

Age of Criminal Responsibility: Synopsis of current research and key debates

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Introduction: The Minimum Age of Criminal Responsibility (MACR) & Doli Incapax

In each jurisdiction in Australia, the MACR is 10 years old. This means that under Australian law, a child under the age of 10 cannot commit an offence as they are not criminally responsible for that offence (Australian Institute of Health and Welfare 2019). Doli incapax refers to the common law doctrine which presumes that a child between the ages of 10 to 14 is incapable of committing a crime (Australian Institute of Criminology 2005). As the protection of doli incapax contradicts legislation regarding the age of criminal responsibility, the protection of doli incapax is considerably weak and is complicated by the current MACR of 10 years old. To refute the presumption of doli incapax, the prosecution simply has to prove that the child had an understanding of the serious wrongfulness of the offence (McDiarmid 2013). A child's guilt is often misinterpreted as understanding, when in reality they are not aware of the full consequences of their actions. McDiarmid (2013) emphasises how this oversimplifies a young person's capacity to do crime, and therefore the greater complexities of youth crime are largely over-looked.

Some Australian jurisdictions have acknowledged the current research and debates regarding raising the MACR, but have not yet made any commitments to a change. However, in August 2020 the ACT Legislative Assembly passed a motion in support of raising the MACR and have committed to discussing how the government will approach this matter. The ACT Justice and Community Safety Directorate 2021 released the 'Discussion Paper: Raising the minimum age of criminal responsibility' in June 2021 as a means to compile the views of the community and from an independent review in order to guide the ACT Government's approach to increasing the MACR. This new development, paired with recent international pressure for Australia to raise the MACR, invites a greater discussion as to why other jurisdictions aren't following in similar footsteps.

International human rights standards: UN Universal Periodic Review 2021

Australia's laws surrounding the MACR fall behind international human rights standards, as the United Nations (2007) has set guidelines explicitly stating a MACR of lower than 12 is unacceptable and denies children's protective rights. High rates of youth detention are commonly seen in countries such as England, who are focused on punishment and have a low MACR. Meanwhile countries like Iceland and Sweden that have a higher MACR and operate under a welfare model, have lower rates of young people in detention (Australian Institute of Health and Welfare 2019). At the Universal Periodic Review in January 2021, a review that takes place every 4 to 5 years, the United Nations Human Rights Council conducted a peer-review process to assess Australia's human rights performance (Human Rights Law Centre 2021). Amongst issues such as action for climate change and treatment of refugees and asylum seekers, the key issue of concern included Australia's very low age of criminal responsibility. 31 countries recommended that Australia increase the MACR to at least 14 years of age in order to uphold children's human rights. The United Nations (2007) highlights that any environment which increases the risk of being involved in crime, including incarceration, would be detrimental to the development and wellbeing of any child, especially victimised young people. Additionally, this extends to disadvantaged young people connected to other correlates of offending such as being an ethnic minority and being placed in out-of-home care.

The following statements are taken from an NGO Report coordinated by the Human Rights Law Centre, in which over 200 Australian NGOs endorsed. The report briefed UN Members ahead of the Universal Periodic Review.

Nolan Hunter, Indigenous Rights Lead, Amnesty International Australia:

“Australia locks up vulnerable children as young as 10, taking away childhoods and causing them serious harm at a crucial time of development, when they are being shaped into the adults they will become. The UN has benchmarked 14 as the absolute minimum age of criminal responsibility. Experts in child development and health from around the world agree that we must act on this now.

“State and Territory governments have the opportunity to make this powerful legislative reform right now - the ACT Government has recently committed to it as a priority. Raising the age will go a long way to improving Australia's record on its treatment of First Nations people as well as driving down over representation of Indigenous people in our jails, which is the highest in the world.”

Hugh de Kretser, Executive Director, Human Rights Law Centre:

“At this major review, 122 countries highlighted the need for Australia to better protect people’s rights. The fact that children as young as 10 are being locked up in jails across the country is clearly an issue of significant international concern, as is the ongoing mandatory indefinite detention and offshore processing of people seeking asylum

“Australia’s very low age of criminal responsibility is out of step with international standards. 31 countries recommended that Australia raise the age. All Australian governments must heed this call and follow the ACT Government’s lead by committing to raise the age of criminal responsibility to at least 14.

“The review recognised important progress on marriage equality, addressing modern slavery and Australia’s ratification of the torture prevention treaty, as well as the effectiveness of Australia’s public health response to the COVID-19 pandemic. But Australia’s record continued to be plagued by human rights failures, and particularly by its treatment of Aboriginal and Torres Strait Islander Peoples.

“As a wealthy, stable democracy, Australia should be leading the world on human rights, yet too often Australian governments breach people’s rights in critical areas. The Australian Government needs to comprehensively protect human rights in an Australian Charter of Rights and Freedoms. Our lives are better and our communities are stronger and healthier when governments promote human rights.”

Priscilla Atkins, Co-chair, NATSILS:

“It is embarrassing for Australia that five years since the last Universal Periodic Review, Aboriginal and Torres Strait Islander people remain the most incarcerated people on earth. With over 441 Aboriginal deaths in custody since 1991, the death penalty has never ended for our people. The Universal Periodic Review is a critical opportunity for the Australian Government to reimagine the justice system and commit to ending the over-incarceration and deaths in custody of our people, including raising the age of criminal responsibility to at least 14 and implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody, 30 years on from it being handed down. The world is watching.”

AHRC ‘Review of the age of criminal responsibility 2020’: Literature Review

The Australian Human Rights (AHRC) ‘Review of the age of criminal responsibility 2020’ outlines that the current MACR of 10 is too low, and the criminalisation of children as young as 10 years old is not only largely ineffective at preventing future offending behaviour and reducing recidivism rates, it also infringes upon human rights. The review addresses reforming the youth justice system and adopting welfare based approaches that focus on rehabilitation, as opposed to punitive punishment and retribution. Moreover, the review advocates reforming the youth justice system to apply children’s rights properly for youth who are disadvantaged, specifically Aboriginal and Torres Strait Islander children, youth with disability, and children in out-of-home care, all who are overrepresented in youth justice statistics.

The AHRC review paper further highlights the overrepresentation of Aboriginal and Torres Strait Islander children under youth justice supervision and detention. By raising the MACR to 14 years old, this would help overrepresentation to decrease and would similarly reduce reoffending rates of Aboriginal and Torres Strait Islander youth, as those who encounter the youth justice system are more likely to reoffend when they are older. Additionally, most youth offenders are from disadvantaged backgrounds, have complex needs, or are victims themselves. The review discusses that any environment which increases the risk of being involved in crime, including incarceration, would be detrimental to the development and wellbeing of any child, especially victimised young people. Therefore early prevention programs are crucial to divert young offenders away from the criminal justice system, and therapeutic approaches should be introduced instead.

The AHRC Review makes 5 recommendations in their paper:

(Taken directly from the review)

Recommendation 1

All Australian Governments should raise the minimum age of criminal responsibility to at least 14 years.

Recommendation 2

The Australian Government should commission a national review of the operation of doli incapax and its effectiveness in providing protection to children who lack the capacity to understand that what they did is seriously wrong.

Recommendation 3

If doli incapax is retained, Australian Governments should:

- Fund legal education on doli incapax for magistrates, prosecutors, defenders and children in the youth justice system
- Adequately resource the legal system to apply the doli incapax test in all cases and ensure pretrial assessments of a child's cognitive and mental capacity are conducted.

Recommendation 4

Australian Governments should expand the availability and range of diversionary programs for young offenders, including community-controlled and culturally- safe programs.

Recommendation 5

Australian Governments should better implement the principle of detention as a last resort by identifying and removing barriers for young offenders accessing diversionary programs, in particular for Aboriginal and Torres Strait Islander children.

Fitz-Gibbon & O'Brien 2019 'A child's capacity to commit crime: Examining the operation of Doli Incapax in Victoria (Australia)': Literature Review

Fitz-Gibbon & O'Brien (2019) demonstrate how the presumption of doli incapax as a legal safeguard is ineffective in its ability to provide protection of the differences of children's cognitive development, as the presumption has several inconsistencies in its use and is easily rebutted in court. The journal article explores the impacts of an increasingly punitive youth justice system in Victoria, as children in conflict with the law often experience disadvantage and trauma, they are at higher risk of maturing and developing at a slower rate than other children, and thus have greater difficulties at recognising the distinctiveness of their actions. This puts children and young people at serious risk of falling through the cracks of the youth justice and criminal justice system. Fitz-Gibbon & O'Brien (2019) continue that the mere knowledge of having done something naughty cannot be substituted for a deeper understanding that the act was seriously wrong, and that there is serious confusion and inconsistency surrounding the use and prevention of doli incapax. The importance of increasing welfare supports for vulnerable children and their families is vital when reforming the MACR and

the doctrine of *doli incapax*, in order to successfully prevent children from entering the youth justice system and decreasing recidivism rates. Furthermore, Fitz-Gibbon & O'Brien (2019) make several criticisms of the use of *doli incapax*, including the prolonged involvement a child has with the criminal justice system, as the child is held on remand to answer questions to assess the capacity of the child's criminal responsibility, and the reverse onus of proof in which there is an unofficial burden on the defence to provide a report that the defendant is *doli incapax*.

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