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The Chair
Age of Criminal Responsibility Working Group
c/- Strategic Reform Division
Department of Justice of Western Australia
GPO Box F317
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Via email: LegPolicy@justice.wa.gov.au

Dear Chair

Re: Council of Attorneys-General – Age of Criminal Responsibility Working Group review

The National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) welcomes the opportunity to make a submission to the Council of Attorneys-General regarding the review of the age of criminal responsibility.

NATSILS is the peak national body for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in Australia.

We are experts on the delivery of effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander people.

Our submission is attached. NATSILS and the ATSILS thank the Strategic Reform Division for accepting our submission for your consideration as you undertake your deliberations.

Please do not hesitate to contact NATSILS' Executive Officer, Roxanne Moore on 0407 097 955, or via email on rmoore@vals.org.au if the Division has any questions or would like further clarification of our submission.

Yours Sincerely

Nerita Waight
Co-Chair
National Aboriginal and Torres Strait Islander Legal Services

Cheryl Axleby
Co-Chair
National Aboriginal and Torres Strait Islander Legal Services

NATSILS
NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review

National Aboriginal and Torres Strait Islander Legal Services

28 February 2020

NATSILS
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Executive Summary and Summary of Recommendations **5**

About NATSILS and ATSILS **8**

Q1: Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? **9**

The Minimum Age of Legal Responsibility 9

Neurological and Developmental Science 9

A trauma informed approach to raising the MACR 10

Recommendations 12

Q2: What age do you consider the MACR should be raised to? Should the age be raised for all types of offences? **13**

Raising the MACR to at least 14 13

Exceptions to the MACR 14

Recommendations 14

Q3: Should the presumption of doli incapax be retained? **15**

Recommendations 17

Q4: Should there be a separate minimum age of detention? **18**

Recommendations 22

Q5: What programs and frameworks may be required if the MACR is raised? **24**

Case Study: Youth Engagement Program at Aboriginal Legal Service Western Australia (ALSWA) 25

Case Study: Balit Ngulu Youth Legal Service at the Victorian Aboriginal Legal Service 27

Recommendations 29

Q6: Are there current programs or approaches that you consider effective in supporting young people being diverted away from the legal system? **30**

Case study: Aboriginal Legal Rights Movement, South Australia 31

Case study: Aboriginal Legal Service, Western Australia 32

Recommendations 33

Q7: If the MACR is raised, what strategies may be required for children who fall below the MACR and can't access services through the youth legal system? **34**

Recommendations 35

Q8: If the MACR is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children and young people? **36**

Recommendations 36

Q9: Is there a need for new criminal offences for persons who exploit or incite children aged below the MACR to commit crimes? 37

Recommendations 37

Q10: Are there issues specific to states or territories that are relevant to considerations of raising the MACR? 38

Recommendations **38**

Executive Summary and Summary of Recommendations

The minimum age of criminal responsibility (**MACR**) across Australia is 10 years of age.[1]

We submit that the age must be increased to at least 14 years. Raising the age to at least 14 would be in line with our understanding of child development, our commitments under international law, and to reduce the number of children and young people currently in the criminal legal system.

A higher minimum age can also prevent children and young people, particularly Aboriginal and Torres Strait Islander children and young people, from being trapped in the quicksand of the criminal legal system.

The current framework in Australia, particularly with the inconsistent application of the *doli incapax* presumption, creates uncertainty and does not have consistent outcomes and fails at protecting children. By raising the age to at least 14 we can do away with the confusing presumption.

To strengthen communities and keep children and young people out of prisons, Aboriginal and Torres Strait Islander community controlled organisations need further resourcing to be able to deliver culturally competent, safe and holistic programs that connect children and young people to culture, Country, language and community while also promoting individual and community healing.

Below are a summary of our recommendations:

1. All Australian governments should raise their minimum age of criminal responsibility to at least 14 years of age for all children without exceptions;

2. To ensure consistent application of the MACR and in line with our understanding of cognitive and neurological development, all Australian governments should increase their MACR to at least 14 years for all children and young people, and for all offences.

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[1] *Crimes Act 1914* (Cth), s4M *Criminal Code Act 1995* (Cth), s7.1; *Crimes Act 1914* (Cth), s4N *Criminal Code Act 1995*, s7.2; *Criminal Code 2002* (ACT), s25 *Criminal Code 2002* (ACT), s26; *Children and Young People Act 1999* (ACT), Part 1.3 ss7 and 8, and s69; *Children (Criminal Proceedings) Act 1987* (NSW), ss 5,3; *Criminal Code Act (NT)*, s38(1), s38(2); *Criminal Code Act 1899* (Qld), ss29(1),(2); *Young Offenders Act 1993* (SA), ss4,5; Criminal Code Act 1924 (Tas), s18(1)(2); *Children Youth and Families Act 2005* (Vic), s344; *Criminal Code Act Compilation Act 1913* (WA), s29; *Young Offenders Act 1994 (WA)*, s3

3. The presumption of doli incapax should be retained to protect children and young people aged 17 who are unable to form *mens rea*. To ensure the presumption actually protects children and young people, clear, consistent and uniform guidelines on its use must be developed by all jurisdictions in consultation with NATSILS and the ATSILS.

4. All Australian jurisdictions should set a minimum age of incarceration of at least 16 years.

5. All children and young people who may have committed offences are provided with intensive support to rehabilitate and/or divert them away from the criminal legal system.

6. Aboriginal and Torres Strait Islander community controlled organisations must be adequately supported and resourced to provide Aboriginal and Torres Strait Islander children and young people with rehabilitative and diversionary programs that are strong in reconnecting them to culture and Country.

7. Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services must be adequately resourced and supported in providing their communities with culturally appropriate and safe legal advice and assistance.

8. Aboriginal and Torres Strait Islander-controlled services in health, mental health, education, family support, cultural connection, disability, and others must be adequately resourced and supported to provide their communities with holistic support with a focus on ending the disadvantage of Aboriginal and Torres Strait Islander children and young people.

9. All Governments must resource and adequately support Aboriginal and Torres Strait Islander community controlled organisations to provide culturally safe diversionary programs for all children and young people.

10. All children and young people should receive the critical social services and support they need in their communities.

11. All programs for Aboriginal and Torres Strait Islander young people must be underpinned by the principle of Aboriginal and Torres Strait Islander self-determination, allowing communities to have effective control over their own affairs.

12. No new offences should be created for persons who exploit or incite children aged below the MACR to commit crimes. The current legal framework is sufficient to protect children aged below the MACR from being incited to commit offences and new offences would likely disproportionately target Aboriginal and Torres Strait Islander people.

13. The Council of Attorneys-General should properly consider and act on the recommendations raised by any ATSILS making a submission to this inquiry on the specific jurisdictional issues or considerations regarding raising the MACR.

About NATSILS and ATSILS

NATSILS is the national peak body for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in Australia.

NATSILS was established as the peak body for ATSILS in 2007. We have evolved and grown into a highly coordinated body with an expanded sphere of influence to include broader systemic issues of injustice.

We are experts on the delivery of effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples. We have a unique insight into legal and justice issues affecting Aboriginal and Torres Strait Islander people.

We bring together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and imprisoned people's through-care to Aboriginal and Torres Strait Islander peoples in contact with the legal system.

We proudly represent the following ATSILS around Australia:

- Aboriginal and Torres Strait Islander Legal Service Ltd (**ATSILS Qld**);
- Aboriginal Legal Rights Movement Inc. in South Australia (**ALRM**);
- Aboriginal Legal Service (NSW/ACT) (**ALS NSW/ACT**);
- Aboriginal Legal Service of Western Australia Ltd (**ALSWA**);
- North Australian Aboriginal Justice Agency (**NAAJA**);
- Tasmanian Aboriginal Community Legal Service (**TACLS**); and
- Victorian Aboriginal Legal Service Co-operative Limited (**VALS**).

Each numbered heading in this submission corresponds to the questions included in the discussion paper released by the Western Australian Department of Justice.

Q1: Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only?

The Minimum Age of Legal Responsibility

The MACR in all Australian jurisdictions is 10 years of age.[2] It is our submission that it must be increased in line with our understanding of child development, Australia's international commitments, and to reduce the number of children and young people currently in the criminal legal system. A higher MACR can prevent children and young people from being trapped in the quicksand of the criminal legal system.

NATSILS and the ATSILS submit that the MACR be raised to at least 14 years of age for all children and young people without exception, discussed in greater detail in **question two.**

The low MACR in Australia has drawn the attention of the United Nations' Committee on the Rights of the Child which has expressed its serious and ongoing concerns as it's not in line with the United Nations Convention on the Rights of the Child (**UNCRC**), of which Australia is a signatory.[3]

In its *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,* the Committee on the Rights of the Child urged Australia to raise the MACR to "an internationally accepted level" and "make it conform with the upper age of 14 years".[4]

Neurological and Developmental Science

Children who are 14 or under may not have the required cognitive capacity to be legally responsible as they are undergoing significant neurological growth and development. Their brains are not yet mature at that age.[5] This immaturity is likely to contribute to a child or a young

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[2] *Crimes Act 1914* (Cth), s4M *Criminal Code Act 1995* (Cth), s7.1; *Crimes Act 1914* (Cth), s4N *Criminal Code Act 1995*, s7.2; *Criminal Code 2002* (ACT), s25 *Criminal Code 2002* (ACT), s26; *Children and Young People Act 1999* (ACT), Part 1.3 ss7 and 8, and s69; *Children (Criminal Proceedings) Act 1987* (NSW), ss 5,3; *Criminal Code Act (NT)*, s38(1), s38(2); *Criminal Code Act 1899* (Qld), ss29(1),(2); *Young Offenders Act 1993* (SA), ss4,5; Criminal Code Act 1924 (Tas), s18(1)(2); *Children Youth and Families Act 2005* (Vic), s344; *Criminal Code Act Compilation Act 1913* (WA), s29; *Young Offenders Act 1994 (WA)*, s3

[3] United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,* CRC/C/AUS/CO/5-6 (30 September 2019) 13

[4] United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,* CRC/C/AUS/CO/5-6 (30 September 2019) 13, Rec 48(a)

[5] Law Council of Australia, *Minimum Age of Criminal Responsibility Policy Statement,* <https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-ea11-9403-00505

person lacking impulse control, high attraction to risk and the immediate reward that accompanies risky behaviour.[6]

Children and young people are also very vulnerable to peer pressure which can also affect their behaviour because of the importance they place on their peer relationships and because of their own internal neurological and hormonal changes.[7]

Extensive research has shown that the immature child and adolescent brain impacts how children and young people function by causing them to be impulsive, emotional or act with aggression. This may make it difficult for them to appreciate the likely consequences or impact of their actions.[8]

Increasing the MACR to at least 14 years of age will better align with our understanding of child and adolescent development. It will also remove the confusing, rebuttable presumption of *doli incapax* which does not properly protect children or young people. *Doli incapax* is discussed further in **question three**.

A trauma informed approach to raising the MACR

A trauma informed approach to the MACR is particularly important for Aboriginal and Torres Strait Islander children and young people. As mentioned above, children and young people experience significant brain growth and development at and under the age of 14.

At this time brain development is focused on consolidating the neurological pathways that are most used and removing those that are not.[9] This process of consolidation and removal is critical as the experiences that children and young people have and the environments they grow up in significantly affects the development of their brains.[10]

This is a critical factor that must be considered when discussing raising the MACR for Aboriginal and Torres Strait Islander children and young people as they are more likely to experience early trauma than their non-Indigenous peers.[11]

6be13b5>; Chris Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility,* (Report, 2017) <http://cypp.unsw.edu.au/node/146>

[6] *Ibid.*

[7] Sentencing Advisory Council*, Sentencing Children and Young People in Victoria* (2012) 11

[8] Amnesty International, *The Sky Is The Limit: Keeping Young Children Out of Prison By Raising The Age Of Criminal Responsibility* (Report, 2018) 7

[9] Amnesty International, *The Sky Is The Limit: Keeping YOung Children Out of Prison By Raising The Age Of Criminal Responsibility* (Report, 2018) 7

[10] *Ibid.*

[11] Amnesty International, *The Sky Is The Limit: Keeping YOung Children Out of Prison By Raising The Age Of Criminal Responsibility* (Report, 2018) 6

Aboriginal and Torres Strait Islander children flourish when they are connected to Country, land, family, community and spirit. Particularly when they have and are allowed to develop strong and positive social networks and have strong leadership in their families and communities.[12]

Most Aboriginal and Torres Strait Islander children and young people grow up in loving, supportive environments strong in their culture and identity. However, due to the ongoing and brutal effects of colonisation,dispossession of land, systematic attempts to destroy their culture and language, racism, discrimination, and the trauma of forced family separation and removals; some Aboriginal and Torres Strait Islander children experience compounding levels of disadvantage not experienced by their non-Indigenous peers.

Members of the Stolen Generations and their children are particularly more likely to be forced into or experience poorer physical and mental health outcomes, inadequate housing, substance abuse, lower incomes, over policing and therefore over incarceration.[13] In 2012-13 almost half of all Aboriginal and Torres Strait Islander adults reported that they or their relatives had been removed from their natural family.[14]

Because of these entrenched and systemic disadvantages, some Aboriginal and Torres Strait Islander children can be trapped in cycles of trauma, poverty, injustice and illness at key times of their neurological development. This further compounds and entrenches their disadvantage.

The Australian Early Development Census advised that these ongoing, entrenched and systemic disadvantages can disrupt a child or young person's brain architecture. This disruption leads to a lower threshold of activation for a child's stress management system manifesting in learning difficulties, behavioural problems and adverse mental and physical health outcomes.[15]

Factors that contribute to children and young people committing offences, particularly if these behavioural problems or cognitive impairments are not diagnosed and treated early and monitored.

We must raise the MACR to at least 14 years as this is based on the latest understanding of child and adolescent development and to ensure Australia is compliant with our international

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[12] Australian Institute of Health and Welfare, *Australia's Children* (2019) <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/background/introduction>
[13] Australian Institute of Health and Welfare, *Australia's Children* (2019) <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/background/introduction>
[14] Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples: 2015* (2015) <https://www.aihw.gov.au/reports/indigenous-health-welfare/indigenous-health-welfare-2015/contents/determinants-of-health-key-points>
[15] Amnesty International, *The Sky Is The Limit: Keeping YOung Children Out of Prison By Raising The Age Of Criminal Responsibility* (Report, 2018) 6

obligations as signatories to the Convention on the Rights of the Child. A higher MACR, to at least 14, will also bring Australia into line with the median MACR internationally.

Raising the MACR to at least 14 will is in line with our understanding of child and adolescent development. It will also contribute to reducing the over incarceration of Aboriginal and Torres Strait Islander children and young people, particularly those experiencing compounding disadvantage.

Children and young people who are experiencing compounding, systemic, and entrenched disadvantages must be supported and nurtured in their own communities and be diverted away from the criminal legal system.

This approach will be discussed further below.

Recommendations

1. All Australian governments should raise their minimum age of criminal responsibility to at least 14 years of age for all children without exceptions.

Q2: What age do you consider the MACR should be raised to? Should the age be raised for all types of offences?

Raising the MACR to at least 14

As noted above, NATSILS and the ATSILS are of the view that the minimum age of legal responsibility (**MACR**) across all Australian jurisdictions should be increased for all children and young people to at least 14 years of age, without exceptions.

The current framework, particularly with the inconsistent application of the *doli incapax* presumption, creates uncertainty and does not produce consistent outcomes and therefore it fails to protect children.

Furthermore, we submit that the minimum age that a child can be imprisoned should be at least 16 years of age. This will be **discussed in question four.**

We are of the view that raising the MACR is a crucial and transformative step towards ending the overrepresentation of Aboriginal and Torres Strait Islander people in the legal system. In 2019, 70 percent of imprisoned children aged 10-13 years in Australia were Aboriginal and Torres Strait Islander children.[16]

When children enter the legal system at very young ages, evidence shows that they are more likely to stay in the system, including as adults.[17] Australia's low age of legal responsibility exacerbates intergenerational cycles of imprisonment by criminalising the most disadvantaged children and young people in the country, and not helping them adequately.

Globally, the median age of criminal responsibility is 14 years.[18] International research and experience shows that it's possible to raise the MACR to at least 14 years without any adverse effects on crime rates.[19] In fact, many countries like Germany and Norway, with a MACR of 14 and 15 respectively, have low rates of imprisonment of children and young people.[20]

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[16] AIHW, *Youth Justice in Australia 2018-2019*, Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2017–18.
[17] Amnesty International Australia 2018, The Sky's the Limit, p.2 https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf
[18] Australian Human Rights Commission, 2016, National Children's Commissioner, *Children's Rights Report*, p. 187.
[19] Chris Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility,* (Report, 2017) <http://cypp.unsw.edu.au/node/146>
[20] Chris Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility,* (Report, 2017) <http://cypp.unsw.edu.au/node/146>

Exceptions to the MACR

A sound evidence base and keeping in line with our international obligations as signatories to the Convention on the Rights of the Child is critical when considering exceptions to the MACR. The process of developing cognitive capacity for criminal responsibility does not happen uniformly, different children develop at different times. Individual children within their age group can and do develop different cognitive capacities for understanding.[21]

Scientific evidence suggests that children at around age 14 are able to make more mature decisions. Having a uniform MACR of 14 without exceptions will ensure that all children are treated equally, regardless of their offending.

The United Nations Committee on the Rights of the Child has also cautioned on creating exceptions to the MACR, for certain types of offences for example, as this is often done to respond to public pressure and not based on scientific understanding of child and adolescent development.[22]

We agree with The Committee's recommendations that one standardised MACR be set for all, without exception and that this be done based on scientific understanding of child and adolescent development.[23]

Recommendations

2. To ensure consistent application of the MACR and in line with our understanding of cognitive and neurological development, all Australian governments should increase their MACR to at least 14 years for all children and young people, and for all offences.

[21] Chris Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility,* (Report, 2017) <http://cypp.unsw.edu.au/node/146>
[22] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019) [25]
[23] [ii] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019) [25].

Q3: Should the presumption of *doli incapax* be retained?

Doli Incapax, meaning incapable of evil or incapable of crime, is a rebuttable common law presumption that holds that a child under 14 years of age is: "not sufficiently intellectually morally developed to appreciate the difference between right and wrong." In other words, that a child under 14 lacks the capacity to form the *mens rea* for a criminal act.[24]

Doli Incapax as it currently applies is inconsistent, flawed and confusing.[25]

The Australian Law Reform Commission has noted that *doli Incapax* is currently failing because it is difficult to determine whether a child or a young person knew what they did was wrong unless they say so in court or they raise it while being interviewed by police. Therefore, to rebut the presumption the prosecution has to lead highly prejudicial evidence which can end up disadvantaging children and not protecting them.[26]

Some of this inconsistency arises due to the liberal interpretation as to what constitutes 'sufficient rebuttal' or which party bears the burden of proof, a child's rurality or remoteness, as well as the presumption not being engaged as a matter of course for all children to whom it applies.[27]

The United Nations Committee on the Rights of the Child and the Australian Law Reform Commission have both criticised *doli incapax* for its failure to protect children as it is intended because of its confusing and inconsistent application.[28]

As noted above, it is our submission that raising the MACR to at least 14 for all children and in all circumstances is an accepted international standard. Raising the MACR to at least 14 at which *doli incapax* currently applies would make the presumption redundant for children aged 13 and under.

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[24] RP v The Queen [2016] HCA 38, [8]

[25] Law Council of Australia, *Minimum Age of Criminal Responsibility Policy Statement,* <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>

[26] Chris Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility,* (Report, 2017) <http://cypp.unsw.edu.au/node/146>

[27] Chris Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility,* (Report, 2017) <http://cypp.unsw.edu.au/node/146>

[28] United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,* CRC/C/AUS/CO/5-6 (30 September 2019) 13

However, the presumption, with adequate and appropriate safeguards, including clear, consistent, and uniform guidelines for its application in all jurisdictions can protect children and young people who do not have the mental capacity to understand they are committing crimes.

This is particularly important for Aboriginal and Torres Strait Islander young people who lack this capacity for a variety of reasons, like: undiagnosed psychosocial disabilities, neurological development, psychosocial development, trauma, amongst other factors.

The High Court of Australia examined *doli incapax* and its development and has provided some guidance as to its application. In *RP v The Queen [2016] HCA 53*, the majority (Kiefel, Bell, Keane and Gordon JJ) noted:

- the presumption of doli incapax may be rebutted by evidence that the child knew that it was "morally wrong to engage in the conduct that constitutes the physical element or elements of the offence" [8]-[9];
- knowledge of the "moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous." This distinction may be captured by stating the requirement, in terms of proof, that the child knew the conduct was "seriously wrong" or "gravely wrong" [9];
- the presumption of doli incapax cannot be rebutted "merely as an inference from the doing of that act or those acts", no matter how obviously wrong the act(s) may be (cf. R v ALH (2003) 6 VR 276, [86]). The prosecution must rely on more than the circumstances of the offences, and adduce "evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct" [9].

The current difficulties with *doli incapax* are not unsolvable. The presumption can still apply with a higher MACR of at least 14 years if the presumption is changed to apply to children and young people aged 14 to 17 years who cannot form *mens rea* for example, due to their neurological or cognitive development.

However, for doli incapax to be an effective protection for children and young people all jurisdictions need to commit to developing clear, consistent, and uniform guidelines on its use using the decision in *RP v The Queen* as a foundation. In doing this, the primary objective of improving the presumption must always be on keeping all children and young people out of prisons.

NATSILS and the ATSILS look forward to working with each jurisdiction on developing these clear, consistent and uniform guidelines to improve and strengthen the presumption of *doli incapax* for children and young people aged between 14 and 17.

Recommendations

3. The presumption of doli incapax should be retained to protect children and young people aged 14 to 17 who are unable to form *mens rea*. To ensure the presumption actually protects children and young people, clear, consistent and uniform guidelines on its use must be developed by all jurisdictions in consultation with NATSILS and the ATSILS.

Q4: Should there be a separate minimum age of detention?

We submit that the minimum age of detention should be at least 16 years of age. The United Nations Committee on the Rights of the Child stated in General Comment No. 24:

> "...State parties to fix an age limit for the use of deprivation of liberty and recommends that no child in conflict with the law below the age of 16 years old be deprived of liberty, either at the pre-trial or post-trial stage. Even above that age, deprivation of liberty should only be used as a measure of last resort and for the shortest period of time with the child's best interests as a primary consideration."[29]

As a signatory to the convention, Australia has a duty to comply with its international obligations and responsibilities, raising the age of detention to at least 16 years will also ensure that Aboriginal and Torres Strait Islander children and young people are kept out of the criminal legal system.

Aboriginal and Torres Strait Islander children and young people belong in their communities, not separated from their loved ones, Country, or parents by being imprisoned or detained. The imprisonment of children is ineffective and abusive, the legal system must prioritise keeping children and young people, particularly Aboriginal and Torres Strait Islander people, out of prisons.

Aboriginal and Torres Strait Islander children and young people are imprisoned at 28 times the rate of non-Indigenous young people.[30] Young Aboriginal and Torres Strait Islander people made up more than half (56 percent) of all imprisoned young people in 2018.[31]

The low MACR contributes to this over-incarceration of children and young people. When children enter the legal system at such young ages they are highly likely to return as adults, especially those who are imprisoned as children.[32]

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[29] United Nations Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system , UN Doc CRC/C/GC/24

[30] Australian Productivity Commission, Report on Government Services 2020, Report 23 January 2020, 17.1

[31] AIHW, *Youth Justice in Australia 2018-2019*, Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2017–18.

[32] D Arrendondo, 'Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making' (2003) 14 *Stanford Law & Policy Review* 1, 13–28; E Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6 *Journal of Children's Services* 2, 86–95.

Children must not be imprisoned as the institutions they are forced into and the separation from family, community and culture are harmful to their health and development; even if they are imprisoned for a short time awaiting sentencing.[33]

On an average day, 60 percent of Aboriginal and Torres Strait Islander children in prisons are not sentenced or are awaiting trial ('on remand').[34] Time on remand can have a severe and damaging impact on a child, leading to longer term harm and ongoing interactions with the legal system.

NATSILS and the ATSILS hold grave concerns for the treatment of children and young people, particularly Aboriginal and Torres Strait Islander children and young people in youth detention facilities across the country. Imprisoning children is cruel and inhuman.

Due to reported abuses, including the use of solitary confinement on children, violence, strip searches, and other abuses, every Australian jurisdiction has initiated inquiries into their respective youth detention regimes, including the Royal Commission in the Northern Territory.

One of the Royal Commission's recommendations was to close the Don Dale facility immediately due to its repeated breaches of the human rights of children and young people.[35] The centre remains open, and in fact has since been expanded.[36]

The Royal Commission also found that imprisoned children and young people in the Northern Territory were denied access to basic needs like food, water and the use of toilets. In some cases, children were bribed to carry out degrading and humiliating acts or to commit acts of violence on each other.[37]

The Queensland Ombudsman found that the Youth Detention staff had failed to protect young people from assaults and investigated complaints that Youth Detention staff had orchestrated threats and assaults on young people. The Ombudsman also found that some young people

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[33] B Holman and J Ziedenberg for Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*', (2006).
[34] AIHW, above, Table S109a: '*Young people in detention on an average day(a) by legal status, detention type and Indigenous status, states and territories*, 2015–16
[35] Royal Commission into the Protection and Detention of Children in the Northern Territory, Report Overview, Report November 2017, 5
[36] Northern Territory Government, Safe, Thriving and Connected | First Progress Report (Web Page, 16 November 2018) <https://rmo.nt.gov.au/updates/royal-commission-into-the-protection-and-detention-of-children-in-the-nt-first-progress-report>.
[37] Royal Commission into the Protection and Detention of Children in the Northern Territory, Report Overview, Report November 2017, 4

had been subjected to separation amounting to solitary confinement in facilities lacking beds, running water or a bathroom for ten days.[38]

These investigations led to independent reviews being commissioned into the Queensland youth detention system. These reviews found that children as young as ten are being imprisoned in adult watch houses, often in solitary confinement, and some for weeks because youth detention facilities are at capacity.[39]

Adult watch houses in Queensland are not much more than bare concrete pens. They are designed only for the purpose of holding adults for short periods of time either for adults in custody to be transported to and from court appearances or for temporary holding of adults that are in an acute or dangerous state. However, some children have been remanded or imprisoned in these pens for weeks instead of being transported to the Youth Detention Centres.

The watch houses are not built to afford proper access to the outdoors and sunlight in accordance with the minimum international standards required of detention centres and jails. One child reported that the only access to outdoors sunlight and air was 15 minutes in a four-walled pen with a mesh roof obscuring the sky.[40]

Worryingly, solitary confinement is common across Australia. However, because solitary confinement may be called isolation, segregation, seclusion or separation, there is no consistency in the governing legislation that regulates or prohibits solitary confinement.

For example, in Western Australia, two young people were held in solitary confinement at the Banksia Hill Detention Centre for 10 days in 2017. An independent investigation by the Western Australian Office of Custodial Services found that their solitary confinement did not satisfy the protections due to imprisoned young people that are outlined in *The Young Offenders Act 1994* (WA). However, the provisions in the Act did not protect young people if they were placed in solitary confinement subject to a 'Personal Support Plan'.[41]

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[38] Queensland Ombudsman, The Brisbane Youth Detention Centre Report, Report March 2019,x, xi, xii
[39] Australian Broadcasting Corporation, The Watch House Files (Web Page, 13 May 2019) <https://www.abc.net.au/news/2019-05-13/hold-the-watch-house-files/11046190>
[40] Australian Broadcasting Corporation, The Watch House Files (Web Page, 13 May 2019) <https://www.abc.net.au/news/2019-05-13/hold-the-watch-house-files/11046190>
[1] Australian Broadcasting Corporation, The Watch House Files (Web Page, 13 May 2019) <https://www.abc.net.au/news/2019-05-13/hold-the-watch-house-files/11046190>
[41] Office of Custodial Services Western Australia, Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre, Report, June 2018, vi

In one instance a teenager was held in solitary confinement for 328 days at Banksia Hill in a cell no bigger than a car parking space. He claims to also have been subjected to degrading treatment, the refusal of basic hygiene, of having to ‘earn’ bedding materials and having to kneel for his food or being fed through a grill in the door.[42]

Children and young people, particularly Aboriginal and Torres Strait Islander young people are also subject to excessive strip searching when imprisoned. In the state of New South Wales, Aboriginal and Torres Strait Islander young people accounted for 22 percent of all recorded strip searches in custody.[43] A report found that there are imprecise legal thresholds to enable strip searches in New South Wales and that unlawful strip searches are potentially widespread.[44]

The New South Wales Inspector of Custodial Services found that: “…the practice of searching young people by asking them to partially remove their clothes may be humiliating and distressing for young people. This is particularly the case given that many young people in detention have experienced abuse.”[45]

In the Australian Capital Territory (ACT), the ACT Human Rights Commission found that a young person in handcuffs was punched by a staff member in a youth detention centre, in retaliation for being attacked by three detainees during a violent assault.

The ACT Human Rights Commission also substantiated claims of racism among youth detention centre staff and that staff had encouraged detained young people to fight with each other.[46]

In the Australian Capital Territory, there have been allegations of unauthorised physical force by workers in responding to violence or misbehaviour by imprisoned young people. Including, disturbing allegations of use of force intended to hurt or punish young people, such as pushing young people hard against a wall, choking them, dragging them along the ground and punching

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[42] Amnesty International Australia, Teenager in Banksia Hill Asking to go to Adult Prison After 328 Days in Isolation, (Web Page, 20 March 2018) https://www.amnesty.org.au/teenager-in-banksia-hill-asking-to-go-to-adult-prison-after-328-days-in-isolation/
[43] Grewcock, M and Sentas, V. Rethinking Strip Searches by NSW Police, Report, August 2019, 4
[44] Grewcock, M and Sentas, V. Rethinking Strip Searches by NSW Police, Report, August 2019, 4
[45] New South Wales Inspect of Custodial Services, Report on the Use of Force, Segregation and Confinement in NSW Juvenile Justice Centre, Report 2018, <http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf
[46]Toohey, K, Watchirs, H, McKinnon, S, de Fatima Vieira, M., Commission Initiated Review of Allegations Regarding Bimberi Youth Justice Centre, Report March 2019

or kneeing them while restrained. There are allegations that in some cases youth workers offered imprisoned young people physical punishment as an alternative to proper behaviour management techniques.[47]

In South Australia, an investigation into the Adelaide Youth Training Centre detention facility found that the repeated use of mechanical restraints on children, unnecessary application of force and the use of spit hoods is unreasonable and unjust.[48] Particularly concerning is the fact that South Australia is the only jurisdiction in Australia that authorises the use of spit hoods on children or young people in youth detention.

We do note that the South Australian Ombudsman has recommended that the use of spit hoods in youth detention be ended in South Australia by 5 September 2020.[49]

To give children the best chance to thrive, more needs to be done to support and strengthen families to stay together and on keeping communities together and not imprisoning children or young people. The most effective way to do this is for governments of all levels to grow, develop, and strengthen targeted programs to support children and their families to stay together.

These programs must be focused on addressing the causes of their disadvantage and connecting them to Country and culture and be delivered by Aboriginal and Torres Strait Islander community controlled organisations.

This will be discussed in further detail in **question five.**

Recommendations

4. All Australian jurisdictions should set a minimum age of incarceration of at least 16 years.

5. All children and young people who may have committed offences are provided with intensive support to rehabilitate and/or divert them away from the criminal legal system.

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[47] Toohey, K, Watchirs, H, McKinnon, S, de Fatima Vieira, M., Commission Initiated Review of Allegations Regarding Bimberi Youth Justice Centre, Report March 2019, 16
[48] South Australian Ombudsman, Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre, Report September 2019, 35
[49] South Australian Ombudsman, Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre, Report September 2019, 35

6. Aboriginal and Torres Strait Islander community controlled organisations must be adequately supported and resourced to provide Aboriginal and Torres Strait Islander children and young people with rehabilitative and diversionary programs that are strong in reconnecting them to culture and Country.

Q5: What programs and frameworks may be required if the MACR is raised?

As mentioned above, there are many systemic and entrenched reasons why Aboriginal and Torres Strait Islander children are over-imprisoned.[50] A whole-of-government approach is required to focus on addressing the root causes of Aboriginal and Torres Strait Islander people's disadvantage in the legal system.

Governments at all levels must actively work to reduce or eliminate intergenerational trauma caused by past and present policies, racism, systemic discrimination, child removal, homelessness, substance abuse, intergenerational poverty, family violence, disability, and poor health outcomes.[51]

Raising the MACR alone will not lead to the significant and sustained improvements in the lives of Aboriginal and Torres Strait Islander children, young people, and their communities we wish to see. For real change to occur improvements must be made across all of the factors that impact upon the health and wellbeing of Aboriginal and Torres Strait Islander people.

Aboriginal and Torres Strait Islander community owned and run organisations must be supported and resourced to design and deliver holistic programs and services to their own communities.

Improving and growing these programs has been critical to preventing children from coming into contact or becoming entrenched in the youth legal system and in preventing family violence and child removal.[52] It should be noted that these programs, while highly effective, are resource intensive because of their holistic nature.

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[50] AIHW, Youth justice fact sheet no 70: Remoteness, socioeconomic position and youth justice supervision: 2014–15 (2016), <http://content.webarchive.nla.gov.au/gov/wayback/20170818225421/http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129560047> 3

[51] See for e.g. E Johnson, Royal Commission into Aboriginal Deaths in Custody: National Report (1991), <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>, recs 62; 192, 235; AIA, above n 3, 6; Price Waterhouse Coopers, PriceWaterhouseCoopers, PwC's Indigenous Consulting and Change The Record, Indigenous incarceration: Unlock the facts (2017), <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>, 23.

[52] See for examples D Palmer, Murdoch University, ''We know they healthy cos they on country with old people":demonstrating the value of the Yiriman Project (2013); Australian Government, BushMob: Helping youth get back on track, http://www.indigenous.gov.au/bushmob-helping-youth-get-back-on-track; AIA, Heads Held High: Keeping Queensland kids out of detention, strong in culture and community (2016), <https://www.amnesty.org.au/wp-content/uploads/2016/12/Heads_Held_High_-_Queensland_report_by_Amnesty_International.pdf>, 25–31.

Taking a broad approach to wellbeing which includes spiritual and cultural wellbeing, cultural and community connection delivers excellent outcomes. When this is properly resourced, communities flourish.

Case Study: Youth Engagement Program at Aboriginal Legal Service Western Australia (ALSWA)

ALSWA's Youth Engagement Program (YEP) provides holistic wrap-around services to young people appearing in the Perth Children's Court.

The program provides services such as case management, court support, advocacy, referrals (to education, training and counselling supports), mentoring, transport and support at appointments and practical assistance (e.g. assistance in obtaining birth certificates, Centrelink, accommodation, Medicare cards, medical assistance and drivers licences).

YEP's diversion officers work closely with ALSWA lawyers and court officers to ensure the best outcomes for children and young people, including compliance with the requirements of court.

More broadly, the program aims to reduce offending behaviour and improve the wellbeing of children and young people now and into the future.

YEP helped a young boy who was in the Banksia Hill Detention Centre on remand. The diversion officer identified a suitable carer and developed a release plan with the young boy and his family. This release plan included a referral to alcohol counselling at Wungening (formerly the Aboriginal Alcohol and Drug Service).

A bail application before the President of the Children's Court was successful and the young boy was released on bail.

YEP has also helped a 14-year-old boy for a number of months. At the time he commenced in the YEP, his school attendance was irregular and he spent time in and out of detention.

YEP helped him to re-engage with a previous football club. After a couple of months he was placed on an intensive youth supervision order for six months. Since that time, he has engaged extremely well with his diversion officer who has provided him with significant support, including cultural support, and mentoring. YEP has also referred him to counselling for substance abuse and for PTSD which he responded very well to.

His diversion officer has watched him play football on the weekend and has established a strong rapport with him over the past months. He is fully compliant with his youth justice order, is attending school every day and is enjoying his developing football career.

To date, YEP has supported young people who have been referred to the Juvenile Justice Team (diversion from a court imposed sentence), with a 64 percent completion rate, diverting young people from further court hearings.

YEP has also supported young people to complete their requirements of court conferencing and thereby avoided further adjournments to enable completion or more punitive sentences.Where these programs exist, they struggle to attract ongoing funding

The YEP program is a fantastic example of a program that connects children and young people to culture, language and country while also supporting them if they are in contact with the legal system and preventing their return.

Aboriginal and Torres Strait Islander community-controlled legal service providers are best placed to provide legal, social, educational and cultural support to Aboriginal and Torres Strait Islander children and young people in contact with the legal system.[53]

In 2014, the Productivity Commission called for governments to meet the significant unmet legal need among Aboriginal and Torres Strait Islander people, recognising that the "*inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system.*"[54]

These types of holistic, culturally safe programs are a fundamental feature of how ATSILS work. However, even when these programs are proven to be effective, they can sometimes struggle to attract secure, long-term funding.

Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services must be adequately resourced and supported in providing their communities with culturally legal advice and assistance.

Similarly, it is vital to support Aboriginal and Torres Strait Islander-controlled services in health, mental health, education, family support, cultural connection, disability, and others, to holistically address the disadvantage that results in the over-imprisonment of Aboriginal and Torres Strait Islander children and young people.

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[53] See Productivity Commission, 'Access to Justice Arrangements: Inquiry report Vol. 2' (2014), 76
[54] See Productivity Commission, 'Access to Justice Arrangements: Inquiry report Vol. 2' (2014), 770

When these programs work together and are adequately resourced, they produce excellent outcomes.

Case Study: Balit Ngulu Youth Legal Service at the Victorian Aboriginal Legal Service

In 2017 VALS launched a separate legal service titled Balit Ngulu, which means "strong voice" in Wurundjeri, to provide legal assistance in the areas of youth justice, child protection, family law, and civil law issues to Aboriginal young people across Victoria.

The catalyst for its foundation was a VALS lawyer hearing a 16-year-old in youth detention say, "I'm a lost cause, aren't I?". At the time VALS was having to refer out Aboriginal children and young people involved in child protection and youth legal systems because of conflicts of interest. Due to this, children and young people were receiving little or patchy legal representation when referred to outside agencies and as a result were getting lost in the system with little positive outcomes.

Balit Ngulu was Australia's only dedicated legal service for Aboriginal young people. Balit Ngulu provided holistic, integrated and culturally appropriate services to 100 Aboriginal young people to address issues such as recidivism, cultural needs, connection to family, educational and employment needs, and leadership. Advocacy provided by Balit Ngulu has made the difference between having children placed in out-of-home care or within their kinship networks.[55]

One of Balit Ngulu's team members grew up in Shepparton, he used to get into trouble as a young man but had an Uncle who taught him Indigenous culture and encouraged him to get an education. He brought his own lived experience to the program and he would make a folder for each young client that detailed their country, family history, and other information for magistrates.

He would sit with the lawyers and ensure that the young people understood what was happening to them. He helped guide them through the court environment, connected

[55] M Perkins, 'I'm a lost cause, aren't I?' Aboriginal legal service faces closure', The Age (online), 5 June 2018, <https://www.theage.com.au/national/victoria/i-m-a-lost-cause-aren-t-i-aboriginal-legal-service-faces-closure-20180603-p4zj81.html>.

them with social services and connected them with culture. Sometimes, the support he provided included transporting the young person to court.[56]

In one example, a young person had stolen cars and was involved in a nearly fatal accident. The program connected him with cultural programs and reconnected him with school. He didn't offend again.[57]

In another instance, a 13 year old boy was charged with assault and placed into a diversion program. This meant he avoided a criminal conviction and reported that having an Aboriginal caseworker with lived experience meant he was more likely to listen to the advice given.[58]

Balit Ngulu costs about $1 million a year to run, with four lawyers and two client service officers. A recent report by Koorie Youth Council '*Ngaga-dji*' found children and young people preferred using a service like Balit Ngulu and that it was more likely to stop recidivism.[59]

With great sadness, Balit Ngulu had to close its doors on 29 September 2018 due to a lack of government support and funding.

The Victorian Government's response was:

> "*[The service] had been self-funded by the Victorian Aboriginal Legal Service (VALS), and any decision regarding its future funding is a matter for VALS… Under the Indigenous Legal Assistance Program, providers are required to prioritise their funding to where the need is greatest to ensure they maximise benefit to Indigenous Australia.*"[60]

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[56] M Perkins, 'I'm a lost cause, aren't I?' Aboriginal legal service faces closure', The Age (online), 5 June 2018,<https://www.theage.com.au/national/victoria/i-m-a-lost-cause-aren-t-i-aboriginal-legal-service-faces-closure-20180603-p4zj81.html>

[57] C Agius, '*Victorian Aboriginal Legal Service shuts down youth service*', ABC News (online), <http://www.abc.net.au/news/2018-09-28/victorian-aboriginal-legal-service-shuts-down-youth-service/10315948>

[58] M Perkins, *'I'm a lost cause, aren't I?' Aboriginal legal service faces closure',* The Age (online), 5 June 2018, <https://www.theage.com.au/national/victoria/i-m-a-lost-cause-aren-t-i-aboriginal-legal-service-faces-closure-20180603-p4zj81.html>.

[59] Koorie Youth Council*, Ngaga-dji (Hear Me): Young Voices Creating Change for Justice* (2018), <https://www.ngaga-djiproject.org.au/the-report/>.

[60] C Agius, 'Victorian Aboriginal Legal Service shuts down youth service', ABC News (online), <http://www.abc.net.au/news/2018-09-28/victorian-aboriginal-legal-service-shuts-down-youth-service/10315948>.

Recommendations

7. Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services must be adequately resourced and supported in providing their communities with culturally appropriate and safe legal advice and assistance.

8. Aboriginal and Torres Strait Islander-controlled services in health, mental health, education, family support, cultural connection, disability, and others must be adequately resourced and supported to provide their communities with holistic support with a focus on ending the disadvantage of Aboriginal and Torres Strait Islander children and young people.

Q6: Are there current programs or approaches that you consider effective in supporting young people being diverted away from the legal system?

Due to the devastating impacts of colonisation, many Aboriginal and Torres Strait Islander people have a deep distrust or acute personal experience of mainstream programs and services not being welcoming to them, or in many cases of being damaging to them and their interests.

This lack of trust affects all aspects of government and non-government service delivery, hampering the effectiveness of these services and programs. Aboriginal and Torres Strait Islander culture is an incredible source of strength, resilience, pride and are protective factors for Aboriginal and Torres Strait Islander people.

Therefore empowering Indigenous community controlled organisations to lead approaches to legal issues that are culturally safe and connect children and young people to culture is critical.

Programs that are culturally safe and delivered by Aboriginal and Torres Strait Islander community organisations are able to work effectively with children under 10 and their parents, loved ones and communities because they are trusted.

For clarity, cultural safety for Aboriginal and Torres Strait Islander peoples includes:

- Feeling heard, believed and understood in your own language(s);
- Being able to seek service without fear of mistreatment, repercussions or misunderstanding of cultural needs;
- Not having to justify your experience of systemic or cultural barriers or discrimination to a service provider;
- Having a shared understanding between community members and suport staff, particularly lawyers, that a legal issue has arisen in the context of a culturally incompetent system; and
- Knowing that a legal representative will endeavour to overcome those barriers to get you a fair hearing and outcome.[61]

[61] NATSILS, Submission to the Review of the Indigenous Legal Assistance Programme, 8 October 2018, p.43. National Health and Medical Research Council, Cultural Competency in Health: A Guide for Policy, Partnerships and Participation, 2006, p.7, as cited in Australian Human Rights Commission, Social Justice Report 2011, 2011.

All diversionary programs for Aboriginal and Torres Strait Islander children under 10 must be firmly rooted in cultural safety and connection. Without these fundamental requirements embedded across the whole organisation or service, success will be limited.

Case study: Aboriginal Legal Rights Movement, South Australia

> Kate[62] called South Australia's Aboriginal Legal Rights Movement (ALRM) to ask for help with her nephew, who was being held in prison.
>
> The prison had denied her nephew permission to attend the funeral of his aunty (Kate's sister). Due to the personal and cultural significance of sorry business. Sorry business being a term used in many Aboriginal and Torres Strait Islander communities to describe rituals and cultural obligations surrounding the death of a loved one, or senior community member.
>
> Kate held concerns that her nephew would harm himself as a result of the decision. ALRM made contact with the Aboriginal liaison officer at the prison, who initiated a protocol to ensure the client was safe from self harm.
>
> ALRM successfully worked with the Department for Correctional Services to review their decision to deny permission for her nephew to attend the funeral. The department granted permission for the client to honour his aunt by participating in sorry business.

Kate's interaction with ALRM shows the cultural knowledge, understanding of structural barriers and accountability to community that are fundamental features of a culturally safe service. For people like Kate to feel culturally safe in a service, staff and systems must be culturally competent.

Cultural competency is about valuing diversity, having the capacity for cultural self-assessment, and adapting service delivery so that it reflects an understanding of the diversity between and within cultures.

Kate's story also demonstrates that Aboriginal and Torres Strait Islander staff are key to cultural safety. Field officers (FOs) and client service officers (CSOs) work across criminal, civil and family law matters. These staff members understand local community history, families, kinship, language, Elders and other organisations.

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[62] Name has been changed.

This knowledge is applied in conjunction with individual and community demographics – such as profile, gender, age, population – used in a western legal culture to understand client needs, situation and experiences.

CSOs and FOs also provide community legal education, offer practical support like transport to court, and connect Aboriginal and Torres Strait peoples to other support services, providing a holistic, community-centred approach to their needs.

CSOs may also assist lawyers, particularly to communicate matters on their behalf so that everyone is clear on their rights and understand the legal processes. In the case of Karen's family, ALRM had the cultural expertise to advocate for the importance of allowing Karen's nephew to uphold his cultural responsibilities under his traditional lore.

Case study: Aboriginal Legal Service, Western Australia

> Aboriginal Legal Service Western Australia (ALSWA) assisted Jess,[63] a 13-year-old female client who has Fetal Alcohol Spectrum Disorder (FASD), on an arrest warrant. ALSWA lawyers worked with the Youth Engagement Program to provide Jess with the best services to navigate the justice system and be supported in her community.
>
> Youth Engagement Program diversion officers visited Jess at home, encouraged her to hand herself into the court and picked her up the following morning to transport her to court. Jess was sentenced to a four-month conditional release order, a suspended sentence of detention. Staff stayed with Jess throughout the day for support, before taking her home.
>
> Youth Engagement Program staff supported Jess to complete her order with transport, help reporting to youth justice and ongoing mentoring.
>
> Jess successfully completed the order, avoiding four months in detention. Jess told her diversion officer that she was the first person who had ever helped her.
>
> ALSWA's Youth Engagement Program has had over 140 clients. The program provides holistic wrap-around case-management, advocacy, mentoring, referral, practical and legal support to reduce offending behaviours, and to improve wellbeing and future prospects.

[63] Name has been changed.

ATSILS are set apart from mainstream services because the people we help are more than statistics — they are our community.

ATSILS staff are trained to understand the underlying causes and systemic injustice that can lead to contact with the legal system. For young people like Jess, these causes are often family violence, child removal, poverty and homelessness.

Our holistic approach to legal service provision means that people are connected with one another and supported to deal with issues that are trapping them in the justice system. This leads to better outcomes for everyone by resolving the driving causes of contact with the legal system, thereby reducing ongoing legal need, reoffending, and adverse health and social outcomes.

Recommendations

9. All Governments must resource and adequately support Aboriginal and Torres Strait Islander community controlled organisations to provide culturally safe diversionary programs for all children and young people.

Q7: If the MACR is raised, what strategies may be required for children who fall below the MACR and can't access services through the youth legal system?

Aboriginal and Torres Strait Islander children and young people flourish when they are connected to family, Country, culture, language and their community.

The criminal legal system is ill equipped to, and was not designed to, provide health, welfare, education and support services to children. As noted above, in the Northern Territory youth detention facilities are not even fit to house children and young people, let alone provide services to them.

These services for children and young people that fall below the MACR must be provided in community settings, *outside of the criminal legal system,* and in partnership with, and wherever possible delivered by, Aboriginal and Torres Strait Islander community controlled organisations.

Some of Australia's most vulnerable children are being churned through the criminal legal system, instead of receiving the health and social interventions they need delivered to them in community settings.

Evidence shows that churning children through the legal system just entrenches disadvantage due to the lack of early critical support services, like schooling and health care, including screening for and supporting people with psychosocial or cognitive disability.[64]

NATSILS is a member of the Coalition of Peaks, a representative body comprised of Aboriginal and Torres Strait Islander community controlled peak-body organisations, that have come together to partner with all Australian governments on designing, implementing and evaluating the Closing the Gap. We are heartened that the Coalition of Peaks has entered into a historic formal Partnership Agreement on Closing the Gap with the Council of Australian Governments (COAG) which sets out shared decision making on Closing the Gap.

NATSILS has been working with our members and the Coalition of Peaks, to embed national justice targets, including youth justice targets so that Aboriginal and Torres Strait Islander children and young people are not over-represented in prisons and youth detention facilities.

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[64] Law Council of Australia, *Minimum Age of Criminal Responsibility Policy Statement,* <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>

Justice targets must be inclusive of police, courts, community corrections, youth justice system and adult corrections across all jurisdictions and align with human rights principles, and be informed by the evidence of the health and social impacts of the imprisonment of children and young people.

Recommendations

10. All children and young people should receive the critical social services and support they need in their communities.

Q8: If the MACR is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children and young people?

Collaboration and community participation offer the best hope in the face of entrenched and historically based disadvantage for Aboriginal and Torres Strait Islander children and young people.[65]

Successful programs involve early intervention, prevention or diversion from the criminal legal system.[66] More importantly they are centred in self determination, that being the ability for Aboriginal and Torres Strait Islander people to freely determine their political status and freely pursue their economic, social and cultural development.

It is our submission that connected, strong communities, particularly those that are strong in culture and language will keep children from offending behaviours.

This means that best practice solutions for Aboriginal and Torres Strait Islander communities involve the rebuilding of relationships by allowing them control over their own affairs, respect for Elders and senior law people, programs that facilitate cultural and spiritual healing and community cohesion.[67]

Recommendations

11. All programs for Aboriginal and Torres Strait Islander young people must be underpinned by the principle of Aboriginal and Torres Strait Islander self-determination, allowing communities to have effective control over their own affairs.

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[65] Oxfam, *In Good Hands,* (Report) <http://natsils.org.au/portals/natsils/IN_GOOD_HANDS_DIGITAL-1.pdf?ver=2019-11-28-115448-050>
[66] Oxfam, *In Good Hands,* (Report) <http://natsils.org.au/portals/natsils/IN_GOOD_HANDS_DIGITAL-1.pdf?ver=2019-11-28-115448-050>
[67] Oxfam, *In Good Hands,* (Report) <http://natsils.org.au/portals/natsils/IN_GOOD_HANDS_DIGITAL-1.pdf?ver=2019-11-28-115448-050>

Q9: Is there a need for new criminal offences for persons who exploit or incite children aged below the MACR to commit crimes?

We are of the opinion that current legal provisions in all jurisdictions are sufficient to protect children from people who may incite them to commit crimes.

Across all Australian jurisdictions, laws that punish people who incite, counsel, procure, aid, or abet a child to commit a crime are sufficient to protect children from exploitation.

These laws ensure that children that are aged below the MACR are protected while also ensuring anyone who may use them to commit an offence can be liable.

Additional criminal offences of this nature will likely disproportionately target Aboriginal and Torres Strait Islander people, particularly young people, and therefore increase the over-incarceration of Aboriginal and Torres Strait Islander people. As the most incarcerated people in the world, this would have devastating consequences for our communities.

Recommendations

12. No new offences should be created for persons who exploit or incite children aged below the MACR to commit crimes. The current legal framework is sufficient to protect children aged below the MACR from being incited to commit offences and new offences would likely disproportionately target Aboriginal and Torres Strait Islander people.

Q10: Are there issues specific to states or territories that are relevant to considerations of raising the MACR?

NATSILS is the national peak body for Aboriginal and Torres Strait Islander Legal Services in Australia. While NATSILS is a national voice for the ATSILS, each ATSILS is the expert on issues affecting Aboriginal and Torres Strait Islander people in their relevant jurisdiction.

It is our understanding that the ATSILS will be making their own submissions to this inquiry and defer to their expertise.

Recommendations

13. The Council of Attorneys-General should properly consider and act on the recommendations raised by any ATSILS making a submission to this inquiry on the specific jurisdictional issues or considerations regarding raising the MACR.