6 February 2020

Ms Margery Nicoll
Law Council of Australia
GPO Box 1989
CANBERRA ACT 2601

By email: alex.kershaw@lawcouncil.asn.au

Dear Ms Nicoll

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


2. The Society supports and commends the previous work of the Law Council in relation to raising the age of criminal responsibility to 14 years of age. Such an increase would bring Australia into line with international human rights standards and medical consensus on child brain development.

3. In the memorandum of 20 December 2019, the Law Council set out a number of questions regarding the terms of reference of the Review. The Society addresses a number of these questions below, drawing on where relevant, any applicable South Australian laws and policy considerations.

Should the age be raised for all types of offences?

4. The Society considers the age of criminal responsibility should be raised to 14 years for all offences in both federal and state jurisdictions.

5. Furthermore, as the majority of juvenile offending occurs between the ages of 15-17, an increase in the age of criminal responsibility is further justified and unlikely to result in any widespread negative effects.

If the age is raised, should the presumption of doli incapax be retained?

6. The Society supports the Law Council’s position with respect to the removal of the presumption of doli incapax. The presumption in practice is problematic, in particular, the difficulties involved in proving the juvenile’s capacity at the time of the alleged offence. The Society further notes that both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission have expressed criticisms of the presumption.

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Does the operation of doli incapax differ across jurisdictions, how might this affect prosecutions, and could the presumption be applied more effectively in practice?

7. In South Australia, section 5 of the Young Offenders Act 1993 (SA) provides that a person under the age of 10 years cannot commit an offence. Under the common law, where a juvenile is aged 10 or above but under 14, there is a rebuttable presumption that the juvenile lacks the capacity to be criminally responsible for their acts. This presumption of doli incapax can be rebutted if the prosecution can show the juvenile possessed the required mental element of the offence and knew that what they were doing was wrong according to the ordinary principles of reasonable people. Consequently, in South Australia, juveniles aged between 10-14 rebuttably presumed incapable of criminal capacity; and individuals 14 and older are presumed capable of criminal capacity.

8. While the Law Council is best placed to examine how the presumption of doli incapax operates across the different jurisdictions, if it was going to be maintained, the Society suggests that it be codified with a view to adopting nationally consistent legislation. Such an approach must address the difficulty in determining the capacity of the juvenile at the time of the offence as well as the issue of the burden of proof. This means that any legislated doli incapax provisions would need to:

8.1 involve a psychological assessment of the juvenile at the earliest possible stage;
8.2 prescribe the range of factors the judge must consider when exercising his or her discretion (with the best interests of the child being the paramount consideration); and
8.3 avoid the practical reserved onus issues arising from the existing common law principle by requiring the prosecution to always rebut the presumption.

9. It is further suggested that if such reforms were pursued (as opposed to an overall increase in the age of criminal responsibility from 10 to 14 years of age as suggested above), they should be accompanied by an increase to the legislated minimum age of criminal responsibility to at least 12 years of age.

Should there be a separate (higher) minimum age of detention?

10. The Society supports a comprehensive review of all Australian jurisdiction’s laws and policies relating to the detention of children, informed by the principles of United Nations Convention on the Rights of the Child General Comment 24. General Comment 24 makes it clear that certain forms of detention (e.g. incommunicado detention) should not be permitted for anyone under 18. It also contains a range of other relevant principles to help guide policy makers in this area, including:

10.1 imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
10.2 every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours; and
10.3 every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in a centre of prison for adults.

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3 See R v M [1977] 16 SASR 589, 591; The Queen v M 16 SASR 589, 591 (Bray CJ).
What programs and frameworks (e.g. social diversion and preventative strategies) may be required if the age is raised?

11. The Society considers that increased investment in and implementation of programs and strategies that seek to divert young people out of the criminal justice system is required, whether the age of criminal responsibility is raised or not. Such programs and strategies should be aimed at particularly vulnerable groups such as Aboriginal children and children in care.

Is there a need for new criminal offences in Australia for persons who exploit or incite children who fall under the minimum age to participate in behaviours which may otherwise be a criminal offence?

12. The Society notes that section 267 of the Criminal Law Consolidation Act 1935 (SA) (“the CLCA”) provides that a person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender. "Abets" means to incite, instigate or encourage.4

13. The act of encouraging or inciting a person to commit an offence would be covered by this provision. Even where it might not be possible to obtain a conviction for the principal offender, this is not a bar to a person being convicted of aiding and abetting an offence, pursuant to section 267 of the CLCA. Therefore, it would be possible for an adult to be convicted for an offence pursuant to this provision, in the circumstances where the principal is a child aged under 10 years of age (and doli incapax).5

14. In addition, the common law offence of incitement may also apply in South Australia. The meaning of incitement is broad; it includes to arouse, to stimulate, to hasten, to urge forward, to encourage, to spur on, to stir up, and to instigate etc.6 Unlike the statutory offence of aiding and abetting, pursuant to section 267 of the CLCA, the offence of incitement does not require the person incited to commit the offence.7 Thus an adult encouraging a child under ten years of age to commit an offence would come within the scope of incitement, and constitute an offence. It is not necessary for the child to act on that incitement. It is the act of incitement alone that constitutes the offending conduct.

Yours sincerely

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7 R v Haines (2001) 80 SASR 363, 368.