
Criminal Responsibility: Older but No Wiser

Dr Andrew Hemming*

This article is a rejoinder to an article entitled “Will Australia Raise the Minimum Age of Criminal Responsibility?” and an editorial entitled “A New Architecture for Youth Justice” both published in the Criminal Law Journal in 2019 and 2022 respectively, in which Professor Thomas Crofts and editor Phillip Boulten endorsed previous calls for an increase in the minimum age of criminal responsibility (MACR) in Australia to a minimum of 12 years of age and preferably 14 years of age. By contrast, the author supports the retention of doli incapax for children aged between 10 and 13 years of age to address the small number of children who represent a threat to public safety, and argues that the neuroscience relied upon by proponents of raising the MACR is dated. The author contends that simply raising the MACR does not address the complex societal factors underlying offending by children.

I. OVERVIEW

Simply changing the criminal law does not reflect the complexity underlying youth offending and why children as young as 10 years old commit these offences.¹

There has been a growing chorus of academic and political voices in Australia calling for the raising of the minimum age of criminal responsibility (MACR).² Crofts states that “[s]uch calls have come from a broad range of sources” which inter alia include Amnesty International, Jesuit Social Services, the National Children’s Commissioner, the Queensland Family & Child Commission, and the Royal Commission into the Protection and Detention of Children in the Northern Territory (NT).³ Boulten maintains that “[r]aising the age would sweep away the overly complex and clumsy laws that exist now about children’s criminal responsibility”.⁴ Both the Northern Territory⁵ and Australian Capital Territory (ACT)⁶ Governments have made in principle decisions to raise the MACR from 10 to 12 years of age. Recently, the Community Support and Services Committee of the Queensland Parliament considered the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (Qld), which while recommending the Bill not be passed did advise the Queensland Government to continue to work with the federal, State and Territory attorneys-general to raise the MACR from 10 to 12 years of age.⁷

* Associate Professor in Law, School of Law and Justice, University of Southern Queensland. The author would like to thank Ms Sue Unger for her helpful comments on earlier drafts which have improved the quality of this article.

¹ The Hon Shannon Fentiman (Attorney-General) speaking against the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* in the Queensland Parliament on 16 August 2022 <https://documents.parliament.qld.gov.au/speeches/spk2022/Shannon_Fentiman-Waterford-20220816-119884493978.pdf>.

² See, eg, Thomas Crofts, “Will Australia Raise the Minimum Age of Criminal Responsibility” (2019) 43 Crim LJ 26; Philip Boulten, “A New Architecture for Youth Justice” (2022) 46 Crim LJ 121; Tamara Walsh et al, “Raise the Age – And Then What? Exploring the Alternatives of Criminalising Children under 14 years of Age” (2021) 27 *James Cook University Law Review* 37; 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; Australian Medical Association and Law Council of Australia, *Minimum Age of Criminal Responsibility Policy Statement* (December 2019).

³ Crofts, n 2, 29–30.

⁴ Boulten, n 2, 122.

⁵ Northern Territory Government, *Safe, Thriving and Connected: Generational Change for Children and Families 2018-2023* (2018) 25.

⁶ Morag McArthur, Aino Suomi and Belinda Kendall, “Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory” (Final Report, Australian National University, 2021) 7.

⁷ Community Support and Services Committee, 57th Queensland Parliament, *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (Report No 16, 2022) 18.

In contrast to the calls to raise the MACR, the author contends that the arguments for raising the MACR are misguided, at least until the issue is dealt with nationally and a full range of intervention services provided across all areas of Australia. Social injustice is at the heart of child offending, which is related to poverty, lack of affordable housing, dysfunctional families, truancy and school exclusions. Any solution to child offending requires a recognition that without improved social justice for the most disadvantaged sections of society, raising the MACR is both pointless and dangerous. The author supports the retention of *doli incapax* for children aged between 10 and 13 years of age in order, as a last resort, to deal with the small number of children who represent a real threat to public safety.

This article is divided into two Parts. Part II summarises and critiques the arguments being put forward by proponents of raising the MACR, such as Crofts and Boulten: (1) Australia is out of step with the rest of the world; (2) *doli incapax* works practical injustices throughout Australia; (3) the child cohort in question is relatively small; (4) neuroscience and developmental immaturity. Part III covers the introduction of legislation in the NT Parliament in October 2022 to raise the MACR to 12 years of age; the in principle decision in the Australian Capital Territory to raise the MACR to 12 years of age; and the unsuccessful *Private Member's Bill* introduced by Michael Berkman, the Member for Maiwar representing the Greens, entitled *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (Qld) which sought to raise the MACR to 14 years of age.

II. ARGUMENTS FOR RAISING THE MACR

The standard you walk past, is the standard you accept.⁸

A. Australia Is Out of Step with the Rest of the World

An oft cited argument for raising the MACR is that Australia is out of step with the rest of the world by having a MACR of 10 years of age. The following observation by Boulten reflects the tenor of proponents of raising the MACR:

The median age of criminal responsibility around the world is 14 years of age, as endorsed by international human rights organisations, which base their recommendation on scientific studies showing that, on average, children younger than 14 are not developmentally mature enough to be criminally liable. The UN Committee on the Rights of the Child recommends 12 as the absolute minimum age for a child to be charged with a criminal offence.⁹

Similarly, Crofts applauds the Northern Territory's in principle decision to raise the MACR to 12 years of age as that would be a good step putting "the Northern Territory in line with other common law countries which have already made this change"¹⁰ citing Canada, Ireland and Scotland, while placing pressure on other common law countries such as England and Wales, and New Zealand to follow suit.

Herein lies the first weakness in the arguments put forward for raising the MACR. Reference to the median age of criminal responsibility around the world being 14 years of age is meaningless without knowledge of the context of the minimum age within the relevant statute or the exceptions depending on the seriousness of the offence.¹¹ For example, countries with a common law tradition inherited the doctrine of *doli incapax* which provides for a rebuttable presumption that a child under 14 years of age is not criminally responsible "unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission".¹²

Furthermore, there is no obvious pressure on Australia, England and Wales, New Zealand, and the United States to follow the example set by other common law countries such as Canada, Ireland and Scotland

⁸ David Morrison, "Address at the International Women's Day Conference" (8 March 2013).

⁹ Boulten, n 2, 121.

¹⁰ Crofts, n 2, 27.

¹¹ For example, in New Zealand, a child over 10 years of age may be prosecuted for murder or manslaughter: *Children's and Young People's Well-being Act 1989* (NZ) s 272(1)(a).

¹² *Criminal Code* (Qld) s 29(2); *Criminal Code* (WA) s 29.

to raise the MACR to 12 years of age. This is because each country has its own approach to criminal justice, and children under 10 years of age who consistently break the law can face repercussions, along with their parents. For example, in England and Wales, while children under 10 years of age cannot be charged with committing a criminal offence, they can be subject to a Local Child Curfew or a Child Safety Order.¹³ Similarly, parents can be held responsible if their child repeatedly gets into trouble with the police or they do not take reasonable steps to control their child's behaviour, and can be asked to sign a Parenting Contract or be given a Parenting Order.¹⁴

Advocates of increasing the MACR in Australia appear to overlook the decision taken in England and Wales to abolish *doli incapax* in 1998,¹⁵ and thus in stark contrast to countries like Canada have actually reduced the MACR to 10 years of age. The reasons behind the decision to abolish *doli incapax* were threefold: (1) its inherent irrationality in failing to hold children aged 10–13 to account; (2) its unfairness in practice to the victims of crime; and (3) its archaic nature.¹⁶

Young people, too, should face up to the consequences of their offending. The rule of *doli incapax* can stand in the way of holding properly to account 10 to 13 year-olds who commit crimes. Young people of that age know that it is wrong to steal, vandalise or commit an assault. We will abolish this archaic rule to ensure that they are answerable for their offences.¹⁷

England and Wales have drawn a MACR at 10 years of age, and this line in the criminal responsibility sand has remained unaltered in 24 years of operation.¹⁸

B. Doli Incapax Works Practical Injustices throughout Australia

Immature age or *doli incapax* refers to the presumption that a child cannot form the necessary mens rea because he or she does not possess sufficient understanding to distinguish between right and wrong. In Australia the minimum age at which a child is deemed capable of criminal responsibility is 10 years old. Between the ages of 10 and 13 there is a rebuttable presumption that a child retains the defence of *doli incapax*, sometimes referred to as the defence of infancy. The test to be used as established in *R v M*¹⁹ is whether the accused knew what he or she was doing was wrong according to the ordinary principles of reasonable people. The Crown must prove the act was wrong as opposed to naughty, and the evidence must be strong, no matter how obviously wrong the act may be: *C v DPP*.²⁰ The strength of the required evidence required to rebut the presumption of *doli incapax* is reduced the closer the child approaches the age of 14 years: *R (a child) v Whitty*.²¹

The most recent High Court authority on the strength of the required evidence for the Crown to rebut the *doli incapax* presumption can be found in *RP v The Queen*.²²

¹³ *Crime and Disorder Act 1998* (England & Wales) s 11.

¹⁴ *Crime and Disorder Act 1998* (England & Wales) ss 8–10.

¹⁵ *Crime and Disorder Act 1998* (England & Wales) s 34. The presumption was abolished in Northern Ireland by the *Criminal Justice (Northern Ireland) Order 1998* Art 3.

¹⁶ *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*, CM 3809 (November 1997).

¹⁷ United Kingdom, *Parliamentary Debates*, House of Lords, 27 November 1997, Vol 583 col 1123 (Lord Williams of Mostyn).

¹⁸ Lord Dholakia introduced a *Private Member's Bill* in 2017 to raise the age of criminal responsibility in England and Wales from 10 to 12, but it did not progress. The Government's position in response to Lord Dholakia's previous bills has been that children aged 10 and 11 are "for the most part, able to distinguish between bad behaviour and serious wrong-doing" and should be held accountable for their actions. The Government has also argued that the public must have confidence in the youth justice system and know that offending will be dealt with effectively. Nicola Newson, "Age of Criminal Responsibility Bill [HL]: Briefing for Lords Stages" (Research Briefing, 18 August 2017) <<https://lordslibrary.parliament.uk/research-briefings/lln-2017-0054/>>.

¹⁹ *R v M* (1977) 16 SASR 589. See also *RYE v Western Australia* (2021) 288 A Crim R 174, [92]; [2021] WASCA 43, where Vaughan J favoured the phrase "the child has the capacity to know that the act or omission is wrong by the normal adult standards of a reasonable person".

²⁰ *C v DPP* [1996] AC 1, 38.

²¹ *R (a child) v Whitty* (1993) 66 A Crim R 462, 465 (Harper J).

²² *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53.

What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. ... Rebutting [the *doli incapax*] presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.²³

The High Court was directing attention to the strength of the *doli incapax* presumption, namely, its very flexibility in adjusting the evidence required to fit the capacity of an individual child aged between 10 and 13 years of age to understand the serious wrongness of his or her act(s). Thus, in *R v TT*,²⁴ where the appellant aged 12 years and 10 months had acknowledged when signing a caution six months previously for carrying a weapon in public and affray that he knew it was wrong to threaten violence to other people, was sufficient to satisfy Keane JA that he retained that capacity when he assaulted a person in a wheelchair.²⁵

However, in the view of proponents of raising the MACR, *doli incapax* works against defence lawyers who are portrayed as facing practical difficulties despite the burden of proof to rebut the presumption resting with the Crown on the balance of probabilities.

In the real world of youth justice courts defence lawyers have an uphill battle invoking the presumption of *doli incapax*. More often than not, *doli* is reduced to a merely theoretical construct. ... Actually, in many (if not most) cases where *doli* is sought to be invoked, it is the defence lawyer who needs to actively chase the evidence that points towards their child client lacking the capacity to know their actions were seriously wrong.²⁶

No statistical evidence is offered for these sweeping statements, which are in effect a serious attack on the courts for failing to hold the prosecution to account. While a series of reasons are offered as to the nature of the practical difficulties facing defence lawyers (access to testing, language difficulties, geographic isolation, lack of records, etc),²⁷ no mention is made of the evidence in the hands of the Crown which is likely to include an extensive criminal record, records of previous interviews with the police, and school records such as exclusions for violent behaviour.

As to reports on whether the child is *doli incapax* or not, there is equivocation regarding the advisability of allowing the Crown to organise the reports. For example, in a research project undertaken in 2016 in Victoria, 48 semi-structured interviews were conducted to gain insight into the views and experiences of legal practitioners dealing with the operation of the Victorian youth justice system.²⁸ On the one hand, “[t]he interviews revealed general support for the availability of the presumption”,²⁹ while on the other hand, “despite its recognised benefits, there was a general view among those interviewed that the presumption has been falling into disuse in Victoria in recent years and that, where used, it is done so in an ad hoc and procedurally questionable way”.³⁰

A key point was the view that, despite the legal presumption, in practice there was a reverse onus on the defence, “who bear the unofficial burden of providing a report (at their cost) to prove that the defendant is *doli incapax*”.³¹ However, significantly, those participating in the interviews did not advocate the prosecution holding the onus:

²³ *RP v The Queen* (2016) 259 CLR 641, [12] (Kiefel, Bell, Keane and Gordon JJ); [2016] HCA 53.

²⁴ *R v TT* [2009] QCA 199.

²⁵ *R v TT* [2009] QCA 199, [20] (Keane JA).

²⁶ Boulten, n 2, 122–123.

²⁷ Boulten, n 2, 123.

²⁸ Kate Fitz-Gibbon and Wendy O’Brien, “A Child’s Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)” (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18.

²⁹ Fitz-Gibbon and O’Brien, n 28, 21.

³⁰ Fitz-Gibbon and O’Brien, n 28, 21.

³¹ Fitz-Gibbon and O’Brien, n 28, 22.

You wouldn't necessarily want the prosecution to have control of that assessment process because you'd have to be very careful about who they were getting an assessment from and all of that ... I think it's good in theory that it's their [the prosecution's] burden but it would sit uncomfortably with me if ultimately they were the ones that facilitated all these types of assessments.³²

Thus, contrary to those advocating an increase in the MACR, the research study in Victoria revealed two important outcomes: (1) general support for *doli incapax*; and (2) general reluctance to leave the process of procuring assessments in the hands of the prosecution. Such an outcome is unsurprising given the flexibility of *doli incapax* and the fact that it spans a four-year period between 10 and 13 years of age. In any event, if, for example, the defence is going to run cognitive impairment such as foetal alcohol spectrum disorder or attention-deficit/hyperactivity disorder as a reason for the child falling within *doli incapax*, then the assessment properly lies with the defence as it does for any defence involving mental impairment.

C. The Child Cohort in Question Is Relatively Small

Supporters of increasing the MACR point to the relatively small numbers of children aged between 10 and 14 who are arrested and held in detention:

According to the Australian Bureau of Statistics only 4% of all people arrested are aged 10-14. In 2018 and 2019 there were only 21 kids under 14 sentenced to detention in the Northern Territory and only 573 throughout Australia.³³

In a recent article in the *Conversation*,³⁴ the MACR debate was placed in perspective with several statistical sources for 2020–2021 confirming the very small number of children in detention:

2021 Census data indicates there are 1,588,051 children aged 10-14 in Australia. In 2020-21, the Australian Institute of Health and Welfare reported there were 444 children aged 10-13 in detention (this includes unsentenced and sentenced detention) for the year. This was down from 499 in 2019-20.

The Australian Bureau of Statistics reported that children aged 10-14 accounted for 16% of Children Court matters finalised with a guilty outcome in 2020-21. Of those defendants, 95% received a non-custodial sentence, meaning they were not imprisoned. Only 73 defendants, or 2%, received a custodial sentence, whereby they were sent to a correctional institution such as a prison or youth detention centre.

One would have thought these statistics pointed to the extent, if not the long-term effectiveness, of the various juvenile diversion programs across Australian jurisdictions in keeping children out of detention rather than a justification for raising the MACR, and that as a residual group the children involved had exhausted the patience of magistrates and judicial officers who had tired of giving endless warnings and cautions to the child and his or her family. As the Queensland Attorney-General has observed: "We know that 46 per cent of youth crime is committed by a small group of recidivist offenders."³⁵

In this context, there appears to be a degree of naivety as to the impact of raising the MACR on the activities of criminal gangs. The classic fictional character of Fagin³⁶ has real life counterparts in 21st century Australia, as exemplified by the following observation: "police work to infiltrate organised crime groups that are targeting vulnerable young gang members, getting them to do their dirty work."³⁷ Raising the MACR will set up an untouchable class of children who will be targeted by older criminals and youth gangs to undertake criminal activities such as burglary and car theft.

³² Fitz-Gibbon and O'Brien, n 28, 23.

³³ Boulten, n 2, 123.

³⁴ "Why We Should Not Rush to Raise the Age of Criminal Responsibility in Australia", *The Conversation*, 1 September 2022.

³⁵ Fentiman, n 1.

³⁶ Fagin is a fictional character in Charles Dickens's 1838 novel *Oliver Twist*. He is the leader of a group of children (including the Artful Dodger) whom he teaches to make their livings by pickpocketing and other criminal activities.

³⁷ Erin Pearson, "Youth Gangs 'Weaponizing' as City Reels from Fresh Violence", *The Age*, 30 June 2020 <<https://www.theage.com.au/national/victoria/youth-gangs-weaponising-as-city-reels-from-fresh-violence-20200630-p557pf.html>>, citing police commander Tim Hansen.

D. Neuroscience and Developmental Immaturity

As Crofts has pointed out,³⁸ the Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory has recommended raising the MACR to 12 years of age based on neuroscience research:

Recent neurobiological research has prompted a reassessment of how recognition of developmental immaturity should affect the way society treats young offenders, particularly in determining the age at which criminal responsibility should be imposed.³⁹

To reflect more recent scientific evidence about the developing brain of children and young people, their limited capacity for reflection before action, and their overall immaturity, the Commission recommends that the age of criminal responsibility be raised to 12 years.⁴⁰

However, not only is the neuroscience relied upon by the Royal Commission dated (2012) and indeed challenged by the most recent research (2022) from the United States (discussed later in this section), but as early as 2018 the neurobiological research was not as clear-cut as the Royal Commission claimed. Wishart has noted that while neuroscience shows that adolescents lack some capacities, studies do not distinguish 12 years of age as being developmentally important.⁴¹ Wishart cites two studies in support of the proposition that if the MACR is to be raised it needs to increase beyond 12 years of age because capacities such as self-control and practical reasoning develop in later adolescence.⁴² Consequently, neuroscience has limitations in driving a policy debate as to the appropriate age to set criminal responsibility, and does not support the arbitrary selection of the MACR being raised to 12 years of age from a child development perspective.

Indeed, Crofts acknowledges “younger children might generally be able to make moral judgments about right and wrong”, citing a study by Wagland and Bussey which suggested that children as young as eight years of age may be as capable “of appreciating the wrongfulness of criminal conduct and differentially evaluating it from mischievous conduct” as older children.⁴³ The study involved 132 males and females from four age groups (8, 12, and 16 years and adults) who listened to a series of vignettes which described a person committing a transgression. The seriousness of the transgressions varied across the vignettes. Participants then provided ratings on the wrongfulness and outcome expectations associated with the conduct described in the vignette. The abstract summarised the conclusions of the study in these terms:

Eight-year-olds from the study sample demonstrated that they meet the current cognitive standard associated with achieving the Age of Criminal Responsibility. These 8-year-olds also provided evidence that they were comparable to older children and adults in terms of their understanding of the wrongfulness of criminal behaviour and the ability to distinguish it from mischievous behaviour.⁴⁴

Thus, this research supports the view that children as young as eight years of age have the capacity to distinguish criminal behaviour from mischievous behaviour, or, put another way, to distinguish between serious wrong-doing and bad behaviour. Such capacity is distinct from exercising poor judgment in using this capacity to control their behaviour. So, in the case of *R v TT*⁴⁵ discussed earlier, the appellant’s

³⁸ Crofts, n 2, 30.

³⁹ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Report* (2017) Vol 1, 134 <<https://www.royalcommission.gov.au/system/files/2020-09/Volume%201.pdf>>, citing Brenda Midson, “Risky Business: Developmental Neuroscience and the Culpability of Young Killers” (2012) 19(5) *Psychiatry, Psychology and Law* 692.

⁴⁰ Royal Commission into the Protection and Detention of Children in the Northern Territory, n 39, 28.

⁴¹ Hannah Wishart, “Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & the Age of Criminal Responsibility Bill – Promise and Perils” (2018) 82(4) *Journal of Criminal Law* 311.

⁴² Christopher Frith and Uta Frith, “What Can We Learn from Structural and Functional Brain Imaging?” in Michael Rutter et al (eds), *Rutter’s Child and Adolescent Psychiatry* (Blackwell Publishing, 5th ed, 2008); BJ Casey, Adriana Galvan, Todd Hare, “Changes in Cerebral Functional Organization during Cognitive Development” (2005) 15(2) *Current Opinion in Neurobiology* 239.

⁴³ Crofts, n 2, 31, citing P Wagland and K Bussey, “Appreciating the Wrongfulness of Criminal Conduct: Implications for the Age of Criminal Responsibility” (2017) 22 *Legal and Criminological Psychology* 130, 143.

⁴⁴ Wagland and Bussey, n 43, 130.

⁴⁵ *R v TT* [2009] QCA 199.

signature on a previous caution was sufficient to satisfy Keane JA that he retained that capacity when committing the later offence.⁴⁶ If neurodevelopment disability is engaged to displace the presumption that a child with previous dealings with the police does not fall within *doli incapax*, then the onus properly falls on the defence.

Consequently, the author disagrees with the assertion by Boulten that for children with cognitive impairments, identified as including foetal alcohol spectrum disorder, attention-deficit/hyperactivity disorder, learning deficits, middle ear disease and mental illnesses, “it is bleedingly obvious that a child with these weighty issues has next to no ability to understand the ‘moral’ quality of their behaviour”.⁴⁷ Such a *carte blanche* approach is the equivalent of a “get out of jail free card”, and totally disregards both the onus of proof when putting a cognitive impairment defence, and the potential impact on community safety.

The most recent neuroscience (2022) emanating from the United States is focused on the teenage brain. The old assumption that adolescents were risk machines lacking the decision-making powers of a fully developed prefrontal cortex is being challenged and is at odds with the dated (2012) neuroscience research relied upon by the Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory, due to advances in technology now available to neuroscientists:

There is growing recognition that what was previously seen as immaturity is actually a cognitive, behavioural, and neurological flexibility that allows teens to explore and adapt to their shifting inner and outer worlds.⁴⁸

This means that neuroscientists are now not viewing the developing brain as broken, immature or contributing to problematic behaviour, but rather as “malleable, flexible and promoting many positive aspects of development in adolescence”:⁴⁹

Heightened sensitivity to rewards, for example, which is partly driven by increased activity in a part of the brain called the ventral striatum, has been implicated in behaviours such as substance use and unprotected sex among teens. But research now shows that in different settings, that same neural circuitry can also promote positive peer influence and behaviours, Telzer said, such as wearing a seat belt or joining a peaceful protest.⁵⁰

Other research challenges the long held assumption that adolescence triggers a shift away from parental influence in favour of peer influence, particularly when it comes to risk-taking: “teens shift their behaviour to align with the risky choices of parents more than the risky choices of peers.”⁵¹ The inferences are twofold. First, the degree of stability or dysfunction in the home environment is critical to the behavioural outcomes for children. Second, adolescent development is not linear and is not readily gauged by an arbitrary age line in the sand for criminal responsibility. The policy implications are that the criminal justice system must be flexible and allow for a range of responses in relation to the nature and frequency of the juvenile offending, unhampered by an arbitrary MACR.

E. Summary of Arguments for Raising the MACR

The foregoing analysis contests each of the arguments put forward in support of raising the MACR. There is little value in complaining that Australia is out of step with the rest of the world when two important independent variables are unspecified: (1) the legal regime within which the MACR is drawn; (2) the support systems in place to respond to children exhibiting harmful behaviour. The argument that *doli incapax* works practical injustices across Australia is open to question as one study found (1) general

⁴⁶ *R v TT* [2009] QCA 199, [20] (Keane JA).

⁴⁷ Boulten, n 2, 123.

⁴⁸ Zara Abrams, “What Neuroscience Tells Us about the Teenage Brain” (2022) 53(5) *American Psychological Association* 66.

⁴⁹ Abrams, n 48, citing Eva Telzer of the Developmental Social Neuroscience Laboratory at the University of North Carolina, Chapel Hill.

⁵⁰ Abrams, n 48.

⁵¹ Abrams, n 48, citing Seh-Joo Kwon et al, “Neural Correlates of Conflicting Social Influence on Adolescent Risk Taking” (2020) 31(1) *Journal of Research on Adolescence* 139.

support for *doli incapax*; and (2) general reluctance to leave the process of procuring assessments in the hands of the prosecution.⁵² Similarly, the small numbers of children aged between 10 and 14 years of age who have been detained is actually testimony to the extent of juvenile diversion programs, if not their long-term effectiveness, rather than a justification for increasing the MACR. Finally, there is (1) support for the proposition that children as young as eight years old can distinguish between serious wrong-doing and bad behaviour;⁵³ and (2) the most recent neuroscience views (a) the developing brain as “malleable, flexible and promoting many positive aspects of development in adolescence”⁵⁴ and (b) teenagers align their behaviour with the choices of their parents rather than their peers.⁵⁵

III. THE INTRODUCTION OF LEGISLATION TO RAISE THE MACR IN THE NORTHERN TERRITORY; THE IN PRINCIPLE DECISION TO RAISE THE MACR IN THE AUSTRALIAN CAPITAL TERRITORY; AND THE UNSUCCESSFUL CRIMINAL LAW (RAISING THE AGE OF RESPONSIBILITY) AMENDMENT BILL 2021 (QLD)

By 1990, no Australian child will be living in poverty.⁵⁶

A. Legislation to Raise the MACR in Northern Territory

On 13 October 2022, Chansey Paech, the NT Attorney-General, introduced legislation into Parliament designed to raise the age of criminal responsibility from 10 years old to 12 years old.⁵⁷ The objective is to refer children under 12 and their families to intensive parenting and behavioural change programs to break the cycle of offending. The legislation is expected to come into operation in 2023. The NT Attorney-General is quoted as saying:

The reforms would balance community safety while ensuring young children in contact with the justice system were supported; that incarcerating young children was contrary to best practices to reduce the rate of young offenders; and that punitive approaches would not reduce offending patterns. The evidence is clear, the earlier a child enters the justice system, the more likely they are to reoffend. Punitive measures are not a deterrent for 10 and 11 year-olds – in fact, it is more likely to increase behavioural problems and offending.⁵⁸

Consistent with the statistics discussed in Part II.C, the number of children involved is relatively small:

Between 2017 and 2022, children aged 10 or 11 represented 1% of children in custody, with 18 children being received in detention. During the same period, 296 children aged 10 or 11 years old were “apprehended”, making up about 3% of all children in contact with the justice system, while those aged under 12 made up 11% of children entering police diversion programs. The attorney general’s department said in the last financial year, 2.9% of offences were committed by those aged 10 and 11 years old.⁵⁹

Thus, in the five-year period between 2017 and 2022 only 18 children (6%) were held in detention out of a total of 296 children who were apprehended. Detention is the last option, not least because of the cost. The Productivity Commission has found that it costs approximately \$1,500 per day (over \$500,000

⁵² Fitz-Gibbon and O’Brien, n 28.

⁵³ Wagland and Bussey, n 43.

⁵⁴ Telzer, n 49.

⁵⁵ Kwon et al, n 51.

⁵⁶ Bob Hawke, the then-prime minister told Labor’s election campaign launch on 23 June 1987.

⁵⁷ *Criminal Code Amendment (Age of Criminal Responsibility) Bill 2022* (NT). The inserted s 38 states: A child under 12 years of age is not criminally responsible for an offence. The new s 38A states: (1) A child aged 12 or 13 years can only be criminally responsible for an offence if the child knows the child’s conduct is wrong. (2) The question whether a child knows the child’s conduct is wrong is one of fact. (3) The burden of proving that a child knows the child’s conduct is wrong is on the prosecution.

⁵⁸ Sarah Collard, “Northern Territory Moves to Raise Age of Criminal Responsibility from 10 to 12”, *The Guardian*, 13 October 2022 <<https://www.theguardian.com/australia-news/2022/oct/13/northern-territory-moves-to-raise-age-of-criminal-responsibility-from-10-to-12>>.

⁵⁹ Collard, n 58.

per year) to hold a young person in juvenile detention.⁶⁰ If detention is the last resort for the worst offenders, then the fundamental question is this: if the age of criminal responsibility is raised to 12 years of age, what will happen to a child of 10 or 11 who commits a very serious offence? What will happen if a James Bulger tragedy occurs?⁶¹ What plan (if any) is to be in place for the pointy end of juvenile offending? Under the *Criminal Code Amendment (Age of Criminal Responsibility) Bill 2022* (NT) there is no provision for an exception to be made for murder or manslaughter, as occurs in New Zealand.⁶²

This is not just an academic question, as the case of *Pickett v Western Australia*⁶³ demonstrates. In this case, the victim, Patrick Slater, aged 26, was assaulted by a group of eight males, including an 11-year-old boy, PM, with makeshift weapons including a star picket and a wooden pole in the early hours of 28 January 2016, near the Esplanade station, Perth. Mr Slater died after he was stabbed through the heart with a screwdriver. CCTV footage captured PM carrying the screwdriver after the victim was killed. All eight were convicted: six of murder and two (including PM who was tried separately in the Children's Court of Western Australia) of manslaughter.

The issue in the High Court was whether ss 7(b), 7(c) and 8 of the *Criminal Code 1902* (WA) dealing with aiding and unlawful common purpose applied where “the deceased may have been actually killed by a child who had not been shown to be criminally responsible for the killing because of the operation of s 29 of the Code”.⁶⁴ The argument in the High Court proceeded on the basis that it was reasonably possible that PM stabbed the Deceased:

[16] By reason of s 29 of the Code, because PM was under the age of 14 at the time of the offending, but over the age of ten, he could not be criminally responsible for his acts in killing the Deceased unless it was proved by the prosecution that, at the time of the killing, he had the capacity to know that he ought not to do the act. It is common ground that the prosecution adduced no evidence to establish PM's capacity beyond reasonable doubt at the appellants' trial.⁶⁵

The High Court unanimously held that the liability to punishment of each of the appellants for murder by operation of s 7(b), s 7(c) or s 8 of the *Criminal Code 1902* (WA) did not depend upon either the criminal responsibility of PM, and thus proof beyond reasonable doubt that he had capacity under s 29, or proof beyond reasonable doubt that he did not stab the Deceased. Accordingly, the trial judge did not err in declining to instruct the jury that it did.⁶⁶ In other words, the High Court found that just because the assailant (here PM) who stabbed the Deceased may not have been criminally responsible for the offence of murder by reason of some personal circumstance peculiar to that assailant (here, s 29 of the Code) did not affect the operation of ss 7 and 8. If the High Court had found otherwise, then gangs would have been able to rely on the inability of the Crown to prove a child under 14 years of age had the necessary capacity to know not to commit murder beyond reasonable doubt to avoid criminal responsibility being sheeted home to gang members who aided the child in the killing.

Thus, with the above case in mind, whereby PM would not have been criminally responsible for manslaughter under the proposed legislative reform to *doli incapax* in the Northern Territory as PM was 11 years of age at the time of the killing, the author contends that the NT Attorney-General is making an untested, Pollyanna statement by claiming the proposed behavioural change reforms balance community safety while supporting young children in contact with the criminal justice system. More generally, the

⁶⁰ Productivity Commission, *Youth Justice Services* (Commonwealth of Australia, 2016) 16.31 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2016/community-services/youth-justice/rogs-2016-volume-f-chapter16.pdf>>.

⁶¹ James Bulger was a two-year-old boy from Kirkby, Merseyside, England, who was abducted, tortured, and murdered by two 10-year-old boys, Robert Thompson and Jon Venables, on 12 February 1993.

⁶² *Children's and Young People's Well-being Act 1989* (NZ) s 272(1)(a).

⁶³ *Pickett v Western Australia* (2020) 270 CLR 323; 282 A Crim R 118; [2020] HCA 20.

⁶⁴ *Pickett v Western Australia* (2020) 270 CLR 323, [1] (Kiefel CJ, Bell, Keane and Gordon JJ); 282 A Crim R 118; [2020] HCA 20.

⁶⁵ *Pickett v Western Australia* (2020) 270 CLR 323, [16] (Kiefel CJ, Bell, Keane and Gordon JJ); 282 A Crim R 118; [2020] HCA 20.

⁶⁶ *Pickett v Western Australia* (2020) 270 CLR 323, [69] (Kiefel CJ, Bell, Keane and Gordon JJ); 282 A Crim R 118; [2020] HCA 20.

NT Attorney-General appears to be blind to the real possibility mentioned earlier that raising the MACR may set up an untouchable class of children who will be targeted by older criminals and youth gangs to undertake criminal activities such as burglary and car theft. Such an outcome will significantly raise the 2.9% of offences committed in the last financial year by those aged 10 and 11 years old.

The author predicts all that will be achieved by raising the MACR will be to delay the entry into detention those 10- and 11-years-old children who commit offences, potentially more crime hardened, unless the behavioural change programs are soundly based on the most recent (2022) neuroscience. Furthermore, the political risks are considerable if the “best practices” referred to by the NT Attorney-General do not eventuate, with an inevitable loss of public confidence in the criminal justice system, especially for victims of youth crime. It would appear that good parenting practice, whereby the child understands bad behaviour has negative consequences, does not apply under a policy of raising the MACR. Australia has repeatedly failed to provide appropriate social services responses to child poverty,⁶⁷ homelessness, abuse, truancy etc, so why tie the hands of the criminal justice system until the child is 12 or 14 years of age when the social justice system is broken?

In the absence of any clear detail as to how “intensive parenting programs” and expanded family support services will be rolled out across the Northern Territory, particularly in remote indigenous communities, it is necessary to now turn to the identified service system and implementation requirements for raising the MACR in the Australian Capital Territory.

B. In Principle Decision to Raise the MACR in Australian Capital Territory

In contrast to the lack of detail in the Northern Territory as to how the support services are to be implemented when the MACR is raised, the Australian Capital Territory commissioned a review of the service system in order to identify service gaps, implementation issues and alternative models to meet the needs of 10–13 year olds likely to be affected by the proposed reform.⁶⁸ Implicit in the review is the possibility of the MACR being raised to 14 years of age at some future point.

The executive summary to the review identified a number of key themes which capture the complexity of the issues involved in raising the MACR: (1) Children who offend or who are at risk of offending have complex needs; (2) gaps in the current ACT service system; (3) implementing a strong narrative to communicate the changes; (4) a therapeutic response to meet children’s complex needs; (5) the need for strong systems for early help and support; (6) improved integration of responses; (7) a self-determined Aboriginal and Torres Strait Islander response; (8) and an independent authority for children’s safety and wellbeing.

For present purposes, this article will focus on (1)–(3) above. (1) It is axiomatic that young children who offend come from deeply troubled backgrounds:

Children who are at risk of offending experience multiple health and mental health challenges, often with significant underlying trauma and disability. They are known to disengage from school early and to develop problems with substance misuse and are, too often, from Aboriginal and Torres Strait Islander backgrounds or from families where parents have been incarcerated. Many of these children are involved with the child protection system and have a history of family violence (as victims and/or perpetrators), sexualised behaviours and sexual exploitation. They are also at risk of homelessness. By the time children interact with the youth justice system, unmet needs have often multiplied and become more complex.⁶⁹

The review identified the major risk factors for the early onset of criminal behaviours as including “personality or temperament and early environmental conditions, such as harsh and erratic parenting, early behavioural problems or trauma, history of parental offending and the role of adverse childhood

⁶⁷ About one in six children in Australia (761,000) live below the poverty line of 50% of median income: ACOSS and UNSW Sydney, *Poverty in Australia 2020: Part 1 Overview* (2020) <https://povertyandinequality.acoss.org.au/wp-content/uploads/2020/02/Poverty-in-Australia-2020_Part-1_Overview.pdf>.

⁶⁸ McArthur, Suomi and Kendall, n 6, 7.

⁶⁹ McArthur, Suomi and Kendall, n 6, 7–8.

experiences”.⁷⁰ The review defined the term “complex needs” to refer to persons who have a combination of: “mental health problems; cognitive disability, including intellectual and developmental disability; physical disability; behavioural difficulties; precarious housing; social isolation; family dysfunction; and problematic drug or alcohol use.”⁷¹ It is therefore obvious that successfully improving the life experience of such children requires the extensive provision of a range of services.

(2) Service systems are often unable to meet children’s complex needs because identification and assessment of these needs is lacking; the sharing of information between services is ineffective reflecting a lack of co-ordination between services; the existence of service gaps; and a lack of familiarity with existing services.⁷²

Consequently, the review identified a number of barriers to meeting children’s complex needs in Australian Capital Territory:

Barriers to adequately addressing complex needs in the ACT include a lack of coordination and integration across the service system, including: limited information sharing; lack of capacity to work with children with multiple needs; limited specialised and generalist programs; service delivery modes that are inflexible; barriers to navigating the system; limited understanding of child-specific familial and cultural needs; and long waiting lists for specialised services.⁷³

Thus, a considerable investment of additional resources will be necessary to address gaps in the current ACT service system, which is the prime reason why the Australian Capital Territory has only made a decision in principle to raise the MACR. The improvement in service delivery is a precondition to securing community support for raising the MACR.

(3) The review highlighted “the importance of bringing the community along with the reform by clearly communicating the key arguments and benefits of a therapeutic or public health response over a youth justice response”.⁷⁴ However, the review recognised the need to “acknowledge the experiences of victims and to ensure that those who have been harmed will not be forgotten or ignored”.⁷⁵ Herein lies the dilemma likely facing any government considering raising the MACR, namely, whether the community will accept the model suggested by the review “that victims and children have the opportunity to engage in restorative processes”.⁷⁶

One jurisdiction rightly hesitant to test the waters of public opinion in regards to community safety following a raising of the MACR is Queensland, where a Private Member’s Bill introduced by Michael Berkman, the Member for Maiwar representing the Greens, which sought to raise the MACR to 14 years of age was defeated in Parliament.

C. The Unsuccessful Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (Qld)

Youth who grow up in more disorganized neighborhoods; who come from impoverished, distressed families; who do poorly in school and have low attachment to school and teachers; who associate with delinquent peers; and engage in various forms of problem behaviors are at increased risk for becoming gang members.⁷⁷

⁷⁰ McArthur, Suomi and Kendall, n 6, 17.

⁷¹ McArthur, Suomi and Kendall, n 6, 18.

⁷² McArthur, Suomi and Kendall, n 6, 8.

⁷³ McArthur, Suomi and Kendall, n 6, 8.

⁷⁴ McArthur, Suomi and Kendall, n 6, 9.

⁷⁵ McArthur, Suomi and Kendall, n 6, 9.

⁷⁶ McArthur, Suomi and Kendall, n 6, 9.

⁷⁷ Terence Thornberry, “Membership in Youth Gangs and Involvement in Serious and Violent Offending” in R Loeber and DP Farrington (eds), *Serious & Violent Juvenile Offenders: Risk Factors and Successful Interventions* (Sage, 1998) 157.

The Community Support and Services Committee of the Queensland Parliament produced a report in March 2022,⁷⁸ which examined the *Criminal Law (Raising the Age of Responsibility) Amendment Bill*. The Bill proposed to amend the *Criminal Code 1899* (Qld) and the *Youth Justice Act 1992* (Qld) to raise the MACR in Queensland from 10 to 14 years old. The background to the Bill was a report on youth justice referred to as the “Atkinson Report”.⁷⁹

The Atkinson Report recommended a two-stage process to raising the MACR through a national approach. The first stage would be to raise the MACR to 12 years, and if successful, a second stage advancing the MACR to 14 years could be adopted:

If the Queensland Government supports, in principle, raising the MACR to 12 years, then this would ideally be achieved through a national uniform approach involving all states and territories. Further, if the MACR is successfully raised to 12, a similar process could be adopted to consider later advancing it to age 14 as criminal justice, human services, health and education systems build the requisite capabilities for non-criminal responses to offending by very young children (up to 13 years of age).⁸⁰

The Atkinson Report made three recommendations (numbers 68–70) in relation to raising the MACR:

68. That the Government support in principle raising the MACR to 12 years, subject to: (a) national agreement and implementation by State and Territory governments; (b) a comprehensive impact analysis; (c) establishment of needs based programs and diversions for 8-11 year old children engaged in offending behaviour.

69. That the Government advocate for consideration of raising the MACR to 12 years as part of a national agenda for all states and territories for implementation as a uniform approach.

70. In the interim, that the Government consider legislating so that 10-11 year olds should not be remanded in custody or sentenced to detention except for a very serious offence.⁸¹

Importantly, the Atkinson Report recognised the need to undertake a comprehensive impact analysis along with establishing needs based programs within a national agreement, before considering raising the MACR. Thus, it can be seen that the ACT review published in 2021 discussed in the previous section came to similar conclusions to the Atkinson Report which had been published three years earlier in 2018.

One aspect of a comprehensive impact analysis is to examine the rising number of students being excluded from Australian schools. There is a documented progression whereby short informal exclusions develop into longer, formal suspensions because exclusionary school discipline does not address the wider factors underlying the anti-social behaviour of children and can reinforce such behaviour:⁸²

Multiple suspensions means spending a lot of time out of school. This is time that may be unsupervised, which can lead to injury and even death, gang affiliation, drug use, crime, increased police contact and entry to the criminal justice system. Exclusionary school discipline is described as contributing to a phenomenon known as the “school-to-prison pipeline”.⁸³

The extent of the problem can be gauged from Queensland Education statistics for 2019, taken from an article published in the *Brisbane Times* in 2020:

More than 400 students were suspended or expelled from Queensland state schools each day on average during 2019. New Education Queensland data revealed there were 77,167 short suspensions, 3132 long suspensions and 1674 expulsions in 2019. That works out to be an average of 422 students put on

⁷⁸ Community Support and Services Committee, 57th Queensland Parliament, n 7.

⁷⁹ Bob Atkinson, *Report on Youth Justice*, Version 2 (8 June 2018) <<https://www.cvjma.qld.gov.au/resources/dcsyw/youth-justice/reform/youth-justice-report.pdf>>.

⁸⁰ Atkinson, n 79, 106.

⁸¹ Atkinson, n 79, 106.

⁸² Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian Government Schools, *The Centre for Inclusive Education* (Final Report, 26 October 2020).

⁸³ Linda Graham et al, “Suspensions and Expulsions Could Set Our Most Vulnerable Kids on a Path to School Drop-out, drug Use and Crime”, *The Conversation*, 15 September 2021 <<https://theconversation.com/suspensions-and-expulsions-could-set-our-most-vulnerable-kids-on-a-path-to-school-drop-out-drug-use-and-crime-166827>>.

disciplinary absence across the 194 school days in 2019, or about 7 per cent of all students. The data also showed more than 1500 prep students, aged 5, were suspended in 2019 compared with 572 in 2013. Queensland Teachers Union president Kevin Bates said teachers were dealing with “some extremely challenging behaviours among younger students”.⁸⁴

Given that “some extremely challenging behaviours” are present at the earliest entry point in primary education, it is self-evident that without intervention these behaviours will worsen and bring this cohort of children to the attention of police. A study published in 2015 found that 87% of a sample of youth offenders in New South Wales had experienced school suspensions and expulsions.⁸⁵ Australia has closed most special schools where children with specific disabilities were educated as a group according to their specific needs, and moved to a policy of full inclusion while at the same time excluding children repetitively because they come from homes which are not meeting their emotional and safety needs.

The complexity of the problem of youth crime can be seen in the response of the Premier of Queensland to criticism by Robbie Katter, the State Member of Parliament for Mount Isa, with a property offence crime rate of 1,167.37 incidents per 100,000 people which is more than triple the State average, that the Queensland Government was not showing leadership in intervening to deal youth crime:

In her response to Mr Katter, Ms Palaszczuk acknowledged youth crime as a serious issue in many Queensland communities, including Mount Isa.

These are very complex issues. Unfortunately, some young children who are involved in youth crime do not have safe and secure homes. We need to continue to grow our foster care system and we must recognise that that needs to be culturally appropriate as well.⁸⁶

The foster care system referred to by the Premier is severely stretched in Queensland, with 10,000 children in State care but only 5,700 children in foster care or kinship care in 2021. This means that the remaining children are in residential care:

Residential care is like a share house, but for children – with the addition of a youth worker for supervision. Residential care is ultimately a last resort and generally only for children aged between 12 and 17 years. But with a growing number of children entering care, and not enough foster carers, children under the age of 10 are being placed into these group homes.⁸⁷

This means that very young children who have experienced trauma are being regularly placed with older children who have similarly experienced trauma: “For any little child ... to be placed in a situation with older kids around 15, to be living with them in those situations, it just would be terrifying for them really.”⁸⁸ The future negative implications for little children of being exposed to such behaviours in older children are obvious. Thus, the Premier’s reference to needing “to grow our foster care system” is somewhat disingenuous without addressing the tailored needs of very young children in State residential care.

Notwithstanding the Atkinson Report recommendations to establish needs based programs before implementing a two-stage process to raising the MACR, the *Criminal Law (Raising the Age of Responsibility) Amendment Bill* proposed a one-stage raising of the MACR to 14 years of age without any preconditions regarding impact analysis or needs based services provision. In the explanatory notes to the Bill an alternative model that included multiple levels of response was put forward, but not as a

⁸⁴ Lydia Lynch, “Queensland Schools with Most Student Suspensions Revealed”, *Brisbane Times*, 19 August 2020 <<https://www.brisbanetimes.com.au/politics/queensland/queensland-schools-with-most-student-suspensions-revealed-20200818-p55mt5.html>>.

⁸⁵ Pamela Snow et al, “Language Functioning, Mental Health and Alexithymia in Incarcerated Young Offenders” (2015) 18(1) *International Journal of Speech-Language Pathology* 1. Alexithymia is a difficulty recognising emotions.

⁸⁶ Kylie Stevens, “‘I Will Never Go Back Again’: The Australian Town Where Tourists Are Telling Others to Stay Away”, *Daily Mail Australia*, 6 September 2022 <<https://www.dailymail.co.uk/news/article-11183443/Mount-Isa-Queensland-hit-TripAdvisor-reviews-urging-travellers-avoid-outback-town.html>>.

⁸⁷ Elizabeth Cramsie, “Children under 10 Being Placed in Residential Care with Traumatic Outcomes, Experts Warn”, *ABC News*, 6 September 2021 <<https://www.abc.net.au/news/2021-09-06/qld-residential-care-children-foster-kinship/100431406>>.

⁸⁸ Cramsie, n 87, citing Lindsay Wegener, Executive Director of the child protection body PeakCare.

precondition to raising the MACR.⁸⁹ Consequently, it was unsurprising that the Community Support and Services Committee of the Queensland Parliament recommended the Bill not be passed.⁹⁰ The Committee explained there was more work to be done:

Considering all evidence before the committee and noting the importance of appropriately balancing the welfare of children with community safety, as well as the need to address the complex problems that give rise to children entering the justice system, the committee considers there is more work to be done before the minimum age of criminal responsibility is raised in Queensland.⁹¹

In line with the Atkinson Report recommendations, the Committee recommended that “the Queensland Government continue to work with all State and Territory Attorneys-General to consider the increase of the minimum age of criminal responsibility from 10 to 12, including any caveats, timing and discussion of implementation requirements”.⁹²

This recommendation was endorsed by Shannon Fentiman, the Queensland Attorney-General, in speaking against the Bill in the Queensland Parliament on 16 August 2022:

This bill seeks to put the cart before the horse both in the sense that it lacks the necessary alternative framework to respond to children aged between 10 and 14 years who exhibit harmful behaviour and in that it pre-empt a national approach to a fundamental criminal justice issue ...

The safety of Queenslanders is the government’s No. 1 priority ...

Any increase in the minimum age of criminal responsibility must be underpinned by an alternative response to those children who exhibit harmful behaviour, particularly those who pose an immediate risk to the community, to ensure the safety of the community. Developing such an appropriate alternative is complex, particularly given Queensland’s decentralised geography. For example, there would need to be arrangements in place to ensure that children who are currently subject to supervision continue to receive the support they need to facilitate their rehabilitation and therefore reduce the risk of any reoffending; first responders would need to be able to safely and appropriately respond to children exhibiting harmful behaviour; and supports and services would need to be in place to adequately address a child’s harmful behaviour thereby reducing the likelihood of repeat behaviour and enhancing community safety.⁹³

The author takes issue with the Queensland Attorney-General’s use of the word “rehabilitation” in the above extract from her speech in Parliament. A better view is to “habilitate”⁹⁴ children coming from dysfunctional households, as the latest neuroscience supports the view that children model their behaviour on their parents.⁹⁵ If family dysfunction is all a child has ever known, then the child does not possess the core values or understandings to revert to, and these must be learned anew. This leads into the model of detention needed to break such a cycle.

A society where we punish the young for coming from violent and abusive homes by excluding them from a place of potential safety, namely school, and return them to a home lacking in basic food and proper sleep regimes, is doomed to failure. Research tells us we parent how we were parented, and in order to break such a cycle, in certain circumstances the criminal justice system ought to be able to take measures to protect the community, but more importantly detain, educate and habilitate children. In other words, detention, properly managed, should not be viewed as a universal evil.

The Queensland Attorney-General also endorsed the national approach to raising the MACR, stating that the Age of Criminal Responsibility Working Group established by the Commonwealth, State and Territories Attorneys-General was “the appropriate forum to consider complex policy considerations

⁸⁹ Explanatory Notes, *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (Qld) 8–9.

⁹⁰ Community Support and Services Committee, 57th Queensland Parliament, n 7, vii and 7.

⁹¹ Community Support and Services Committee, 57th Queensland Parliament, n 7, 7.

⁹² Community Support and Services Committee, 57th Queensland Parliament, n 7, vii and 18.

⁹³ Fentiman, n 1.

⁹⁴ Habilitate: to make fit or capable (as for functioning in society). Merriam-Webster online dictionary <<https://www.merriam-webster.com/dictionary/habilitate>>.

⁹⁵ Kwon et al, n 51.

relating to the minimum age of criminal responsibility such as an appropriate alternative service system, possible carve-outs and timing for implementation”.⁹⁶

Clearly, the Queensland Attorney-General is only too well aware of the real political dangers of risking the safety of Queenslanders if a single jurisdiction leads the charge to raise the MACR without adequate interventionist services being in place. Presently, only the Northern Territory has advanced further than in principle support for raising the MACR by introducing legislation into the NT Parliament in October 2022, but without any details as to how it proposes to implement the legislation, which may ultimately have political consequences at the ballot box in 2024.

IV. CONCLUSION

The author contends that simply raising the MACR is a blunt and ineffective instrument in dealing with the complexities of child offending, arguing that *doli incapax* should be maintained for children aged between 10 and 13 years of age as the doctrine provides the necessary flexibility to deal with the most serious cases. The author does not support the New Zealand position whereby only charges of murder and manslaughter may be brought against a child aged between 10 and 11 years of age.⁹⁷ Why, for example, not rape or grievous bodily harm? In fairness, New Zealand does address criminal responsibility for offences other than murder and manslaughter for children aged 12 or 13 years.⁹⁸ However, the doctrine of *doli incapax* as applied in Australia avoids the arbitrary dissection of offences for MACR purposes, and is better directed at the circumstances of the particular case along with the offender’s criminal history.

Politically, a critical factor in raising the MACR is public acceptance of diversionary programs, which is well illustrated by the very recent sentencing of two 14-year-old boys for the murder of a 15-year-old boy, Angus Beaumont, in Redcliffe, North Brisbane in 2020:

Both boys had long criminal histories with one offending from the age of 11. One boy was on probation and the other was on bail at the time of the murder. Neither had previously received custodial sentences.

The boy now aged 17 also pleaded guilty to three more offences including dangerous operation of a vehicle after stealing a car and sparking a police chase in May 2022 while on bail for murder. His history included an incident in October 2019 when he stabbed another 15-year-old in the shoulder with scissors.⁹⁹

The parents of the victim described the youth justice system as “failing” victims. Given the criminal histories of the two murderers, such a natural parental sentiment to the loss of their son will also be widely shared in the community, and will give any government contemplating raising the MACR without proper interventionist needs based programs in place pause for reflection.

This article has also sought to highlight the rapid changing nature of neuroscience resulting from improvements in technology, and in particular the policy implications of the developing brain being viewed as “malleable, flexible and promoting many positive aspects of development in adolescence”¹⁰⁰ and that teenagers align their behaviour with the choices of their parents rather than their peers.

Finally, the author has ventured into the controversial territory of suggesting that under certain circumstances, properly managed detention, delivering education and habilitation, may not only be the best solution for particular children but also break a cycle that ultimately places them in the adult prison system.

⁹⁶ Fentiman, n 1.

⁹⁷ *Children’s and Young People’s Well-being Act 1989* (NZ) s 272(1)(a).

⁹⁸ *Children’s and Young People’s Well-being Act 1989* (NZ) s 272(1)(b) and (c).

⁹⁹ “Teens Jailed over Brutal Murder of Angus Beaumont after Schoolboy Stabbed in the Chest”, 7 *News*, 31 October 2022 <<https://7news.com.au/news/court-justice/teens-jailed-over-brutal-murder-of-angus-beaumont-after-schoolboy-stabbed-in-the-chest--c-8655024>>.

¹⁰⁰ Telzer, n 49.