

Your Ref: Doc/19/144714
Our Ref: 824/348

28 February 2020

The Secretary
Office of the Secretary
Department of Justice
Email: legislation.development@justice.tas.gov.au

Att: Brooke Craven - Director, Strategic Legislation and Policy

Dear Secretary

Age of Criminal Responsibility Review

Thank you for inviting me to contribute to the review of the minimum age of criminal responsibility being undertaken by the Council of Attorneys-General (CAG) Working Group. I commend the CAG on its commitment to this important review.

By way of background, the UN *Convention on the Rights of the Child* (UNCRC) requires countries to establish a minimum age below which children are presumed not to have the capacity to breach the criminal law, although it does not set a minimum age (article 40(3)).

Currently in Tasmania, as in all other Australian jurisdictions, the minimum age of criminal responsibility is set at 10 years of age. This means that primary school aged children can be arrested, searched, held in reception prisons, formally charged, remanded, and given a custodial sentence for an offence or crime. Internationally, the most common minimum age of criminal responsibility is 14 years and the United Nations Committee on the Rights of the Child has called on Australia to raise its minimum age to at least 14 years.

Currently there is a groundswell of support for raising the minimum age of criminal responsibility in Australia informed by human rights standards, improved understanding of brain development in children, the complex needs and experiences of children who come into conflict with the law, and the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system.

Together with other members of the Australian and New Zealand Children's Commissioners and Guardians (ANZCCG), I have previously recommended the minimum age of criminal responsibility be increased to at least 14 years. This would involve a move away from a justice response for children under 14 years to a developmentally appropriate, trauma-



informed and culturally safe early intervention model that supports children in their families and communities.¹

It is therefore encouraging that during the recent CAG meeting on 29 November 2019, Attorneys-General:

- a) Noted that there is strong interest in the review of the age of criminal responsibility, and recognised the importance of views, knowledge and expertise of interested stakeholders and individuals.
- b) Agreed that the Working Group undertake targeted and public consultation as soon as practicable.
- c) Noted that the Working Group will continue to progress the review, taking into account stakeholder contributions, and will provide a report with recommendations to the Council of Attorneys-General in 2020.²

Role of the Commissioner for Children and Young People

The Commissioner for Children and Young People is an independent statutory office established under Tasmania's *Commissioner for Children and Young People Act 2016* (the CCYP Act).

The Commissioner's functions, which are set out in section 8(1) of the CCYP Act, include:

- advocating for all children and young people in the State generally;
- acting as an advocate for a detainee under the *Youth Justice Act 1997* (Tas);
- researching, investigating and influencing policy development into matters relating to children and young people generally;
- promoting, monitoring and reviewing the wellbeing of children and young people generally;
- promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; and
- assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.

In performing these and other functions under the CCYP Act, the Commissioner is required to do so according to the principle that the wellbeing and best interests of children and young people are paramount and must observe any relevant provisions of the UNCRC.³ The Commissioner is also required to give special regard to the needs and interests of children and young people who are vulnerable or disadvantaged for any reason.⁴

¹ ANZCCG. (2019). Raise the age of criminal responsibility: Australian and New Zealand Children's Commissioners and Guardians <https://www.childcomm.tas.gov.au/wp-content/uploads/FINAL-CAG-MACR-Media-Release-November-2019.pdf>

² Council of Attorneys-General Communique (November 2019), <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2019.pdf>

³ CCYP Act, s3(1)

⁴ CCYP Act, s3(2). "Vulnerable", in relation to a child or young person, is defined in section 4 of the CCYP Act to include a child or young person who is the subject of proceedings under the *Youth Justice Act 1997* (Tas).



Comment

To understand how the minimum age of criminal responsibility operates in practice in Tasmania, it is important to understand how many children between the ages of 10 and 13 come into contact with our youth justice system, and how they are currently dealt with when they do.

In 2018-19, the number of offenders aged between 10 and 14 in Tasmania was 300 (71 per cent male; 29 per cent female).⁵ This number has remained about the same since 2015-16.

However, not all children who are alleged to have committed an offence are prosecuted. Tasmania's *Youth Justice Act 1997* provides several options for pre-court diversion including informal and formal cautions and community conferences. In 2018-19, 46 per cent of juvenile files in Tasmania were diverted.⁶ The percentage of juvenile files diverted has declined since 2010-11, when 59 per cent of juvenile files were diverted. This data is not publicly reported by age of child.

At my request, Tasmania Police has provided the data in Table 1 regarding juvenile file outcomes disaggregated by age. It should be noted that the same individual may appear on multiple occasions and possibly across more than one age group depending on the frequency and age/date of offending (see data notes).

Table 1: Juvenile File Outcomes for 2018-19 by Selected Year of Age and File Type*

Offender Age	Community Conferences	Formal Cautions Files	Informal Cautions Files	Prosecution Files
10	1	6	8	2
11	7	14	13	14
12	13	17	26	32
13	27	42	50	120
Other ages	57	272	385	884
	105	351	482	1,052

Source: Tasmania Police, from Police Offenders Dataset. Extracted 19 Feb 2020.

* Notes:

- Data supplied by Tasmania Police.
- Age of offender is calculated as of the date they committed the offence(s).
- Juvenile File Outcomes count each unique offender once per file. A file may contain multiple offences committed on different dates. An offender may appear on multiple files within a reporting period.
- It is also possible that a unique offender counts towards multiple age groups within the reporting period.

⁵ Australian Bureau of Statistics. (2019). *Recorded Crime – Offenders, Australia 10-14 years* Table 15 Offenders, Sex by age, States and territories, 2017-18 to 2018-19, Excel spreadsheet, cat. no. 4519.0 – note the scope of the collection includes all offenders, aged 10 years and over, who have been proceeded against by police during the reference period. All criminal offences where police agencies have the authority to take legal action against an individual are included, with some exclusions. <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02018-19?OpenDocument> It is important to note this data includes children aged 14.

⁶ Tasmania Police. (2019). *Annual 2018-19 (June 2019) Corporate Performance Report*.



Tasmania Police has advised that the total number of juvenile file offenders for 2018-19 aged 10 to 13 was 197. There were 15 juvenile file offenders aged 10, 29 juvenile file offenders aged 11, 56 juvenile file offenders aged 12 and 97 juvenile file offenders aged 13.⁷

In Tasmania, a small number of children aged less than 14 years are subject to youth justice supervision in the community, or in detention at Ashley Youth Detention Centre:

- In 2017-18, 14 of the total 232 children and young people under community-based supervision in Tasmania were aged between 10 and 13.⁸ Of the 14 children aged between 10 and 13, three identified as Indigenous (21 per cent), 10 identified as non-Indigenous (71 per cent) and one did not state their Indigenous status.⁹
- Of the total 232 children and young people under community-based supervision during 2017-18 in Tasmania, 36 were aged between 10 and 13 years *during their first period of supervision* (15 per cent).¹⁰
- During 2017-18 six of the total 58 children and young people in detention in Tasmania were aged between 10 and 13 years (two 12-year-olds and four 13-year-olds).¹¹ Of these six children, two identified as Indigenous (33 per cent) and four identified as non-Indigenous (66 per cent). All of the six children aged between 10 and 13 years during 2017-18 were in unsentenced detention (remand),¹² however one was also in sentenced detention during the year.¹³
- Of the 58 children and young people in detention during 2017-18 in Tasmania, 13 were aged between 10 and 13 years *during their first period of supervision* (22 per cent)¹⁴ and 9 children were aged between 10 and 13 years *during their first period of detention* (16 per cent).¹⁵

Notwithstanding the relatively small number of children aged below 14 years in contact with Tasmania's youth justice system, evidence indicates that the younger children are when they first encounter the youth justice system, the more likely they are to become caught up in the system.¹⁶ This in itself suggests that we should be responding in a fundamentally differently way to the needs of these children.

Recognising that Tasmanian Aboriginal children and young people are over-represented in the youth justice system in Tasmania, it is, in my respectful opinion, important that Tasmanian Aboriginal people and representatives of Aboriginal communities have a greater say in the design and delivery of services and programs for at risk Tasmanian Aboriginal children. It is essential that these services and programs build strength and promote self-determination for Tasmanian Aboriginal communities and people.

⁷ Tasmania Police Prosecution and Information Bureau Systems. Extracted 27 Feb 2020. Note a person's age is calculated as their minimum age on juvenile files, based on offence date.

⁸ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table S36b.

⁹ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table S42b.

¹⁰ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table S57.

¹¹ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table S74b.

¹² Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table 114b.

¹³ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table 121b.

¹⁴ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table S95.

¹⁵ Australian Institute of Health and Welfare. (2019). *Youth Justice in Australia 2017-18*, Cat. no. JUV 129., Table S97.

¹⁶ Australian Institute of Health and Welfare, *Young people aged 10–14 in the youth justice system 2011–2012*, 20.



My comments in response to the consultation questions are set out below. I note that my comments are not intended to be exhaustive, particularly given the numerous alternative approaches, programs and services that could be considered if the minimum age of criminal responsibility is to be raised.

- 1. Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.**

It is my strong view that the minimum age of criminal responsibility should be raised to at least 14 years for reasons outlined in my response to Question 2.

- 2. If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.**

It is my strong view that the minimum age of criminal responsibility should be raised to at least 14 years.

The United Nations Committee on the Rights of the Child recently reviewed its position on the minimum age of criminal responsibility and has now urged all countries to raise their minimum age to at least 14 years. In arriving at this position, the Committee commented that ‘evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing’.¹⁷ The Committee has called on Australia to raise its age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 at which *doli incapax* applies.¹⁸ This approach would be consistent with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") which recommend that the minimum age of criminal responsibility ‘shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’.¹⁹

Australia’s National Children’s Commissioner (NCC) considered the minimum age of criminal responsibility in her *Child Rights Report 2019*.²⁰ In support of her recommendation that Australia raise its minimum age of criminal responsibility to 14 years, the NCC cited the following:

- Many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs better addressed outside the criminal justice system.

¹⁷ United Nations Committee on the Rights of the Child. (2019). General comment no.24 (2019) on children’s rights in the child justice system, UN Doc CRC/C/GC/24* (18 September 2019) *Reissued for technical reasons on 11 November 2019.), para 22.

¹⁸ United Nations Committee on the Rights of the Child. (2019). Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019), para 49(a).

¹⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Adopted by the General Assembly resolution 40/33 of 29 November 1985.

²⁰ Australian Human Rights Commission (National Children’s Commissioner). (2020). *Children’s Rights Report 2019—In Their Own Right: Children’s Rights in Australia*.



- It would help to decrease the rate of overrepresentation of Aboriginal and Torres Strait Islander children in detention.
- Research into brain development is inconsistent with the current age of criminal responsibility of 10 years. Children have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility.
- Children lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings.
- In general, children are more likely than adults to commit less serious offences, and they commit more property than person offences. Research has shown that young people aged 10–14 years are more likely than those aged 15–17 years to have principal offences of theft, unlawful entry with intent and property damage, and less likely to have principal public order and illicit drug offences.
- Studies have shown that the younger children are when they encounter the justice system, the more likely they are to reoffend. Between 2011 and 2012, children who were first subject to supervision under the youth justice system due to offending when aged 10–14 years were more likely to experience all types of supervision in their later teens (33% compared to 8% for those first supervised at older ages). [citations omitted]²¹

Further evidence in support of raising the minimum age of criminal responsibility can be found in the Law Council of Australia and the Australian Medical Association joint position paper which references a strong association between poor health and contact with the justice system, especially for young people.²²

3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of *doli incapax* (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of *doli incapax* differ across jurisdictions and, if so, how might this affect prosecutions? Could the principal of *doli incapax* be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.

The presumption of *doli incapax* is the rebuttable presumption that children aged less than 14 years of age are incapable of crime.²³ Its purpose is to protect children aged less than 14 years from the full force of the criminal law.²⁴ The presumption of *doli incapax* is based on the view that children aged less than 14 years are not sufficiently developed to appreciate the difference between right and wrong and thus lack the capacity for forming criminal intent. The onus is on the prosecution to rebut the presumption of *doli incapax* by establishing

²¹ Australian Human Rights Commission (National Children's Commissioner). (2020). *Children's Rights Report 2019—In Their Own Right: Children's Rights in Australia*, para 11.6.

²² Law Council of Australia and Australian Medical Association. (2019). *Minimum Age of Criminal Responsibility - Position Statement* <https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-4a11-9403-005056be13b5>. See also Snow P & Powell M 2012. Youth (in)justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence. *Trends & issues in crime and criminal justice* no. 435. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/tandi/tandi435>.

²³ *Criminal Code Act 1924* (Tas), s18(2).

²⁴ Crofts, Thomas --- "A Brighter Tomorrow: Raise the Age of Criminal Responsibility" [2015] *CI Crim Just* 15; (2015) 27(1) *Current Issues in Criminal Justice* 123; See also Crofts, T, 'The Criminal Responsibility of Children', in Young, L., Kenny, M.A., & Monahan, G., (eds.) (2017). *Children and the Law in Australia*, 2nd Ed., Chatswood: LexisNexis Butterworths, 153.



through evidence that a child knew at the time of the conduct that their conduct was morally wrong and not just naughty or mischievous.²⁵

While I am not in a position to comment on the operation of the presumption of *doli incapax* in Tasmanian courts, I am aware that there has been a degree of criticism of its application generally. For example, while acknowledging the presumption of *doli incapax* was originally devised as a protective mechanism for children, the UN Committee on the Rights of the Child has observed that it can result in discriminatory practices.²⁶ Further, in a recent joint position statement, the Law Council of Australia and the Australian Medical Association state that the presumption can create confusion and has been difficult to apply in courts.²⁷ The Law Council has however cautioned that raising the minimum age of criminal responsibility to an age below 14 years should not be used to justify the removal of the doctrine of *doli incapax*.²⁸

If the minimum age of criminal responsibility is lifted to 14 years or above, then the presumption of *doli incapax* will no longer apply. However, if the minimum age of criminal responsibility is to remain below the age of 14 years, or is raised to 14 in certain circumstances only, the presumption of *doli incapax* should be retained. This will be necessary to ensure that those children who have not yet developed the capacity to form criminal intent are conditionally protected from prosecution notwithstanding the apparent challenges to the application of the presumption.

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

Consistent with my comments in response to questions 1 and 2 above, I am of the view that children below the age of 14 years should not be subject to detention. Alternative approaches to responding to the needs of this small but significant group of children are addressed in detail elsewhere in this submission.

Detention must be understood as representing only one element of a continuum of youth justice services and should only ever be a measure of last resort. Tasmania's *Youth Justice Act 1997* provides that children and young people should be detained in custody only as a last resort and for the shortest necessary period of time.²⁹ This provision reflects our obligations under the UNCRC.³⁰

However, the "last resort" principle can only operate to reduce detention rates where there is an effective package of alternatives to detention available. The need to position youth justice detention at one end of the continuum, and as a last resort, was described clearly in the October 2016 *Custodial Youth Justice Options Paper* commissioned by the Tasmanian

²⁵ *RP v The Queen* [2016] HCA 53.

²⁶ Committee on the Rights of the Child. (2019). General comment No. 24 (2019) on children's rights in the child justice system, para 26 and 27.

²⁷ Law Council of Australia and Australian Medical Association. (2019). *Minimum Age of Criminal Responsibility - Position 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>

²⁸ Law Council of Australia. (August 2018). *The Justice Project – Final Report – Part 1 – Children and Young People*, 40.

²⁹ *Youth Justice Act 1997*, section 5(g).

³⁰ Article 37.



Government from Noetic Solutions.³¹ In that Options Paper, Noetic points out the limited intensive support options in Tasmania for children and young people before detention:

- There are no graduated supported and secure sentencing options under the *Youth Justice Act 1997*, including more appropriate bail accommodation for low-risk children and young people.
- There are no mandated drug, alcohol and mental health residential services with a specific focus on young people, which could address the risk factors for offending behaviour (including secular options).
- There is a lack of prevention, early intervention and diversionary services available for children and young people at risk across Tasmania.³²

A lack of support for transition from youth justice detention was also noted as a factor needing to be addressed as part of the implementation of a therapeutic approach to youth justice in Tasmania.

Despite work that has occurred or is underway, there is still a need to expand diversionary and non-custodial measures in Tasmania so that detention is truly a measure of last resort and is used only for the shortest necessary time.

I have previously called for the development of an overarching Strategic Plan which governs the implementation of a therapeutic model of youth justice in Tasmania generally, and specifically for youth justice detention.³³

5. What programs and frameworks (e.g. social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

Increased awareness of the range of factors which contribute to children engaging in antisocial and harmful behaviour has led to the increasing recognition of the benefits of a public health approach to addressing these children's complex needs. A public health approach emphasises universal preventative initiatives and early intervention. Statutory or tertiary approaches are only considered as a last resort.³⁴

Prevention and early intervention programs are critical to addressing the biological and environmental risk factors for children entering the youth justice system. Research on anti-social and delinquent behaviour in children and young people has found that the experience of particular risk factors at the individual, social and community levels may help in identifying children who are in most need of preventative interventions. Individual characteristics play out in social and community environments - they are not just risk factors in and of themselves, but are influenced by family and peers, neighbourhoods, and schools.

³¹ Noetic Solutions Pty Ltd, *Custodial Youth Justice Options Paper - Report for the Tasmanian Government Department of Health and Human Services*, October 2016.

https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0018/268020/99010_Custodial_Youth_Justice_Options_Paper_October_2016_-_Report_for_the_Tasmanian_Government.pdf

³² Ibid, p13.

³³ Letter to the Hon. Roger Jaensch MP, Minister for Human Services, 18 October 2019, <https://www.childcomm.tas.gov.au/wp-content/uploads/2019-10-18-Letter-to-Minister-Therapeutic-Approach-to-YJ.pdf>

³⁴ <https://www.pc.gov.au/research/ongoing/report-on-government-services/what-works/child-protection>



Pre- and perinatal environment

The first 1,000 days refers to the earliest stage of human development, from conception to the end of a child's second year of life.³⁵ This period is when the developing foetus and infant are at their most vulnerable to exposures and experiences, and we now know that these experiences will not only shape their development during this critical time, but will impact on their future health, wellbeing, learning and development outcomes.³⁶

A range of pre-natal and perinatal factors can influence child development outcomes such as low birth weight, birth complications, respiratory problems, premature birth, and exposure to environmental toxins including alcohol and other drugs.³⁷ These factors can create developmental vulnerabilities in children which can lead to atypical behaviour in childhood including hyperactivity, attention problems, impulsiveness and aggression. For most infants and children these complications do not have a significant impact on their lifelong development. However, children are more likely to experience long-term negative outcomes, including criminal and antisocial behaviour, if they experience multiple developmental risks and come from socially disadvantaged backgrounds or live in poverty.³⁸

Evidence has shown that the most effective way to improve outcomes for all children and to reduce inequalities between children is through an evidence-based, holistic, integrated and inclusive approach, which is delivered universally and proportionate to need. All parents, children and families need a level of support during this critical period of growth and development, however, for those parents, families and children with greater and more complex needs, targeted services should be provided before and during the first 1,000 days. For example, sustained nurse home visiting programs, embedded in the universal system but with the capacity to provide more intensive supports for those families requiring it could be strengthened in Tasmania to serve this need. These intensive support services could include periods of residential/inpatient support in multidisciplinary parenting centres or through sustained supports within the home to assist families with complex parenting issues, or other related issues (e.g., drug and alcohol, family violence).

Randomised controlled studies of several nurse home visiting programs have reported positive outcomes. The Elmira Nurse-Family Partnership followed up with participants and their children 15 years after their engagement with the program, and found that those who had the most intensive home visiting prenatally and until the child was two had fewer hazards in the home, fewer child injuries or ingestions, fewer instances of reported child abuse and neglect, and fewer notations of child behavioural problems.³⁹ Among low-income, single mothers, participants spent less time on food stamps, had fewer pregnancies, and longer intervals between births than similar women in the control group.⁴⁰ After fifteen years, children who had received sustained nurse visits had fewer arrests, convictions, violations of probation, runaway instances, sexual partners, and consumed less alcohol and

³⁵ Strong Foundations collaboration. (2019). *The first thousand days: A case for investment*. PricewaterhouseCoopers. <https://www.aracy.org.au/documents/item/608>

³⁶ Ibid.

³⁷ (2001). 'The Development of Delinquency'. In National Research Council and Institute of Medicine, *Juvenile Crime, Juvenile Justice* (pp. 66-106). The National Academies Press.

³⁸ Ibid.

³⁹ A. M. Stone and E. E. Page. (2009). *Home Visitation Programs as an Early Intervention Strategy*. Georgetown Public Policy Institute Paper presented at Family Impact Seminar, Washington, DC, September 21, 2009.

⁴⁰ Ibid.



less cigarettes than the children of women in the comparison group. These results have been replicated in similar programs in other locations.

Early and Middle Childhood

Antisocial behaviour, problems with emotional regulation, oppositional behaviour and aggression, difficulties with executive and cognitive functioning, early signs of mental health conditions, and language and speech delays are all individual factors which can be identified in early childhood and which have been shown to affect children's development, including their future engagement in criminal and antisocial behaviour in childhood and adolescence.

Early identification of these behaviours and characteristics is essential as well as access to timely supports for families and children at the first sign of these difficulties emerging. Often early signs will begin to show either during child health and development checks or upon entry to childcare and kindergarten. Therefore, it is vital that child health nurses, teachers, and other professionals engaging with children and families can identify these risk factors and support parents to seek appropriate services and supports. The Seattle Social Development Project combined teacher training, social competence training for students, and parent training components offered on a voluntary basis. The program was run from Year 1 to Year 6 and at follow up (when students were aged 18) the experimental group reported significantly less violent and delinquent behaviour, less alcohol consumption, lower rates of pregnancy and higher academic achievement.⁴¹ It is also vital that children can access high quality pre-school programs which have been found to prevent and address behavioural issues in high-risk children.

Family and Community Factors

The development of antisocial and delinquent behaviour in children and adolescents has been causally linked to the family environment, peer relationships and interactions within neighbourhoods, communities and schools. Certain parenting practices and styles can contribute to the development of well-adjusted and socialised adults such as consistent discipline, supervision and affection, and maintenance of a strong parent-child relationship between the ages of 15 and 17.⁴² Where the child lives also influences the values they hold and what behaviour they see as acceptable, as well as the opportunities they may have for productive and socially acceptable employment and entertainment activities.⁴³

On the other end of the spectrum, child abuse and neglect raise the risk of antisocial and delinquent behaviour including earlier engagement in these activities compared to other children, and a higher risk of being arrested for a violent crime as a juvenile. In saying this, it is important to recognise that while certain 'risk factors' may be associated with youth offenders this certainly does not mean that having such factors will necessarily lead to youth offending. Data from the Australian Institute of Health and Welfare (AIHW) has found that of those who had received both child protection services and youth justice supervision, most had an interaction with child protection first.⁴⁴ For Tasmania, 8.17 per cent of young people

⁴¹ (2001). 'The Development of Delinquency'. In National Research Council and Institute of Medicine, *Juvenile Crime, Juvenile Justice* (pp. 66-106). The National Academies Press.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Australian Institute of Health and Welfare. (2019). *Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018*. Data linkage series no. 25. Cat. no. CSI 27.



aged 10-17 who had received child protection services had also been under youth justice supervision between 1 July 2014-15 and 30 June 2018.⁴⁵ The rate of youth justice supervision for the age-equivalent population in Tasmania over the same period is less than 1 per cent (0.68).⁴⁶ Therefore, specific supports and programs should be provided for children and young people in contact with child protection and living in out-of-home care. Preventative strategies may include education and training for teachers and carers, trauma-informed care and support, access to tailored and appropriate therapeutic services, and restorative approaches to conflict resolution between children/their peers/their carer.⁴⁷

Also, the school environment can have both an overwhelmingly positive or negative influence on the development of children's antisocial and criminal behaviour depending on the approach teachers and school leadership take to disruptive behaviour. Use of suspension has been found to be academically detrimental, does not contribute to behaviour change, and is disproportionately experienced by children with existing learning difficulties and low academic performance.⁴⁸ Children who are suspended and expelled from school are at a higher risk of engaging in delinquent behaviour due to less adult supervision and increased difficulties keeping up with schoolwork. Therefore, we need to provide additional support and assistance to children who display difficult and antisocial behaviours to allow them to remain engaged in education. This in turn has been shown to contribute to the prevention of escalating behaviour and future anti-social and criminal behaviour.

As Noetic said in its 2016 report on custodial youth justice options,

Tasmania does not have the breadth or depth of prevention, early intervention and diversionary services required to address the complex needs of young people. Investment in these services can address the risk factors that lead to offending behaviour, which is a far more cost-effective approach to rehabilitating young people than detention.⁴⁹

The Early Intervention Foundation, The Front Project, CoLab at the Telethon Kids Institute and the Minderoo Foundation recently released a report which found that "the cost to government of late intervention in Australia is \$15.2bn each year", with one of the largest areas of expenditure being youth crime (including police and court costs) estimated at around \$2.7bn.⁵⁰

Despite work that has occurred or is underway in Tasmania, in my opinion there continues to be a need for further investment in prevention, early intervention and diversionary services to address the complex needs of children and young people who engage in anti-social or harmful behaviour.

⁴⁵ Ibid, Table S3a.

⁴⁶ Ibid, Table S15.

⁴⁷ Jesuit Social Services. (2019). *Raising the age of criminal responsibility: There is a better way.*

⁴⁸ (2001). 'The Development of Delinquency'. In National Research Council and Institute of Medicine, *Juvenile Crime, Juvenile Justice* (pp. 66-106). The National Academies Press.

⁴⁹ Noetic Solutions Pty Ltd, *Custodial Youth Justice Options Paper - Report for the Tasmanian Government Department of Health and Human Services*, October 2016. 15.

⁵⁰ Teager, W., Fox, S., and Stafford, N. (2019). *How Australia can invest early and return more: A new look at the \$15b cost and opportunity.* Early Intervention Foundation, The Front Project and CoLab at the Telethon Kids Institute, Australia.

<https://colab.telethonkids.org.au/siteassets/media-docs---colab/coli/full-report-how-australia-can-invest-in-children-and-return-more---final.pdf>



I respectfully suggest that consideration be given to undertaking work to quantify the cost savings which might flow from investment in early intervention, prevention and diversion services.

- 6. Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.**

It is clear that for most children and young people engaging in anti-social behaviour or potentially criminal behaviour the justice system is not the appropriate place to address their needs. Diversion away from the statutory system to an agency or organisation that can provide the appropriate therapeutic and restorative supports is the most appropriate response for this type of harmful behaviour.

The specific needs of the child should be addressed through an individualised plan developed with the child, their family or carer. Further development of the plan should be informed by an assessment undertaken by a multi-disciplinary team, with a lead agency taking responsibility for case management and referral of children and families to support services. For example, if the child was disengaged from school, the agency could assist in exploring options for alternative education (either at the current school or external), or if mental health and substance abuse issues are present then warm referrals could be made to mental health or drug and alcohol services as required. Support and training could also be provided to parents, carers and families through parenting programs with a therapeutic lens to deal appropriately with a child's behaviour at home.

Programs which respond to this type of harmful behaviour must include restorative approaches (including group conferencing) to encourage children to take responsibility for their actions. These should be delivered by community-based organisations (i.e. outside of the criminal justice system) and be part of the holistic response to addressing the child's needs.

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

If the minimum age of criminal responsibility is raised, it will be necessary to realign the current service system in Tasmania in order to respond differently to children who fall below the minimum age. The Committee on the Rights of the Child has said that '[c]hildren below the minimum age of criminal responsibility are to be provided with assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences'.⁵¹

⁵¹ United Nations Committee on the Rights of the Child. (2019). General comment no.24 (2019) on children's rights in the child justice system, UN Doc CRC/C/GC/24* (18 September 2019) *Reissued for technical reasons on 11 November 2019.), para 23.



The transition to a new service model will need to be done in a way which ensures continuity of service provision. While it is beyond the scope of this submission to make recommendations regarding which organisations should deliver these services, it would be appropriate to have a lead agency with overall responsibility for case management and coordination for individual young people who could then broker other services as required.

A move away from a justice response for children under 14 years to a developmentally appropriate, trauma-informed and culturally safe early intervention model that supports children in their families and communities will require a whole-of-government approach.

See also my responses to questions 5, 6 and 8.

8. If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold?

As mentioned in my answer to Question 5 above, where prevention and early intervention programs and approaches are resourced and implemented effectively, only very small numbers of children will require an intensive response to protect the community from their anti-social or harmful behaviours. Addressing children's behaviour requires consideration of the complex causes as to why a child causes harm or comes into contact with the law and systematically responding to their needs taking account of their age and developmental stage.⁵² Such an approach acknowledges that children and young people who do come into contact with the law have often faced difficult life circumstances and that the escalation of their behaviour is often a symptom of the failure of the systems and services designed to support them and their families.⁵³

For the small number of children who are violent or cause serious harm, a proactive approach is necessary from a range of services, including from police where they are the first responders. The service response will depend on identifying the needs of the child and the family and taking action to ensure the safety of the child and the community. Responding to and addressing these types of behaviours requires individualised, therapeutic, non-timebound responses and interventions from specialised services. Interventions may include a combination of psychological interventions and strategies (aimed at changing emotion, patterns of thinking and behaviour), drug and alcohol services (including access to residential treatment), mental health, education, child safety, and family services. An example of an evidence-based psychological intervention is multi-systemic therapy (MST) which is a family-focused intervention which targets the behaviours of the child within their family and peer relationships. MST has been found to significantly reduce the likelihood of reoffending in children and young people, including two- and four-years post-intervention.⁵⁴ Children and young people engaging in MST are reported to be significantly less likely to become involved in serious and violent offending. Significant improvements have also been observed in both self- and parent-reported delinquency, family relations and interactions, and home, school, community and emotional functioning.⁵⁵

⁵² Jesuit Social Services. (2019). *Raising the age of criminal responsibility: There is a better way.*

⁵³ Ibid.

⁵⁴ Borduin, C.M., Mann, B.J., Cone, L.T., Henggeler, S.W., Fucci, B.R., Blaske, D.M., et al. (1995). Multisystemic treatment of serious juvenile offenders: long-term prevention of criminality and violence. *Journal Consulting and Clinical Psychology*, 63, 569.

⁵⁵ Ibid.



Depending on the needs of the child, there may be a requirement for increased engagement with mental health services (including practitioners in forensic child and adolescent psychiatry) to treat any clinical requirements alongside responses to their behaviours. For this small group of children, an appropriate response may be placement in a residential setting dedicated to addressing the mental health problems of children and young people. Engagement with education will be an important part of providing opportunities for positive engagement in meaningful activities, which might be school-based or in alternative education settings, such as one-on-one support. If the child is “at risk” consistent with the *Children, Young Persons and their Families Act 1997*⁵⁶ there will also be a need to engage with the Child Safety Service which will determine the appropriate protective response for the child. As mentioned in my answer to Question 5, children who are in contact with Child Safety Services or are living in out-of-home care need special attention and support to prevent further escalation of behaviour and future contact with the law.

A move away from a justice response for children under 14 years to a developmentally appropriate, trauma-informed and culturally safe early intervention model that supports children in their families and communities will require a whole-of-government approach.

See also my response to previous questions, particularly question 7.

9. Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered *doli incapax*) to participate in activities or behaviours which may otherwise attract a criminal offence?

As a matter of principle, children and young people should be protected from exploitation and harm which may arise as a result of raising of the minimum age of criminal responsibility. I would therefore support further discussion around the issues that arise and potential solutions.

10. Are there issues specific to states or territories (e.g. operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

See my comments above.

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

An important aspect of my role is to advocate for individual young people detained under Tasmania’s *Youth Justice Act 1997*. Through carrying out this role it has become abundantly clear to me that many of these young people have not experienced the breadth or depth of prevention, early intervention and diversionary services required to address their complex needs. In fact, some young people have told me that they wish they were able to access the health and other services available to them at Ashley Youth Detention Centre without first having to commit a crime.

⁵⁶ *Children, Young Persons and Their Families Act 1997 (Tas.)*, pt 1, s4.



Finally, I reiterate my earlier comments regarding the crucial and self-determining role to be played by Tasmanian Aboriginal people and communities to have a say in the design and delivery of services and programs for at risk Tasmanian Aboriginal children and young people.

Conclusion

I appreciate the opportunity to provide my views on this important area of policy and law affecting the rights and wellbeing of children in Tasmania. I would be very pleased to discuss my comments in more detail if this would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc *The Hon Peter Gutwein MP, Premier and Treasurer*
The Hon Jeremy Rockliff MP, Deputy Premier, Minister for Education and Training, Minister for Mental Health and Wellbeing
The Hon Elise Archer MP, Attorney General, Minister for Justice
The Hon Sarah Courtney MP, Minister for Health
The Hon Roger Jaensch MP, Minister for Human Services
The Hon Mark Shelton MP, Minister for Police, Fire and Emergency Management