principle is effectively applied in other Australian jurisdictions. This common law principle should be enshrined in legislation, to avoid confusion regarding its application in practice.

²⁹ Satya, S. and Barson, Ruth B. 2011. A contemporary snapshot of two issues upon which the RCIADIC Report commented: Youth Justice and the over-incarceration of Aboriginal young people, and alcohol-related offences and offending. Australian Indigenous Law Review. Vol. 15. No 1. 87-92

³⁰ Baidawi and Sheehan. Op cit.

³¹ O’Brien, Wendy and Fitz-Gibbon, Kate 2017, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders’ view and the need for principled reform, Youth Justice, vol. 17, no. 2 pp. 134-152.

³² Ibid pp. 148.

26. The Human Rights Law Centre (HRLC) state that: “Children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children’s brains are still developing throughout these formative years where they have limited capacity for reflection before action. Children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of criminalisation.”³³

27. Therefore, the NHLF calls for the presumption of *doli incapax* to be retained, but that the age to which it is applied is changed to include children aged 14 years and over.

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

28. The NHLF does not support the imprisonment of children and therefore calls for a higher minimum age of detention of 16 years.

29. Addressing the driving factors that lead young people to behave in ways that could lead them to imprisonment then differentiating between age for criminal responsibility and imprisonment becomes irrelevant. The focus becomes one of prevention and interventions through increase welfare and social supports rather than a ‘law and order’ approach.

30. The Australian Law Reform Commission recommends that all jurisdictions repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.³⁴

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.

31. The overrepresentation of Indigenous people in Australian prisons was the focus of the Australian Law Reform Commission report *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.³⁵ Two of the key

³³ HRLC. 2019. Our Youth, Our Way. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice. 31 October. <https://www.hrlc.org.au/submissions>.

³⁴ Australian Law Reform Commission. 2018. Pathways to Justice-Inquiry into the Incarceration Rate of Aboriginal and Torres Strait islander Peoples. Final Report 133 (2017)

³⁵ Ibid

recommendations of that report involved “justice reinvestment”. Justice reinvestment is a strategy for reducing the number of people in prison (and the numbers coming into contact with the criminal justice system) by investing funds drawn from the corrections budget into early intervention, prevention and diversionary solutions in communities where many prisoners come from and return to.³⁶ The enquiry went so far as to suggest that a justice reinvestment body be set up to provide ‘technical expertise and promote the reinvestment of resources from the criminal justice system into community-based initiatives’.³⁷

32. Justice Reinvestment is not a new concept and was advocated by the Australian Human Rights Commission, in their Social Justice Report of 2009³⁸ which focused on *justice reinvestment as a solution* to reduce Indigenous over-representation in the criminal justice system. Tom Calma,³⁹ the Aboriginal and Torres Strait Islander Social Justice Commissioner from 2004–2010, who oversaw the 2009 Report, recently noted the ALRC Pathways to Justice Report recommendations and advocates for their implementation particularly justice reinvestment.
33. An example of justice reinvestment in action is the Maranguka Justice Reinvestment project in Bourke, New South Wales. As a result of the project, from 2016 to 2017, the Bourke community experienced a:
- 23% reduction in police-recorded incidents of domestic violence
 - 14% reduction in bail breaches for adults
 - 42% reduction in days spent in custody for adults
 - 31% increase in year 12 student retention rates
 - 38% reduction in charges across the top five juvenile offence categories.⁴⁰
34. Arguably, what has made the Maranguka project so successful, is that is a community-led, ‘place-based model of justice reinvestment.’⁴¹ Mick Gooda, also a former Aboriginal and Torres Strait Islander Social Justice Commissioner, has supported a justice reinvestment approach as it enables communities to take back local control...to not only take some ownership of the problem but also own the solution.⁴² The characteristics of justice reinvestment align well with

³⁶ Russel, S and Cunneen, C. 2018. As Indigenous incarceration rates keep rising, justice reinvestment offers a solution. The Conversation. Australia retrieved from <https://theconversation.com/as-indigenous-incarceration-rates-keep-rising-justice-reinvestment-offers-a-solution-107610>

³⁷ ALRC. Op. cit.

³⁸ AHRC. 2009. Social Justice Report. Sydney.

³⁹ Calma, T. 2019. Justice reinvestment: key to reducing Indigenous incarceration. 6 June. Opinion: Australian Lawyers Alliance: <https://www.lawyersalliance.com.au/opinion/justice-reinvestment-key-to-reducing-indigenous-incarceration>

⁴⁰ ALRC Op. cit.

⁴¹ KPMG. 2018. Maranguka Justice Reinvestment Project Impact Assessment: <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

⁴² Cited in the Senate Legal and Constitutional Affairs References Committee Report. 2013. Value of a justice reinvestment approach to criminal justice in Australia.

notions of self-determination in emphasising community ownership and responsiveness to local need.⁴³

35. The NATSILS calls for actions aimed to tackle the behaviour of children and preventing the potential for lifelong interactions with the youth justice and criminal justice systems. Some of the actions called for are:⁴⁴
- 35.1. Establish greater flexibility in funding models to enable Aboriginal and Torres Strait Islander community controlled organisations to deliver holistic wrap-around services that are responsive to community needs.
 - 35.2. Provide adequate resources to Aboriginal and Torres Strait Islander community controlled organisations to enable greater collaboration with Commonwealth, State and Territory Governments to identify gaps and design appropriate infrastructure that will increase the availability of culturally appropriate community based sentencing options.
 - 35.3. Implementing alternative non-punitive sentencing responses that focus on rehabilitation and addressing the underlying causes of offending behaviour.
 - 35.4. Work with Aboriginal and Torres Strait Islander organisations to identify unmet need and develop culturally appropriate community based sentences, with a particular emphasis on the delivery of community based sentences in rural and remote locations.
 - 35.5. Invest in developing better infrastructure and support services to increase the availability of culturally appropriate community-based sentencing options.
 - 35.6. Invest in the design and implementation of culturally appropriate community-based sentencing options.
36. Likewise, the Change the Record Coalition have developed frameworks that outline actions that governments in partnership with Aboriginal and Torres Strait Islander communities to deliver programs and services to address the issues and assist children who are at risk of falling into the youth justice cycle. Their *National Plan of Action* and *Blueprint for Change* aim to end the overrepresentation of Aboriginal and Torres Strait Islander children in prison through reform of the youth justice system and address concerns of governments and the broader community regarding 'community safety'. These documents provide guidance to the policies and strategies required to address the underlying reasons why individuals come into contact with the justice system in the first place and provide alternative strategies than the current youth justice

⁴³ Ibid.

⁴⁴ NATSILS. Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples, September 2017. Pp 17, 35

approach. The fundamentals behind these two plans is that all levels of governments need to listen to and empower Aboriginal and Torres Strait Islander communities to create the change. Governments need to acknowledge and accept that all strategies must be grounded in a firm understanding of Aboriginal and Torres Strait Islander peoples' culture and identity.⁴⁵

37. With the recognised crossover of Aboriginal and Torres Strait Islander children in child protection system into the youth justice system it is a must that the Aboriginal and Torres Strait Islander peak organisations are recognised to holding the solutions. As previously mention the Legal Services through NATSILS know the issues and solutions within the youth justice systems. Likewise, SNAICC, the peak body representing children and the secretariat for the Family Matters Campaign are leading the designing and implementing alternative approaches within the Out of Home Care system. This is the only way reduce the overrepresentation of Aboriginal and Torres Strait Islander children in youth justice system.
38. The Family Matters Campaign calls for action that aims to ensure Aboriginal and Torres Strait Islander children and young people grow up safe and cared for in family, community and culture. It aims to eliminate the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 2040. The Family Matters Report 2019⁴⁶ notes:
 - 38.1. The growing trend towards permanent placement away from their families and that Aboriginal and Torres Strait Islander children continue to experience high levels of disadvantage.
 - 38.2. That Aboriginal and Torres Strait Islander children are 37.3% of the total out-of-home care population, including foster care, but only 5.5% of the total population of children. Aboriginal and Torres Strait Islander children are now 10.2 times more likely to be removed from their families than non-Indigenous children.
 - 38.3. That poverty and homelessness have a profound impact on children being removed from their home. Nearly one in three Aboriginal and Torres Strait Islander people are living below the poverty line. Aboriginal and Torres Strait Islander householders are almost twice as likely to experience rental stress.

⁴⁵ Change the Record. Free to be Kids – National Action Plan:

<http://www.natsils.org.au/portals/natsils/Change%20The%20Record%20Free%20to%20be%20Kids%20National%20Plan%20of%20Action.pdf?ver=2018-06-27-120222-650>; Policy Framework – Blueprint for Change: <https://changetherecord.org.au/policy-framework-blueprint-for-change>

⁴⁶ SNAICC, Family Matters Campaign, Griffith University, University of Melbourne and Monash University. 2019. Family Matters Report: https://www.familymatters.org.au/wp-content/uploads/2019/10/1097_FM-2019_LR.%C6%92.pdf

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.

39. The Council of Attorneys-General Review must recognise that along with the experience of poverty and disadvantage, involvement in the child protection system and family violence are two of the clearest indicators of people who are more likely to end up in the criminal justice system. Early intervention strategies to prevent crime must include measures to stop family violence and avoid exposure to the child protection system by supporting families and strengthening communities. These strategies will decrease imprisonment and violence rates.⁴⁷
40. The focus should be on the above which is about acknowledging the systemic drivers including intergenerational trauma that drives the “anti-social” behaviour which is the responsibility of governments. Placing the focus on children taking responsibility for their behaviour relieves governments and their agencies from their actions which are part of the system issues.
41. Justice reinvestment approaches can include programs as diverse as investments in education, job training, health, parole support, housing or rehabilitation.⁴⁸ As outlined above, the justice reinvestment approach being utilised in Bourke, NSW is having an overwhelmingly positive impact on the community owing to its community-led, place based approach.
42. Justice reinvestment approaches can be employed at all critical points along the criminal justice path: in prevention of offending, diversion from custody at the point of remand or conviction and in lowering the numbers returning to custody via breaches of parole or reoffending.⁴⁹
43. Justice reinvestment clearly offers the potential for the development of strategies to deal with children who are too young to be charged or where a diversionary strategy is employed to deal with the behaviours.

⁴⁷ Ibid

⁴⁸ Schwartz, M *Australian Indigenous Law Review* vol 14 No 1, 2010 “Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment” p.3.

⁴⁹ Schwartz, M *Australian Indigenous Law Review* vol 14 No 1, 2010 “Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment” p.1.

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?

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?

Response to Questions 7 and 8 Combined

44. The NHLF does not accept the statements of anti-social behaviour and social norms when it is linked to children. The placing of adult expectations on children takes away the ability of children to learn, develop and grow with the help of adult and community guidance. Additionally, there is a lack of acknowledgement that many Aboriginal and Torres Strait Islander children and young people with a disability are over-represented in the youth justice system.⁵⁰ There needs to be an acknowledgement that many in youth justice system have a cognitive impairment or disability which may mean they are unable to behave 'normally' and/or understand the implications of their behaviour.
45. More investment to strengthen the welfare and social support systems is required to address the issues that lead children to behave in ways that are anti-social and bring them into contact with the youth justice system. Such investment would also assist to address the concerns the Attorneys-General may have regarding any gaps that may result from an increase in the age for criminal responsibility. The reference to investment is not just in a funding sense, but also enabling communities to design and implement solutions and find alternatives to the current youth justice approach.
46. The NHLF supports the advocacy call by the NATSILS⁵¹ to improve the interaction and experience by Aboriginal and Torres Strait Islander peoples with the criminal justice system and particularly to prevent the formation of criminals of children:
- 46.1. Ensure culturally appropriate and safe community based sentences are readily available to enable a child to stay connected to family and community, particularly in regional and remote areas,
- 46.2. Co-locate disability support workers within Aboriginal and Torres Strait Islander Legal Services and community controlled disability organisations,

⁵⁰ Law Council of Australia. The Justice Project Final Report – Part 1: Aboriginal and Torres Strait Islander People. August 2018.

⁵¹ NATSILS' Submission to the Law Council of Australia's National Justice Project, October 2017,

46.3. Increase the availability of culturally appropriate health care services in detention,

46.4. Increase investment in community controlled early intervention and family support services,

46.5. Increase funding for Aboriginal and Torres Strait Islander Legal Services, and

46.6. Increase Police Accountability.

47. The NHLF also calls for more accountability of health services within correctional systems to prevent further deaths and to ensure the health status of a child or adult does not worsen but instead improves.

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?

48. The NHLF makes no comment against this question.

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.

49. This question is a concern to the NHLF, particularly given the pattern across the jurisdictions where the normal operational procedure is for Aboriginal and Torres Strait Islander children to incur some form of detention which is causing them more long term harm through ongoing interactions with the criminal justice system. Rather, the current operational issues within the states and territories need to be improved as it is the application of the law which is unfairly applied to Aboriginal and Torres Strait Islander children compared to non-Indigenous children.

50. As this submission has noted, it is the application of the states and territories' current laws, policies and procedures that are detrimental to children that need reform rather than maintaining the status quo. Increasing the age of criminal responsibility is but one reform measure others include the following to address over-imprisonment:

50.1. include and commit to Justice Targets, as part of the COAG National Agreement on Closing the Gap,

50.2. all jurisdictions should resource and expand justice reinvestment trials,

- 50.3. states and territories should abolish mandatory sentencing regimes which disproportionately incarcerate Aboriginal and Torres Strait Islander people,
 - 50.4. Make available culturally sensitive non-custodial sentencing options, co-designed by Aboriginal and Torres Strait Islander community-controlled organisations and run by them or in partnership with them, in all jurisdictions and rural and remote locations, underpinned by sufficient culturally appropriate, trauma-informed services,
 - 50.5. all jurisdictions should legislate to implement custody notification services,
 - 50.6. police protocols and guidelines should, where appropriate and community safety is not at risk, prioritise warnings and diversion over arrest,⁵²
 - 50.7. legislate and embed strong, culturally responsive mechanisms and child inclusive decision making/dispute resolution processes, particularly in family law, child protection and youth justice,
 - 50.8. commit to improving police–youth interactions by educating police in contemporary youth engagement strategies, through the Australia New Zealand Policing Advisory Agency, and
 - 50.9. ensuring the availability of age appropriate, therapeutic, family strengthening, and evidence based programs to prevent and address identifiable risk factors and anti-social behaviour for children between ten and 13 years of age; with priority for funding given to community controlled programs and services for Aboriginal and Torres Strait Islander children.⁵³
51. The Family Matters Roadmap released in 2015, provides a framework for what needs to be done to address the over-representation of children in the child protection systems and consequently from crossing over into the justice system. The 2019 Family Matters Report states that places that have implemented the Roadmap as a blueprint for reform is working. The NHLF implores governments to take up and implement the building blocks outlined in the Family Matters Roadmap.

⁵² Law Council of Australia. Op. cit.

⁵³ Australian Child Rights Taskforce. 2018. The Children’s Report: Australia’s NGO coalition report to the United Nations Committee on the Rights of the Child. UNICEF Australia.

Question 11: Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

52. Australia should stop the ongoing social political and cultural hangover from the UK whose harshness in criminal justice led to the formation of the penal colonies. Their attitude towards children should no longer be the blueprint for Australia. Our civil society, human rights and our political/legal systems need to be in alignment otherwise we provide more cause for “anti-social” behaviour than otherwise be the case.⁵⁴
53. As the Australia Law Reform Commission’s Pathways to Justice Report notes to reduce the disproportionate rates of incarceration, the following is required:
- 53.1. “promote substantive equality before the law for Aboriginal and Torres Strait Islander peoples,
- 53.2. promote fairer enforcement of the law and fairer application of legal frameworks, and
- 53.3. ensure Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of strategies and programs for Aboriginal and Torres Strait Islander people in contact with the criminal justice system”⁵⁵.
54. Finally, the NHLF affirms the leadership shown the NATSILS, SNAICC and the Change the Record Coalition who have made various submissions over the years, which have highlighted the systemic issues and the solutions to address the overrepresentation in our child protection and youth just systems. Lifting the age of criminal responsibility is just one action area that could lead to much improvement but without Government working with this leadership and communities the fundamentals will remain and we will continue to see children without opportunities to be healthy, safe and able to participate fully in society.

⁵⁴ Gordon F. and Peleg, N. 2019. The Australian government is not listening’: how our country is failing to protect its children. The Conversation: <https://theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779>

⁵⁵ Australian Law Reform Commission. Op. cit.