

## OLD ENOUGH TO KNOW BETTER? REFORM OPTIONS FOR SOUTH AUSTRALIA'S AGE OF CRIMINALITY LAWS

### I INTRODUCTION

The minimum age of criminal responsibility is the age below which children are considered by law not to have the capacity to infringe the criminal law.<sup>1</sup> As the Australian Council of Attorneys-General grapples with the challenge of articulating a nationally consistent approach to the minimum age of criminal responsibility,<sup>2</sup> it is timely to consider where South Australia fits within the broader legal landscape and to reflect upon the options for legislative reform that meet recently updated international human rights standards. Not only is this a legal imperative, given Australia's voluntarily assumed obligations under the *Convention on the Rights of the Child* ('CRC'),<sup>3</sup> but it also has significant normative and practical implications for the lives of South Australian children and their families.<sup>4</sup> In this comment, we briefly outline South Australia's current juvenile criminal capacity laws and the

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<sup>1</sup> Committee on the Rights of the Child, *General Comment No 24 (2019): Children's Rights in Juvenile Justice*, UN Doc CRC/C/GC/24 (18 September 2019) para 6 ('*General Comment No 24*').

<sup>2</sup> Council of Attorneys-General, *Communiqué* (23 November 2018) 4; Council of Attorneys-General, *Communiqué* (29 November 2019) 4.

<sup>3</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2) ('CRC'). Indeed, international human rights bodies have consistently expressed concerns about Australia's current laws governing the criminal capacity of children and have advocated for change: see, eg, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Australia*, 40<sup>th</sup> sess, UN Doc CRC/C/15/Add.268 (20 October 2005) para 74 ('*Concluding Observations: Australia 40<sup>th</sup> sess*'); Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) para 84 ('*Concluding Observations: Australia 60<sup>th</sup> sess*'); Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 44 ('*Concluding Observations on the Sixth Periodic Report of Australia*').

<sup>4</sup> See Margaret White, 'Youth Justice and the Age of Criminal Responsibility: Some Reflections' (2019) 40(1) *Adelaide Law Review* 257.

extent to which they comply with the international human rights standards contained in the recently updated *General Comment No 24* from the United Nations Committee on the Convention of the Rights of the Child ('CRC Committee').<sup>5</sup> We conclude by offering three options for reform of South Australian laws in this area, with the aim of contributing to the broader debate surrounding juvenile justice in this State. Throughout this comment, we retain an explicit focus on the *legislative* response to criminal conduct by children in South Australia. In so doing, we are acutely aware of the broader policy context in which any legislative reform in this area would take place, some of which has been articulated recently by Margaret White,<sup>6</sup> and we recognise the critical need to take a holistic approach to juvenile justice in our community.

## II CURRENT SOUTH AUSTRALIAN LAWS

The current South Australian approach to the age of criminality is a hybrid model — s 5 of the *Young Offenders Act 1993* (SA) ('*Young Offenders Act*') provides a 'bottom floor' by stipulating that a person under the age of 10 years cannot commit an offence, while the common law provides a rebuttable presumption that children aged between 10 and 14 'lack the capacity' to be criminally responsible for their acts.<sup>7</sup> This presumption is called *doli incapax* and can be rebutted if the prosecution can show that the child 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.<sup>8</sup> Taken together, this means that children under 10 in South Australia can never be held criminally responsible for offending conduct and, unless the prosecution can show otherwise, those between 10 and 14 will be presumed to lack criminal capacity. The current legal framework gives rise to at least three key questions for those contemplating law reform in this space to consider:

- how does the *doli incapax* presumption work in practice?
- is the current hybrid model appropriate, having regard to Australia's international human rights law obligations?
- what are the practical consequences that flow from any changes to the law in this area?

We examine these questions below in support of the conclusion that there is a strong case for reform in this area.

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<sup>5</sup> *General Comment No 24* (n 1).

<sup>6</sup> White (n 4).

<sup>7</sup> *R v Gorrie* (1918) 83 JP 136, affd *R v M* (1977) 16 SASR 589 ('*R v M*').

<sup>8</sup> *R v M* (n 7) 591 (Bray CJ).

### III HOW DOES THE *DOLI INCAPAX* PRESUMPTION WORK IN PRACTICE?

Before contemplating the options for legislative reform in South Australia, it is important to understand how the existing laws function in practice. Here, the use of the rebuttable *doli incapax* presumption is particularly important as it reveals significant insights into both the need for reform in this area, and the challenges associated with raising the age of criminality.

The traditional rationale behind the concept of *doli incapax* is that the law should punish those who behave in a way that they know is ‘morally wrong’ rather than ‘merely naughty or mischievous’.<sup>9</sup> In previous reports on its compliance with its international human rights obligations, Australia has defended the use of the *doli incapax* presumption as part of its implementation of art 40(3) of the CRC on the grounds that it provides a ‘gradual transition to full criminal responsibility’<sup>10</sup> which recognises the progressive psychological development of children and young adults.<sup>11</sup> Indeed, proponents of *doli incapax* explain that it is a ‘practical way of acknowledging young people’s developing capacities.’<sup>12</sup> By focusing on the individual’s capacity, *doli incapax* is thought to counteract the arbitrariness of setting an age limit and provide for a more individualised and transitional approach.

Notwithstanding the logic of this rationale, from a practical perspective, the presumption appears to be failing on a number of fronts.<sup>13</sup> The case law suggests that the difficulty in proving a child’s capacity at the time of the alleged offence has resulted in questionable legal reasoning, highly prejudicial material being included in proceedings, and a practical reversal of the onus of proof. These factors mean that the presumption is rarely raised.<sup>14</sup>

The problematic elements of the *doli incapax* presumption, in particular the strategies used by prosecutors to rebut the presumption and the legal reasoning adopted by the courts when ruling on the application of *doli incapax*, can be seen in a number of cases. For example, in *C (a minor) v DPP* evidence that the defendant (who was a

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<sup>9</sup> Julia Fionda, ‘Doli incapax’ (1995) 5 *King’s College Law Journal* 114, 115.

<sup>10</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/31/14 (13 January 2016) [132].

<sup>11</sup> White (n 4) 266; Nuria Carriedo et al, ‘Development of the Updating Executive Function: from Seven-Year-Olds to Young Adults’ (2016) 52(4) *Developmental Psychology* 666, 675–6.

<sup>12</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 30 September 1997) [18.20] (‘*Seen and Heard: Priority for Children in the Legal Process*’).

<sup>13</sup> See, eg, 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, 140–1.

<sup>14</sup> Lisa Bradley, ‘The Age of Criminal Responsibility Revisited’ (2003) 8(1) *Deakin Law Review* 73, 85.

minor) fled from police was sufficient for the presumption to be rebutted as it was found to indicate a knowledge that the actions constituted an offence.<sup>15</sup> In the case of *A (a minor) v DPP* — involving two boys accused of homicide by throwing rocks from a freeway overpass — the prosecution adduced evidence from school teachers to rebut the *doli incapax* presumption on the basis that the defendants were aware that rock-throwing was banned at their school, and therefore they understood the criminal nature of their actions.<sup>16</sup>

Given the difficulty in proving the capacity of a child at the time of the alleged offence, highly prejudicial material such as confessions and previous offences have been admitted to show capacity. This is compounded by the criminal justice procedure in Australia, where the defence counsel's consideration of *doli incapax* occurs after substantial police contact with the accused juvenile.<sup>17</sup>

Also of concern is that, at least from a practical perspective, the defendant is likely to have to demonstrate that the juvenile is *doli incapax* by adducing expert psychological evidence if the prosecution seeks to rebut the presumption at trial.<sup>18</sup> This gives rise to a range of strategic and resource-based questions for defence counsel to consider which may or may not align with the psychological status or needs of the child defendant. These tensions between exploring the viability of relying upon the *doli incapax* defence and the availability and affordability of expert psychological evidence can place acute pressures on the defendant and their counsel, particularly given the propensity for child defendants to come from low socio-economic backgrounds<sup>19</sup>. Further, there appears to be a shortage of qualified psychologists in some parts of Australia who can appropriately assess the criminal capacity of children and young people.<sup>20</sup> Taken together, these factors suggest that *doli incapax* is having a detrimental impact on a child's right to a fair trial.<sup>21</sup> As discussed below, this is consistent with the observations of the CRC Committee in *General Comment No 24*.

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<sup>15</sup> [1996] 2 AC 1.

<sup>16</sup> [1992] Crim LR 34. For discussion see Terence Bartholomew, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in the Supreme Court of Victoria, Australia' (1998) 5 *Psychiatry, Psychology and the Law* 95, 100–2.

<sup>17</sup> Patricia Blazey-Ayoub, 'Doli Incapax' (1996) 20(1) *Criminal Law Journal* 34, 35.

<sup>18</sup> O'Brien and Fitz-Gibbon (n 13) 140.

<sup>19</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2018–19* (Report, 15 May 2020) 12.

<sup>20</sup> O'Brien and Fitz-Gibbon (n 13) 140.

<sup>21</sup> On the right to a fair trial see generally *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; *CRC* (n 3) art 40(2).

#### IV IS THE CURRENT ‘BOTTOM FLOOR’ OF 10 YEARS APPROPRIATE HAVING REGARD TO AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS?

The short answer to this question is ‘no’ — both features of the South Australian approach (the 10 years of age ‘bottom floor’ and the use of the *doli incapax* presumption) are incompatible with the approach to age of criminality recommended by international human rights bodies.

The international community has long recognised that a child’s lack of moral and physical maturity demands that special considerations should apply before holding them criminally responsible for their conduct. Decades of scientific research into the development of the human brain has now revealed much about the capacity of children or adolescents to understand fully the consequences or culpability of their actions.<sup>22</sup> As White summarises:

Even in optimal developmental circumstances, after a child leaves the highly vulnerable age of infant dependence and approaches adolescence, brain structure and processes undergo considerable change. Since its advent, magnetic imaging has shown that the adolescent brain is structurally different to that of a mature adult and, particularly in the area devoted to impulse control and decision-making, inclined to risk taking.<sup>23</sup>

As White explains, over the years the international response to wrongdoing by children has been to ‘raise the age at which they are deemed to be criminally responsible for their acts’.<sup>24</sup> This is reflected in a range of international conventions to which Australia is a party, and most explicitly in art 40(3) of the *CRC* which provides that

States Parties shall seek to promote the establishment of laws ... in particular:  
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law ...<sup>25</sup>

Precisely what this ‘minimum age’ should be and how it should be implemented in practice has been subject to a developing body of international law, most recently culminating in a detailed pronouncement by the *CRC* Committee in *General*

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<sup>22</sup> See, eg, the range of research cited in Sara B Johnson, Robert W Blum and Jay N Giedd, ‘Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy’ (2009) 45(3) *Journal of Adolescent Health* 216, 218.

<sup>23</sup> White (n 4) 266, citing Staci A Gruber and Deborah A Yurgelun-Todd, ‘Neurobiology and the Law: A Role in Juvenile Justice?’ (2006) 3(2) *Ohio State Journal of Criminal Law* 321, 330.

<sup>24</sup> White (n 4) 267.

<sup>25</sup> *CRC* (n 3) art 40(3).

*Comment No 24*,<sup>26</sup> which replaces and clarifies previous iterations of the Committee's statements on children's rights in juvenile justice.<sup>27</sup>

In *General Comment No 24*, the CRC Committee acknowledges that while art 40(3) of the *CRC* requires States parties to prescribe a minimum age of criminal responsibility, it does not set out what that age should be.<sup>28</sup> Reports submitted to the CRC Committee from States parties to the *CRC* suggest that a wide variety of minimum ages have been prescribed, ranging from a very low level of age seven or eight to 'the commendably high level' of 14 or 16.<sup>29</sup> This prompted the CRC Committee to provide the States parties with clear guidance regarding the minimum age of criminal responsibility. In *General Comment No 10* (2007), the CRC Committee considered 12 years to be the absolute minimum age — the appropriate 'bottom floor'.<sup>30</sup> However, in its 2019 *General Comment No 24*, it considered 12 years to be still too low.<sup>31</sup> It now encourages States parties to increase their minimum age to 'at least 14 years of age' and commends States parties that have a higher minimum age, such as 15 or 16 years.<sup>32</sup>

This leaves South Australia — with its 'bottom floor' of 10 years — well below the international standard. Even if the rebuttable *doli incapax* presumption is taken into account, the South Australian hybrid model appears to fall well short of the parameters set by the CRC Committee. The CRC Committee expressed particular concern about States parties allowing exceptions to the minimum age of criminal responsibility 'in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible'<sup>33</sup> as a way to approach their international obligations in this area. As the use of *doli incompax*, in effect, reduces the age of criminality from 14 to 10, it may be viewed as an example of an exception that the CRC Committee 'strongly recommends' that States parties do not allow.<sup>34</sup> The CRC Committee also expressed concern about the reliance on presumptions and principles that depend exclusively on the use of judicial discretion to determine questions of the child's psychological maturity, which 'results in practice in the use of the lower minimum age in cases of serious crimes'.<sup>35</sup> The Committee concluded that such hybrid models create confusion and uncertainty, and also 'may result in discriminatory practices'.<sup>36</sup>

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<sup>26</sup> *General Comment No 24* (n 1).

<sup>27</sup> See, eg, Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) ('*General Comment No 10*').

<sup>28</sup> *Ibid* para 31.

<sup>29</sup> *General Comment No 24* (n 1) para 32.

<sup>30</sup> *General Comment No 10* (n 27).

<sup>31</sup> *General Comment No 24* (n 1) para 33.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* para 35.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* para 43.

<sup>36</sup> *Ibid*.

This is consistent with the views of the CRC Committee in earlier iterations of *General Comment No 24*, such as in *General Comment No 10*, where it expressed concerns that *doli incapax* assessments are confusing, elevate judicial discretion over psychological assessments, and lead to lower minimum age ranges being applied.<sup>37</sup> Indeed, both the CRC Committee and the Human Rights Committee have criticised Australia's juvenile justice framework for failing to meet international standards and have recommended that the age of criminal responsibility in Australia be raised.<sup>38</sup>

Before setting out its views on the minimum age of criminal responsibility, the CRC Committee acknowledged the fact that even very young children can commit offences, but explained that when they do so, they should be dealt with through diversionary or special protective measures, rather than through the criminal process.<sup>39</sup> As discussed further below, South Australia's response to criminal behaviour of young children is one of the practical implications that needs to be considered carefully when contemplating reform in this area.

## V WHAT ARE THE PRACTICAL CONSEQUENCES THAT FLOW FROM ANY CHANGES TO THE LAW IN THIS AREA?

In light of the above considerations, it appears that there is a strong case for reform to raise the age of criminality in South Australia. Calls for reform have also been made by a wide range of organisations with direct experience in the juvenile justice system, including the South Australian Guardian for Children and Young People and the South Australian Commissioner for Children and Young People.<sup>40</sup>

The South Australian Government is not opposed to reform per se but has expressed a desire for a consistent national approach.<sup>41</sup> It has been openly supportive of the Council of Attorneys-General's approach of undertaking a national consultation on

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<sup>37</sup> *General Comment No 10* (n 27) para 30.

<sup>38</sup> *Concluding Observations: Australia 60<sup>th</sup> sess* (n 3) para 82; *Concluding Observations: Australia 40<sup>th</sup> sess* (n 3) para 74(a); *Concluding Observations on the Sixth Periodic Report of Australia* (n 3) para 44.

<sup>39</sup> *General Comment No 10* (n 27) para 31; *General Comment No 24* (n 1) paras 24–26.

<sup>40</sup> See, eg, Rebecca DiGirolamo, 'Children Charged as Criminals: But Is the Age of Responsibility Too Young in South Australia?', *The Advertiser* (online, 22 June 2019) <<https://www.adelaidenow.com.au/news/south-australia/children-charged-as-criminals-but-is-the-age-of-responsibility-too-young-in-south-australia/news-story/f06a3620acdc2154cf98401adba3cdbf>>.

<sup>41</sup> National Children's Commissioner, *Children's Rights Report 2017* (Australian Human Rights Commission Report, 5 December 2017) 46 ('*Children's Rights Report 2017*'); Harrison Schultz, 'Member for Mayo Rebekha Sharkie Pushes for Criminal Responsibility Age to be Raised from 10 to 14', *The Times* (online, 16 October 2019) <<https://www.victorharbortimes.com.au/story/6442212/push-to-change-criminal-responsibility-age/?cs=3991>>.

the age of criminality laws in different jurisdictions with the aim of developing a national best practice model.<sup>42</sup>

South Australia could be well placed to lead this discussion. For example, it could present a range of clear legislative reform options for improving compliance with international human rights standards. South Australia could also share research and other qualitative and quantitative data about the impact of various reform options on the juvenile justice system and, most importantly, on the lives of children and their families. This is not to suggest that reform in this space will be easy — any legislative change that would remove children and young people from the scope of the *Young Offenders Act* would need to be accompanied by complementary policy changes and additional resourcing of alternative measures of responding to criminal behaviour from this cohort of offenders. Some of these alternatives are discussed below in the context of three possible legislative reform options for South Australian policymakers — and the community more generally — to consider as part of the broader conversation about raising the age of criminality in this country.

*A Option 1: Raise the Minimum Age of Responsibility to 12 and  
Codify the Doli Incapax Presumption*

This option would retain the existing hybrid model by raising the current ‘bottom floor’ of criminality up from 10 years to 12, whilst at the same time maintaining the common law *doli incapax* rebuttable presumption for ages 12 to 14, albeit in codified form.

This approach could encapsulate the potential benefits of the *doli incapax* approach (described above) whilst improving certainty of its application and addressing the risk of misuse by setting out in legislation precisely how the presumption should be applied or rebutted.

If effectively achieved, the legislated form of *doli incapax* could work to ensure that an individualised and non-discriminatory approach to criminal capacity is maintained, whilst attempting to limit any prejudicial effect of the *doli incapax* presumption as currently applied. These recommendations are consistent with the Australian Law Reform Commission’s recommendations that *doli incapax* should be established by legislation in all jurisdictions.<sup>43</sup>

Central to the issues arising from *doli incapax* is the difficulty in determining the capacity of the child at the time of the offence. Therefore, a legislated form of *doli incapax* would need to involve a psychological assessment of the child at the earliest possible stage. This would ensure the assessment of criminal capacity is contemporary to the alleged crime and minimise the contaminating effect of criminal law procedures. To address international concerns with the broad discretion afforded to the judiciary when determining if a child has criminal capacity, a mandated

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<sup>42</sup> *Children’s Rights Report 2017* (n 41) 46.

<sup>43</sup> *Seen and Heard: Priority for Children in the Legal Process* (n 12) [18.20].

psychological assessment of the child and instructions for judicial officers to consider the psychological assessment when making decisions should be included. To avoid imposing a reverse onus upon defendants who may seek to rely upon the *doli incapax* principle, any legislation should include explicit provisions to require the prosecution to rebut the presumption once raised. It is important to note that increasing the minimum age to 12 years does not meet the age requirement of 14 years expressed in *General Comment No 24*. However, this option would go some way to addressing the international concerns with *doli incapax* and allow for the protection of children under 12 years old, who do not possess criminal capacity.

B *Option 2: Raise the Minimum Age of Criminal Responsibility to 14 Years and Abolish the Doli Incapax Presumption*

This option would require amending s 5 of the *Young Offenders Act* to replace the reference of 10 years to 14 years, ensuring that no children under the age of 14 could be held criminally responsible in South Australia. This could be accompanied by a clear legislative statement within the *Young Offenders Act* that the common law *doli incapax* rebuttable presumption is abolished.

This option would greatly improve South Australia's compliance with art 40(3) of the *CRC*, as outlined in *General Comment No 24*. It would also address the range of difficulties associated with *doli incapax*, as described above. Such an approach is supported by the Australian Human Rights Commission and the Law Council of Australia.<sup>44</sup>

It would, however, need to be accompanied by careful consideration as to what civil or administrative responses should be implemented in order to respond to criminal conduct undertaken by children aged between 10 and 14, and what types of investments would need to be made to prevent, deter and rehabilitate offending within that demographic.

C *Option 3: Adopt a Public Health or Welfare Model to Juvenile Offending Regardless of Age*

A third, alternative option to simply raising the age of criminality would be to undertake a more holistic reform of South Australia's approach to juvenile justice by adopting what White describes as a 'public health and welfare model'.<sup>45</sup> Such a model would be better suited to deal with issues that can lead to juvenile offending,

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<sup>44</sup> National Children's Commissioner, *Children's Rights Report 2019* (Australian Human Rights Commission Report, 28 October 2019) 19 ('*Children's Rights Report 2019*'); Law Council of Australia, 'Law Council Backs Push for Increase to Minimum Age of Criminal Responsibility' (Media Release, 14 October 2019).

<sup>45</sup> White (n 4) 271.

such as poverty, mental or physical illness, family violence, childhood neglect, and substance abuse.<sup>46</sup>

Public health and welfare models have now been trialled and evaluated in other comparable jurisdictions. This includes the long-running and much-praised Scottish approach to rehabilitating children and adolescents who engage in criminal conduct, which was first recommended by the Kilbrandon Committee more than 50 years ago.<sup>47</sup> These approaches aim to remove children from the criminal justice system and focus resources on rehabilitation and education. Instead of bringing children before courts, young offenders are brought before welfare panels for assessment as to their rehabilitation needs.<sup>48</sup> While prosecutors retain a discretion to prosecute in exceptional cases, this option is rarely used.<sup>49</sup> As White concludes:

So much more is now known about the fundamental damage that exposure to poverty, violence, neglect and the other calamities of life do to the structure of the brain, with consequences of mental, cognitive and physical ill health than when our legal responses to childhood delinquency were developed. It is irrational to continue to base a system on processes that do not produce beneficial outcomes when other, more successful approaches are known and not beyond reach.<sup>50</sup>

## VI CONCLUSION

South Australia's existing laws on the age of criminality are part of an Australia-wide approach to juvenile justice that results in many thousands of young people being subject to supervision or detention every day,<sup>51</sup> and can lead to high rates of recidivism and more serious offending, particularly for those subject to custodial sentences.<sup>52</sup> The Council of Australian Governments has agreed to examine whether to raise

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<sup>46</sup> See, eg, Judy Cashmore, 'The Link between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' (2011) 89 *Family Matters* 31, 36; Elizabeth Brown and Mike Males, 'Does Age or Poverty Level Best Predict Criminal Arrest and Homicide Rates? A Preliminary Investigation' (2011) 8(1) *Justice Policy Journal* 23, 23; V A Morgan et al, 'A Whole-of-Population Study of the Prevalence and Patterns of Criminal Offending in People with Schizophrenia and Other Mental Illness' (2013) 43(9) *Psychological Medicine* 1869, 1869.

<sup>47</sup> John A Mack, 'The Kilbrandon Report' (1964) 4(6) *The British Journal of Criminology* 604; Gerry Maher, 'Age and Criminal Responsibility' (2005) 2(2) *Ohio State Journal of Criminal Law* 497; White (n 4) 269.

<sup>48</sup> White (n 4) 268.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* 271.

<sup>51</sup> Australian Institute of Health and Welfare (n 19) 5.

<sup>52</sup> *Children's Rights Report 2019* (n 44) 235; Australian Human Rights Commission, *Review of the Age of Criminal Responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 11.

the age of criminal responsibility and has a consultation plan in mind.<sup>53</sup> However, immediate action could be taken by South Australia to reform its particular version of the hybrid model, which sets the ‘bottom floor’ at 10 years of age and incorporates the problematic *doli incapax* presumption. These current laws are inconsistent with Australia’s human rights obligations and, in particular, the CRC Committee’s recent *General Comment No 24*. They are also inconsistent with a growing body of evidence that points to the need to reassess this type of approach to assessing a child’s maturity and capacity to understand the consequences of their offending behaviour.

In *General Comment No 24*, the CRC Committee emphasises what it considers to be the core elements or objectives of state practice when it comes to juvenile justice, which include:

- the prevention of child offending, including through the use of interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings;
- establishing a minimum age of criminal responsibility;
- protecting the rights of children in detention including in pre-trial detention and post-trial incarceration; and
- protecting the rights of children in the post-detention phase, including reintegration services.<sup>54</sup>

In this comment, we have sought to discuss just one of these elements and suggest options for reform. We recognise, however, that states should refrain from making changes to one of these elements of a broader juvenile justice policy without carefully considering the implications for other elements and objectives. We look forward to South Australia taking a leadership role in the national discussion on this important issue.

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<sup>53</sup> Council of Attorneys-General, *Communiqué* (29 November 2019) 4.

<sup>54</sup> *General Comment No 24* (n 1) para 17.

