

**AMNESTY
INTERNATIONAL**



Submission to the

**Council of Attorneys-General Age of Criminal Responsibility Working
Group review**

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Submitted by
Amnesty International Australia

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries and over 500,000 supporters in Australia.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

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1. Summary

- 1.1 Amnesty International welcomes the interest of the Council of Attorneys-General into the minimum age of criminal responsibility. Amnesty International also welcomes the opportunity to provide this submission to the inquiry into Council of Attorneys-General – Age of Criminal Responsibility Working Group review.
- 1.2 The minimum age of criminal responsibility has been an important area of Amnesty International's research into the over-representation of Indigenous children in the youth justice system across Australia. Amnesty International's national report, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*¹, and reports investigating youth justice in Queensland², and Western Australia³ each recommended the government to raise the age of criminal responsibility.
- 1.3 Amnesty International also released a research report, *The Sky is Limit*⁴, which recommended all Australian governments to raise the minimum age of criminal responsibility to at least 14 years old.
- 1.4 The Change The Record - of which Amnesty International Australia is a member - also released a report, *Free To Be Kids: National Plan of Action*⁵, which recommended that the age of criminal responsibility be raised to at least fourteen.
- 1.5 Our submission will draw on this research, since 2013, on the over-representation of Aboriginal and Torres Strait Islander children in the Australian justice system.
- 1.6 Along with our research on the age of criminal responsibility, we found that Aboriginal and Torres Strait Islander children make up less than 6 percent of children aged 10-17 years, they make up 54 per cent of children in prison.
- 1.7 As well as raising the minimum age of criminal responsibility, we recommend the development of policies at a national, state and territory levels to reduce and ultimately end the over-representation of Aboriginal children in the criminal justice system, and to improve youth justice policies Australia-wide.
- 1.8 Amnesty International has chosen to respond to the terms of reference most relevant to its research. The recommendations contained in this submission go towards ending the overrepresentation of Aboriginal and Torres Strait Islander children in the Australian justice system.

¹ Amnesty International Australia, *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/>

² Atkinson et al, *Youth Justice in Queensland, V2*, 2018 available at <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf>, Queensland Ombudsman, The Brisbane Youth Detention Report: An investigation into the management of young people at Brisbane Youth Detention Centre between November 2016 and February 2017 available at <https://www.qfcc.qld.gov.au/brisbane-youth-detention-report-investigation-management-young-people-brisbane-youth-detention> et al

³ WA Government youth justice portal available at <https://www.cryp.wa.gov.au/our-work/resources/youth-justice/>

⁴ Amnesty International Australia, *The Sky Is The Limit*, 2018, available at <https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>

⁵ Change The Record Coalition, *Free To Be Kids: National Plan of Action*, 2017, available at <https://drive.google.com/file/d/1RUxnUyjmrBUdMs91n7RKohTSHnzD7hQi/view>

Recommendations

- 1.9 Amnesty International recommends that all Australian governments:
- (1) Immediately raise the age of criminal responsibility to at least 14 years old, with no limitations under this age;
 - (2) Transition all children out of prison within a year;
 - (3) Abolish the notion of *doli incapax*.

2. International Legal Frameworks

- 2.1 Across Australia, the minimum age of criminal responsibility is 10. This means that children as young as 10 are arrested by police, locked up in police cells, hauled before courts and sent to youth prisons – often in prisons far away from their community.
- 2.2 The minimum age of criminal responsibility in Australia is comparatively low compared with other countries. For example, the minimum age is 12 years in Canada and the Netherlands; 13 years in France; 14 years in Austria, Germany, Italy, and many Eastern European countries; 15 years in Denmark, Finland, Iceland, Norway and Sweden; 16 years in Portugal, and 18 years in Belgium and Luxembourg.⁶
- 2.3 An international study of 90 countries revealed that 68 per cent had a minimum criminal responsibility age of 12 years or higher, with the most common minimum age of criminal responsibility being 14 years.⁷
- 2.4 The international framework of standards relating to children in contact with the justice system is ‘informed by an evidence base on the neurobiological impacts of early childhood trauma and knowledge from developmental psychology about both the corrosive and four protective factors for child wellbeing’.⁸
- 2.5 Australia has been repeatedly criticised by the United Nations, including long-standing criticism from the United Nations Committee on the Rights of the Child,⁹ and most recently by the Committee on the Elimination of Racial Discrimination, for failing to reform the current minimum age of criminal responsibility. When the Special Rapporteur on the Rights of Indigenous Peoples visited Australia in 2017 she said that the routine detention of 10 and 11 year-old children was the most distressing aspect of her visit.¹⁰
- 2.6 Australia also has a binding obligations under the Convention on the Rights of the Child and the United Nations Committee on the Rights of the Child recommended Australia raise the MACR “to an internationally acceptable level” in 2005¹¹ and again in 2012.¹¹

3. Answers to requested information

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.

3.1 Amnesty International submits that the minimum age of criminal responsibility should be raised to at least fourteen in all circumstances.

⁶ Australian Human Rights Commission, National Children’s Commissioner, Children’s Rights Report 2016, 2016, p.187 available at https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf

⁷ Hazel, N. Youth Justice Board for England and Wales, *Cross-national comparison of youth justice*, 2008, available at https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

⁸ W O’Brien. ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’, *Youth Justice*, Vol.17, No.2, pp.135, 2017

⁹ United Nations Committee on the Rights of the Child, Sessions of the Committee, 1997: paragraphs 11 and 29, 2005: paragraph 73; 2012: paragraph 82(a).

¹⁰ United Nations Human Rights Council, Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, accessed, 2 August 2018, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/234/24/PDF/G1723424.pdf?OpenElement> .

¹¹ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4, 2012.

- 3.2 It is very rare for children aged 10 to 14 to commit serious crimes – and the rate is decreasing.¹²
- 3.3 Children do not yet understand the consequences of criminal actions. They therefore should not be punished with imprisonment. During adolescence, brain development focuses on the neurological pathways that are used most often. The neurological pathways least used are ‘pruned’. The process of ‘pruning’ shows that the experiences children have, and the environments they grow up in, significantly affects the development of their brain.¹³
- 3.4 During this period of brain development ‘adolescents will often make decisions using the amygdala – the part of the brain connected to impulses, emotions and aggression’.¹⁴ This is why they might act on impulse or emotion and are unable to appreciate the likely consequences or impact. The four developmental factors that most often affect children in contact with the justice system are memory, communication skills, social orientation and suggestibility.¹⁵
- 3.5 Imprisoning children also have negative impacts on brain development through toxic stress. The imprisonment of children is an example of toxic stress that can have a negative impact on their brain development.¹⁶
- 3.6 Indigenous children are more likely to experience trauma than their non-Indigenous peers because of the cumulative effect of historical and intergenerational trauma, which can all be traced back to colonisation. For young people this trauma can manifest as ‘high rates of drug and alcohol addiction, violence directed at themselves and others, criminal behaviour and interaction in the justice system, gang membership, homelessness and leaving school early’.¹⁷
- 3.7 Australian research suggests that trauma, mental health and cognitive disability factors, when not addressed early in life, compound and interlock to create complex support needs in the justice system.¹⁸ Children in the justice system have significantly higher rates of mental health disorders and neurocognitive disabilities than children outside the justice system.¹⁹

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.

3.8 Amnesty International submits that the minimum age of criminal responsibility should be raised to at least fourteen in all circumstances.

¹² Australian Bureau of Statistics, *4519.0 - Recorded Crime - Offenders*, 2016-17, available at: <https://www.lawcouncil.asn.au/docs/7b6b5121-5220-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>.

¹³ Australian Early Development Census, *Brain Development in Children*, 2015, available at <https://www.aedc.gov.au/resources/detail/braindevelopment-in-children>

¹⁴ Australian Government, *Learning and the teen brain*, 2017, available at <https://www.learningpotential.gov.au/learningand-the-teen-brain>

¹⁵ Lamb and Sim, ‘Developmental Factors Affecting Children in Legal Contexts’, *Youth Justice*, 2013.

¹⁶ Amnesty International Australia, *The Sky Is The Limit*, 2018, p 6

¹⁷ Healing Foundation, *Growing our children up strong and deadly: Healing children and young people*, 2013, available at <https://www.health.act.gov.au/sites/default/files/Growing%20our%20children%20strong%20and%20deadly%20-%20healing%20for%20children%20and%20young%20people.pdf>

¹⁸ Cunneen, *Arguments for raising the minimum age of criminal responsibility*, Research Report, Comparative Youth Penalty Project, University of NSW, 2017, pp.8-9.

¹⁹ S Kinner et al, ‘Complex health needs in the youth justice system: a survey of community-based and custodial offenders’, *J Adolescent Health*, vol. 54, 2014, pp.521-6

3.9 As stated above, the Australian minimum age of criminal responsibility is inconsistent with prevailing practice in Europe. Indeed, the average minimum age of criminal responsibility in the European Union is 14 years where ‘it can be shown that there are no negative consequences to be seen in terms of crime rates’. Similarly, in some 86 countries surveyed worldwide the median age was 14 years and, despite variation, ‘there has been a trend for countries around the world to raise their ages of criminal responsibility’. The situation in Australia is clearly anomalous with global norms.²⁰

3.10 According to significant research in this space, reform of the minimum age of criminal responsibility anything less than 14 years old is unlikely to achieve the desired result of minimizing the adverse consequences of criminalisation.²¹

3.11 Children under the age of 14 are undergoing significant growth and development, which means they may not have the required capacity to be criminally responsible.²²

*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.*

3.12 *Doli incapax* is a very inadequate way of protecting young children from criminalisation.²³
When the minimum age of criminal responsibility is raised, the notion of *doli incapax* should be abolished.

3.13 Raising the minimum age of criminal responsibility to 14 would remove the need for courts to consider the confusing and complex *doli incapax* presumption.

3.14 Research has found that the threshold of rebutting *doli incapax* has been lowered.²⁴ Legal stakeholders who shared examples from their professional practice say the automatic principle of *doli incapax* for children under 14 no longer applies. Instead, for a child to be deemed *doli incapax* the onus now falls on the defence to actively pursue an assessment that determines this child lacked capacity to know that their actions were seriously wrong. In practice this can mean that children are denied the protection of being *doli incapax*.²⁵

3.15 O’Brien and Fitz-Gibbon also found that in practice *doli incapax* is not engaged as a matter of course for all children aged 10–13 and that ‘inconsistencies in practice have largely eroded this legal safeguard’.

3.16 The Australian Law Reform Commission noted that *doli incapax* could be problematic, including for example:

²⁰ Cunneen, C. *Arguments for raising the minimum age of criminal responsibility*, Research Report, Comparative Youth Penalty Project, University of NSW, 2017, p.3

²¹ Cunneen, C. Comparative Youth Penalty Project, 2017, p.4

²² Australian Medical Association and Law Council of Australia, *Minimum Age of Criminal Responsibility: Policy Statement*, 2017, available at <https://www.lawcouncil.asn.au/docs/7b6b5121-5220-4a11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>

²³ Cunneen, C. Comparative Youth Penalty Project, 2017, p.5

²⁴ T. Bartholomew, ‘Legal and Clinical Enactment of the *Doli Incapax* Defence in Supreme Court of Victoria, Australia’, *Psychiatry, Psychology and Law*, Vol. 5, No.1, 1998, pp.95-105

²⁵ W. O’Brien and K. Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’, *Youth Justice*, Vol.17, No.2, 2017 p.142

“... it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage”.²⁶

3.17 The United Nations Committee on the Rights of the Child has also noted the limitations of *doli incapax*, stating that ‘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 practice’.²⁷

3.18 Research indicates the younger a child is when first having contact with youth justice, the more likely it is the child will become entrenched in the justice system. Early contact with the criminal justice system is one of the key predictors in juvenile and adult offending.²⁸

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

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

3.19 All Australian Governments must increase the allocation of funding to Indigenous community-led and controlled organisations, within existing budgets, to support culturally appropriate, place-based Indigenous designed and led preventative programs to address the needs of children under 14 years at risk of entering the justice system. This funding should be allocated to Indigenous-led organisations and programs in proportion to the over-representation of Indigenous kids in the justice system.

Are there issues specific to states or territories (eg 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.

3.20 The considerations outlined above should override ‘operational’ considerations, and instead the minimum age of criminal responsibility across all states should reflect the principles outlined in the Convention on the Rights of the Child, specifically relevant to: non-discrimination (article 2), best interests of the child (article 3), the right to life, survival and development (article 6) the right to be heard (article 12) and dignity (article 40 (1)) Specifically referred to in General Comment 24: “In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40”²⁹.

²⁶ Australian Law Reform Commission, Age Thresholds in criminal justice, 18.19, 2010, available at <https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/18-childrens-involvement-in-criminal-justice-processes/age-thresholds-in-criminal-justice-processes/>

²⁷ UNCRC, General Comment 10, page 11, 200. available at <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

²⁸ Australian Medical Association and Law Council of Australia, *Minimum Age of Criminal Responsibility: Policy Statement*, 2017.

²⁹ UNCRC General Comment 24, 2019. Children’s Rights in Juvenile Justice available at <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

4. Conclusion

- 4.1 Amnesty International calls for all governments to raise the minimum age of criminal responsibility to at least fourteen.