



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Mr Cattle,

Council of Attorneys-General Age of Criminal Responsibility Working Group Review

Thank you for the opportunity to contribute to a Law Council submission to the Council of Attorneys-General (“CAG”) Working Group Review into the age of criminal responsibility (“the Review”).

The Council of the Law Society considered this issue in 2019. By majority, the Council adopted the position that New South Wales should raise the minimum age of criminal responsibility from 10 to 14 years and remove *doli incapax*.

In reaching this decision, the Council considered a number of factors including the limitations of *doli incapax*, the disproportionate impact of the present age of criminal responsibility on Indigenous children, developmental and cognitive considerations, recommendations from relevant stakeholder groups, and alternatives to a criminal law response for children aged 10-13. These factors are outlined in further detail below, along with some additional matters raised by the CAG Review.

1. Limitations of *doli incapax*

The minimum age of criminal responsibility (“MACR”) in NSW is currently 10 years of age, pursuant to s 5 of the *Children (Criminal Proceedings) Act 1987* (NSW). In addition, there is a rebuttable presumption under common law, known as *doli incapax*, that a child aged 10-13 does not possess the necessary knowledge to have criminal intention. This approach to the MACR and operation of *doli incapax* is replicated in all other jurisdictions across Australia.

The availability of *doli incapax* at common law for children aged 10-13 has traditionally been an argument against raising the MACR.¹ However, there are a number of limitations in relation to the application of *doli incapax* in NSW.

¹ Wendy O'Brien and Kate Fitz-Gibbon, 'The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform' (2017) *Youth Justice*, 17(2), 12.

1.1. Process of applying *doli incapax*

In each criminal proceeding, the potential rebuttal of the presumption of *doli incapax* is not considered until the court hearing. Due to the processes and delays in our criminal justice system, a determination by a court on this issue can take weeks, and often months. As a result, many children aged 10-13 are enmeshed in the criminal justice system for lengthy periods of time – including in custody, if bail is denied – for matters that are ultimately dismissed by the court or withdrawn by police at the time of hearing. Often, despite the relevance of *doli incapax*, a young person will not defend a matter to avoid the court process. As outlined at part 4 below, contact with the criminal justice system in early adolescence can have long-term negative effects on a child’s education and development. Studies also show that the younger a child is when they have their first contact with the criminal justice system, the higher the chance of future offending.²

*Case study: Zac**

Zac is first charged by the police at 10 years of age. He is charged on a number of occasions over the next few years and placed on bail. Zac spends 132 days in custody in relation to these charges. All charges are dismissed on the basis of doli incapax.

** This case study is based on a matter that Law Society members had direct experience with. All names have been changed.*

1.2. Prejudicial evidence

In a review of children in the legal process, the Australian Law Reform Commission found that “*doli incapax* can be problematic for a number of reasons”.

For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.³

2. Recommendations from organisations and experts in Australia

A number of organisations and experts in Australia have recommended raising the MACR to 14 years. These include the Office of the NSW Advocate for Children and Young People, the National Children’s Commissioner, the Royal Australasian College of Physicians, the Australian Medical Association, National Aboriginal and Torres Strait Islander Legal Services, Australian Indigenous Doctors’ Association, the Lowitja Institute, UNICEF Australia, and the Human Rights Law Centre.

A range of other experts, organisations and inquiries have recommended the MACR be adjusted to either 12 years, or “at least 12 years”, with retention of *doli incapax*. These include: the Royal Commission into the Protection and Detention of Children in the Northern Territory; the NSW Children’s Court; Jesuit Social Services; and Bob Atkinson AO, APM, in a 2018 report to the Queensland government.⁴

² Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2014–15* (2016), Juvenile justice series no. 20. Cat. no. JUV 84.

³ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process (ALRC Report 84)* (November 1997).

⁴ Bob Atkinson AO, *Report on Youth Justice* (June 2018), 13.

3. Disproportionate impact on First Nation children

Data from the NSW Bureau of Crime Statistics and Research (“BOCSAR”) illustrates that between the ages of 10 and 12, the proportion of Aboriginal Australians making their first contact with the NSW criminal justice system is between 30 and 56 times higher than that of non-Aboriginal Australians. For children aged 13, the ratio of Aboriginal to non-Aboriginal criminal justice system contact is around 7:1.⁵ The Australian Institute of Health and Welfare *Youth Justice in Australia 2017-18* report found that of the 49 children aged 10-13 either in detention or under community supervision in NSW on an average day during the year under review, a total of 31 – or 63% – were Indigenous. The equivalent figures in 2016-17 and 2015-16 were 59% and 62% respectively.⁶

Raising the MACR may help ameliorate the disproportionate impact of the current law on Aboriginal and Torres Strait Islander children in Australia. However, a change in the MACR should not occur in isolation; it would need to be accompanied by increased capacity for needs-based, non-criminal law responses to behaviour which currently constitutes ‘offending’ for children aged 10-13. For examples of evidence-based programs of this nature, including those tailored to meet the needs of Indigenous children, see section 6 below.

We further note that the MACR is one of several intersecting factors that contribute to adverse outcomes for Indigenous children and young people. A 2011 report by the Parliamentary Standing Committee on Aboriginal and Torres Strait Islander Affairs found that “contact with the criminal justice system represents a symptom of the broader social and economic disadvantage faced by many Indigenous people in Australia”. The Standing Committee identified several aspects of disadvantage that contribute to the overrepresentation of Indigenous juveniles and young adults in the criminal justice system including individual family dysfunction, connection to community and culture, health, education, employment, and accommodation.⁷

4. Developmental and cognitive considerations

4.1. Rates of development

While the mental development of each child takes place at a different rate, there is widespread recognition of the developmental immaturity of children and young people compared to adults. Evidence indicates the early adolescent brain is malleable as it transitions from childhood, gradually increasing its ability for adult level reasoning. Developmental immaturity can also affect a number of areas of cognitive functioning including impulsivity, reasoning and consequential thinking.⁸ Research studies have found that “law and order” morality is generally not achieved until mid-teens,⁹ and logical thinking and problem-solving abilities develop considerably between the ages of 11 and 15.¹⁰

⁵ Don Weatherburn and Stephanie Ramsey, ‘Offending over the life course: Contact with the NSW criminal justice system between age 10 and age 33’ (April 2018), *NSW Bureau of Crime Statistics and Research Bureau Brief*, Issue paper no. 132, 5.

⁶ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129, table S128a.

⁷ Parliament of Australia Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system* (June 2011), Chapter 2. Available at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/atsia/sentencing/report/chapter2>.

⁸ Nicholas Lennings and Chris Lennings ‘Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study’ (2014), *Psychiatry, Psychology and Law*, 21(5), 794.

⁹ UK Houses of Parliament – Parliamentary Office of Science and Technology, ‘Postnote: Age of Criminal Responsibility’ (June 2018), 3.

¹⁰ Michael Lamb and Megan Sim, ‘Developmental factors affecting children in legal contexts’ (2013) *Youth Justice*, 13(2), 131-144.

During the early adolescent phase of brain development, children are also apt to make decisions using the amygdala, the part of the brain connected to impulses, emotions and aggression.¹¹ In addition, children aged 10–13 years are particularly vulnerable to peer pressure.

As well as being a time of developmental vulnerability, early adolescence also presents a unique window of opportunity for prevention and early intervention to address spirals of negative behavioural and emotional patterns.¹² The fact that an adolescent's brain is still developing creates the conditions to leverage change for an enduring impact. As a result, prevention and intervention methods are especially significant in this transition period. It is critical, therefore, that children in early adolescence are steered away from the criminal justice system and instead integrated into positive programs to shape social, emotional, psychological, and neurodevelopmental behaviours. Rehabilitation and intervention – rather than incarceration – are instrumental to creating positive trajectories in early adolescence.¹³

4.2. Mental Health Disorders and Cognitive Disability

In a 2017 publication, Professor Chris Cunneen of UNSW reviewed relevant research and found that:

Young people within youth justice systems have significantly higher rates of mental health disorders and cognitive disabilities when compared with general youth populations. They are also likely to experience co-morbidity, that is co-occurring mental health disorders and/or cognitive disability, usually with a drug or alcohol disorder. Australian research suggests that these multiple factors, when not addressed early in life, compound and interlock to create complex support needs.¹⁴

Professor Cunneen also referred to the 2015 NSW Young People in Custody Health Survey, which found that 83% of young people in detention were assessed as having a psychological disorder, with a higher proportion for Indigenous children than non-Indigenous children, depending on the type of disorder.¹⁵ This figure is several times greater than the rate for children living in the community: the 2015 Australian Child and Adolescent Survey of Mental Health and Wellbeing found 14% of 4 to 17 year-olds assessed as having a mental disorder.¹⁶ In addition, some 18% of young people in custody in NSW have cognitive functioning in the low range (IQ < 70) indicating cognitive disability, and various studies have shown that between 39-46% of young people in custody in NSW fall into the borderline range of cognitive functioning (IQ 70-79).¹⁷

There is also evidence to suggest that young people in the youth justice system have a range of other impairments often associated with cognitive disability, including: speech, language and communication disorders; ADHD; autism spectrum disorders; FASD; and acquired/traumatic brain injury.¹⁸ Research suggests that many Indigenous young people in

¹¹ Australian Government, 'The amazing, turbulent, teenage brain' (20 February 2017). Available at: <<https://www.learningpotential.gov.au/the-amazing-turbulent-teenage-brain>>.

¹² UNICEF Office of Research – Innocenti, *The Adolescent Brain: A second window of opportunity* (2017), 15.

¹³ Ibid 33.

¹⁴ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (2017), *Comparative Youth Penalty Project UNSW*. <Available at <http://cypp.unsw.edu.au/node/146>>.

¹⁵ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report* (2017).

¹⁶ Lawrence et al, *The Mental Health of Children and Adolescents: Report on the second Australian Child and Adolescent Survey of Mental Health and Wellbeing*, Commonwealth of Australia, (2015).

¹⁷ Cunneen, above n 14.

¹⁸ Ibid.

detention have hearing and language impairments that are not diagnosed and their behaviour is misinterpreted as non-compliance, rudeness, defiance or indifference.¹⁹

Professor Cunneen has argued:

Raising the minimum age of criminal responsibility will in itself not solve all the problems associated with the criminalisation of people with mental health disorders and/or cognitive impairments. However, it will open a door to firstly, not criminalising young children with mental health disorders and/or cognitive impairments and entrenching them at an early age in the juvenile justice system; and, secondly, provide the space for a considered response as to how these young people should be responded to in the community.²⁰

5. International approaches

5.1. The approach in other jurisdictions

Countries around the world have different approaches to the age of criminal responsibility, both through statute and the common law. The UN Committee on the Rights of the Child (“UN CROC”) stated in 2019 that “over 50 States parties have raised the minimum age following ratification of the [*Convention on the Rights of the Child*], and the most common minimum age of criminal responsibility internationally is 14”.²¹ An earlier study of 90 countries found that 68 had a minimum age of criminal responsibility of 12 or higher, with the most common age being 14 years.²² To cite some specific examples: the minimum age is 12 years in Canada and the Netherlands; 13 years in France; 14 years in Austria, Germany, Italy, and many Eastern European countries; 15 years in Denmark, Finland, Iceland, Norway and Sweden; 16 years in Portugal, and 18 years in Belgium and Luxembourg.

England, Wales and Northern Ireland have set the MACR at 10 years of age,²³ and abolished the *doli incapax* presumption in 1998. A range of stakeholders – including the Equality and Human Rights Commission and the UN Committee on the Rights of the Child – have criticised the approach to the MACR in England, Wales, and Northern Ireland, and called for it to be raised.²⁴ The approach in the United States – the only UN Member State that is not a party to the *Convention on the Rights of the Child* (“CRC”) – differs by state. 33 states set no minimum age, and of the states that do, North Carolina has the lowest at six years, while 11 states have the highest age at 10 years.²⁵

5.2. Recommendations from international bodies

The CRC requires States Parties to establish a MACR, though does not specify a particular age.²⁶ The UN CROC has sought to provide additional guidance on the issue. In its General Comment 24 on children’s rights in the child justice system, the UN CROC encouraged States

¹⁹ Ibid.

²⁰ Ibid.

²¹ UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24 (18 September 2019), 6.

²² Nean Hazel, ‘Cross-national comparison of youth justice’ (2008), Young Justice Board for England and Wales. Available at: <http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf>.

²³ Australian Institute of Health and Welfare, *Comparisons between Australian and International Youth Justice Systems: 2015-2016* (Youth Justice Fact Sheet no 93) 1.

²⁴ Helen Pidd et al, ‘Age of criminal responsibility must be raised, say experts’ (5 November 2019), *The Guardian* <<https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts>>.

²⁵ Juvenile Justice Geography, Policy, Practice & Statistics, ‘Jurisdictional boundaries’ (2020), <<http://www.jjgps.org/jurisdictional-boundaries>>.

²⁶ *UN Convention on the Rights of the Child* (1989) art 40(3)(a).

parties “to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age”.²⁷ This follows the July 2019 report of the Independent Expert leading the UN global study on children deprived of liberty, Professor Manfred Nowak, which recommended that “States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age.”²⁸

In November 2019 the UN CROC adopted concluding observations in relation to Australia’s compliance with the CRC. The Committee recommended Australia “raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies”.²⁹ The previous two times that the UN CROC reviewed Australia’s compliance with the CRC – in 2005³⁰ and 2012³¹ – it similarly recommended that Australia raise its minimum age of criminal responsibility “to an internationally acceptable level”.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice state that the age of criminal responsibility “shall not be fixed at too low an age level” and emphasise the need to consider the emotional, mental and intellectual maturity of children.³² Similarly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (“UN Guidelines”) provide that conduct contravening “overall social norms and values is often part of the maturation and growth process” and will abate as children transition into adulthood. The UN Guidelines note that labelling young persons as ‘deviants’ or ‘delinquents’ will often increase the development of a pattern of undesirable behaviour in young people.³³

6. Programs and frameworks that may be required if the age of criminal responsibility is raised

Any upwards shift in the MACR in NSW would need to be accompanied by increased capacity for needs-based, non-criminal law responses to behavior, which currently constitutes ‘offending’ for children aged 10-13.³⁴ These alternatives to incarceration and non-custodial sentences serve a vital purpose, as research has shown that children who first encounter the justice system by the age of 14 are more likely to experience all types of supervision in their later teens, particularly the most serious type – a sentence of detention (33% compared to 8% for those first supervised at older ages).³⁵ We note that if the MACR is increased, there should be cost savings in the criminal justice system, which could be used to scale up evidence-based alternatives to incarceration and non-custodial sentences for children aged 10-13.

²⁷ UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24 (18 September 2019), 6.

²⁸ UN General Assembly, *Global study on children deprived of liberty: Note by the Secretary-General*, 74th session, A/74/136 (11 July 2019), 20.

²⁹ UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 82nd session, CRC/C/AUS/CO/5-6 (1 November 2019) 14.

³⁰ UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.

³¹ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.

³² *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985), r 4.1.

³³ *Ibid* r 5(e).

³⁴ Bob Atkinson AO, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (8 June 2018), Queensland Government, 105.

³⁵ Youth Justice Coalition, ‘Policing Young People in NSW: A Study of Suspect Targeting Management Plan’ (25 October 2017), 11. <<https://www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/>>.

There are a range of evidence-based programs already being employed in Australia to divert early adolescent children from the criminal justice system. These programs often help children and families to work together to address the underlying risk factors that lead to offending behaviour, and include:

- New Street Adolescent Services, an early intervention program delivered by NSW Health targeted to address harmful sexual behaviours displayed by children aged 10-17 years.³⁶ This program has an evidence-informed model of operation that involves working with the entire family unit. A 2014 evaluation of New Street Services by KPMG found that the service has achieved significant outcomes with young people and their families, with positive impacts for both individuals and the child protection system as a whole.³⁷ The evaluation included a cost benefit analysis, which identified a “significant net [economic] benefit attached to the completion of New Street compared to all alternative scenarios”.³⁸
- Youth on Track, a program delivered by the NSW Department of Communities and Justice, is an early intervention scheme for children aged 10-17 years that identifies and responds to young people at risk of long-term involvement with the criminal justice system. Through the program, the Department of Justice funds non-government organisations (Mission Australia, Social Futures and Centacare) to deliver the scheme in six locations across NSW. A 2017 review of Youth on Track prepared by Cultural & Indigenous Research Centre Australia the Department of Justice found that “Youth on Track is contributing to enhanced social outcomes for many clients. The success of the scheme appears to relate to the application of strong evidence of ‘what works’ in interventions to address the individual criminogenic risk factors of the young person.”³⁹

There are a number of other programs specifically tailored to meet the needs of Indigenous children, including:

- Junaa Buwa! and Mac River, residential rehabilitation centres for young people who have entered, or are at risk of entering, the juvenile justice system and have a history of alcohol and other drug use. These services take a holistic approach including case management addressing mental, physical, social, and inter and intra-personal challenges. At Junaa Buwa! more than 80% of clients are Aboriginal and Torres Strait Islander young people, and there is a similar client profile at Mac River.
- The Maranguka Justice Reinvestment project in Bourke is an example of a community-led system of working across communities and sectors and is delivering promising results promising results across many domains in young people's lives including justice, education and health. An impact assessment of the project by KPMG in 2018 found that the project had led to a 38% reduction in charges across the top five juvenile offence categories, among other benefits.⁴⁰
- The Tiwi Islands Youth Development and Diversion Unit offers young people aged 10-17 the opportunity to forgo a criminal record in exchange for agreeing to comply with beneficial voluntary conditions such as participating in a youth justice conference, issuing apologies to the victim, attending school, and undertaking community service. Qualitative data has showed that this program is useful in reconnecting young people

³⁶ NSW Health, 'New Street Services' (September 2018). Available at:

<<https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>>.

³⁷ KPMG, *Evaluation of New Street Adolescent Services Health and Human Services Advisory* (March 2014). Available at: <https://www.health.nsw.gov.au/parvan/hsb/Documents/new-street-evaluation-report.pdf>

³⁸ Ibid 64.

³⁹ Circa, *Youth on Track Social Outcomes Evaluation* (April 2017). Available at:

<<http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf>>.

⁴⁰ KPMG, 'Maranguka Justice Reinvestment Project: Impact assessment' (27 November 2018).

<<http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>>.

to cultural norms and the nature of the program was seen to be culturally 'competent' and directly addressed the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education.⁴¹ Young people who engaged in the program credited it for helping them recognise wrongdoing and adopt strategies to stay out of the criminal justice system.⁴²

- Panyappi Indigenous Youth Mentoring Program (from South Australia) is an early intervention program targeting Indigenous youths aged between 10 to 18 years old who are at risk or are in the early stages of contact with the youth justice system. The program employs full-time mentors with low caseloads to allow mentors to engage intensively and comprehensively with the youths and build voluntary relationships of trust.⁴³ These mentors help to facilitate the transition of youths into the community and enable them to move towards independence by developing or providing them with access to educational, training and recreational services.⁴⁴ An evaluation of the program found the frequency and severity of the offending by participants in the program had significantly decreased, and there were a range of other benefits to participants, including stronger family relationships and better connections with school.⁴⁵

Australia can also look beyond its borders in developing alternatives to incarceration for early adolescent children. In Finland, the youth justice system is premised on the belief that crime is a social problem that cannot be resolved by restricting the liberty of individuals.⁴⁶ Young offender intervention occurs through the child welfare system, which prioritises the best interests of the child.⁴⁷ A wide range of measures are available depending on the seriousness of the issue and the underlying problems in the child's life. This may include a series of discussions with the child offender and their family. In cases of greater seriousness, more extensive open care measures may be required such as economic and social support for the parents, or psychological, psychiatric, substance abuse and educational support programs for the child.⁴⁸

7. Additional matters raised by the CAG Review

7.1. Best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold

If the age of criminal responsibility were to be raised to 14, there may be a very small cohort of children below that age who engage in anti-social behavior, causing injury to themselves or unacceptable adverse consequences to others in the community, and for whom programs of the nature outlined at section 6 are insufficient. For these rare cases, a specialised service and treatment-based approach should be available, in the community where possible, but only on a compulsory basis as a last resort.

⁴¹ Bodean Hedwards et al, 'Indigenous youth justice programs evaluation' (Special report, Australian Institute of Criminology, 2014) 37 <<https://aic.gov.au/publications/special/005>>.

⁴² Ibid.

⁴³ Viciki-Ann Ware, 'Mentoring programs for Indigenous youth at risk' (Resource sheet no. 22, Closing the Gap Clearinghouse, Australian Institute of Health and Welfare, 2013) 12.

⁴⁴ Tom Calma, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Australian Human Rights Commission, 2008) 29.

⁴⁵ Just Reinvest, 'Examples of promising interventions for reducing offending, in particular Indigenous juvenile offending' (2013).

⁴⁶ Laura S Abrams, Sif P Jordan and Laura A Montero, 'What is a Juvenile? A Cross-National Comparison of Youth Justice Systems' (2018) 18(2) *Youth Justice*, 119.

⁴⁷ Tapio Lappi-Seppälä, 'Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends (Finland)' (2011) *International Juvenile Justice Observatory*, 1-2.

⁴⁸ Ibid 18.

The Law Society notes that in Portugal, a range of educational measures are available for children under the age of criminal responsibility (which is set at 16) who commit an offence qualified by the penal law as a crime. The criteria for the educational measures rely on the young person's needs and the seriousness of the offence.⁴⁹ Options available under the country's Educational Guardianship Law include an admonition, reparations, educational supervision, and attendance of training programs. For the most serious cases, custodial measures are available, where the child attends educational, training, employment, sports and leisure activities, and receives psychological assessment if required. The custodial facilities are classified as "open", "semi-open" or "closed"; only children aged 14 and over can be placed in closed facilities.⁵⁰

7.2. Whether the MACR should be raised for all types of offences

The CAG Review queries whether "the age [of criminal responsibility] should be raised for all types of offences". The Law Society is of the view that the MACR should be raised from 10 to 14 in NSW for all offences. Creating exemptions from a higher MACR for certain offences would be inconsistent with the arguments outlined at sections 1, 3 and 4 above.

7.3. Additional issues

Law Society members have emphasised the critical and protective role that education plays in supporting children who are at risk of offending or have displayed offending behaviour. In this regard, we note that the 2015 NSW Young People in Custody Health Survey ("YPICHS") stated that:

Education plays a critical role in a child's health and wellbeing, with low levels of education associated with a range of adverse psychosocial and health outcomes. Moreover, poor school attendance and engagement is a well-documented risk factor for childhood and adolescent antisocial behaviour, offending and contact with the criminal justice system, and further recidivism.

Of the young people who participated in the YPICHS, 94% had been suspended from school on at least one occasion prior to entering custody, and 56% had been expelled at least once. To mitigate the demonstrated impact that exclusion from school has on children, schools should be provided with an equitable distribution of services, according to need, to enable them to support the continuing engagement and attendance of children.

Should you have any questions or require further information about this submission, please contact Andrew Small, Acting Principal Policy Lawyer, on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,



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President

⁴⁹ International Juvenile Justice Observatory, *Alternatives To Custody For Young Offenders: National Report On Juvenile Justice Trends* (2013) <http://www.oijj.org/sites/default/files/baaf_portugal1.pdf>.

⁵⁰ Ibid.