Submission to the

Inquiry into Victoria's Justice System

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Submitted by
Amnesty International Australia

Contact: Ry Atkinson
[redacted]

Table of Contents

About Amnesty International

Amnesty International is the world's largest independent human rights organisation, with more than ten million supporters in over 160 countries.

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Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is impartial and independent of any government, political persuasion or religious belief and does not receive funding from governments or political parties.

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Amnesty International calls for states to take measures that prohibit discrimination as well as positive measures to address long-standing or systemic disadvantages, and to prevent discrimination by non-state actors. Within the Australian context, this discrimination and disadvantage is steeped in a history of institutionalised racism towards Aboriginal and Torres Strait Islander People that is still rampant today.

To combat this, In 2015 Amnesty International launched the 'Community is Everything' campaign, with the aim to complement the huge amount of human rights advocacy that Aboriginal and Torres Strait Islander individuals and organisations are doing across Australia. The campaign calls for Australian Governments to support more Indigenous-led solutions for children and change laws for a fairer youth justice system.

Amnesty International is a proud People Powered movement founded on the work of volunteers and activists all around the country. In Victoria, Amnesty International has nearly 100,000 supporters, with nearly 10,000 of these supporters actively engaged with the 'Community is Everything' campaign.

1. Summary

1.1 Amnesty International Australia (AIA) welcomes the opportunity to make a submission to the Inquiry into Victoria's Justice System.

1.2 AIA has chosen to respond to the terms of reference most relevant to its research. The recommendations contained in this submission go towards ending the overrepresentation of Aboriginal and Torres Strait Islander People, specifically children in Victoria's growing remand and prison population.

1.3 The minimum age of criminal responsibility has been an important area of AIA's research into the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system across Australia. In AIA's most recent report, *'Raise the Age: Kids Belong in Community'* AIA has recommended all State and Territory Governments raise the minimum age of criminal responsibility to at least 14 in their jurisdictions.[1]

1.4 With respect to the above, this submission's focus will be;

> (a) the impact of the current minimum age of criminal responsibility on growing remand and prison populations, with a particular focus on Aboriginal and Torres Strait Islander children;
>
> (b) a case for the reformation of the principle of *doli incapax*;
>
> (c) the positive impact Indigenous designed and led preventative programs can have in addressing the needs of children under 14 years at risk of entering the justice system; and
>
> (d) the necessary knowledge required of judiciary, magistracy and others working with Aboriginal and Torres Strait Islander children who are at risk of entering the criminal justice system.

1.5 This submission will draw on our expertise in international human rights law and standards as well as our Australian research on effective mechanisms to tackle the overrepresentation of Aboriginal and Torres Strait Islander children in Australian prisons.

[1] Amnesty International, 'Kids Belong in Community,' 2020 available at https://www.amnesty.org.au/wp-content/uploads/2020/05/Raise-the-Age-Kids-Belong-in-Community-2020.pdf

2. Recommendations

AIA recommends that the Victorian Government adopt the following measures;

1) immediately raise the minimum age of criminal responsibility to at least 14 years old;

2) that the presumption of doli incapax be abolished and alternatives, such as 'developmental immaturity' be enshrined in legislation;

3) increase the allocation of funding to Indigenous community-led and controlled organisations to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of children under 14 years at risk of entering the justice system.[2] This funding should be allocated to Indigenous-led organisations and programs in proportion to the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system; and

4) invest in the creation of Aboriginal and Torres Strait Islander judicial resources and provide funding for psychologists to train and undertake neurocognitive testing for children who display risk factors for future offending when in contact with police, doctors or schools.

[2] Amnesty International, 'From the Ground Up,' 2018, available at https://www.amnesty.org.au/campaigns/indigenous-justice/

3. International Legal Human Rights Framework

3.1 Through ratification of binding international human rights treaties and the adoption of United Nations (UN) declarations, the Australian Government has committed to ensuring that all people enjoy universally recognised rights and freedoms.

3.2 The overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system has been recognised as a human rights issue by a number of UN treaty bodies and the Special Rapporteur on the Rights of Indigenous Peoples in her 2017 report.[3]

Convention on the Rights of the Child

3.3 The Convention on the Rights of the Child (CRC) is the primary source of rights relevant to this submission.

3.4 Under international law, all fair trial and procedural rights that apply to adults apply equally to children, but additional juvenile justice protections exist under the international human rights framework, in recognition that children differ from adults in their physical and psychological development. The CRC is the primary source of these rights.[4] Unique among the major UN human rights treaties, it explicitly recognises the particular needs of Indigenous children.

3.5 The CRC provides that States Parties shall ensure that "the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time."[5] Additionally, it requires States Parties to "promote the establishment [of] measures for dealing with such children without resorting to judicial proceedings … to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."[6]

3.6 In its General Comment 10, on children's rights in juvenile justice, the Committee on the Rights of the Child says that "a comprehensive policy for juvenile justice must deal with … the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings.[7]

3.7 The Committee on the Rights of the Child also urges States Parties to consider "the application of special measures in order to ensure that Indigenous children have access to culturally appropriate services in the [area of] juvenile justice." These should "take into account the different situation of Indigenous children in rural and urban situations" and "particular attention should be given to girls … to ensure that they enjoy their rights on an equal basis as boys."[8]

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[3] Committee on the Rights of the Child, 2012, Concluding Observations – Australia, CRC/C/AUS/CO/4, 28 August 2012, viewed 14 September 2017, available at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf; Committee Against Torture, 2008, Concluding Observations – Australia, CAT/C/AUS/CO/3, 22 May 2008, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F3&Lang=en; Office of the High Commissioner for Human Rights, 2017, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, A/HRC/36/46/Add.2, 8 August 2017, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/37/Add.2

[4] United Nations, Convention on the Right of the Child

[5] Convention on the Rights of the Child, Art. 37

[6] Convention on the Rights of the Child, Art. 40(3)

[7] Committee on the Rights of the Child, 'General Comment No. 10: Children's rights in juvenile justice' (2007)

[8] Committee on the Rights of the Child, 'General Comment No. 11: Indigenous children and their rights under the Convention' (2009).

3.8 The UN Guidelines for the Prevention of Juvenile Delinquency sets out that community-based services and programs should be developed for the prevention of youth offending and that "formal agencies of social control should only be utilized as a means of last resort".[9] They further provide that "[e]very society should place a high priority on the needs and well-being of the family and of all its members" and "should establish policies that are conducive to the bringing up of children in a stable and settled family environment.[10]

3.9 These pieces of international law and standards form the basis of AIA's recommendations.

[9] United Nations General Assembly, 1990, UN Guidelines for the Prevention of Juvenile Delinquency, adopted by General Assembly resolution 45/112, UN Doc A/RES/45/112 ('The Riyadh Guidelines'), available at, https://www.crin.org/en/docs/resources/publications/hrbap/IHCRC/UnitedNationsGuidelinesforthePrevention ofJuvenileDelinquency.pdf.
[10] Ibid.

4. Raise the age - Stop locking up 10 year olds

4.1 Currently, pursuant to s 344 of the *Children, Youth and Families Act 2005* (Vic), children as young as 10 years of age can be charged, brought before a court, sentenced and locked up behind bars.

4.2 Overwhelming evidence from health experts, social workers, Indigenous leaders, legal experts and human rights organisations is that this disproportionately impacts Aboriginal and Torres Strait Islander children.[11] AIA has spent time on the ground in Indigenous communities to understand these impacts and how they can best be mitigated.

4.3 When children this young are forced through a criminal legal process, their health, wellbeing and future are put at risk. Punitive approaches simply don't work.

4.4 AIA has called for the minimum age of criminal responsibility to be raised to at least 14 years, in all jurisdictions.[12]

4.5 The global median age of criminality is 14 years old.[13] Most European countries set their ages of criminal responsibility at between 14 and 16 years and China, Russia, Kazakhstan, Japan, Sierra Leone and Azerbaijan have 14 years as the age.[14]

4.6 The UN Committee on the Rights of the Child has said that countries should be working towards a minimum age of criminal responsibility of 14 years or older.[15]

4.7 Australia has been repeatedly criticised by the UN, including long-standing criticism from the UN Committee on the Rights of the Child, and by the Committee on the Elimination of Racial Discrimination, for failing to reform the current minimum age of criminal responsibility.[16] When the Special Rapporteur on the Rights of Indigenous Peoples visited Australia in 2017, she said that the routine detention of 10 and 11 year-old children was the most distressing aspect of her visit.[17] During its Universal Periodic Review, 31 countries called on Australia to raise the minimum age of criminal responsibility.[18]

4.8 By way of background, between 2018 and 2019, almost 8,353 children between the ages of 10 and 13 came into contact with the criminal justice system, with 573 children under the age of 14 in detention.[19] Victoria had the lowest rate of children aged 10 to 17 in youth detention in 2019–20 at

[11] Above, n1.
[12] Ibid.
[13] Australian Human Rights Commission, 'Children's Rights Report,' 2016, 187.
[14] Child Rights International Network, 'Minimum ages of criminal responsibility around the world, 2018, available at https://www.crin.org/en/home/ages
[15] Committee on the Rights of the Child, 2007, General comment No. 10 (2007) Children's rights in juvenile justice, CRC/C/GC/10, p.11, accessed 2 August 2018, available at http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf.
[16] United Nations Committee on the Rights of the Child, Sessions of the Committee,1997: paragraphs 11 and 29, 2005: paragraph 73; 2012: paragraph 82(a)
[17] United Nations Human Rights Council, 2017, Report of the Special Rapporteur on the rights of inidenous peoples on her visit to Australia, accessed, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/234/24/PDF/G1723424.pdf?OpenElement.
[18] The Guardian, 'More than 30 countries condemn Australia at UN over high rates of child incarceration', available at https://www.theguardian.com/australia-news/2021/jan/21/china-attacks-australia-at-un-over-baseless-charges-as-canberra-criticised-for-keeping-children-in-detention
[19] Australian Bureau of Statistics, 'Recorded Crime - Offenders, 2018-19, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra and 2020, Australian Institute of Health and Welfare (AIHW), Youth Justice in Australia 2018-19, 'Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2018–19'.

10.2 per 10,000 children.[20] Concerningly 68 per cent of children in detention were unsentenced—that is, awaiting the outcome of their legal matter or sentencing.[21]

4.9 We have the benefit of extensive scientific research on children and their neuropsychological and social development.[22] The research shows the following;

(a) children, at least until around the age of 14, have immature frontal lobes of the brain, meaning that they may lack the requisite capacity to distinguish between right and wrong;[23]

(b) children are more likely to act on impulse or emotion and therefore, may be unable to appreciate the likely consequences or impact of their actions;[24] and

(c) children are influenced and/or affected by environmental factors which can affect the development of their brains.[25] This can affect a young person's propensity to engage in antisocial behaviour.

4.10 Further, the statistics show that a great proportion of children in contact with the criminal justice system have, for example;

(a) mental health issues;

(b) cognitive disabilities;[26]

(c) inhibition of emotional responses;[27]

(d) a higher likelihood of:

(i) falsely confessing to crimes than older offenders;[28] and

(ii) being in contact with the child protection system;[29] and

(e) poorer educational attendance and outcomes,[30]

and as such, are the very children most in need of protection by the law. Further, we submit that Victoria's criminal justice system is ill-equipped to adequately provide for the varying needs of children (especially those that are high risk).

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[20] Sentencing Advisory Council, 'Young People in Detention,' available at https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/young-people-in-detention
[21] Australian Institute of Health and Welfare 'Youth justice in Australia 2019-20,' available at https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/contents/summary
[22] Elly Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) Journal of Children's Services 86.
[23] Kate Fitzgibbon, 'Protections for children before the law: An empirical study of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales' (2016)16(4) Criminology and Criminal Justice, 391.
[24] Learning Potential- Australian Government, 'Learning and the teen brain' (2017).
[25] Australian Early Development Census, 'Brain Development in Children' (2019).
[26] Justice François Kunc (ed), 'Increasing the Minimum Age of Criminal Responsibility' (2018) 92 Australian Law Journal 71.
[27] Above, n23, 87.
[28] Ibid; Lisa Bradley, 'Age of Criminal Responsibility Revisited' (2003) 8(1) Deakin Law Review, 80.
[29] Margaret White, 'YOUTH JUSTICE AND THE AGE OF CRIMINAL RESPONSIBILITY: SOME REFLECTIONS' (2019) 40 Adelaide Law Review, 260.
[30] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Comparative Youth Penalty Project Research Report, University of New South Wales, 2017), 5.

4.11 The matters outlined in the preceding paragraphs are particularly concerning in circumstances where, once a young person comes into contact with the criminal justice system, it is likely that they will have increased interaction with the criminal justice system throughout their lifetime.[31] There are many reasons for this, for example, stigmatisation and trauma.

4.12 The Sentencing Advisory Council has reported that the younger a child is at their first sentence, the more likely they are to reoffend (with any offence), to reoffend violently, to continue offending into the adult criminal jurisdiction, and to be imprisoned in an adult prison before their 22nd birthday. The six-year reoffending rate of offenders who were first sentenced at 10–12 years old (86%) was more than double that of those who were first sentenced at 19–20 years old (33%).[32]

4.13 Most children do not commit crimes. However, we know that once children are in the youth justice system their reoffending rates are high. We also know that the relatively few children who start offending early are likely to have suffered trauma, abuse, or neglect. Many have witnessed family violence in their homes or have been victims of violent crimes themselves. This is recognised in our sentencing laws. However, sentencing alone cannot address the root causes of offending by children.[33]

4.14 As stated by the Sentencing Advisory Council in its submission to this Inquiry:

> *"The best way to protect the community is to invest in measures that prevent or interrupt the criminal pathways of children who would otherwise go on to commit a disproportionately high volume of youth crime."*

4.15 Measures such as enhanced early intervention and resources to rehabilitate young offenders are the best way to steer at-risk children away from a life of crime and protect the community in the long term.

Disproportionate Impact on Indigenous Children

4.16 Locking up children disproportionately affects Aboriginal and Torres Strait Islander children.[34]

4.17 The Commission for Children and Young People's (The Commission) Our youth, our way: Inquiry into the over-representation of Indigenous children and young people in the Victorian youth justice system was tabled in the Victorian Parliament on 9 June 2021. The report stated that:

> *"Aboriginal children and young people and their communities have been targeted by the state in an unbroken chain of harmful interventions since early colonisation. For many Aboriginal people, these state-inflicted interventions have directly caused generations of trauma and broken connection to Country and community."*[35]

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[31] Above n,23, 90; Thomas Crofts, 'Will Australia Raise the Minimum Age of Criminal Responsibility?' (2019) 43, Criminal Law Journal, 32.
[32] Above n,21.
[33] Ibid.
[34] Justice François Kunc (ed), 'The Case for Adopting the Uluru Statement on its Second Anniversary – a Guest Contribution by Arthur Moses SC, President of the Law Council of Australia' (2019) Australian Law Journal 339, 340.
[35] Commission for Children and Young People, 'Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations,' 2021, 8, available at https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Summary-Final-090621.pdf

4.18 This has been recognised by Australian courts, most notably in Judge John's decision in DPP v Poole (a pseudonym) [2020] VCC 340, [101]-[104]:

> *"The circumstances that have led you to this court are not confined to those immediate factors which occurred to you at different times in your life. Parents, family members, friends, people you have grown up with and got to know through the various institutions you grew up in, have also been a product of systemic disadvantage and the colonial legacy. They are part of your experience, as you are of theirs.*
>
> *There are some in our community who may view the disadvantage you have experienced as confined to a generation or two - a matter fixed in time. This would be illusory. There is an unbroken line that can be drawn from your people's colonial experience in Northern New South Wales in the 1830s to the removal of you as a child to the Red Cross Boys' Home, and the institutional abuse that followed.*
>
> *That time continuum is littered and marked with stories of prejudice; subjugation; institutional abuse and neglect; trauma and disadvantage; and it is relevant to you and your circumstances because you are a part of it.*
>
> *Your experience belongs on that time continuum. It sits within the history and context of Aboriginal disadvantage in this country and I give it its full mitigatory effect."*

4.19 Due to this, Aboriginal and Torres Strait Islander children are more likely to experience trauma than their non-Indigenous peers. This trauma can lead to some or all of the following;

(a) increased rates of drug and alcohol issues;

(b) violence directed at themselves and others;

(c) antisocial and/or criminal behaviour and interaction in the justice system;

(e) homelessness; and

(f) early departure from school.[36]

4.20 In 2019–20, Aboriginal and Torres Strait Islander children (aged 10 to 17 years) in all Australian states and territories were detained in youth detention facilities at a higher rate than non-Aboriginal and Torres Strait Islander children. In Victoria, the rate for Aboriginal and Torres Strait Islander children was approximately eight times the rate for non-Aboriginal and Torres Strait Islander children.[37]

4.21 Social and economic factors which contribute to the overrepresentation of Aborginal and Torres children include;

(a) disengagement from school - over half of all children in custody had been previously suspended or expelled from school;
(b) cognitive impairment - 11 percent of Aboriginal and Torres Strait Islander children in custody were registered with Disability Services;
(c) mental health issues - 40 percent of all children in youth justice custody presented with mental health issues;

[36] Aboriginal and Torres Strait Islander Healing Foundation, 'Growing our children up strong and deadly: Healing children and young people'.
[37] Above n,21.

(d) unemployment and the increased risk of unemployment after criminal justice involvement - half of all first time offenders were unemployed at time of arrest. Aboriginal and Torres Strait Islander unemployment is 14 percent;
(e) drug or alcohol misuse - 65 percent of children detained had a history of drug or alcohol use;
(f) homelessness - 13 percent of children had no fixed place of address of secure housing before being taken into custody;[38]
(g) discrimination - Victoria Police is more likely to arrest and detain, and less likely to caution Aboriginal and Torres Strait Islander children than their non-Indigenous peers. Courts are more likely to sentence Aboriginal and Torres Strait Islander children to longer periods of community-based supervision than non-Indigenous children;[39]
(h) child protection - a very high proportion of Aboriginal and Torres Strait Islander children involved in the youth justice system also have Child Protection involvement. The Commission observed clear links between the failure of the youth justice and child protection systems to support Aboriginal and Torres Strait Islander children in areas such as housing, family violence, health and trauma, and their continued involvement in the youth justice system.[40]

4.22 Raising the minimum age of criminal responsibility would greatly assist in curbing the mass incarceration of Aboriginal and Torres Strait Islander children, as it would prevent young Aboriginal and Torres Strait Islander children from coming into contact with the criminal justice system, at least until the age of 14. Therefore, diversionary methods or reinvestment projects (detailed below) could be adopted or implemented to understand and mitigate criminal behaviours.

4.23 Additionally, the government should undertake a review of the current demographic of children in juvenile detention centres and remove children under the age of 14 from detention. This could be managed by ensuring at-risk children have access to therapeutic, age-appropriate health care services and prevention programs to address the issues faced by children.

Recommendation 1: Immediately raise the minimum age of criminal responsibility to at least 14 years old, with no limitations for children under this age.

[38] Victorian Aboriginal Justice Agreement, 'Underlying causes of Aboriginal over-representation,' available at https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system/underlying-causes-of-aboriginal
[39] CCYP-OYOW-Summary-Final-090621.pdf - pg 8
[40] CCYP-OYOW-Summary-Final-090621.pdf - pg 9-10

5. 'Doli incapax' is not a sufficient protection

5.1 Some may argue there is sufficient protection for young children accused of criminal offending with the existence of the common law principle of *'doli incapax'.* This principle presumes that young offenders between the ages of 10 and 14 are not able to comprehend the distinction between behaviour that is "merely naughty or mischievous", and behaviour that is seriously wrong, and as such should not be held criminally responsible.[41]

5.2 In practice, however, it does not prevent a child's contact with the harmful aspects of our criminal justice system. As reported by Victoria Legal Aid which represents many children charged with criminal offending, a child will already have been arrested, may have been in custody on remand, and will be required to undergo what can be a difficult and emotional psychological assessment before they are able to rely on the presumption of doli incapax to have their criminal charges resolved.[42] It can take weeks or months to make a determination. The child will have been exposed to multiple hearings and police involvement.[43]

5.3 Where it is relied on, the presumption relies on judicial or/or prosecutorial discretion which may be inconsistently or unfairly applied.[44]

5.4 For many children, particularly those who rely on public defenders, proving that a child lacked the requisite understanding that their conduct was wrong is overly burdensome (and resource dependent).[45] As such, doli incapax fails to afford protection to children consistently.

5.5 In circumstances where it has been accepted that the development of children's brains can affect their ability to appreciate the outcome of their actions, the failure of doli incapax to protect children is unsatisfactory.

5.6 Evidence suggests that the inconsistent application of the doli incapax principle can also result in highly prejudicial evidence being led against children, in order for the prosecution to displace the presumption.[46] This can adversely affect Aboriginal and Torres Strait Islander children.

Other Protections

5.7 In addition to raising the minimum age of criminal responsibility to 14 years of age, it is our submission that there needs to be some form of safeguard for children, aged 14 to 16, which replaces doli incapax.[47]

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[41] RP v The Queen [2016] HCA 53.

[42] Victoria Legal Aid, 'Lift the Age of Criminal Responsibility to Give Children a Chance to Reach Their Potential' available at https://www.legalaid.vic.gov.au/about-us/news/lift-age-of-criminal-responsibility-to-give-children-chance-to-reach-their-potential

[43] Ibid.

[44] CCYP-OYOW-Final-090621.pdf - pg. 157

[45] Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) Youth Justice 134, 140.

[46] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Comparative Youth Penalty Project Research Report, University of New South Wales, 2017); Lisa Bradley, 'Age of Criminal Responsibility Revisited' (2003) 8(1) Deakin Law Review, 85.

[47] Amnesty International; Marque Lawyers, 'Raising the minimum age of criminal responsibility: Potential ACT reform,' 2021.

5.8 The basis for this submission is simple. To submit that a young person, the day before they turn 14 lacks the requisite capacity to commit a criminal offence, however, the following day, on their fourteenth birthday, has the requisite capacity to be held criminally liable would be erroneous.

5.9 This is due to age not being a good indicator of transition between various cognitive or developmental stages. Instead, maturity is a far better indicator, made up of three primary traits;

(a) the capacity to entertain responsibility for an act;

(b) the capacity to have perspective (consequential thinking and thinking about the effects of an act on others);

(c) and temperance (impulse control).[48]

5.10 As stated above, the principle of doli incapax currently does little to ameliorate the low minimum age of criminal responsibility in Australia.[49] As such, new defences and/or presumptions for children, for example, a defence or presumption of 'developmental immaturity' could seek to replace the principle of doli incapax.

5.11 It is our submission that a new defence, with young offenders in mind (such as developmental immaturity), would be most appropriate (rather than making pre-existing defences, such as diminished responsibility, available to young offenders). This could assist with the criminal justice system adapting to the nuances between children and adults.

Recommendation 2: No exceptions should exist to hold children under the age of 14 criminally culpable, as to do so would be contrary to the purpose of raising the minimum age of criminal responsibility. The presumption of *doli incapax* be abolished and alternatives, such as 'developmental immaturity' be introduced.

[48] Dr C. J. Lennings, 'Development and Maturity in Young People in the Forensic Environment,' 2004, available at https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0017/6209/Development-and-Maturity-in-Young-People-in-the-Forensic-Environment.pdf
[49] Above n,47.

6. Justice Reinvestment

6.1 There is a significant body of evidence most recently from the Royal Commission into the Protection and Detention of Children in the Northern Territory and the Australian Law Reform Commission which indicates that for Aboriginal and Torres Strait Islander People including children, early intervention and diversion programs run by Indigenous-led organisations and leaders work best. Report after report has recommended that these programs use a trauma informed therapeutic approach, that they be locally run place-based programs run and controlled by Indigenous People.[50]

6.2 A justice reinvestment approach to criminal justice reform involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration.[51] Justice reinvestment calculates savings as a result of reducing contact with the justice system and avoiding prison expansions by investing in front-end, long term community development instead. These savings are diverted and reinvested into communities to support them to thrive.

6.3 Justice reinvestment has been supported on economic grounds, in that it provides a means for redirecting public money from imprisonment to strengthening individual and community capacity.

6.4. In 2017, PWC Indigenous Consulting (PIC), the Indigenous consulting branch of PWC, and Change the Record coalition undertook a study focused on the costs of Indigenous incarceration in Australia. The PIC report mapped the projected reduction in re-offending and cost for Indigenous children who offend where custodial sentences were replaced by cognitive behavioural therapy or multisystemic therapy, and holistic case management and support. This approach indicated a reduction in the recidivism rates over four years of between 4-15 percentage points each year and savings of $10.6 billion in 2040 and by $153.6 billion in total present value terms.[52]

6.5 New South Wales, Queensland and Western Australia have funded justice reinvestment trials. The Maranguka Justice Reinvestment program in Bourke, New South Wales, reported a 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of reoffending, a 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories, and a 14% reduction in bail breaches and 42% reduction in days spent in custody.[53]

6.6 Federal, State and Territory governments have committed to reducing the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system by setting a target in the Closing the Gap targets. To meet this target, the justice reinvestment model - as a community-led

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[50] Royal Commission into the Protection and Detention of Children in the Northern Territory, Chapter 7 - Community Engagement, and Recommendations 7.1, 7.2, 7.3 and see also 2017, Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, ALRC Report 133, Chapters 7: Community based sentences especially culturally appropriate community based sentencing options p.262, Chapter 10: Access to justice especially Other specialist courts, lists and diversion programs, p.333-336., Chapter 11: Aboriginal and Torres Strait Islander Women, especially dversion, p.368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1, available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf

[51] Susan B Tucker and Eric Cador, 'Justice Reinvestment' 2003.

[52] PIC, 'Indigenous incarceration: Unlock the facts', 2017, 56, available at https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf.

[53] Just Reinvest NSW, 'KPMG Report shows changes in Bourke had economic impact of $3.1m in 2017 & $7m additional over 5 years' available at https://www.justreinvest.org.au/

and evidence-based solution that addresses the root causes of offending - must be adopted, and be based on:

(a) use a trauma informed therapeutic approach;

(b) be locally run place-based programs; and

(c) are run and controlled by Indigenous People.[54]

The Maranguka Justice Reinvestment Project

6.7 The Maranguka Justice Reinvestment Project is a grass-roots justice reinvestment project and one of the first of its kind. The Project is partnered with JustReinvest NSW and aims to empower the Indigenous community in Bourke to assist with making positive change in the community. This is done by redirecting resources, which would ordinarily be allocated to incarceration, back into the community to address the underlying causes of antisocial behaviour and/or imprisonment and provide support to vulnerable children and families.[55]

6.8 In 2018, KPMG undertook an impact assessment of the Project, over the 2017 calendar year, and found that the Project resulted in the following outcomes;

(a) 23% reduction in police recorded incidence of domestic violence and comparable drop in rates of re-offending;

(b) 31% increase in year 12 student retention rates;

(c) 38% reduction in charges across the top five juvenile offence categories;

(d) 14% reduction in bail breaches; and

(e) 42% reduction in days spent in custody.[56]

6.9 Whilst the above statistics are for the Bourke Indigenous community, it is evident that the Project benefits young Aboriginal and Torres Strait Islander children.

6.10 Further, KPMG estimated that the program had an economic impact of $3.1 million in 2017, with a forecasted economic impact exceeding $7 million (with low operational costs).[57]

Victorian Case Studies

6.11 AIA is not aware of a justice reinvestment pilot program in Victoria. However, Youthlaw and Smart Justice for Young People (SJ4YP), a coalition of over 40 legal, youth, health, welfare and community organisations, have documented many examples of investment and work going on in Victorian communities that share the features of a justice reinvestment approach. These examples

[54] Royal Commission into the Protection and Detention of Children in the Northern Territory, Recommendations 7.1, 7.2, 7.3; Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, (2017) ALRC Report 133, 262, 333-336 and 368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1.
[55] Australian Indigenous HealthInfoNet, 'Maranguka Justice Reinvestment Project', 2020.
[56] KPMG, 'Maranguka Justice Reinvestment Project Impact Assessment', 2018, 6.
[57] Ibid.

show how justice reinvestment can strengthen communities, reduce youth offending and, in turn, remand and prison populations.[58]

Recommendation 3: Develop a crime prevention plan that adopts a justice reinvestment approach. This involves setting up a justice reinvestment fund, investing in Victorian place-based justice reinvestment pilots and providing communities with the resources and authority they need to ready themselves for a justice reinvestment approach.

Recommendation 4: Increase funding for Indigenous community-led and controlled organisations, to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of Aboriginal and Torres Strait Islander children. This would assist Indigenous-led organisations and programs in addressing the overrepresentation of Aboriginal and Torres Strait Islander children in remand and reduce recidivism rates.

[58] Youthlaw, 'Justice Reinvestment in Victoria,' available at http://youthlaw.asn.au/campaigns-advocacy/justice-reinvestment-home/justice-reinvestment-in-victoria/

7. Appropriate Knowledge and Expertise

7.1 The judiciary needs support and detailed resources to adequately consider issues of Aboriginal and Torres Strait Islander disadvantage. There are two relevant resources in New South Wales and Western Australia that could be the inspiration for a Victorian benchbook;

(a) The Bugmy Bar Book Committee has developed chapters summarising key research relating to experiences of disadvantage and deprivation to establish the application of the *Bugmy v The Queen* (2013) 249 CLR 571 principles;[59]

(b) The Aboriginal Benchbook for Western Australia Courts was informed by the recommendation of the Royal Commission into Aboriginal Deaths in Custody that judicial officers participate in appropriate cross-cultural training and development programs so that contemporary Aboriginal society and customs were understood in the context of the historical and social factors contributing to contemporary Aboriginal disadvantage.[60]

Recommendation 5: The Victorian Government should invest in the creation of Aboriginal and Torres Strait Islander judicial resources.

7.2 Fetal Alcohol Spectrum Disorder (FASD) relates to a 'spectrum of disabilities including physical, cognitive, intellectual, learning, behavioural, social and executive functioning abnormalities and problems with communication, motor skills, attention and memory'.[61] It can result in a range of difficulties for children such as difficulties understanding cause and effect, learning from past experiences and decision making.[62]

7.3 Studies show that there is higher birth prevalence and incidence rates of FASD in Indigenous communities, with Aboriginal and Torres Strait Islander children making up 65 per cent of those diagnosed with FASD between 2001 and 2004.[63]

7.4 A prevalence study of FASD conducted in Western Australia's Banksia Hill Detention Centre found that 88 young people (89%) had at least one domain of severe neurodevelopmental impairment, and 36 were diagnosed with FASD, a prevalence of 36%.[64]

7.5 Children who display the above behaviours but who are not diagnosed with FASD or other neurodevelopmental impairments are often viewed as troublesome, uncontrollable, obstructive and defiant.[65]

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[59] The Public Defenders, 'Bugmy Bar Book' available at https://www.publicdefenders.nsw.gov.au/barbook

[60] Stephanie Fryer-Smith, 'Aboriginal Benchbook for Western Australia Courts' 2008, available at https://aija.org.au/wp-content/uploads/2017/07/Aboriginal-Benchbook-for-WA-Courts-2nd-Ed.pdf

[61] House of Representatives Standing Committee on Social Policy and Legal Affairs, 'Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (FASD: The Hidden Harm)', p. viii, 2012, available at www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/spla/fasd/report/fullreport.pdf.

[62] Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia', BMJ Open, 2017, available at https://bmjopen.bmj.com/content/8/4/e019605corr1.full

[63] Elliott EJ, Payne J, Morris A, et al, 'Fetal alcohol syndrome: a prospective national surveillance study'. Archives of Disease in Childhood vol. 93, Iss, 9, pp.732-737, 2008.

[64] Carol Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia,' 2017, available at https://bmjopen.bmj.com/content/8/2/e019605

[65] Above n,61.

7.6 The criticism and punishment experienced by people with FASD can lead to the development of secondary issues including mental health problems, trouble with the law, unemployment and homelessness, alcohol and drug problems and a heightened vulnerability to physical, sexual (victim and/or offender), financial, social and emotional abuse. These types of personal problems can be characterised as risk factors that could contribute to children with FASD having contact with the justice system.

7.7 It is critical that children are tested when displaying these symptoms. Children who have their FASD-related symptoms managed are less likely to have contact with the justice system. They can have their symptoms addressed to change their offending behaviour and lessen the likelihood of reoffending.

Recommendation 6: The Victorian Government should allocate funding to psychologists and other mental health professionals to assist with at-risk children who display behaviours that may result in future offending. Increased mental health support provided to children at risk is recommended.

8. Additional Recommendations

8.1 AIA has had the benefit of reading the Human Rights Law Centre's submission to this inquiry and supports the recommendations it has made.[66] Additionally, AIA supports the Commission for Children and Young People's call to raise the age of incarceration.[67]

Recommendation 7: Amend the *Bail Act 1977* (Vic) and the *Children, Youth and Families Act 2005* (Vic) to prohibit a bail decision-maker from remanding a child under the age of 16 to prison.

Recommendation 8: Amend the *Children, Youth and Families Act 2005* (Vic) to prohibit the Children's Court from sentencing a child under the age of 16 to prison.

Recommendation 9: Amend the *Sentencing Act 1991* (Vic) to prohibit an adult court from sentencing a child under the age of 16 to prison.

8.2 Likewise, for the reasons set out by the Human Rights Law Centre, we support maximising the opportunities for our children to obtain diversion when they do encounter our criminal justice system. This includes introducing a legislative presumption in favour of diversion, removing requirements for prosecutorial consent to diversion, and reviewing current exclusions.

Recommendation 10: Introduce a legislative presumption in favour of diversion.

Recommendation 11: Remove the requirement for prosecutorial consent to diversion in section 356D(3)(a) of the *Children, Youth and Families Act 2005* (Vic).

Recommendation 12: Repeal section 356F of the *Children, Youth and Families Act 2005* (Vic), which sets out the matters a prosecutor must consider when consenting to diversion.

Recommendation 13: Review current exclusions under section 356B of the *Children, Youth and Families Act 2005* (Vic) for certain road safety offences with a view to repealing exclusions for less serious road safety offences.

[66] Human Rights Law Centre, 'Reimagining and fixing Victoria's broken criminal legal system: Submission to the Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System,' 2021.
[67] Commission for Children and Young People, 'Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system,' 2021.

9. Conclusion

The Victorian Government should use this inquiry into the criminal justice system as an opportunity to fulfil its obligations under international law and address the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system. Rather than imprisoning children under the age of 14, the Victorian Government should divert Aboriginal and Torres Strait Islander children to Indigenous and community-led programs that address the underlying causes of crime.

Putting children in prison harms children. It compounds existing issues children face and creates new social, emotional and developmental problems. Rather than focusing on justice-led solutions, which removes vulnerable children from their family and community, it's time to focus on Indigenous-led solutions and community programs, which focus on supporting families and have better outcomes for children and their communities.

Raising the age of criminal responsibility to 14 years and supporting young children with therapeutic and culturally appropriate support will reduce the likelihood of their entry into the justice system, decrease recidivism rates and set them up to succeed.

As a nation based on more than 60,000 years of custodianship of Indigenous People, Australia can and must work towards ending the issues affecting Aboriginal and Torres Strait Islander children and to give them an equal opportunity.

For the reasons articulated above, the minimum age of criminal responsibility should be increased to 14 to ensure that children, who lack the capacity to form criminal intent do not come into contact with the criminal justice system. This should be accompanied by a reformation of the doli incapax principle, by providing a statutory defence and/or rebuttable presumption of 'developmental immaturity' available for children to ensure that children are safeguarded from the full force of the criminal justice system. There must be an increase to the allocation of government funding to Indigenous community-led and controlled organisations, to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of Aboriginal and Torres Strait Islander children. Finally, the Victorian Government must invest in the creation of Aboriginal and Torres Strait Islander judicial resources, and increase funding to ensure that at-risk children can be properly identified and then have the proper support provided.

AIA concludes that by addressing these issues the Victorian Government can significantly reduce the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system, and in turn reduce the growing remand and prison population; as well as recidivism.