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The Chair
Age of Criminal Responsibility Working Group
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Dear Working Group members

RE: COUNCIL OF ATTORNEY-GENERALS – AGE OF CRIMINAL RESPONSIBILITY REVIEW

Thank you for the opportunity to provide submissions to the review of the age of criminal responsibility in Australia.

Civil Liberties Australia (CLA) wishes to state first of all our strong support for raising the age of criminal responsibility in all jurisdictions of Australia. Currently, at 10 years of age, the age of criminal responsibility in Australia is one of the lowest in the world¹. It is out of step with comparable countries; it disregards current understandings of child psychology and childhood brain development; and it is against the principles of child welfare that we rightly hold dear in Australia. There is no evidence that holding such young children responsible for crimes is in any way in the long-term best interests of the children themselves or of the wider society.

However, all this should be well known to the Working Group. It has been thoroughly examined by independent reviews, parliamentary inquiries and Royal Commissions. They have conducted thorough investigations, taken many hours of testimony from legal, medical and child welfare experts from around the country, reviewed the available literature, and heard from children themselves. These inquiries have consistently recommended that the age of criminal responsibility in Australia should be raised.

In fact, we are surprised and disappointed that it has taken so long for this matter to come to review. More than two years have passed since the Royal Commission into the Detention and Protection of Children in the Northern Territory recommended that the age of criminal responsibility be raised. And it has been more than a year since federal, state and territory Attorney-Generals agreed in November 2018 that a working group would be established to examine whether to raise the age of criminal responsibility. We can see little evidence that any

¹ Note: We have not provided sources for the statements made in this submission. Most come from sources – such as the Australian Bureau of Statistics, the Australian Institute of Health and Welfare, and the UN Committee on the Rights of the Child that have been widely cited in other reports and submissions on the issue of the age of criminal responsibility.

progress was made on this commitment between November 2018 and November 2019 when Attorney-Generals again asked the Working Group to progress this matter.

In light of all this, we believe that the time to debate whether to raise the age of criminal responsibility in Australia has now passed. It is time for the Working Group to move without further delay to reaching agreement on how best to implement the change around Australia.

Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only?

As stated above, CLA is strongly of the view that the age of criminal responsibility should be raised. This should be beyond debate in light of the consistent findings and recommendations of independent reviews, parliamentary inquiries and even a Royal Commission.

We submit that the age of criminal responsibility should be raised to 16 years of age. And we submit that this should be without exception as to type of offence. In other words, there should be no carve-outs.

The reasons for raising the age of criminal responsibility have been described by many organisations and competent bodies and in the reports of various inquiries, including Royal Commissions. The reasons have been summarised most recently in the Children's Rights Report 2019 ('In Their Own Right: Children's Rights in Australia') by the National Children's Commissioner.

- Compared to other nations, Australia has one of the lowest ages of criminal responsibility.
- Research into brain development is inconsistent with the current age of criminal responsibility of 10 years. Children have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility.
- Children also lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings.
- What's more, it has been demonstrated that a significant number of young offenders are even more delayed in their cognitive development than other children in their age cohort, for example, as a result of foetal alcohol syndrome or other conditions.
- In fact, most children involved in the criminal justice system come from disadvantaged backgrounds and have complex psychological and physical health needs that are better addressed outside the criminal justice system. Enmeshing a child in the criminal justice system – rather than responding to their existing physical and mental health needs, supporting them with counselling and guidance, and ensuring their needs for basic services are met – has a further detrimental impact on the health, wellbeing and development of the child.
- Raising the age of criminal responsibility would go some way towards addressing the shocking rate of overrepresentation of Aboriginal and Torres Strait Islander (ATSI) children in detention. ATSI children constitute nearly 60 per cent of children in prisons despite representing only around 5 per cent of Australia's overall youth population. For children younger than 14 years of age, around 600 children in this category are locked away in youth jails each year, of whom 70 per cent are ATSI children.
- Enmeshing a child in the criminal justice system – and potentially incarcerating them – does nothing to divert a young person away from offending later in life. Just the opposite,

in fact. Studies have shown that the younger children are when they encounter the justice system, the more likely they are to reoffend.

After examining the body of scientific research into the capacity of children to comprehend criminality and to understand the consequences and seriousness of their actions – and taking into account the recommendations of competent bodies about what is in the best interest of children – we have formed the view that 16 years of age is the appropriate minimum age of criminal responsibility. A number of countries have adopted 15 as the age of criminal responsibility, including Norway, Finland and Sweden. Some have adopted 18, including Luxembourg, Brazil, Peru and Uruguay. The UN Committee on the Rights of the Child commended those countries that had adopted 14 or 16 as their minimum age of criminal responsibility (see the UNCRC’s General Comment 10, 2007).

Should the presumption of *doli incapax* be retained?

Our recommendation – that the age of criminal responsibility be raised to 16 years of age – would render moot the issue of *doli incapax*.

This would be a good thing. In Australia, the process for determining whether a primary school aged child can form the *mens rea* and have an actual, substantial understanding of their actions is complex. As has been well documented (for example, by the Law Council of Australia and the National Children’s Commissioner in the 2019 Children’s Rights Report), there is limited evidence to suggest that the principle of *doli incapax* is being routinely applied in practice (the case of *KG v Firth* in the Northern Territory illustrates the problems with the application of the *doli incapax* principle). It produces variable outcomes depending on a range of circumstances in every case and in every courtroom – for example, the legal skill of counsel representing the defendant, the persuasiveness of the prosecutor and the reasoning of the judge.

Should there be a separate minimum age of detention?

Regardless of the minimum age of criminal responsibility that Australian jurisdictions ultimately decide upon, ***we recommend that detention not be an option for children under 16 years of age.***

This would be consistent with recommendations by the UN Committee on the Rights of the Child (see General Comment 24, 2019).

Having ruled out detention for children younger than 16 years of age, the youth of offenders older than 16 years of age could then be taken into account in sentencing decisions in the usual way. Civil Liberties Australia does not support laws that impose mandatory minimum sentences. However, where states do have such laws, ***we recommend that mandatory minimum sentences should never apply to non-adult offenders.***

Where a non-adult offender is sentenced to detention, the conditions of their detention should be responsive to their educational, developmental and other needs.

Social diversion and other preventative strategies

CLA strongly supports social diversion and preventative strategies aimed at young people. It would be very unsatisfactory if the result of raising the age of criminal responsibility were simply to push back by a few years the engagement of young people in the criminal justice system. Instead, ***we strongly recommend that this reform must be seen as part of a larger strategy to reduce Australia's high rate of imprisonment more generally***, particularly the shocking rates of imprisonment of ATSI people.

There are other groups that have substantial experience implementing youth-focused social diversion and other preventative strategies, including programs aimed at young people who may be engaging in anti-social behaviour or who are at risk of entering the criminal justice system in the future. Such programs would have a large role to play in ensuring that young people who would otherwise receive some services through the criminal justice system continue to receive essential services and support when the age of criminal responsibility is raised. We defer to those groups – and to the researchers who have conducted evaluations – to provide details of those programs, including about their effectiveness and shortcomings.

From our reading of the research literature, our understanding is that many of these programs have been very successful and cost-effective (certainly when compared to the direct and indirect costs of prosecuting and imprisoning people). An example is the justice reinvestment approach which has been extensively studied around the world. In Australia, a number of pilot programs have been implemented to test culturally appropriate programs in Indigenous communities.

Such programs that engage families, the community, welfare organisations and the police are also the best way of protecting the community from anti-social behaviour. Criminalising the behaviour of children does not protect the community. Criminalising children and potentially incarcerating them has not been shown to have a deterrent effect given the developmental immaturity of children.

It is also crucial that in amending the age of criminal responsibility, police and law enforcement agents are trained in managing children under the age of criminal responsibility. Police have an important role to play in social diversion. While there is an inherent need to protect the community, police ought to be able to engage – as skilled and appropriately trained adults – with would-be youth offenders at a grassroots level in volatile situations. From a social psychology and developmental perspective, this would involve taking a less authoritative stance in encounters with children, building strong relationships with young people, and acting in a more constructive way with a more amicable focus on prevention. As far as culture-specific action is concerned, an increase in the number of Indigenous police officers would also prove to be beneficial.

We further submit that the benefit of organised sporting programs is severely underestimated as a preventative technique in relation to juvenile anti-social behaviour. An example is Midnight Basketball Australia which operates free social basketball tournaments on Friday and Saturday nights for children aged between 12–18 and provides participants with a nutritious dinner, a motivational talk and at least three games of basketball. We submit that investing in similar programs across a range of sports could prove to be an effective method of encouraging pro-social behaviour, as well as facilitating healthy social networks and a sense of belonging.

New criminal offences for inciting children to anti-social behaviours

We have seen no evidence to suggest the need to create new offences in relation to adults who incite children below the age of criminal responsibility to do things that would otherwise be criminal offences. Raising the age of criminal responsibility should not affect this. Before considering new laws, we would recommend examining how such incitement would be covered by existing laws and whether that coverage is adequate. If such an examination reveals a gap in the existing laws, we would be happy to consider the need to create new offences.

Yours sincerely

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President

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Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards that Australia has traditionally enjoyed and continues to aspire to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.