



The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform

Citation of the final article:

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.

DOI: <http://www.dx.doi.org/10.1177/1473225417700325>

This is the accepted manuscript.

© 2017, The Authors

Reprinted by permission of SAGE Publications.

Downloaded from DRO:

<http://hdl.handle.net/10536/DRO/DU:30092014>

The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform

Abstract

In Australia, children as young as 10 are charged, convicted and sentenced for breaches of the law. Drawing on interviews with youth justice professionals in Victoria, this study finds that inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers an effective legal safeguard for very young children in conflict with the law. This article advocates that the Australian minimum age of criminal responsibility be increased to 14, that the principle of *doli incapax* be applied consistently to all persons under the age of 18 and that justice responses be supplanted by therapeutic supports for children and families.

Key words

Minimum age of criminal responsibility, child offenders, *doli incapax*, youth justice, children's rights, human rights.

Introduction

On 27 January 2016, an 11-year-old boy in Western Australia became the ‘youngest known person’ in Australia to be charged with murder (Booth, 2016). The young aboriginal child, who was charged alongside three other persons, is currently detained, awaiting trial for a crime that carries a maximum penalty of life imprisonment. In response to the case, Amnesty International called on the Australian Government to raise the minimum age of criminal responsibility to 12 years old, noting that ‘Australia’s out-of-step laws dictate’ that this boy could be held criminally responsible, despite lacking the neural development to form the requisite culpability (as cited in Booth, 2016). However, in his response to the international backlash, Western Australian Attorney-General Michael Mischin emphasised the safeguards in place to ensure just processes for children in conflict with the law:

a child under the age of 14 years is not criminally responsible unless it can be proved beyond reasonable doubt that at the time of the alleged offence that accused child had the capacity to know that he or she ought not do the act or make the omission giving rise to the offence. In short, the law already takes into account the accused child’s level of maturity and intellectual development. (As cited in Booth, 2016)

What the Attorney-General refers to here is the presumption of *doli incapax* – a common law presumption that children aged 10 to 13 years (inclusive) lack the capacity to form criminal intent. The presumption applies in all Australian state and territory jurisdictions and, as demonstrated here, is understood to mitigate the impact of Australia’s low minimum age of criminal responsibility (10 years of age).

In Australia, juvenile justice is the responsibility of each state and territory – an arrangement that leads to considerable disparities in law and practice. In Western Australia, for example, juvenile justice is administered by the Department of Corrective Services, which also assumes responsibility for adult offenders. In South Australia, by comparison, juveniles in conflict with the law are dealt with by an arm of the Department for Communities and Social Services, the same government department that administers child protection services. In Victoria, juvenile justice was the responsibility of the Department of Health and Human Services until early 2017, when ‘riots’ in youth justice facilities prompted the state government to wrest responsibility from the child welfare department and place youth justice in the hands of the Department of Corrections, the same department that manages adult prisons (Andrews, 2017). Variations of this kind in the statutory governance of juvenile justice, and considerable legal differences between states and territories, complicate efforts to assess the state of Australian juvenile justice policy nationally.

This article presents empirical data derived from interviews with legal stakeholders in the Australian state of Victoria, and identifies that inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers a legal safeguard for very young children in conflict with the law. This article advocates that the Australian minimum age of criminal responsibility be increased to 14, that the principle of *doli incapax* be applied consistently to all persons under the age of 18, and that justice responses be supplanted by therapeutic supports for children and families.

In doing so, this article recognises that, while the age at which a child can be held criminally responsible for their actions is a matter of law, the impacts of this legal threshold are most certainly not restricted to the legal sphere. There is a robust

body of literature that establishes that a child's contact with the criminal justice system is criminogenic (Moffitt, 1993) and that the earlier a child comes into conflict with the law the more protracted their contact with the criminal justice system is likely to be (AIHW, 2013). Informed by an evidence base on the neuro-biological impacts of early childhood trauma (van der Kolk, 2003), and knowledge from developmental psychology about both the corrosive and protective factors for child wellbeing (Rutter, 1979), the United Nations (UN) has led the establishment of a raft of global norms on juvenile justice. Among the guidelines for UN Member States is the recommendation that no child under the age of 12 be charged or prosecuted for a criminal offence (UN CRC, 2007: para. 32). Despite this normative global prohibition against the criminalisation of very young children, in each Australian state and territory children can be tried, convicted and incarcerated from the age of 10 (see, for example, *Children, Youth and Families Act 2005* (Vic), s. 344).

To examine the minimum age of criminal responsibility in Victoria (Australia) and demonstrate why the presumption of *doli incapax* does not sufficiently mitigate against this low age threshold, this article is structured in five parts. In part 1, an overview of the research design is provided. Part 2 examines the international norms guiding the administration of juvenile justice and demonstrates why, at face value, Australia does not adhere to global human rights standards. The subsequent three sections draw on the findings of interviews conducted in 2016 with a range of members of Victoria's youth justice system to examine practitioners' views on the minimum age of criminal responsibility (part 3), the practical operation of the presumption of *doli incapax* (part 4) and the need for a principled approach to supporting, not criminalising, vulnerable children in conflict with the law (part 5). The article concludes that reform is required in Victoria specifically, and more

broadly at the national level in Australia, to increase the safeguards at law for very young children brought before the criminal justice system.

Research Design

This article draws on qualitative data from 48 semi-structured interviews conducted with Victorian legal stakeholders and youth justice practitioners, as specified below. Seeking professional views on the minimum age of criminal responsibility, and insights into the operation of *doli incapax*, the authors conducted a mix of face-to-face and telephone interviews in metropolitan Melbourne ($n = 26$) and various regional Victorian sites ($n = 22$). The study draws on the breadth of expertise held by those working with children in conflict with the law. Participants comprised current and former judicial officers with specific experience in the Children's Court ($n = 2$); legal practitioners with experience in the defence and/or prosecution of children, including members of the Victorian Bar, Office of Public Prosecutions and Victoria Legal Aid ($n = 14$); professionals working with services that support children in conflict with the law ($n = 24$), including representatives of the Department of Health and Human Services ($n = 5$); professionals delivering youth justice conferencing ($n = 4$); and child advocates ($n = 4$).

To ensure participant confidentiality, research participants have been designated pseudonyms. The prefix 'Metro' or 'Reg' is used to identify the locality of the participant, and the professional role of the participant is indicated using a broad category – judicial, counsel, support, conference or advocate. All pseudonyms conclude with a randomly assigned letter to differentiate between participants. Interviews were transcribed and analysed using NVivo, coding participants' responses on the minimum age of criminal responsibility; the operation of the presumption of

doli incapax; the best interests of the child; the operation and adequacy of diversion programs; and a range of sub-issues pertaining to the children's court, sentencing of children, and children in conflict with the law. In this paper, the findings relating to the minimum age of criminal responsibility and the operation of the presumption of *doli incapax* are explored.

Global human rights standards on juvenile justice

There is a robust international legal framework that enshrines global norms for responding to children in conflict with the law. This framework includes guidelines on the minimum age at which a child may be held criminally responsible. 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' (UN, 1989: Art 3(a)); and the Beijing Rules stipulate that this must 'not be fixed at too low a level, bearing in mind the facts of emotional, mental and intellectual maturity' (UN General Assembly, 1985: 4). In General Comment 10, the Committee on the Rights of the Child (CRC) provides all states with more specific direction, stating that a minimum that is 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' (UN CRC, 2007: para 32).

Multi-state and state parties have used an array of international legal mechanisms to call on Australia to align its juvenile justice processes with global human rights standards. In successive Concluding Observations, the CRC (1997, 2005, 2012) has repeatedly expressed concern about Australia's low minimum age of criminal responsibility and the need for Australia to bring this into alignment with international standards. These concerns of UN bodies are reinforced by states as part

of the UN Universal Periodic Review (UPR). In addition to abiding concerns about the mandatory detention of asylum seekers, Australia's juvenile justice response was the subject of criticism in the 2016 report of the UPR Working Group, with several states recommending that Australia increase the minimum age of criminal responsibility (ss 121, 136.174, 136.176, 136.178 and 136.179).

The minimum age of criminal responsibility in Australia also stands apart from that adopted by comparable international jurisdictions, several of whom have raised the age in recent decades in recognition of international guidelines and best practice. For example, the Republic of Ireland has increased the age of criminal responsibility to 12 years old (Ashworth, 2013); and in Europe there has been a gradual increase over the past two decades, to the point where the majority of countries now legislate at or above the UN-recommended minimum standard of 12 years old (Child Rights International Network (CRIN), n.d; Cipriani, 2009).

The minimum age of criminal responsibility in Australia

Several aspects of Australia's juvenile justice response have drawn sustained criticism, both nationally and internationally (see, for example, Amnesty International, 2016; Barson, 2016; O'Brien and Fitz-Gibbon, 2016). These concerns, and the public release in 2016 of footage depicting the inhuman and degrading treatment of children in the Don Dale Youth Detention Centre in the Northern Territory (ABC, 2016), have trained an international spotlight on Australia's response to children in conflict with the law (Méndez, 2016). In this context, it is timely that we consider the longstanding national and international criticism of Australia's criminalisation of very young children (see, for example, Jesuit Social Services, 2015; Amnesty International, 2015; Child Rights International Network, n.d).

In all Australian states and territories, the minimum age of criminal responsibility is set at 10 years of age, well below the age of 12, which the UN declares an ‘absolute minimum’ (UN CRC, 2007: para. 32). When asked to consider the appropriateness of 10 as a minimum age of criminal responsibility, youth justice stakeholders interviewed for this study largely held that 10-year-old children are too young to be criminalised. Participants shared the views that ‘10 is extremely young’ (MetroSupportG); ‘that’s very young’ (MetroConferencingA); ‘I think that’s young, that’s a little bit too young’ (MetroConferencingB); and ‘[O]bviously it’s too low’ (MetroAdvocateD).

While the overwhelming majority of participants indicated that they would like to see the minimum age increased, many expressed concern about punitive political agendas forestalling an increase in the minimum age of criminal responsibility. Separate announcements by the Victorian Government and the Victorian opposition during 2016 have foreshadowed the introduction of increasingly punitive responses to children in conflict with the law. Proposed reforms include removing children’s right to request bail, naming repeat child offenders (Hosking and Thompson, 2016) and the detention of children in adult prisons (Tomazin, 2016). This last proposal, which is a clear contravention of Australia’s international legal obligations, has bipartisan support in Victoria, indicating the strength of the ‘tough on youth crime’ rhetoric in this state at the present time. Advocates for children argue that punitive narratives of this kind ‘create pressured environments that militate against the making of good policy’ (Fatouros, 2016: 1; see also YouthLaw, as cited in Tomazin, 2016). The following stakeholders explained that this punitive approach to youth justice is likely to compromise efforts to successfully advocate for an increase to a minimum age of 14 years old:

I think there's what's right and what's politically achievable ... in this current environment.... My first objective is to get it to 12. I'd love us to do work around 14. (MetroAdvocateB)

If we could get 12, I think that'd be pretty optimistic in the current climate that we have here with the law and order being such a popular issue. (RegCounselD)

This belief that raising the minimum age to 12 years old would be a more politically feasible reform option than an increase to 14 years old was echoed by many. For example, stakeholders commented: 'I'd like to see it at 14.... I think realistically 12 is probably a more reasonable age' (MetroSupportE); 'One could make a case for 14.... I'd probably be more comfortable with 14 as a general principle' (MetroSupportI); and 'I think it should be put up to 12 at the minimum, if not 14, but at 12 for the present will do' (MetroAdvocateC). Expanding on this view, another participant explained why the minimum age should be raised:

I would suggest around the 14 mark at least. 12, absolute minimum. Just capturing kids that young doesn't seem to be in any way benefiting them, their families, the communities. (MetroAdvocateA)

The view shared by many of the participants who work directly with children is that it is in children's best interests that the minimum age be increased to 14, despite the political pressures of the current punitive climate relating to youth justice.

Beyond the specific age at which the minimum age is set, and an acknowledgement of the need to bring Australia into alignment with international legal standards (MetroAdvocateD; MetroSupportD; MetroSupportE), an analysis of stakeholder views revealed two dominant concerns pertaining to the age of criminal responsibility in Victoria. The first is that children who come into conflict with the law have most often experienced profound childhood adversity and trauma, including histories of physical or sexual abuse, neglect, family disruption and/or significant economic disadvantage (MetroCounselC; MetroAdvocateD; MetroCounselF; MetroSupportF). As noted by one stakeholder, ‘We represent some of the most vulnerable kids, they’re really damaged’ (MetroCounselD). These reflections are supported by recent research that indicates that children in the youth justice system are 15 times more likely to also be involved with child protection (AIHW, 2016: 12). Research participants indicated that children with these complex and intersecting needs require targeted therapeutic responses and natural supports to ensure their wellbeing, rather than punitive interventions that seek to contain or punish behaviours (MetroSupportF; RegCounselE; RegSupportH; MetroAdvocateA). Participants commonly emphasised the importance of early therapeutic and welfare supports to prevent children with a trauma background from coming into contact with the criminal justice system. As one participant explained:

of those [children] who end up in youth justice centres, two-thirds have a child protection background. . . . [Y]ou have to imagine the causes of their offending are absolutely about the trauma and the abuse that they’ve experienced as children... There’s simply no way that a criminal justice response is the right response for those children. It’s absolutely the case that we need to have a far stronger welfare or service response. (MetroAdvocateB)

Stakeholders believed that if the minimum age of criminal responsibility were raised to at least 12, but ideally 14 years old, those who are most vulnerable would be diverted from a system that is inadequate to address their needs, and has consistently been found to both stigmatise and criminalise children (on the dangers of stigmatisation, see Fitz-Gibbon and O'Brien, 2016).

The second key theme to emerge from the interviews was the view, held by many, that it is vital that raising the minimum age be accompanied by a strong network of therapeutic supports for young children who have previously found child services support by virtue of their youth justice involvement. Interviews revealed that children are often criminalised unnecessarily, in lieu of a coordinated therapeutic or welfare response (RegSupportN; RegSupportJ; MetroAdvocateB). As one stakeholder explained:

[I am aware of] kids as young as eight ... coming to [police attention] and it was usually because of welfare reasons rather than anything else. But obviously they couldn't do a lot with them when they were eight, but when they were 10 they would then often take them into the police watch house for their 'own protection' because of a lack of other alternatives, and because of a lack of resources, and perhaps because they haven't understood the family dynamics and worked out that there is someone else they can turn to. So the harm of being held in a police lock-up for a child of that age.... I feel like it's almost self-explanatory how damaging and how alienating and how scary that would be, even if it's supposed to be for their own welfare. (MetroAdvocateD)

This view reflects a broader problem in Victorian responses to vulnerable young children – a lack of appropriate services and specialised training for those who come into contact with young persons. This gap in the system is then arguably amplified by the low minimum age of criminal responsibility, which serves to further exacerbate the poor treatment of children who come into contact with police and social services by permitting a justice-based rather than therapeutic response. In this regard, while increasing the minimum age is integral to addressing the over-criminalisation of young children, it is important to note that this, alone, will not address the problem of punitive welfare. To prevent further trauma and criminogenic impacts for already vulnerable children, it is crucial that there be referral pathways to age-appropriate therapeutic services that provide non-stigmatising supports for children with welfare needs. It is unacceptable that the criminal justice system serves as an unofficial backstop for a compromised welfare system.

The incomplete safeguard of *doli incapax*

Australia has sought to counter international criticism of its low minimum age of criminal responsibility by arguing that 10 is not an unmitigated minimum, as the common law principle of *doli incapax* applies to children aged 10–13 and provides a ‘gradual transition to full criminal responsibility’ (UN General Assembly, 2016: s. 132). The rebuttable principle of *doli incapax* holds that children lack the capacity to know that an act is criminal or seriously wrong and, where engaged, this principle has the potential to offer a partial safeguard for children aged 10–13. The presumption stems from common law (see, inter alia, *C v DPP* [1995] 2 All ER 43), and is established in Victorian case law (*R v ALH* (2003) 6 VR 276, [2003] VSCA 129).

For children in this age range to be convicted, and subjected to the full weight of the criminal law, the prosecution must successfully rebut the *doli incapax* presumption. Yet the interviews revealed a view among legal stakeholders that, in the state of Victoria, *doli incapax* is not engaged for all children in a manner consistent with common law. Rather, 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 appropriate. As one stakeholder explained:

It's interesting because it's the presumption which the prosecution need to displace but that doesn't happen in practice. (MetroCounselE)

There are several risks associated with the fact that the prosecution's onus to displace the presumption of *doli incapax* has now become a discretionary responsibility of the defence. Ordering psychological assessments is resource dependent, yet public defence funds are limited. Furthermore, the practice whereby *doli incapax* is established by a psychological assessment introduces a range of demands with respect to the availability, quality and resourcing of qualified child psychologists who can provide timely, accurate and fulsome assessments. Stakeholders interviewed indicated that there is a shortage of appropriate psychologists who can provide quality *doli incapax* assessments in both metropolitan and regional/rural Victoria (MetroCounselE; RegCounselE; RegSupportN). As one explained, 'I've seen the quality of some of those reports and assessments, and they're appalling' (MetroSupportF). These kinds of deficits in the psychological services workforce have a detrimental impact on the extent to which the *doli incapax*

safeguard can be fully and effectively engaged in order to divert children aged 10–13 from the criminal justice system.

The informality of the inverted onus is also problematic, as it means that defence counsel are not mandated to engage the psychological assessments necessary to prove *doli incapax*. This leaves children vulnerable to the discretion of individual legal counsel who, after all, are trained in law rather than developmental psychology. The fact that ordering *doli incapax* assessments is discretionary also means that these decisions, and *doli incapax* assessment processes, are not the subject of scrutiny or regulation. The CRC has expressed relevant concerns about the prospect of discrimination in instances where there are two ages of criminal responsibility, and outcomes for children are the result of discretionary practices:

Quite a few States Parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices. (UN CRC, 2007: para 30)

Adding weight to these concerns about the risks associated with such discretionary practices, legal stakeholders expressed concern about inconsistencies in process and in the use of police, legal and judicial discretion for children aged 10–13. Part of the difficulty with discretion relates to the order in which children engage with

various points of the criminal justice system. The reversed onus means that the opportunity for defence counsel to make a discretionary decision about whether to order a *doli incapax* assessment comes only after police and prosecution involvement in the case. Interview participants expressed concern about police interviews eliciting a child's admission to knowing that their actions were 'seriously wrong', which then compromises a child's chance of being found *doli incapax* (MetroCounselG; MetroCounselE). In such instances, and where psychological assessments are not ordered and the presumption of *doli incapax* is not engaged, there is little safeguard, and little transparency in terms of legal outcomes for children. As one stakeholder explained:

sometimes it's really clear-cut and it's a way of getting that consistency of approach. And then there are other times when you are really frustrated, because in its current form, that presumption often isn't dealt with consistently with the more complex kids. And I think we could stand to be a little bit more transparent about how we do it. (MetroCounselD)

While it is not possible within the scope of this paper to provide a fulsome analysis of the disjuncture between the presumption of *doli incapax*, at common law, and the practical operation of this principle in the state of Victoria, it is important to note that *doli incapax* is not engaged as a matter of course for all children aged 10 to 13. Participants report a situation in which inconsistencies in practice have largely eroded this legal safeguard. Legally, the default position is that children between the ages of 10 and 13 are assumed to be *doli incapax*. To this end, placing the onus with the prosecution to rebut the presumption is long established in common law (see *C v DPP* [1995] 2 All ER 43; *R v CRH* [1996] NSWSCA Unreported). Were this common

law principle upheld then all children in this age range would be automatically safeguarded from adjudication unless the prosecution were able to successfully rebut the presumption of *doli incapax* to demonstrate that, at the time of the offence, the child possessed the capacity to know that their actions were seriously wrong. In sharing examples from their professional practice, legal stakeholders confirm that this safeguard no longer applies, automatically, to all Victorian children. Instead, for a child to be deemed *doli incapax* the onus now falls to the defence to actively pursue an assessment that determines the child lacked the capacity to know that their actions were seriously wrong. In practice, this can mean that children are denied the protection of being *doli incapax*. As one stakeholder noted:

we hear lots of cases, for example, a 10 year old being dragged before the court for sneaking into a film and charges going ahead as a matter of course rather than there being any real consideration of *doli incapax*. (MetroAdvocateD)

The incompleteness of the *doli incapax* safeguard points to the importance of more closely scrutinising Australia's position in establishing the minimum age of criminal responsibility at 10. If *doli incapax* is not raised for all children who manifestly lack the capacity to know that their actions constitute serious wrongdoing, then the effect is that 10 years of age is Australia's firm minimum age of criminal responsibility. In this, Australia is considerably out of step with global norms on the treatment of children in conflict with the law.

Based on the majority views shared by participants, and informed by child rights and child development scholarship, we advocate that the minimum age of criminal responsibility be increased to 14 years, and the presumption of *doli incapax*

be applied in a consistent and principled manner to all persons under the age of 18. Yet for these changes to serve children's best interests they must not simply be legislative. Increasing the age of criminal responsibility would protect very young children from adjudication, which is necessary given the criminogenic impacts of youth justice involvement. It is important to note, however, that preventing the criminalisation of very young children does not, in and of itself, ameliorate the conditions that contribute to offending behaviours in childhood. As important as increasing the age of criminal responsibility is, such reform increases the need for effective child welfare systems, to ensure that children in contexts of risk are not ignored until they reach an age where they are eligible for criminal conviction.

The broader goals of child and life-long wellbeing will only be met if an increase in the minimum age is accompanied by improved pathways to therapeutic and practical services for children. This will ensure that children who currently receive a service response through the youth justice system receive the support that they require, while avoiding the punitive consequences of criminal justice involvement. In order to spare children the stigmatising and criminogenic impacts of criminal justice punishment, these efforts to improve welfare responses should be informed by an understanding of the complex ways in which welfare and punishment interact (see Phoenix, 2003). Scholarship on the mutually constitutive or 'hybrid' agendas of 'care' and 'control' points to ways in which welfare, itself, may prove punishing (see, for example, Muncie and Hughes, 2002).

In addition, the findings from this Victorian study yield important lessons about the need to ensure the consistent application of the principle of *doli incapax*. At present, the common law principle is compromised by a practice in which the

reversed onus sits with the child, vis-à-vis their defence counsel, and failure to establish *doli incapax* may mean that a child faces the full force of the criminal law. Increasing the minimum age and ensuring the full and equal operation of *doli incapax* requires both law reform and the formalisation of legal protocol to clarify that *doli incapax* applies to all children, unless successfully rebutted by the prosecution.

The importance of ensuring the efficacy of *doli incapax* in Australia is illustrated by changes to the practical application of the principle in other jurisdictions. In the wake of the abolition of this presumption in the United Kingdom, and the era of ‘hardened intolerance’ towards child offenders (Muncie, 1999), scholars and advocates have made cogent arguments for England to bring its minimum age of criminal responsibility into line with international human rights standards (Crofts, 2009; Bateman, 2012; Fitz-Gibbon, 2016). The abolition of *doli incapax* in England provides a concerning precedent, and it is incumbent on those who work daily in implementing the law to ensure that *doli incapax*, as a legal safeguard for very young children, does not fall into disuse in Australia. Where discretion and the opacity of prosecutorial practice result in the inconsistent application of this presumption, children receive inequitable legal response, violating the principle of equality before the law. With the prosecution’s erstwhile onus for displacing the presumption now a burden for the defence, there should be adequate resources and clear processes in place to ensure that this defence is raised for all children aged 10 to 13, not just those children who are thought to be particularly vulnerable or for whom legal and psychological resources are readily available.

Evidence-based therapeutic supports for children

International human rights standards for juvenile justice are underpinned by a robust evidence base about childhood development, the impacts of childhood trauma (van der Kolk, 2007), and the criminogenic effects of contact with the criminal justice system (Moffitt and Caspi, 2001). A child's relative developmental immaturity demands that they receive a different legal response to that designed for adults in breach of the law (Richards, 2011; Lamb and Sim, 2013; Delmage, 2013; Fitz-Gibbon, 2016). The right to such special protections is enshrined in the CROC (1989), which identifies that children require special safeguards by virtue of their 'physical and mental immaturity' (preamble), and that children in conflict with the law should be treated in a manner that takes a child's age into consideration (Art 40(1)).

The interviews with stakeholders identified the importance of ensuring that legal responses to children are informed by not only chronological age, but also developmental age. Several participants identified that capacity should be understood in the context of a child's brain development (MetroSupportA; MetroSupportF), given the scientific evidence that an individual's neural pathways remain incomplete until early adulthood (RegSupportB; RegSupportD). Several respondents problematised the criminalisation of young children who, by virtue of their neuro-developmental stage, do not possess adult cognitive function:

[An individual's] ability to make decisions and not act impulsively and think rationally isn't formed until about 25. So, given that, I think it's pretty scary to hold people [aged under 25] accountable for their actions. (RegSupportD)

It [10 years as a minimum age of criminal responsibility] is a bit young, especially when you look at the human brain not being fully developed until the age of 25. So

10 is really quite young to be looking at it in terms of their ability to be able to process their response and what their impacts of behaviours are. (RegSupportB)

Legal thresholds for capacity that are based on a chronological age of 10 belie the robust neuro-biological and developmental evidence about children's relative lack of cognitive capacity and reasoning. Legal determinations about age-specific thresholds for criminal capacity are even more problematic in the context of the range of factors that may adversely impact on a child's neurological, emotional, moral and cognitive function.

Attention to the minimum age of criminal responsibility is necessary to ensure a system of justice that responds to 'society's most disadvantaged, damaged and distressed children without undue recourse to criminalization' (Goldson, 2013: 116). Lending weight to scholarship in Australia and other international jurisdictions (Hollingsworth, 2014; Goldson, 2013; Crofts, 2009), the views of several Victorian stakeholders in this research advocate for non-stigmatising therapeutic supports for children, instead of criminalising already vulnerable children. As two support workers explained:

as sad an indictment on our system as it is, I see children have no voice and particularly children who are not protected by their families, have even less of a voice and unfortunately we as youth justice get involved, we do a lot of welfare work at that age and sometimes we are able to [use] interventions that child protection aren't even sufficiently resourced to do. (RegSupportN)

I'd really like to focus on criminogenic needs, they are a much more meaningful intervention for young people. So it's not just about an order [court order] and a

couple of conditions, it's actually really back to the best interests of the child, and obtaining much, much better living arrangements for young people than we've got presently, that allow them to be in a reasonably safe and secure place, so it doesn't just keep exposing them to more and more offending behaviour ... but I'm not talking about the physical accommodation, I'm talking about the actual whole environment that a young person lives in. (MetroSupportF)

Further, in cases where a young child comes to the attention of the law and the matter is resolved legally by establishing that the child is *doli incapax*, stakeholders explained that, very often, much-needed therapeutic supports are still not provided:

I have experienced cases, and one recent matter comes to mind, where a young person was charged, over the age of 10 obviously, with serious offending involving sexualised behaviours and not once but twice that young person was found *doli incapax* and that ended the matter, but no additional supports were put in place to address the behaviours that have brought that young person to court. So the charges did not proceed because they were not capable of being responsible and then it seemed somewhat inevitable really that when they ultimately came back before the court then as a 15, 16 year old with similar offending of a similar nature and particularly serious, nothing had been put in place. So irrespective of where you land in terms of at what age should a young person be criminally responsible for their behaviour, it is critical that there are supports available in the community once a young person, particularly a very young person, has come to the attention of police and that appropriate referrals are made for that young person and their family to address the behaviours. If that doesn't happen, you will not be acting in the best interest of the child in any event. (MetroJudicialB)

Scenarios such as this indicate that, at times, the law is too blunt an instrument for responding to young children with complex needs. This case, which the participant indicated was not unique, represents a missed opportunity to provide a child with therapeutic supports that would bolster their long-term wellbeing and reduce their chances of repeat contact with the criminal justice system.¹

Part of the reason for missed opportunities of this kind is that children are framed ambiguously in legal contexts as vulnerable innocents in need of protection, and/or as threatening agents that imperil order and require adult correction and control (Goldson, 2013; Copeland and Goodie, 2008). Historically, ‘the categories of child as threat and child as victim function as dualities: protective measures directed at children as victims always contained punitive elements which served to control children’ (Scott and Swain, 2002: 5). The fact that ‘young people occupy an awkward social and legal space’ (Copeland and Goodie, 2008: 146) leaves children vulnerable to professional discretion about whether they will receive a stigmatising justice response or a protective welfare-based intervention.

Tensions surrounding the complex ways in which justice and welfare responses interact formed a dominant thread throughout the interviews (see also Cipriani, 2009; Hollingsworth, 2007). Among participants’ concerns were the criminalisation of childhood behaviours, and the criminalisation of children in need of welfare supports. As two participants explained:

[We see young children] who have come from extremely impoverished, emotionally and physically, backgrounds, many of them raised in state care, who end up being charged with criminal offences that have occurred in state care, and they won’t understand that they’re not allowed to punch a hole in their wall, and that they get charged with criminal damage. (MetroCounselC)

they can do more than the full sentence whilst on remand in custody. And I think that's a disgrace ... I'm dealing with an Aboriginal boy who is 11 from [location withheld], and he's in custody purely because of accommodation/welfare needs. He's not convicted. By the time he gets out he'll have served whatever he might have for an offence. (MetroSupportF)

Some legal stakeholders articulated the need for increased welfare supports and referral pathways for children aged 10–13 to minimise the reliance on the criminal justice system to address acute welfare needs. This view is captured in the following two excerpts:

the child protection system is really seriously under-resourced, and particularly out-of-home-care systems, and I've witnessed a great deal of criminalisation of welfare issues and usually young children. In fact, in my experience, all of the young children that have come to court that I'm aware of, have come because of really serious welfare issues ... [we need] a strong and well-resourced program, to intervene to support families, to work therapeutically with traumatised children. (RegSupportN)

what we find is that a lot of young people are brought to court before the age of 14 and there's a lot of time wasted and a lack of opportunity for early intervention for young people to be able to access services ... if a young person has committed a crime or may have committed a crime at that early stage, in my view therapeutically it would be much better for that young person in that age bracket to be referred to social support services rather than charge sheets initiated, and to reduce the stigma of them having to actually attend court and even give instructions to a lawyer which they may not have capacity to do as well. (MetroDefenceA)

If combined with reform to raise the minimum age of criminal responsibility, greater provision of welfare supports and the creation of effective referral pathways would play a significant role in diverting young children from the criminal justice system, while still recognising and addressing the breadth of their needs.

A principled approach to supporting, rather than criminalising, vulnerable children

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. To make an increased minimum age contingent on conventional analyses of capacity leaves intact the assumption that there is, in fact, an age at which children uniformly have the capacity to determine that their actions are seriously wrong (Goldson, 2013), and that punishment, rather than support, is an appropriate systems response. Australian law reform research supports the assessment that defining a minimum age of criminal responsibility is a matter of legal utility, rather than a developmentally accurate measure for culpability:

The Inquiry recognises that there is an element of arbitrariness when setting age thresholds, especially given the great variations in capacity between individual children. However, setting an age provides certainty for both the law and children. (Australian Law Reform Commission, 1997: para. 18.16)

This question of legal utility emerged in the interviews with legal professionals, particularly among the small number of participants who supported 10

as the minimum age of criminal responsibility. In these instances, participants prioritised legal utility over addressing the complexities involved with determining capacity as an evolving developmental concept. Two of these legal professionals commented:

[Y]ou have to set a time and 10 seems to me to be about right. (RegCounselB)

it probably comes down to almost case-by-case with young people. I see a lot of young people that are either older or younger than their years for whatever reason, whether that be their upbringing or just maturing quicker. Ten is a nice round number. (RegSupportC)

Another participant who supported retaining 10 as the minimum age of criminal responsibility was of the view that 10 is an age at which children do possess the capacity to determine the wrongfulness of their actions:

Looking at how kids are able to make decisions ... [they] have an understanding of right and wrong even despite what their upbringing may be. I would say that I have seen, and am aware, that by the age of 10 [the] majority of kids would have a good understanding of those basic right and wrong tenets. (RegSupportG)

Some participants indicated that, while they thought that 10 may be too low given children's developmental immaturity, a firm age is required, for the purposes of legal utility. As one legal counsel explained:

[I] might have some concerns about whether they can actually form the requisite criminal intent at 10, but where does the state start? You've got to start somewhere, especially with outrageous offending behaviour, but children and adults are so different. It's arbitrary, isn't it? I don't know where they picked that age from, but presumably from studies and statistics and things like that, but I wonder if 10 is a bit young. Maybe 12, maybe 14, depends on the maturity, capacity and understanding of the child ... 12's arbitrary like 10, but I suppose for the benefit of 12 there's another two years and perhaps there's significant development in a young person's mind from 10 to 12. But again, does it register the requisite intent for criminal behaviour? It's got to be better than 10, but I'm still not sure whether 12's the correct answer either. (RegCounselA)

The mix of views expressed by the interview participants demonstrates that legal stakeholders, by and large, understand that it is an extremely complex matter to determine a fixed age at which children can be held legally accountable for their behaviour (see also McDiarmid, 2013). Nonetheless, complexity and the need for legal or systemic utility are unacceptable reasons for a status quo that criminalises very young children and fails to ensure a holistic and therapeutic approach to redressing the complex causes of a child's behaviour.

Progressing conversations about increasing the age at which children can be held legally accountable requires that we challenge the assumption that capacity adheres uniformly to chronological age. This assumption is untenable in light of the evidence base about the complex factors that influence children's social, moral and intellectual development (Lamb and Sim, 2013; Delmage, 2013). There is nothing in developmental psychology to support the idea of an arbitrary age at which all children

cross a developmental threshold sufficient to justify criminal responsibility. As Goldson (2013: 116) argues:

Rather than becoming pre-occupied with whether or not children aged 10 years and above are sufficiently capacitated to legitimize their exposure to the formal youth justice apparatus, therefore the question might be more profitably framed in terms of whether it is preferable to decriminalize children's transgressions and address their behaviour without recourse to prosecution, sentence and youth justice intervention.

Responding to children in a manner that is consistent with the evidence base provided by neurobiology and developmental psychology would acknowledge that there are a host of factors that impact on a child's cognitive and moral development. The environment in which a child is raised has a considerable impact on their development and outcomes at every life stage (Bronfenbrenner, 1979). Remembering that children in conflict with the law are significantly more likely to have experienced compounding forms of childhood adversity, and that childhood trauma of this kind interferes with a child's cognitive development (van der Kolk, 2003), there is greater utility, and greater humanity, in a systems response that prioritises welfare rather than punishment. Such an approach would accord with global human rights standards, which stipulate that states provide special protections for children, underpinned by a general principle of parsimony for children alleged to have breached the law.

Prospects for increased safeguards for very young children

Raising the minimum age of criminal responsibility in Victoria would require formal legislative amendment. There is considerable domestic and international pressure for this to occur, and this study shows that there is broad-based support for an increased

age among those charged with the implementation of the law. This article lends weight to the campaign to increase the minimum age of criminal responsibility across Australia. In the wake of international condemnation for the abuses against children unveiled in the Northern Territory detention centre, the Commonwealth Government's leadership in announcing a Royal Commission of Inquiry should be followed by a Commonwealth directive that all Australian states and territories bring their legislation into line with the UN recommendation that the absolute minimum age of criminal responsibility be set at 12.

It is necessary to note, however, that the political climate at present is not congenial for law reform of this kind. At the time of writing the Victorian state government has transferred approximately 20 children as young as 15 to the wing of a high-risk adult maximum security prison facility, following a series of 'riots' in juvenile detention facilities (de Kretser, 2017). More than half these children are held on pre-trial detention. Human rights lawyers who have gained access to the adult facility have said that children detained in these conditions are subjected to solitary confinement and denied access to age-appropriate education (de Kretser, 2017). The Victorian government has announced a 'shake-up' of the youth justice system, which will include building a new 'high security' juvenile detention facility with capacity for 224 children and 'scope for further expansion' (Andrews, 2017). With local residents now alarmed about the placement of this facility in 'the heart of their community' (Florance, 2017), public discourse is dominated by concerns about containment and punishment strategies to protect the community from dangerous youth. There is, on the face of it, little appetite for a counter-narrative that might mitigate harms against very young children in conflict with the law.

Despite the punitive climate at present, and the recognised challenges of implementing law reform of this kind, formally raising the minimum age of criminal responsibility should remain firmly on the agenda. Indeed, the currency of punitive rhetoric makes it all the more important to increase legal safeguards for children. Concurrent to pressure to raise the minimum age, we urge that increased attention be given to the current operation of the principle of *doli incapax*. Ultimately, if the presumption of *doli incapax* offers an incomplete safeguard for children, it is incorrect for Australia to report to the UN that Australia has a system in place that affords children a ‘gradual transition to full criminal responsibility’ (UN General Assembly, 2016: s. 132).

Victoria has long been seen as leading the way nationally, in providing policy and practice initiatives that divert children from the criminal justice system. The current ‘crisis’ in the Victorian youth justice system threatens to undermine the decades of work on diversion, therapeutic orders and restorative justice. The views of stakeholders in this study provide support for our call that Victoria demonstrate continued leadership in therapeutic juvenile justice, by increasing the minimum age of criminal responsibility to 14, and ensuring that the principle of *doli incapax* be applied in a principled and consistent manner to all persons under the age of 18. Further, changes to the minimum age of criminal responsibility must be contextualised according to the need for reform to the broad spectrum of services for vulnerable children.

International legal standards promote the principle of parsimony with regards to children’s contact with the criminal justice system. Diversionary services that address children’s needs, and welfare services that support vulnerable children and their families, need to be integral facets of a strategy to address the over-

criminalisation of children. In order for Victoria, and Australia, to adhere to international legal obligations, it is crucial that children who come to attention for their behaviours be provided with comprehensive supports that address their therapeutic needs, without recourse to the criminal justice system.

References

- Amnesty International (2015) *A brighter tomorrow: Keeping indigenous kids in the community and out of detention in Australia*. Available at: <https://www.amnesty.org.au/report-brighter-tomorrow/> (accessed 29 October 2016).
- Amnesty International (2016) *Submission to the Independent Review of Youth Detention in Queensland*. Available at: <https://static.amnesty.org.au/wp-content/uploads/2016/10/20161026-AIA-Submission-to-Old-Independent-Review-of-Youth-Detention.pdf> (accessed 5 November 2016).
- Andrews D (2017) Building a Stronger and More Secure Youth Justice System. Victorian Government Media Release. Available at: <http://www.premier.vic.gov.au/building-a-stronger-and-more-secure-youth-justice-system/> (Accessed 17 February 2017).
- Ashworth A (2013) *Positive Obligations*. Oxford: Hart Publishing.
- Australian Broadcasting Commission (2016) *Four Corners: Australia's Shame*. Available at: <http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm> (accessed 26 October 2016).
- Australian Institute of Health and Welfare (2013) *Young people aged 10–14 in the youth justice system 2011–2012*. AIHW.
- Australian Institute of Health and Welfare (2016) *Young people in child protection and under youth justice supervision 2014–15*. AIHW.
- Australian Law Reform Commission (1997) *Seen and heard: Priority for children in the legal process*. ALRC Report 84.

- Barson R (2016) The youth justice system is a slippery slope of failure. *Sydney Morning Herald* 26 July.
- Bateman T (2012) *Criminalising children for no good purpose: The age of criminal responsibility in England and Wales*. Report, National Association for Youth Justice Campaign. Available at: http://thenayj.org.uk/wp-content/files_mf/criminalisingchildrennov12.pdf (accessed 25 October 2016).
- Booth A (2016) Age of criminal responsibility must rise, say experts, after 11 year-old's murder charge. NITV, 16 February. Available at: <http://www.sbs.com.au/nitv/article/2016/02/11/age-criminal-responsibility-must-rise-say-experts-after-11-year-olds-murder> (accessed 5 November 2016).
- Brofenbrenner U (1979) *The Ecology of Human Development: Experiments by Nature and Design*. Cambridge: Harvard University Press.
- Children, Youth and Families Act 2005* (Vic).
- Child Rights International Network (n.d.) *Minimum ages of criminal responsibility in Oceania*. Available at: <https://www.crin.org/en/home/ages/oceania> (accessed 29 October 2016).
- Cipriani D (2009) *Children's Rights and the Minimum Age of Criminal Responsibility*. Oxon: Ashgate.
- Copeland A and Goodie J (2008) The child, the young person and the law. In: Monahan G and Young L (eds) *Children and the Law in Australia*. Chatswood: LexisNexis Butterworths, pp. 146–163.
- Crofts T (2009) Catching up with Europe: Taking the age of criminal responsibility seriously in England. *European Journal of Crime, Criminal Law and Criminal Justice* 17(4): 267–291.

- de Kretser H (2017) New legal action launched to get children out of Barwon adult jail. Available at: <https://www.hrlc.org.au/news/2017/2/8/new-legal-action-launched-to-get-children-out-of-barwon-adult-jail> (accessed 18 February 2017).
- Delmage E (2013) The minimum age of criminal responsibility: A medico-legal perspective. *Youth Justice* 13(2): 102–110.
- Fatouros H (2016) Is our youth justice system really broken? Paper delivered at the Castan Centre for Human Rights Law Conference 22 July 2016. Available at: http://www.monash.edu/_data/assets/pdf_file/0012/569865/Helen-Fatouros-paper.pdf (accessed 25 October 2016).
- Fitz-Gibbon K (2016) Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales. *Criminology and Criminal Justice* 16(4): 391–401.
- Fitz-Gibbon K and O’Brien W (2016) The naming of child homicide offenders in England and Wales: The need for a change in law and practice. *The British Journal of Criminology*. Published online first. DOI: 10.1093/bjc/azw042.
- Florance L (2017) New prison in Werribee South to replace Melbourne Youth Justice Centre in Parkville after riots review. ABC News. Available at: <http://www.abc.net.au/news/2017-02-06/parkville-youth-justice-to-be-shut-down/8243448> (accessed 17 February 2017).
- Goldson B (2013) ‘Unsafe, unjust and harmful to wider society’: Grounds for raising the minimum age of criminal responsibility in England and Wales. *Youth Justice* 13(2): 111–130.
- Hollingsworth K (2007) Judicial approaches to children’s rights in youth crime. *Child*

- and Family Law Quarterly* (19): 42–59.
- Hollingsworth K (2014) Assuming responsibility for incarcerated children: A rights case for care-based homes. *Current Legal Problems* 67(1): 99–134.
- Hosking W and Thompson A (2016) State Opposition Leader Matthew Guy announces crackdown plan for teen thugs. *Herald Sun*, 13 October. Available at: <http://www.heraldsun.com.au/news/victoria/state-opposition-leader-matthew-guy-announces-crackdown-plan-for-teen-thugs/news-story/3a816c7e3672fea2727c6c326f1cbd28> (accessed 29 October 2016).
- Jesuit Social Services (2015) *Too much too young: Raise the age of criminal responsibility to 12*. Report, Melbourne: Jesuit Social Services.
- Lamb ME and Sim MPY (2013) Developmental factors affecting children in legal contexts. *Youth Justice* 13(2): 131–144.
- McDiarmid C (2013) An age of complexity: Children and criminal responsibility in law. *Youth Justice* 13(2): 145–160.
- Méndez JE (2016) *Does abuse of children in detention qualify as torture?* Interview with Fran Kelly on Radio National. September 2016. Available at: http://mpegmedia.abc.net.au/rn/podcast/2016/07/bst_20160728_0736.mp3 (accessed 29 October 2016).
- Moffitt TE (1993) Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review* 100(4): 674–701.
- Moffitt TE and Caspi A (2001) Childhood predictors differentiate life-course persistent and adolescence-limited antisocial pathways among males and females. *Development and Psychopathology* 13(2): 355–375.
- Muncie J (1999) Institutional intolerance: Youth justice and the 1998 Crime and Disorder Act. *Critical Social Policy* 19(2): 147–175.

- Muncie J and Hughes G (2002) Modes of Youth Governance: Political rationalities, criminalisation and resistance in Muncie J, Hughes G and McLaughlin E (eds) *Youth Justice: Critical Readings*. London: Sage, pp. 1-18.
- O'Brien W and Fitz-Gibbon K (2016) Cemented in their cells: Blessington, Elliott, and the life imprisonment of Australian children. *Australian Journal of Human Rights* 22(1): 111–134.
- Phoenix J (2002) Rethinking Youth Prostitution: National Provision at the Margins of Child Protection and Youth Justice. *Youth Justice* 3(3): 152-168.
- Richards K (2011) What makes juvenile offenders different from adult offenders? *Trends and Issues in Crime and Criminal Justice* 409. Australian Institute of Criminology.
- Royal Commission into Family Violence (2016) *Report and Recommendations*. Victoria: Royal Commission into Family Violence.
- Rutter M (1979) Protective factors in children's responses to stress and disadvantage. *Annals of the Academy of Medicine, Singapore* 8(3): 324–338.
- R v ALH* (2003) 6 VR 276, [2003] VSCA 129.
- Scott D and Swain S (2002) *Confronting Cruelty: Historical Perspectives on Child Abuse*. Melbourne: Melbourne University Press.
- Tomazin F (2016) More violent teens could be sent to adult prison under crime crackdown. *The Age*, 28 October. Available at: <http://www.theage.com.au/victoria/more-violent-teens-could-be-sent-to-adult-prison-under-crime-crackdown-20161028-gsddl2.html> (accessed 28 October 2016).
- United Nations (1989) *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 31 (entered into force 2 September 1990).

- United Nations Committee on the Rights of the Child (1997) *Concluding Observations: Australia*, UN Comm, 16th sess.
- United Nations Committee on the Rights of the Child (2005) *Concluding Observations: Australia*, UN Comm, 40th sess.
- United Nations Committee on the Rights of the Child (2007) *General Comment: Children's Rights in Juvenile Justice*, UN Comm, 44th sess, GC/10.
- United Nations Committee on the Rights of the Child (2012) *Concluding Observations: Australia*, UN Comm, 60th sess.
- United Nations General Assembly (1985) *Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*. Adopted by General Assembly Resolution 40/33 on 29 November 1985.
- United Nations General Assembly (2016) *Report of the Working Group on the Universal Periodic Review, Australia*. A/HRC/31/14
- van der Kolk B (2003) The neurobiology of childhood trauma and abuse. *Child and Adolescent Psychiatric Clinics of North America* 12(2): 293–317.
- van der Kolk B (2007) The developmental impact of childhood trauma. In: Laurence J, Kirmayer LJ, Lemelson, R and Barad M (eds) *Understanding Trauma: Integrating Biological, Clinical and Cultural Perspectives*. Cambridge: Cambridge University Press, pp. 224–242.

¹ Formal evaluations of Sexually Abusive Behaviour Treatment Services show increasingly positive outcomes, with 70% of cases closed in 2011–2012 having positive outcomes (Royal Commission on Family Violence, 2016: 229).