

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Raising the Minimum Age of  
Criminal Responsibility**  
**LAW REFORM CONSIDERATIONS**

RESEARCH REPORT NO. 5

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## About the Tasmania Law Reform Institute

The Tasmania Law Reform Institute (TLRI) is Tasmania's peak independent law reform body. The TLRI was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The TLRI is based at the Faculty of Law at the University of Tasmania. The TLRI undertakes law reform work and research on topics proposed by the government, the community, the University and the TLRI itself.

The work of the TLRI involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other states and the Commonwealth.

The TLRI's Acting Director is Associate Professor Brendan Gogarty. For the purpose of this reference, the members of the Board of the TLRI are: the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania); Professor Michael Stuckey (Faculty of Law at the University of Tasmania appointed by the Vice Chancellor of the University of Tasmania); Associate Professor Brendan Gogarty (Chair); Ms Kristy Bourne (appointed by the Attorney-General); Mr Craig Mackie (nominated by the Tasmanian Bar Association); Ms Ann Hughes (appointed at the invitation of the TLRI Board); Mr Rohan Foon (appointed by the Law Society of Tasmania); Ms Kim Baumeler (appointed at the invitation of the TLRI Board); and Ms Rosie Smith (appointed at the invitation of the TLRI Board as a member of the Tasmanian Aboriginal community). The Board oversees the TLRI's research, considering each reference before it is accepted, making recommendations and approving publications before their release.

### Acknowledgements

This Research Report was prepared for the Board by Associate Professor Brendan Gogarty and Ms Chun Yu with the research assistance of Ms Denice Chang.

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This research has been approved by the University of Tasmania's Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this Inquiry, please contact the Executive Officer of the Human Research Ethics Committee (Tasmania) Network on +61 3 6226 6254 or email [human.ethics@utas.edu.au](mailto:human.ethics@utas.edu.au). The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0016752.

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## Part I

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# REPORT AND RECOMMENDATIONS

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## 1 Overview

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- 1.1.1. This Advisory Report considers legal, and in particular law reform, implications of raising the minimum age of criminal responsibility (MACR) in Tasmania from its present statutory prescription of 10 years old (with a 14-year-old presumption of *doli incapax* or criminal incapacity). The advice in this Report was sought by the Tasmanian Commissioner for Children and Young People (CCYP). The Law Foundation of Tasmania provided financial support for its preparation. The Institute has also been provided a range of confidential submissions from peak public bodies and social services in Tasmania arising from a forum on MACR in early 2021 held by the CCYP. These submissions have informed the advice in this Report.
- 1.1.2. The scope of this Report is limited to the following questions, with the third specifying the nature of recommendations to be made.
- 1) How has the issue of MACR and the balancing of community versus individual rights and interests been approached in other jurisdictions?
  - 2) What options are there for an alternative legal framework to ensure children who exhibit harmful behaviours receive appropriate community support directed at addressing the risk factors for their behaviour?
  - 3) **If the MACR is raised in Tasmania what, if any, additional law reform would be required to ensure community safety and promote the wellbeing of those children aged less than the MACR who exhibit harmful behaviours?**
- 1.1.3. Both the questions asked and the answers given in this Report assume a commitment to raising the MACR in Tasmania. This is a technical report addressing those questions, and in particular the third question on necessary law reform options for Tasmania. This Report does not consider:

- The efficacy of the Youth Justice system, especially in relation to its achievement of its aims and objectives;
- The best or most appropriate therapeutic, educational, or restorative approaches to reducing harm; or
- The best way to deal with crime as a representation of individual or community disadvantage, inequality or trauma.

1.1.4. The responses here do not necessarily reflect the Institute’s view on raising the MACR, and notably to what age it should be raised. Importantly the critical analysis of some of the policy arguments for raising the age should not be mischaracterised as a criticism of raising the age, or the Institute’s intent to discourage law reform in this space.

1.1.5. The Institute is concerned that law reform is properly considered, justified and relevant to Tasmanian conditions, and takes account of the human rights, legal and governance implications that altering a core fixture of the legal system creates. The analysis in this Report is designed to help frame the policy position on law reform, ensure that reform is proportionately balanced and calibrated, and identify the extra-legal reforms that are necessary.

1.1.6. The Institute is especially concerned that the question of the MACR not be considered in isolation or serve to detract from the much larger task of appropriately responding to children in conflict with the law. A child’s pathway towards adulthood is gradual and influenced by a range of biological and environmental factors. Children’s developmental capacity, personality and needs are more than a product of their numeric age. The best interests of the child and the community are in individualised not generalised responses to harmful conduct and its drivers. It is therefore the Institute’s view that raising the MACR can only be one component of a much larger public and social services approach to harmful behaviour by children.

1.1.7. This Report should be read within the confines of its Terms of Reference, and in the longer term in a complementary way with the policy and service recommendations made by the Office of the CCYP on this topic.

1.1.8. This Report addresses the Terms of Reference in four sections.

**Section 1.** This Introduction.

**Section 2.** A brief background and considerations for evidence-based law reform in Tasmania

**Section 3.** An overview of how the MACR is integrated into other jurisdiction’s legal frameworks to respond to harmful behaviour by children.

**Section 4.** Law reform recommendations for Tasmania.

- 1.1.9. **Additional Materials.** A separate volume of materials which informed this Report and its recommendations is attached which provides more detailed and descriptive summaries of Tasmanian law relevant to children and young people (Part 2), and more in-depth case studies and tabular comparisons of how other jurisdictions deal with children in conflict with the law (Part 3).

## Approach

- 1.1.10. As the Terms of Reference were directed to a form of rights balancing, the Institute identified the following rights as relevant to each of the communities affected by a change to the MACR. They are the rights of:
- A child to non-discriminatory treatment, directed to their best interest, and addressed to their personal development and voice;
  - Victims of harmful behaviour to justice and fair treatment, restitution, compensation and assistance; and
  - The Tasmanian community to public safety and order, including the collective interest in ensuring children understand and respect the rights of others.
- 1.1.11. The recommendations are also informed by a range of broader international rights instruments, international measures, and the guidance of relevant international rights organisations such as the United Nations Committee on the Rights of the Child.
- 1.1.12. In addition, the Institute considered the common law principles informing the MACR. It also considered the fundamental rights, duties, and functions of the criminal justice system that the MACR marks the entry point into.
- 1.1.13. The Institute considered a range of arguments for raising the age within the lens of the fundamental rights and functions set out above and adopted the following law reform principles. These include any reformed law's need to:
- Limit children's contact with the broader criminal justice system;
  - Ensure the law is individualised not generalised to each child's circumstances and conduct;
  - Protect and promote the integrity of family, culture and community;
  - Be trauma responsive;
  - Reduce risk from harmful and antisocial behaviour;
  - Uphold and vindicate the rights of victims;
  - Promote community safety and values; and
  - De-escalate self-help remedies and vigilantism against children.
- 1.1.14. Based on these law reform principles the Institute considered how various approaches adopted by other OECD jurisdictions might be implemented in Tasmania as part of law reform to raise the MACR. Relevant approaches included:
- Using child focused systems which are either based on child protection, specialist child and youth justice or a combination of these;

- Within those systems applying tailored, trauma-informed, and developmentally and culturally appropriate institutional measures to educate and therapeutically address risks children pose to themselves and others;
- Articulating, clarifying and guiding the role and duties of police and other first responders to deal with violent and antisocial behaviour by children; and
- Guiding or limiting the ways in which children can be prosecuted and detained within the criminal justice system as a way of ensuring the first option is always child protection.

## Summary of Recommendations

1.1.15. In respect of the identified law reform principles, Tasmanian law does not require a significant level of reform to raise the MACR or associated criminal and youth justice laws. The Institute does not recommend the implementation of a new legislative regime, public office or hearing system. Rather it recommends some amendment and re-calibration of existing law to ensure the rights and interests of relevant communities are adequately addressed and that appropriately tailored child protection and care is the mandated approach under the MACR, and the assumed approach in the rebuttable age range above it.

1.1.16. The Institute's recommendations are as follows.

- 1.** Section 18 of the *Criminal Code 1924* (Tas) should be rephrased to specify that no child under the MACR 'is criminally responsible' for an act or omission.
- 2.** The *Children, Young Persons and Their Families Act 1997* (Tas) should be amended to clarify that children who cause risk to themselves or others come within the jurisdiction of the Act.
- 3.** The roles, responsibilities and restrictions for police dealing with children younger than the MACR should be clarified by statute.
- 4.** Police powers to collect forensic evidence from children should be amended to reflect any new MACR.
- 5.** The *Children, Young Persons and Their Families Act 1997* (Tas) should be amended to specify that a court may determine the rules of evidence that apply to a matter relating to the care and protection of a child.
- 6.** Victims of crime compensation legislation should be expanded to cover property damage caused by children who are younger than the MACR.

- 7.** A new provision should be added to the *Criminal Code* to proscribe the intentional recruitment of children to commit an offence.
- 8.** The rebuttable presumption of *doli incapax* should be retained and consideration should be given as to whether the upper absolute age of discretion should move along with the lower MACR.

## 2 Background, analysis and principles

### 2.1. History of MACR in Tasmania

2.1.1. Tasmania last raised the minimum age of criminal responsibility (MACR) from the age of 8 to 10 just over twenty years ago in 2000. A presumption of criminal incompetence (*doli incapax*) remained undisturbed by the reforms and is statutorily fixed at 14 years old. This is expressed in s 18 of the Criminal Code which currently stipulates:

- (1) No act or omission done or made by a person under 10 years of age is an offence. [MACR]
- (2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make. [*doli incapax*]

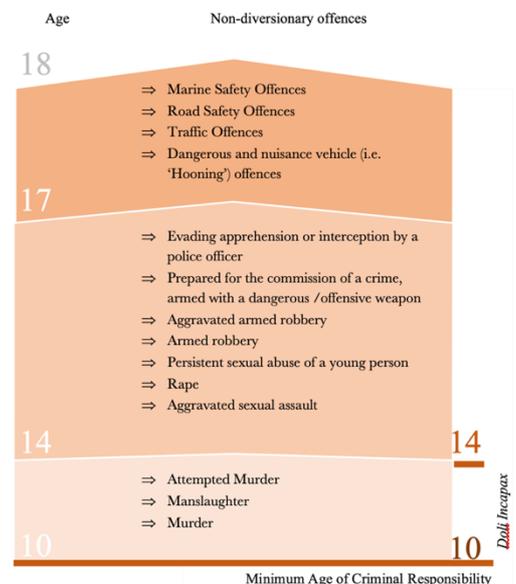
2.1.2. The 2000 reforms brought Tasmania into line with other Australian jurisdictions (in respect of age, not legal terminology [see Additional Materials 5.4.1]). This uniformity was consistent with the Australian Law Reform Commission's recommendation that the minimum age at which children may be subject to criminal law be consistent across Australia.

2.1.3. The raised MACR was contained within a broader package of reforms to youth justice law in Tasmania, which were broadly designed to transition from a 'welfare' model towards a responsibility model of justice [see 5.7.5]. This youth justice approach is aimed at encouraging a child and their guardian(s) to take greater responsibility for offending behaviour in a constructive way, leaving coercive state intervention, and sanctions as options of last resort.

2.1.4. The responsibility-focused youth justice model introduced a two-tiered system of diversionary processes, which principally aims to divert youth away from the criminal justice system and courts unless the child is uncooperative or involved in habitual or very serious offending [see Additional Materials 5.7.1]

2.1.5. Approximately half of juvenile file outcomes are diverted, though this data is not publicly reported by age and therefore it is unclear whether the proportion is different for younger children.

Figure 1 Tasmania's Youth Justice Model : Non-diversion



## 2.2. Peak positions on raising the age

- 2.2.1. The Institute understands that, in late 2021, after the commissioning of this Report, the Meeting of Attorneys General agreed to raise the MACR to 12 years old across each Australian jurisdiction, including Tasmania. This nationally uniform age is lower than the age of 14 recommended by the Law Council of Australia, United Nations Committee on the Rights of the Child, Commissioner for Children and Young People and a range of peak bodies who made submissions to the 2021 Commissioner's Forum. It is also different to other jurisdictions around the world which utilise MACR ages above and below that age [see Appendix A, p 163].

## 2.3. Considerations for evidence based law reform

- 2.3.1. Noting that this Report does not reflect the Institute's position on raising the MACR, the Institute considers the following principles relevant to the context and background of this Report.

### Rights based principles

- 2.3.2. At its simplest, the MACR operates as a gateway to the criminal justice system in Tasmania. Children younger than the MACR may not, at present, be arrested or prosecuted because their conduct is, as a matter of law, not an offence [see Additional Materials 5.5.14]. Children above the MACR may technically be dealt with by the criminal justice system. Increasing the age will move the entry point to the criminal justice system, limiting the number of people that the system covers and the number of harmful acts it can regulate. The communities that such a legal change will affect are therefore:

- 1) **Children** who would previously have been subject to criminal law but are now not.
  - The four basic principles dictating a duty to the state to children *Convention on the Rights of the Child* are:
    - **Non-discrimination:** all children should enjoy their rights and should never be subjected to any discrimination.<sup>1</sup>
    - **Best interests of the child:** children are vulnerable and have special needs, and all organs of the state are under a duty to ensure children are able to enjoy their rights in a manner that is most conducive to their care, protection and development into adults.<sup>2</sup>

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<sup>1</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2.

<sup>2</sup> *Ibid* art 3. See also *Family Law Act 1975* (Cth) s 43.

- **Survival and development:** the state must ensure that children have the best opportunity to survive and develop physically, emotionally, and socially in a way that allows them to reach their full potential.<sup>3</sup>
- **Respect for the views of the child:** a child who can express their views should be listened to, and their views given due weight in accordance with their age and maturity.<sup>4</sup>

**2) Persons harmed** by the acts of children younger than the MACR (victims). The state is under an obligation to provide equal protection for the fundamental rights to life, liberty and security under the *International Convention on Civil and Political Rights*.<sup>5</sup> More specifically the United Nations General Assembly has articulated four basic principles relating to the obligation of states to protect victims of crime:<sup>6</sup>

- **Access to justice and fair treatment:** victims should be treated with compassion and respect for their dignity in relation to the harm they have suffered. This includes that the views and concerns of victims be presented and considered.<sup>7</sup>
- **Restitution:** persons who have suffered harm should have their rights restored, and property returned.<sup>8</sup>
- **Compensation:** States should endeavour to provide financial compensation to victims and families when other sources are not available.<sup>9</sup>
- **Assistance:** victims should receive the necessary material, medical, psychological and social assistance.<sup>10</sup>

**3) The public** within which, and on behalf of which, the criminal justice system operates. The same obligations to protect individuals under the *International Convention on Civil and Political Rights* apply to the community at large. The *Convention of the Rights on the Child* also commits states to appropriately responding to harmful behaviour by children on behalf of the community (with regard to the child's role within in it. Broadly, states are under an obligation to:

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<sup>3</sup> *Convention on the Rights of the Child* (n 1) art 6.

<sup>4</sup> *Ibid* art 12.

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*').

<sup>6</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34 (29 November 1985).

<sup>7</sup> *Ibid* [4].

<sup>8</sup> *Ibid* [8].

<sup>9</sup> *Ibid* [12].

<sup>10</sup> *Ibid* [14].

- **Protect the public:** States have an international legal right and duty to protect and promote public safety, order, health, morals [and] the fundamental rights and freedoms of others pursuant to the *International Convention on Civil and Political Rights*.
- **Ensure children respect the rights of others:** under the *Convention on the Rights of the Child*, States must ‘reinforce the child's respect for the human rights and fundamental freedoms of others’ with the aim of the child ‘assuming a constructive role in society’.<sup>11</sup>

2.3.3. Each of these communities are entitled to separate, shared and interrelated rights and interests. The rights are interrelated and shared because of the interconnectedness of all these communities. Children harm other children, often because they themselves have been abused. Children are members of the public and their safety and wellbeing is undermined by crime and antisocial behaviour. As the *Convention on the Rights of the Child* makes clear, properly responding to harmful behaviour by children allows them to be integrated into and contribute to society. That is both in the child’s best interests and in society’s best interests.

2.3.4. The law needs to balance and harmonise public and private rights, both of which the state has a duty to uphold. However, the particular vulnerabilities and needs of each community must be given meaningful consideration and weight in this process. Hence the rights of victims may not be able to be realised through a requirement of restitution or compensation from a child, because of the particular special needs and circumstances of the child. Nor should the law unjustifiably preference or elevate the rights of one community over the others. Caring and protecting children does not mean that the rights of those harmed or the wider community should be diminished, but it may require that alternative forms of legal and non-legal measures are adopted.

2.3.5. Considerations for the above rights principles will be incorporated into the analysis of the MACR and recommendations for appropriate law reform to address what, if any, additional law reform would be required to ensure community safety and promote the wellbeing of those children aged less than the MACR who exhibit harmful behaviours.

## 2.4. Principles relevant to criminal law reform

2.4.1. A range of arguments have been made about the raising the MACR. The below analysis aims to critically examine the basic justification for law reform in this area, consider how general arguments for raising the age should be responded to in Tasmania, and inform the character and design of any measures to deal with deviant behaviour by children under a higher threshold

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<sup>11</sup> *Convention on the Rights of the Child* (n 1) art 40(1).

MACR. Specifically, it considers: whether each argument is relevant to Tasmania; whether there are any countervailing considerations; and how the argument may shape and be responded to in law reform. The law reform principles developed from this analysis will be integrated into the above human rights principals and applied in section 3 with reference to relevant approaches taken in other jurisdictions (section 2) that might be adopted in Tasmania.

## **Reforming the age requires broader considerations than custodial detention**

- 2.4.2. A dominant — and sometimes singular — focus of the political campaign to raise the MACR has been directed to the association of criminal responsibility with involuntary detention, and specifically the potential for 10-year-old children to be imprisoned.<sup>12</sup> The Institute’s position is that children should not be subject to punitive detention and should be diverted from the criminal justice system. However, the focus on detention may serve to oversimplify the complex and challenging issues in this area.
- 2.4.3. Focusing on the age of 10 as the age of detention tends to be somewhat misleading given the statutory presumption that children under 14 are not criminally responsible unless the prosecution proves beyond reasonable doubt otherwise. This presumption was strengthened and clarified by the High Court in 2016.<sup>13</sup> There have been no reported appellate cases relating to the presumption being rebutted since that decision was handed down.<sup>14</sup> This means that whilst it is technically possible to prosecute and incarcerate children who are ten years old, it is the legal exception to the rule that children younger than 14 are not criminally responsible.
- 2.4.4. According to the Australian Institute of Health and Welfare, the number of young people in detention on an average day in 2019–2020 in Tasmania was zero (0) for ages 10–13, and 0.5 for age 14 (which is over the upper threshold of the current *doli incapax* and proposed 14-year-old MACR).<sup>15</sup>
- 2.4.5. Ultimately, if reform policy solely or primarily leverages off the association between the MACR and punitive detention of children it may not produce meaningful law reform in practice. Either the policy arguments will be dismissed by reference to the very small statistical likelihood of

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<sup>12</sup> CCYP Forum Submissions 277, 286, 288, 298, 299, 300, 301, 303, 304.

<sup>13</sup> *RP v The Queen* (2016) 259 CLR 641.

<sup>14</sup> The Institute notes the limited number of reported judgments in the Youth Justice division, particularly relating to the calling of evidence by the Prosecution on hearing. This would limit the amount of available data on cases presumption would not be challenged except by the calling of evidence by the prosecution on a hearing and where young people between 10–14 have pleaded guilty or been found guilty.

<sup>15</sup> Australian Institute of Health and Welfare (‘AIHW’), *Youth Justice in Australia 2019–20* (Report, 2021) 18–21.

detention, or it will produce overly narrow responses that are addressed only to that detained cohort.

2.4.6. There is a marked difference between figures relating to young people's *contact* with the justice system rather than detention as a result of it. It is the Institute's understanding that the issues affecting children in conflict with the law are much broader than detention, and ultimately come down to whether the present system properly caters to the needs of children in conflict with the law, their families and the community more generally. That includes:

- **Early warning of life-long offending.** It is not at all common for young children to commit crime. When they do it generally suggests that they are living in or affected by personal, social, environmental, or other risks. If those risks are not properly addressed the child is likely to continue offending *regardless* of whether they are dealt with by the justice system or not. In fact, the younger the child begins committing crime, the more statistically likely they are to become life-long subjects of the criminal justice system. That indicates that the younger a child is, the greater the need for targeted intervention to reduce the risk factors that drive harmful behaviour. Such a response is consistent with the best interests of the child and their rights to survival and development. It is also consistent with the right of the broader community to public safety and order as a result of state intervention to attenuate life-long offending before it starts.<sup>16</sup>
- **Institutionalisation.** Relatedly, once a child has come into contact with the youth justice system, they are more likely to be scrutinised and monitored by law enforcement. The resultant selection effect in some cases means an exponential increase in contact with the law and, by consequence, increased exposure to crime culture.<sup>17</sup>
- **Unjustified treatment.** For a range of reasons it is not statistically possible to measure whether criminal proceedings are more or less effective in reducing further harmful behaviour by children than diversionary approaches (not least because of the unethical nature of blind control studies). However, it is relatively certain that criminal justice is *no more* reliable than diversionary processes in reducing recidivism.<sup>18</sup> Given criminal justice contact

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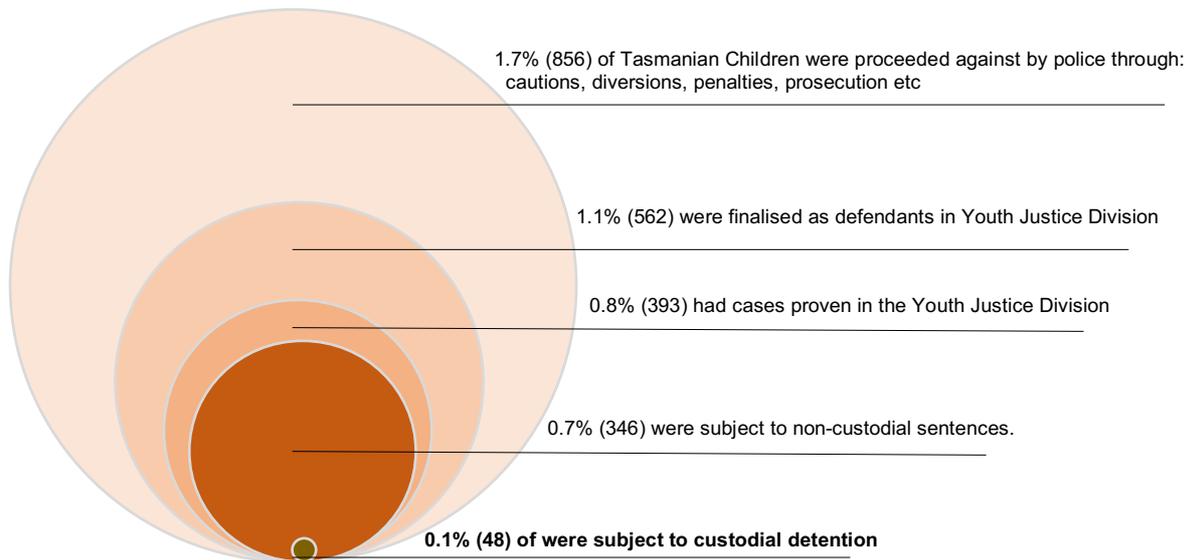
<sup>16</sup> Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth Crime in Australia* (Oxford University Press, 5th ed, 2013) 65.

<sup>17</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time — Time for Doing: Indigenous Youth in the Criminal Justice System* (Commonwealth of Australia, 2011) 3.134; Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4 *European Journal of Criminology* 315, 319.

<sup>18</sup> Don Weatherburn and Sindy Wang, 'Are Police Cautions a Soft Option? Reoffending among Juveniles Cautioned or Referred to Court' (2019) 52 *Australian & New Zealand Journal of Criminology* 334.

is stressful, stigmatising, destabilising to a child's life and liberty, and amplifies existing trauma, reducing contact is to be preferred to increased contact.<sup>19</sup>

Figure 2 Snapshot of involvement of young people in Tasmanian Criminal Justice System 2019-2020 (Sentencing Advisory Council)



- 2.4.7. **Reform Principle 1: Limited contact.** Law reform should seek to limit contact of children with criminal justice generally, rather than focusing solely on limiting the custodial detention of children.
- 2.4.8. While this might also be described as a principle of diversion, it extends to pre-diversionary measures that limit contact with the criminal justice system altogether.

### Children's moral and intellectual development is variable, complex and multicausal

- 2.4.9. A common argument for raising the age is that children under 14-years-old are not sufficiently developed to:
- understand the moral wrongfulness of their acts (i.e., distinguish right from wrong);
  - regulate their impulses (i.e., act on emotion rather than reason); or
  - predict the consequences of their conduct (i.e., understand how their behaviour will affect themselves or others in the future).<sup>20</sup>

<sup>19</sup> Dylan Jackson et al, 'Police Stops among At-Risk Youth: Repercussions for Mental Health' (2019) 65 *Journal of Adolescent Health* 627; Peta Phelan and Robyn Oxley, 'Understanding the Social and Emotional Wellbeing of Aboriginal LGBTIQ(SB)+ Youth in Victoria's Youth Detention' (2021) 9 *Social Inclusion* 18; Sentencing Advisory Council, *Sentencing Young Offenders* (Research Paper No 6, 2021) 34.

<sup>20</sup> CCYP Forum Submissions 299, 300 and 301.

- 2.4.10. Medical and behavioural literature is sometimes cited in support of this position.
- 2.4.11. The Institute’s view is that behavioural science literature on the moral development of children is, at best, unsettled. There are a range of contemporary studies to show that a statistically significant proportion of children and young adolescents can articulate moral arguments about the wrongfulness of criminal acts and identify the consequences of rule breaking on others and themselves.<sup>21</sup> It is also important not to overstate the level of knowledge that contemporary science has on the interface between childhood development and antisocial behaviour.<sup>22</sup> As Bessant and Watts explain:

The allure of biological reductionism has a powerful influence on how ‘adolescent brains’ are understood ... [However] physical structures and processes that make-up the brain is not the ‘cause’ of action but at most a condition for it ... Of specific concern is the way the discovery that a difference in brain structure is used as evidence that young people are, by virtue of their biology, unable to make good judgment and for that reason are destined be irresponsible, psychologically unwell and likely to engage in antisocial or criminal behaviour ... the effect is akin to reduce young people ‘to being little more than a brain in a jar’ ... [and] the success of this science depends on prejudicial stereotypes of youthful troublemaking ...

adolescent behaviour, even their criminal behaviour, cannot be reduced to factors such as the relative strength of the amygdala response. Like all human conduct, the conduct of young people is shaped by complex factors including social goals and expectations, as well as by the degree of life experience which they have acquired up to that point and which can inform their best efforts to live well in the circumstances in which they find themselves.<sup>23</sup>

- 2.4.12. The Institute acknowledges evidence that some children have higher rates of impulsivity, risk taking and emotional (that is less rational) decision making than adults. Whilst the basis for such behaviour is an active area of research, there is no conclusive determinant,<sup>24</sup> and ‘growing recognition that social contexts strongly influence how these neural systems develop and how adolescents make decisions’.<sup>25</sup> That evidence supports the need for children and especially

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<sup>21</sup> As Bregant, Wellbery and Shaw note ‘[e]ven early in development, children understand how rules work, and they harshly evaluate rule violators’: Jessica Bregant, Isabel Wellbery, and Alex Shaw, ‘Crime but Not Punishment? Children Are More Lenient toward Rule-Breaking When the “Spirit of the Law” is Unbroken’ (2019) 178 *Journal of Experimental Child Psychology* 266.

<sup>22</sup> As Raine explains, there is a ‘lack of both research on children and longitudinal research’ on childhood offending and that ‘research on children with disruptive behaviour disorders is sorely needed’: Adrian Raine, ‘The Neuromoral Theory of Antisocial, Violent, and Psychopathic Behaviour’ (2019) 277 *Psychiatry Research* 64.

<sup>23</sup> Judith Bessant and Rob Watts, ‘The Mismeasurement of Youth: Why Adolescent Brain Science is Bad Science’ (2012) 7 *Contemporary Social Science* 193.

<sup>24</sup> Jennifer H Pfeifer and Nicholas B Allen, ‘Arrested Development? Reconsidering Dual-Systems Models of Brain Function in Adolescence and Disorders’ (2012) 16 *Cognitive Science* 322.

<sup>25</sup> Eveline A Cron and Ronald E Dahl, ‘Understanding Adolescence as a Period of Social–Affective Engagement and Goal Flexibility’ (2012) 13 *Neuroscience* 637.

adolescents to be treated differently by the legal system — which is already the case<sup>26</sup> — but it does not suggest that all children uniformly suffer from a general impairment of responsibility purely as a result of the age bracket they fall into.

- 2.4.13. Evidence about cognitive development should be read within the context of the rights of the child to be treated as an autonomous individual under law whose special vulnerabilities and needs should be taken into account on an individualised basis. It should also be read in context of statistical data that highlight the multicausal biological, environmental, and sociological drivers of youth offending.<sup>27</sup>
- 2.4.14. What current law and science do appear to align on is that children mature and develop at different rates. Children, like the adult population, are a highly diverse cohort. Children who are the same age will naturally possess differing levels of social, emotional, and intellectual capacity. There is no bright line between when a child is mature and when they are not. In their 2018 review of developmental science relating to adolescence in *Nature*, Dahl et al explain that:

As a pragmatic matter, modern societies typically confer adult rights and responsibilities based on age. However, this is at best an approximate way to estimate maturation — especially during adolescence when punctuated growth processes can result in markedly different maturational development between individuals of the same age.<sup>28</sup>

- 2.4.15. The common law has dealt with this developmental divergence by applying a rebuttable general presumption of *doli incapax*, which may be rebutted by evidence about the cognitive maturity of a specific child proven beyond a reasonable doubt. That common law approach is currently codified in Tasmanian criminal law [see Additional Materials 5.5.17] for children between 10 and 14 years old. If evidence of childhood development is to be taken into account in law reform it may be appropriate to consider modifying not only the lower age threshold but also the rebuttable upper threshold of *doli incapax* [see 4.8].

*Concepts of maturity may be politicised*

- 2.4.16. A further consideration for law reform policy is the breath and malleability of the socio-political concept of ‘maturity’. How developed or mature a person is can be interpreted in different ways, with reference to different measures, depending on the circumstances and politics of the

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<sup>26</sup> Cf *DPP (Vic) v TY [No 3]* (2007) 18 VR 241, 242, 247 (Bell J).

<sup>27</sup> These include gender, homelessness, substance abuse, Indigenous status, substance abuse, familial factors, educational options and attainment, disability, mental health, disadvantage and poverty: Sentencing Advisory Council (n 19) 9-22.

<sup>28</sup> Ronald E Dahl et al, ‘Importance of Investing in Adolescence from a Developmental Science Perspective’ (2018) 554 *Nature* 441.

day. Indeed, in 1998 the United Kingdom Parliament statutorily abolished the upper (14 year old) threshold of *doli incapax* in response to arguments by the Government<sup>29</sup> and views of judges<sup>30</sup> that ‘children seem to develop faster both mentally and physically’<sup>31</sup> than they had when the presumption was first developed, thus making its contemporary use ‘unreal and contrary to common sense’.<sup>32</sup> The result is that several generations of children in the United Kingdom have not been afforded protections from criminal prosecution that previous generations have had.

*Implications for other areas of law which rely on maturity should be considered*

- 2.4.17. The Institute is also concerned that enshrining and embedding concepts of diminished moral or intellectual responsibility of children as a class (defined by age) in one area of the legal system may have across the broader corpus of Tasmanian law. Of particular concern is the value judgment that such a policy signals about the competency, reliability and autonomy of children as legal subjects. For instance, it raises doubts about the right of children under 16 to make decisions about their own bodies, such as consenting to health procedures, surgery, reproductive rights, gender incongruence, abortion or even sexual intercourse.
- 2.4.18. At present children under 16 will be determined to have legal bodily autonomy if it can be shown they have the individual ‘intellectual capacity and emotional maturity to understand [the intervention’s] *nature and consequences*’.<sup>33</sup> Indeed, in articulating the principle and test for children’s decisional autonomy (‘Gillick competence’), the Deane J explained that children already possess ‘the capacity to commit (and to be liable to be punished for) crimes requiring criminal intent’ and thus should be held responsible for decisions over their own bodies.<sup>34</sup> The intersection of the legal domains of criminal and bodily responsibility by reference to a child’s emotional maturity and capacity to understand means that raising the age in one raises questions about whether the age should be raised in the other.
- 2.4.19. Similarly, there is a connection between the age of criminal responsibility and the capacity of children to give reliable evidence. Because children were considered to have diminished moral

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<sup>29</sup> UK Home Office, *Tackling Youth Crime: A Consultation Paper* (September 1997) 6.

<sup>30</sup> Hence, in 1995, Mann J of the Queen’s Bench Division of the High Court (UK) stated ‘[w]hatever may have been the position in an earlier age, when there was no system of universal compulsory education and when, perhaps, children did not grow up as quickly as they do nowadays, this [*doli incapax*] presumption at the present time is a serious disservice to our law ... It is unreal and contrary to common sense’: *C v DPP* [1995] 2 All ER 43.

<sup>31</sup> UK Home Office (n 29) 6. The UK Parliament subsequently agreed to statutorily abolish the presumption of *doli incapax* through the *Crime and Disorder Act 1998* (UK) s 38.

<sup>32</sup> *C v DPP* [1995] 2 All ER 43 (Mann J).

<sup>33</sup> *Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218 (*‘Marion’s Case’*), 311 (McHugh J) (emphasis added).

<sup>34</sup> *Ibid*, 290, (Deane J).

responsibility, or unable to understand the consequences of giving false evidence, they were not, historically, automatically considered reliable witnesses.<sup>35</sup> For instance, in *AG's Reference [No 2]* Cox J of the Supreme Court of Tasmania noted:

The Tasmanian Criminal Code, s18 provides that no act or omission done or made by a person under [the MACR] is an offence, nor is one done or made by a person under 14 years of age an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make. This provision would *suggest that children under 14 years of age prima facie lack the maturity to know that to tell a falsehood on oath is something they ought not to do* and that it would be a wise precaution in respect of any person under that age tendered as a witness to treat him as a child of tender years and to make inquiry as to his understanding of the nature of an oath and of the duty of speaking the truth.<sup>36</sup>

2.4.20. In the same decision Slicer J explained:

The section [s 18] provides a legislative guide which suggests that caution should be exercised in regarding a person under 14 years as being necessarily possessed of sufficient knowledge and understanding of conduct and consequence [to provide witness testimony].<sup>37</sup>

2.4.21. Importantly, the existence of a rebuttable presumption of *doli incapax* rendered the assumption of evidential reliability *prima facie* rebuttable. Following this logic, law reform which entirely removed the rebuttable presumption of *doli incapax* below 14 on the grounds of diminished responsibility would have a correlative effect on the rebuttable presumption of evidential reliability. That is, it would become equivalently absolute below 14 (or 12 if that were the threshold age).

2.4.22. Importantly, any rebuttable presumption that a child witness is not reliable has now been partly modified by the Tasmanian *Evidence Act 2001* (Tas). This is due to the serious injustice it created for children as complainants, victims and participants in the criminal justice system. It was also a reform justified by reference to evidence about childhood development.

2.4.23. In 1997 the Australian Law Reform Commission (ALRC) concluded that the historic devaluing of children's testimony was premised upon false assumptions about children as a separate class of witnesses to adults.<sup>38</sup> The ALRC based this conclusion on the following evidence:

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<sup>35</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) [14.15].

<sup>36</sup> (1994) 4 Tas R 26 (emphasis added).

<sup>37</sup> *Ibid.*

<sup>38</sup> Australian Law Reform Commission (n 35).

Recent research into children’s memory and the sociology and psychology of disclosing remembered events has established that children's cognitive and recall skills have been undervalued ...

there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings or that children are more likely to lie than adults. Indeed, research suggests that children may be actually more truthful than adults.<sup>39</sup>

- 2.4.24. Consequently, the ALRC recommended that all jurisdictions statutorily prohibit judges warning juries that a witness is unreliable based solely on their childhood age, nor direct the jury that it is generally dangerous to convict on the uncorroborated evidence of any child witness. That recommendation was implemented in Tasmania through s 165A of the *Evidence Act*.
- 2.4.25. Law reform policy that promotes the express or implicit assumption that children lack moral and intellectual competency is in contradistinction to the above stated reforms, which were premised on the opposite assumption. From a rule of law perspective, it would raise questions about consistency and continuity of legal principle across the corpus of criminal law. It would also raise issues of fairness and certainty in criminal matters. For example, while the *Evidence Act* precludes jury directions about the reliability of children’s evidence-based on age alone, it does not extend to appeals relating to that evidence.<sup>40</sup>
- 2.4.26. It may very well be the case that advances in our scientific understanding of children’s moral and intellectual development are relevant to the question of MACR. If that is the case, then it must be shown why that new knowledge relates only to criminal responsibility and not also to matters such as self-autonomy or reliability that rely on moral, intellectual and neurological factors to determine competency.
- 2.4.27. Improvements in the law in one area should not undermine advancements in the treatment, equality and rights gained in other areas unless there is a clear, rational and justified basis for doing so.
- 2.4.28. **Law reform principle 2: Individualised treatment.** Law reform should be directed to facilitating tailored responses to each child based on their individual moral and intellectual capacity and needs as a person. A child’s age may be relevant to that individualised approach but should not be determinative.

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<sup>39</sup> Ibid [14.19] and [14.22].

<sup>40</sup> This leaves open the possibility that appellants to criminal matters may bring uncorroborated testimony by children into question. That is because the State had reformed criminal law on the basis children of a certain age are, as a class: unable to tell right from wrong; more likely to act impulsively; and/or without consideration of the implications of their testimony for an accused person.

## **The integrity of a child’s family, culture and community should be promoted in law reform**

- 2.4.29. A common argument for raising the MACR is that the primary drivers of harmful behaviour by children are social, environmental, and familial, rather than personal.<sup>41</sup> In the main, these arguments are well-grounded and substantiated by a range of socio-legal, socio-economic and health and public health science. However, some caution should be exercised in how such evidence informs law reform within a broader public policy and public health context.
- 2.4.30. The position that children are not responsible for harmful behaviour because of their circumstances and environment echoes the philosophy underpinning the welfare model that dominated Australian social services and youth justice services for the majority of the 20th century. That model was, broadly speaking, concerned with the ‘needs’ of the child rather than their deeds. In practice, this resulted in children’s behaviour being blamed on their parents, guardians and communities. Indeed, the general principle underlying the historical Tasmanian welfare model, was set out in s 4 (now repealed) of the *Child Welfare Act 1960* (Tas) as follows:

each child suspected of having committed, charged with, or found guilty of an offence shall be treated, not as a criminal, but as a child who is, or may have been, *misdirected or misguided*, and that the care, custody, and discipline of each ward of the State shall approximate as nearly as may be to that *which should be given to it by its parents*. (emphasis added)

- 2.4.31. In other words, childhood offending was the result of parents misdirecting, misguiding and not providing the care, custody and discipline that proper guardians ‘should’ give a child. The legal response was to remove children from ‘harmful’ environments that were viewed as the cause and drivers of proscribed conduct so as to, ostensibly, correct their moral, social and intellectual development. That included removing children from families and placing them in state guardianship, foster care or welfare facilities. This resulted in lifelong and intergenerational trauma for children, families and communities.<sup>42</sup> First Nations communities were disproportionately affected by these policies. Aboriginal children were regularly removed from their families under the welfare model on the discriminatory assumption that Aboriginal parents

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<sup>41</sup> CCYP Forum Submissions 264, 266, 292, 298, 301, 304.

<sup>42</sup> Senate Standing Committee on Community Affairs, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (Parliament of Australia, 30 August 2004) chs 4–6; Katie Wright, ‘Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse’ (2017) 74 *Child Abuse and Neglect* 10; Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 11: Historical Residential Institutions* (2020) <https://www.childabuseroyalcommission.gov.au/historical-residential-institutions>.

and communities were the cause of, rather than victims of disadvantage.<sup>43</sup> Welfare approaches remain problematic in the context of First Nations people.<sup>44</sup> Aboriginal children continue to be subject to removal from their families and communities across Australia at much higher rates than non-Aboriginal children, and this statistic is increasing, not decreasing.<sup>45</sup>

- 2.4.32. O'Donnell et al noted that the 'removal of children within Aboriginal communities are traumatic and are likely to compound the grief with which many are already struggling'.<sup>46</sup> That continuing injustice contradicts Australia's obligation under the United Nations *Declaration on the Rights of Indigenous Peoples*, which recognises the 'right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child'.<sup>47</sup>
- 2.4.33. As a number of respondents noted to the 2021 CCYP Forum, Aboriginal children are also overrepresented in the youth justice system across the country.<sup>48</sup> That includes Tasmania where Aboriginal children are 4.8 times more likely than non-Aboriginal children to be subject to state supervision (including detention).<sup>49</sup> What is essential is that the solution to one problem (over representation in the criminal justice system) does not amplify the other problem (removing children from their families and communities). In particular it is important not to perpetuate the reductionist notion that all childhood deviance is the product of familial and community neglect. Indeed, harmful behaviour by children may in fact be an indicator that the child's

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<sup>43</sup> In the *Bringing Them Home* Report on the Stolen Generations, the Human Rights and Equal Opportunity Commission subsequently noted that: '[u]nder the general child welfare law, Indigenous children had to be found to be "neglected", "destitute" or "uncontrollable". These terms were applied by courts much more readily to Indigenous children than non-Indigenous children as the definitions and interpretations of those terms assumed a non-Indigenous model of child-rearing and regarded poverty as synonymous with neglect': *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997).

<sup>44</sup> For instance, the so-called 'emergency intervention' into First Nation communities from 2007 onwards was viewed as a perpetuation of legacy welfare views towards aboriginal children and their families. As Pounder explains 'attitudes towards Indigenous children and assumptions about how to best secure their protection undoubtedly fuelled and shaped the intervention. Indigenous parents, correspondingly, were portrayed as "the problem". ... The inference was that all Aboriginal parents were neglectful or abusive ... This prism for viewing children, their families and the state is grounded in a "child-saving" welfare model ... This model has long been applied to Indigenous people in Australia': Louise Pounder, 'Never Mind Human Rights, Let's Save the Children: The Australian Government's Emergency Intervention in the Northern Territory' (2008) 2 *Australian Indigenous Law Review* 2, 2–3.

<sup>45</sup> In 2019 O'Donnell et al reported that, 'nationally, Aboriginal children are ten times more likely to be placed in out-of-home care than non-Aboriginal children and this disparity starts in infancy' and that incidents of early removal are increasing not decreasing: Melissa O'Donnell et al, 'Infant Removals: The Need to Address the Over-Representation of Aboriginal Infants and Community Concerns of Another "Stolen Generation"' (2019) 90 *Child Abuse and Neglect* 88.

<sup>46</sup> *Ibid.*

<sup>47</sup> GA Res 61/295 (13 September 2007).

<sup>48</sup> Submissions 275, 277, 282, 287, 288, 296, 298, 299, 301, 302, 303, 304.

<sup>49</sup> Australian Institute of Health and Welfare (n 15) 10–11.

family and extended community is at risk and in need of collective assistance, rather than intervention and separation. Hence the United Nations General Assembly has declared that:

Every society should place a high priority on the needs and well-being of the family and of all its members. Since the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued.

... Governments should establish policies that are conducive to the bringing up of children in stable and settled family environments. Families in need of assistance in the resolution of conditions of instability or conflict should be provided with requisite services

... Governments should take measures to promote family cohesion and harmony and to discourage the separation of children from their parents, unless circumstances affecting the welfare and future of the child leave no viable alternative.<sup>50</sup>

- 2.4.34. These rules clearly envision situations in which it is not possible to keep children with their families. Indeed, in developing appropriate frameworks for responding to harmful childhood behaviour, the state needs to consider all drivers, including familial ones. It must also provide for situations in which it is inappropriate and harmful to leave a child with their parents or guardians. However, in developing that framework the state must ensure that it does not inappropriately assume that harmful childhood behaviour is always a consequence of parental neglect. It should also ensure that any measures to respond to harm involves the family and intimate community and seek to keep the child connected to those units.
- 2.4.35. An alternative lens to welfare (or at least the welfare association of harm with neglect) is an individualised and trauma-informed response. A trauma-informed approach begins with an acknowledgement that harmful behaviour may be the result of manifestations of underlying multifaceted problems in the child's life. As such, in the implementation of measures to address the behaviour and any underlying causes, it will be important to gain an understanding of the child's background and family or social environment. However, it does not automatically assume the child needs to be removed from that environment, but rather that appropriate measures be put in place within it to reduce the source and consequences of the trauma. That may involve supporting the parents and carers in the child's home environment and educating the child to assist them in developing an understanding of the nature and consequences of their conduct.<sup>51</sup>

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<sup>50</sup> *Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112 (14 December 1990) ('*Riyadh Guidelines*').

<sup>51</sup> These needs were raised in many responses to the CCYP's post-forum survey.

- 2.4.36. Notably the present Tasmanian Child Protection and Youth Justice framework are both strongly family- and community-oriented. Both expressly recognise and enshrine the need for the state to protect and promote familial, cultural, and community connections in all its dealings with children and youth.<sup>52</sup> Both Acts provide for the involvement of elders, kinship groups, and families and communities in promoting the wellbeing care and assisting in shaping the developmental pathway of Aboriginal children.<sup>53</sup> That includes forming family group conferences under *Children, Young Persons and Their Families Act* to allow a child and their family to make informed recommendations as to the arrangements for best securing the care and protection of a child.<sup>54</sup> The *Youth Justice Act* also encourages cautioning by Aboriginal Elders or community members, the contribution and involvement of families, Elders and community representative involvement in community conferences,<sup>55</sup> and more formal court procedures.<sup>56</sup>
- 2.4.37. The Institute emphasises the need to build upon and strengthen the rights-based and family- and community-oriented approach of the current child protection and youth justice model. Law reform should be directed to tailoring and building upon these laws rather than replacing them or returning them to their previous welfare underpinnings.
- 2.4.38. **Reform principle 3: Family, culture and community.** The integrity of a child’s family, culture and community should be promoted in law reform.
- 2.4.39. **Reform principle 4: Trauma responsive.** Responses to children should be trauma-informed and not limited to general associations with parental neglect or abuse.

## Replacing the core functions of criminal justice with child-safe alternatives

- 2.4.40. A common argument for raising the MACR is that criminal punishment (and most often imprisonment) is not an effective deterrent of youth offending.<sup>57</sup> Proponents of this view note that contact with public authorities and, in particular, formal contact with police (i.e., as opposed to informal cautions) and courts is criminogenic and increases the potential for recidivism rather than decrease it.

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<sup>52</sup> *Youth Justice Act 1997* (Tas) s 5(2). In the case of the *Children, Young People and Their Families Act 1997* (Tas) ss 10C, 10E(2). This acknowledgment extends to the incorporation of the *Convention on the Rights of the Child* (n 1) and *Declaration on the Rights of Indigenous Peoples* (n 47) for the purposes of statutory interpretation: s 8.

<sup>53</sup> *Children, Young Persons and Their Families Act 1997* (Tas) ss 10G, 32(4) and 10(f); 51(d); *Youth Justice Act 1997* (Tas) ss 5(2)(f), 11, 14(2)(c)(ii), 30(1)(i).

<sup>54</sup> *Children, Young People and Their Families Act 1997* (Tas) pt 5.

<sup>55</sup> *Youth Justice Act 1997* (Tas) ss 14(2)(c) and 38(2).

<sup>56</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 30.

<sup>57</sup> CCYP Forum Submissions 275, 278, 288.

2.4.41. Weatherburn, McGrath and Bartels have highlighted that evidence supporting such propositions is ‘more fragile and open to question’ than has sometimes been recognised in youth justice policy.<sup>58</sup> Their systematic review of the literature showed that the assumptions that children ‘cease offending of their own accord’ or that ‘reoffending amongst the remainder is best reduced through a youth justice conference’ is not supported by randomised control trials and cohort studies.<sup>59</sup> Indeed, the available evidence for that study, and more recent evidence, highlights the problems with singular, generalised approaches which are focused on discrete ages rather than the diverse drivers of antisocial and harmful behaviour.<sup>60</sup> More generally it suggests caution in holding up one system of intervention as more effective than another in reducing criminal behaviour and recidivism given the complex nature of offending and responses to it in large communities.

2.4.42. Importantly, Weatherburn, McGrath and Bartels did not conclude the lack of efficacy was a reason to abandon diversionary forms of youth justice, because ‘reducing reoffending is [not] the sole aim of juvenile justice policy’.<sup>61</sup> Indeed, deterrence is not a primary function of the criminal justice framework applicable to children above the MACR in Australia. Nor is it an express consideration in Tasmania’s *Youth Justice Act* [see Additional Materials 5.6.23].<sup>62</sup> Rather that framework is concerned with treatment, rehabilitation, and restorative justice which

is weighted, but not subsumed by, the needs of treatment, acceptance of responsibility, future control, protection and maturation ... [reflecting] an understanding, simply expressed, that historically in many instances, detention within an institution can be counter-productive and further fracture personality.<sup>63</sup>

2.4.43. While deterrence may play a ‘tempered’ role in youth justice, its focus is predominantly directed to reducing the potential for personal, rather than general, reoffending.<sup>64</sup> Furthermore, youth justice principles require that sanctions are:

- Only imposed as a last resort,
- Only imposed for as short a time as necessary, and
- Tailored to the age, maturity and cultural identity of the youth.

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<sup>58</sup> Don Weatherburn, Andrew McGrath, and Lorana Bartels, ‘Three Dogmas of Juvenile Justice’ (2012) 35 *UNSW Law Journal* 779, 780.

<sup>59</sup> *Ibid* 806.

<sup>60</sup> L S Richmond-Rakerd et al, ‘Clustering of Health, Crime and Social-Welfare Inequality in 4 Million Citizens from Two Nations’ (2020) 4 *Nature Human Behaviour* 255.

<sup>61</sup> Weatherburn, McGrath and Bartels (n 58) 806.

<sup>62</sup> *Youth Justice Act 1997* (Tas) s 4.

<sup>63</sup> *Conroy v S* [2005] TASSC 101.

<sup>64</sup> *Ibid* [9]; *LWR v Lusted* [2009] TASSC 3, [23].

- 2.4.44. The common law principles which inform those sanctions ‘involve the predominance, but not the exclusivity, of rehabilitation as a factor in sentencing’.<sup>65</sup>

*The functions of the criminal justice system extend beyond deterrence*

- 2.4.45. Deterrence is not the only function of criminal law.<sup>66</sup> In *Munda v Western Australia* the High Court explained:

The proper role of the criminal law is not limited to the utilitarian value of general deterrence ... To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community’s disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.<sup>67</sup>

- 2.4.46. As their Honours emphasised in *Munda*, failing to respond appropriately to harmful offending ‘may be seen as a failure by the state to vindicate the human dignity of the victim’.<sup>68</sup> This consideration is very important given that the only non-diversionary crimes that can be committed by 16-year-olds in Tasmania involve serious violence or interference with others (murder, attempted murder, aggravated sexual assault, rape etc [see Figure 3, p 41]). It is also important given that much of the serious offending in this age bracket is directed towards other children.<sup>69</sup>
- 2.4.47. Ensuring that victims of such crimes are properly protected will necessarily require authorities: investigate and substantiate allegations of violent and/or sexual behaviour, respond decisively and appropriately to remove the risk, and ensure that the damage done to the person is appropriately addressed.

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<sup>65</sup> *LWR v Lusted* [2009] TASSC 3, [23].

<sup>66</sup> Rather the functions of punishment include ‘deterrence, retribution, reformation and incapacitation’. *Australian Competition and Consumer Commission* [2002] FCA 559 (3 May 2002) (Finkelstein J). See also *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 155 (McHugh J): ‘the factors taken into account in the criminal jurisdiction — retribution, deterrence, reformation, and protection of the public’ (through incapacitation).

<sup>67</sup> (2013) 249 CLR 600, 620.

<sup>68</sup> *Ibid.*

<sup>69</sup> Kate Warner and Lorana Bartels, ‘Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response’ (2015) 38 *UNSW Law Journal* 48; H Barbaree and W Marshall (eds), *The Juvenile Sex Offender* (Guilford Press, 2nd ed, 2006).

- 2.4.48. It may be readily accepted that the dichotomy between perpetrator and victim is, in most cases of offending by children, illusory, if not false. The correlation between perpetrators and victims of violence, abuse, and crime is well documented.<sup>70</sup> Yet that further suggests the need to limit the cumulative trauma and risk to both individuals and the community from unchecked violence that becomes endemic and cyclical.
- 2.4.49. The correlation between victims and perpetrators also highlights the socially destabilising nature of crime and the need for appropriate state intervention to protect the public interest. Hence the courts have emphasised that criminal justice exists to placate community fear and ‘assuage public outrage’.<sup>71</sup> That is essential for the constitutional sustainability of the state and the rule of law which relies on trust and voluntary participation in formal systems of justice. It is also important for the sustainability of alternative socio-legal responses to harmful childhood behaviour. Public outrage about outlier cases involving seriously harmful behaviour and the perception (correct or otherwise) that the legal system has not responded seriously or severely enough have stalled the progress of criminal law reform, and in some jurisdictions meant the MACR has remained at a very young age [see 3.4.8].
- 2.4.50. Reform which involves the replacement of one system with another must consider whether or not important and necessary functions which addressed social needs in the legacy system are effectively provided for in the new one. In the alternative it is important to consider why some functions should be abandoned in the circumstances and what the implications of abandoning them are.
- 2.4.51. The Institute is unaware of any compelling reason to abandon the present socio-legal functions provided by criminal law. Each serves a fundamental purpose of protecting, vindicating the rights and interests of victim, offender, public and constitutional system. Summarising the High Court’s dicta in *Munda*, they have been held to extend to:
- 1) Reducing the likelihood of further harmful conduct occurring;
  - 2) Protecting, promoting and vindicating the safety, rights and dignity of community members and victims;
  - 3) Responding to and reflecting community expectations and concerns about seriously harmful behaviour; and
  - 4) Providing an effective and trusted process for de-escalating vendettas between, or self-help by, members of the community (vigilantism).

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<sup>70</sup> Mark T Berg and Carrie F Mulford, ‘Reappraising and Redirecting Research on the Victim-Offender Overlap’ (2020) 21 *Trauma Violence Abuse* 16; Nina Papalia et al, ‘Child Sexual Abuse and Criminal Offending: Gender-Specific Effects and the Role of Abuse Characteristics and Other Adverse Outcomes’ (2018) 23 *Child Maltreatment* 399.

<sup>71</sup> *DPP (Tas) v Harrington* [2017] TASCRA 4 (17 March 2017).

- 2.4.52. The Institute notes that some of the functions that are conventionally ascribed to criminal law are, in respect of children, more appropriately realised through alternative forms of intervention, which are not necessarily, or predominantly legal in character. This is true of deterrence which is better realised by pre-emptive and early responses to the drivers of harmful behaviour in the form of therapeutic, educational, public health or social services. Other functions may be similarly provided for through non-legal avenues.<sup>72</sup>
- 2.4.53. **Law Reform Principle 5: Risk reduction.** The reformed law should proportionately respond to and attenuate risks from harmful and antisocial behaviour.
- 2.4.54. **Law Reform Principle 6: Dignity.** The reformed law should appropriately uphold and vindicate the rights of those affected by harmful and antisocial behaviour.
- 2.4.55. **Law Reform Principle 7: Community safety.** The reformed law should respect and respond to community concerns about public order, safety and community values undermined by harmful and antisocial behaviour.
- 2.4.56. **Law Reform Principle 8: De-escalation.** The reformed law should operate in a way which ensures those affected by harmful or antisocial behaviour do not take the law into their own hands.

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<sup>72</sup> Accepting that a necessary level of structural legal support may be required for non-legal approaches to be effective.

### 3 What can Tasmania learn from other jurisdictions' MACR?

*This part is expanded in parts III & IV of the additional materials. Some material is repeated in both parts.*

- 3.1.1. The MACR provides a broad comparative indicator of the legal status of children in conflict with the law across the world. However, it is not a normative indicator. The MACR does not provide a complete or reliable basis for comparison between youth justice and child protection in different countries. That is, not least, because of the diversity of constitutional arrangements, criminal justice and child protection systems across the world.
- 3.1.2. Criminal responsibility may be interpreted and applied differently across different jurisdictions. As the comparative table below shows [Table 1], the MACR itself does not reflect how each jurisdiction responds to children in conflict with the law. In some countries with high MACR thresholds children below the MACR may be dealt with by police, be subject to review by courts and tribunals, and be subject to varying forms of restrictions on liberty, including secured institutional supervision which would be considered involuntary detention in Australia. In Australia, involuntary detention is primarily a function of the criminal process. In countries with low or no MACR (e.g., France), other limitations — such as age bars on prosecution or detention — mean that children avoid much, if not all, of the coercive and punitive aspects of the country's legal system.

*Table 1 Selected comparison of MACR / institutional responses to children in conflict with the law.*

Age	< 9	9	10	11	12	13	14	15	16	17	18
<b>MACR</b>											
Tasmania			<i>Doli incapax</i>								
Denmark											
Portugal											
France	Liable, but no penalties. Presumption against discernment (similar to <i>doli incapax</i> ).										
<b>Police custody</b>											
Tasmania	No										
Denmark	Yes, but never in a detention centre and limits on duration										
Portugal <sup>73</sup>					Only <i>in flagrante delicto</i> or on judicial order						
France	No		Exceptional cases only								

<sup>73</sup> The relevant law only applies to those aged between 12–16, and the *Code of Criminal Procedure* does not specify an age limit below which someone cannot be arrested and taken into police custody. However, as arrest must be for the purpose of bringing the person before a judicial authority, it follows that someone who cannot have criminal proceedings instituted against them cannot be held in police custody after their age is known.

<b>Pre-trial detention</b>										
Tasmania	No									
Denmark	No			Last resort						
Portugal	No (not under criminal law)			Last resort						
France	No									
<b>Institution placements</b>										
Tasmania <sup>74</sup>	–									
Denmark	Open inst. only <sup>75</sup>	Open inst. only <sup>76</sup>	Partially secure or secure inst. permitted							
Portugal	Open only — child protection regime		Open/semi-open	Closed permitted						
France	Yes, <i>except</i> in closed educational centre			Closed educational centres permitted						
<b>Record</b>										
Tasmania	No	Depends on measure imposed								
Denmark	No	Serious incidents of serious crimes	Serious crimes							
Portugal	No	Separate register from adult records								
France	Yes, but expunged after three years									

3.1.3. Noting the different ways in which states integrate criminal responsibility into their legal systems, there are a number of generalisable observations about how other jurisdictions (especially OECD jurisdictions) balance the community versus individual rights when a child engages in violent or antisocial behaviour. These include:

- Child-focused systems that are tailored and responsive to behaviour by children which places themselves, others or the community at risk; and/or
- Clarifying the roles and responsibilities of police and other first responders to violent and antisocial behaviour by children under the MACR; and/or

<sup>74</sup> The child protection regime in Tasmania is governed by the *Children, Young Persons and Their Families Act 1997* (Tas) which applies to children under 18 years of age. For child protection reasons, children may be placed in various Out of Home Care types after application to the court by the Child Safety Service. This includes residential care provided by non-government organisations on a contract basis. However, the Act makes no explicit reference to criminal behaviour or to acts that would otherwise qualify as criminal conduct, though the definition of when a child is ‘at risk’ is broad and may cover such circumstances.

<sup>75</sup> There is no minimum age for children to which social services legislation applies. A number of children aged 0–10 years are placed out of their home in the general ward of an open residential institution. None are placed in partially closed wards or institutions, or locked wards: ‘Children and Young Persons Placed outside of Own Home per 31st December by Sex, Time, Age and Place of Accommodation’, *Statistics Denmark* (Web Page, 2021) <<https://www.statbank.dk/ANBAAR15>>. Where such placement is non-consensual, it would be a measure imposed by the Children and Young People Committee acting under social services legislation.

<sup>76</sup> As a general rule.

- Relatedly, utilising a minimum age of prosecution to triage children into child protection rather than criminal justice systems; and/or
- The use of protective (rather than punitive) detention for children who present a risk of significant harm to themselves or others; and/or
- Special provisions (carve-outs) for serious offences.

## 3.2. Child-focused systems

Child protection is by far the most common response to addressing risk from harmful conduct by children younger than the MACR. Tailored, graduated youth justice responses are the most common above that range. However, there are few singular approaches to dealing with children in conflict with the law. Many countries integrate and blend elements of each system into their framework. They also use a mixture of legal and non-legal tools to respond to and address harmful behaviour. Further, many jurisdictions have overlapping and complementary child protection and youth justice regimes, albeit for children above the MACR or children who commit an act that is subject to a special provision. Some jurisdictions use measures such as a minimum age of prosecution (absolute or discretionary) to preference child protection over youth justice.

- 3.2.1. A cross-system, child-centred approach to dealing with harmful behaviour by children has been recognised by the United Nations General Assembly in its 2014 declaration of the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice*, which urges Member States to:

foster close cooperation among the justice, child protection, social welfare, health and education sectors, so as to promote the use and enhanced application of alternative measures to judicial proceedings and to detention; [and] To consider designing and implementing restorative justice programmes for children as alternative measures to judicial proceedings; [and] To consider the use of non-coercive treatment, education and assistance programmes as alternative measures to judicial proceedings and the development of alternative non-custodial interventions and effective social reintegration programmes.<sup>77</sup>

- 3.2.2. Various child-focused systems are described in the additional materials to this Report [see pp 133-162].

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<sup>77</sup> *United Nations Model Strategies and Practice Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice*, GA Res 69/194 (26 January 2015) para 31(b), (c) and (d).

3.2.3. An example of a cross-system and child-centred approach behaviour is **Denmark**.<sup>78</sup> For children below the MACR (15) child protection is the principal approach (although the police may deal in specified ways to deal with risks created by children). For children above the MACR the criminal justice system operates, but is complemented and overlaid by the child protection system. In practice this means that when a child has been suspected or, in the case of children over the MACR (15), convicted, of certain dangerous crimes or other serious crimes, and where there is a risk of the child committing further crime, the Juvenile Delinquency Board is engaged.<sup>79</sup> The Board does not have any criminal justice function and its role is to decide the most appropriate social measure instead of criminal sanction or criminal guilt.<sup>80</sup> A range of measures may be imposed by the Board, the most restrictive one being placement in specially secured wards in secured residential institutions.<sup>81</sup> This involves a level of detention equivalent to that imposed under Tasmania’s youth justice system. However, the purpose and focus of the Danish detention system is protective and tailored to the risk of harm that a child poses to themselves and others with the aim of reducing the potential for further engagement in harmful behaviours.

### Therapeutic and educational options

3.2.4. The UN Committee on the Rights of the Child’s *General Comment 24* relating to article 3 (Best interests of the child) of the *Convention of the Rights of the Child* recognises:

The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. *This can be done in concert with attention to effective public safety*.<sup>82</sup>

3.2.5. Similarly the United Nations General Assembly, in the Beijing Rules has urged states to ‘consider the use of non-coercive treatment, education and assistance programmes’ to deal with children in conflict with the law for the purpose of ‘effective social reintegration’.<sup>83</sup> This may occur in a range of institutional settings, including through programs aimed ‘training and

<sup>78</sup> *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 2(2).

<sup>79</sup> *Ibid.*

<sup>80</sup> ‘Om os [About us]’, *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/om-os/index.html>>.

<sup>81</sup> *Servicebogen* [Social Services Act] (Denmark) 6 August 1998, s 66(1)(7).

<sup>82</sup> Committee on the Rights of the Child, *General Comment No 24 (2019) on Children’s Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) para 12 (emphasis added) (‘*General Comment 24*’).

<sup>83</sup> *Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33 (29 November 1985) (‘*Beijing Rules*’).

treatment’ to assist them to ‘assume socially constructive and productive roles in society’ through ‘social, educational, vocational, psychological, medical and physical’ assistance.<sup>84</sup>

3.2.6. In providing for considerations of public safety in respect of the treatment of children in conflict with the law, the Committee on the Rights of the Child recommends that the treatment must:

- Be consistent with the child’s sense of dignity and worth;
- Reinforce the child’s respect for the human rights and freedoms of others;
- Take into account the child’s age and promotes reintegration; and
- Must never involve violence against the child.<sup>85</sup>

3.2.7. It is therefore both possible and important to frame a child protection approach with consideration for a child’s risk to others and the community. Indeed, should such risks not be taken into account in providing for the care and protection of that child, their development and future integration into the general community are likely to be undermined [dignity and community safety principles see 2.4.54 - 2.4.55]. In the extreme, it may also lead to the child being subject to retribution or vilification by members of the community who have been affected by their behaviour and believe that behaviour was not appropriately or fairly dealt with [de-escalation principle].

3.2.8. The United Nations Committee on the Rights of the Child recommended in its *General Comment No 24* that:

Specialized services such as probation, counselling or supervision should be established together with specialized facilities including for example non-residential community centres. Where necessary, facilities for residential care and treatment of child offenders may be established. Effective coordination, monitoring and quality control of the activities of all these specialized units, services and facilities should be promoted in an ongoing manner.<sup>86</sup>

*OECD implementation of international rules*

3.2.9. Many countries, especially those with a higher MACR than Tasmania utilise institutional measures, including detention, to respond to behaviour by children that would otherwise constitute criminal offending. Institutional measures generally revolve around programs that aim to provide a child with the necessary educational and therapeutic supports for reintegration back into their family and social environment. This may be achieved by requiring the relevant authority to implement measures relevant to a child’s circumstances, which are usually

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<sup>84</sup> Ibid rule 26.

<sup>85</sup> *General Comment 24* (n 82) para 15.

<sup>86</sup> Ibid para 93.

recommended by qualified professionals who have conducted an assessment of the child's needs, cognitive development and health. Examples include [see Appendix A]:

- **Costa Rica** provides for the making of supervision orders requiring an offending child to enrol in a formal education or vocational centre, or be interned at a rehabilitation centre for substance abuse.
- **Czech Republic** allows the Court for Youth to assign a child to a therapeutic, psychological, or other suitable program in a Centre for Educational Assistance or, as a more serious measure, placement in 'protective education' which is a type of home education carried out in facilities of the Ministry of Education.<sup>87</sup> All measures are guided by the principle of restorative justice and the goal of restoring and reintegrating the child into their family and social environment, while also preventing further misconduct.
- **Portugal**, uses a hybrid model to deal with children who have acted in harmful ways. If the behaviour is sufficiently dangerous and poses an ongoing risk a court may order the child be admitted to an educational institution on specific grounds. These are ordinarily set out in an education plan, which necessarily incorporates instruction from a multidisciplinary team of health, social service and pedagogical professionals. The plan may specify differing levels of out-of-home supervision, to open or closed care in specialist education centre.<sup>88</sup>
- **France**, does not have an MACR, but rather applies restrictions on state responses to offending behaviour. Where a young child below the age of 13 is found criminally liable, penalties cannot be applied<sup>89</sup> and the measures that may be imposed may only be of an educational nature, namely a judicial warning or a judicial educational measure.<sup>90</sup> Educational measures are aimed at protecting, assisting, educating, and integrating the child, and ensuring they have access to care,<sup>91</sup> despite their characterisation as a 'sanction'.<sup>92</sup>

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<sup>87</sup> Children may also be placed in protective medical treatment carried out in the facilities of the Ministry of Health.

<sup>88</sup> Open educational centres largely reflect the process of state schooling, with children returning to families on weekends and holidays. Closed care resembles youth detention in Australia, albeit with a principal focus on education rather than youth justice. In addition to legal and personal education, children in these programs participate in social and cultural activities, sports, health, and whatever else the specialist considers important and relevant to the development of the child.

<sup>89</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) arts L11-3, L11-4.

<sup>90</sup> *Ibid* art L111-1.

<sup>91</sup> *Ibid* art L112-1.

<sup>92</sup> Made clear in the language of *Code de la justice pénale des mineurs* art L111-1. Some of these educational measures are further limited by an additional age threshold and cannot be imposed on children below 10 years old: arts L112-1–L112-3. The most restrictive option of a closed educational centre (*centres éducatifs fermés*) is explicitly excluded from the placement provisions under an educational measure. It is only available for those aged 13 or above. Even then, measures with a high degree of restriction on the child's liberty are restricted only in a legal sense and do not denote physical closures. Anne Wyvekens, 'The French Juvenile Justice System' in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer, 2006) 173, 173 and 184–5; Jocelyne Castaignède and Nathalie

## Observations for Tasmania

- 3.2.10. There would be some challenges to introducing out of home therapeutic care as complete alternatives to youth justice in Tasmania. One reason for this is that the number of children who arguably would require such intervention is so small as to arguably not justify the creation of a bespoke alternative system in a small jurisdiction. Another is the general Australian constitutional principle that only a court is permitted to place a person in involuntary detention.

### *Resourcing and funding*

- 3.2.11. Implementing effective child protection systems to appropriately deal with harmful and at-risk behaviour by children is a complex and challenging task. Specialist hearing systems require highly trained and representatives, support workers, decision makers and bespoke hearing facilities. Therapeutic treatment, education and assistance programs must be reflexive and responsive to the needs of each child, but also cater to the spectrum of behaviours that bring children into conflict with the law. Institutional facilities where such programs are delivered must also be suitably child-safe, trauma-informed and ensure the dignity of the children accommodated there is protected. They must also provide a safe place where re-integration of a child into the community is possible and the risks the child poses to themselves or others are taken into account. The establishment and sustainable operation of such a system requires significant planning, support, resources and — most essentially — appropriately trained and supported specialist staff.
- 3.2.12. Given Tasmania's size and the number of children who are involved in harmful or antisocial behaviour — even counting the enlarged cohort of 10–12 or 10–14 if the MACR is raised — the potential for the creation of a specialist hearing system (separate and additional to existing systems) is limited. That is especially the case given the historical resource challenges which child protection and youth justice have faced and continue to face in Tasmania.<sup>93</sup>
- 3.2.13. A series of coronial inquests into the deaths of children in state care, or known to child protection services, have highlighted failures of the system to properly identify and assess harm and cumulative harm or respond to and attenuate risks to children.<sup>94</sup> These failings have been systemic and the result of a lack of sustainable funding and support for child service. In September 2021 Coroner McTaggart found that:

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Pignoux, 'France' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2nd ed, 2010) vol 1, 483, 509.

<sup>93</sup> Select Committee on Child Protection, *Final Report (No 44)* (Parliament of Tasmania, 2011) 161, 187; *Infant Deaths* [2021] TASCDC 551, 552, 553, 554, 555, 556, 557, at 44.

<sup>94</sup> *Bjay Johnstone* [2017] TASCDC 248; *Rhiannon Pitchford* [2018] TASCDC 511; *Hayes* [2018] TASCDC 208; *Infant Deaths* [2021] TASCDC 551, 552, 553, 554, 555, 556, 557.

It is apparent that, during the years in which [deaths of children have occurred], issues associated with the [Tasmanian Child Safety Service (formerly Child Protective Service)] workforce in the face of very high demand played a very significant role in these practice deficits. Good child protection practice cannot occur consistently in a workplace not properly staffed or resourced.<sup>95</sup>

- 3.2.14. Beyond the resource limitations facing child protection, there is the question of appropriate institutional facilities to cater to the needs of children, and in some circumstances ensure the secure accommodation of children for temporary or longer periods of time. Tasmania presently has no specialised secure accommodation other than the custodial detention centre in which to place children in conflict with the law.<sup>96</sup> Specialised child-safe accommodation options — particularly for children who actively abscond from supervision — are limited. The present youth detention centre for children over the MACR has been regularly criticised as an inappropriate facility to achieve therapeutic or educational rehabilitation of the children detained there.<sup>97</sup>
- 3.2.15. As noted above, the challenges the State faces in sustainably maintaining existing child protection and youth justice systems suggests that an additional entirely bespoke child hearing system — as found in some larger overseas jurisdictions — would be challenging. Indeed it may further divert resources from the existing systems. The Institute notes that both those systems are under review and that the State’s child protection system is undergoing a long term transition towards a public health-oriented approach. The Institute acknowledges the preference of the Children’s Commissioner that all children in conflict with the law — and especially those younger than the MACR — are dealt with by child safety services rather than police, prosecutors and courts. Given that is the case, it is more appropriate that therapeutic, educational or restorative programs aimed at reducing the risks of children to themselves or others are incorporated into existing child-protection systems.
- 3.2.16. Given child protection systems are applicable to the care and protection of all persons under the age of majority (18-years-old) there is no need to restrict the use of therapeutic and educational or (especially) restorative programs (which are already used within Youth Justice) to children younger than the MACR. That approach would be consistent with the Commissioner’s position that all children should be triaged into child protection and away from the justice system wherever possible. Accepting that preference, the Institute highlights the need for there to be adequate and appropriately tailored institutional programs and facilities available to the child

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<sup>95</sup> *Infant Deaths* [2021] TASCDC 551, 552, 553, 554, 555, 556, 557, at 48.

<sup>96</sup> Sentencing Advisory Council (n 19) 97.

<sup>97</sup> Office of the Custodial Inspector Tasmania, *Resources and Systems Inspection Report: Inspection of Youth Custodial Services in Tasmania* (2019, tabled in Tasmanian Parliament in 2021).

protection system to deal with the specific needs of children who have been involved in violent or anti-social conduct.

- 3.2.17. Given the enlarged cohort of children and offence-like behaviours that will need to be dealt with, appropriately tailored and resourced treatment, education and assistance programs need to be in place and operating effectively before, rather than after, the MACR is raised. That will necessarily require the construction, fit-out and staffing of child-safe facilities that are suitable to the needs of a child and the risks they face and pose. The design and implementation of those programs and facilities are matters of expertise and policy which lie outside the scope of this Report and the expertise of the Institute. However, there are a number of legal, rights and/or policy considerations which should be taken into account.
- 3.2.18. **Compliance with international principles.** Beyond the legal framework in which orders are made for educational treatment there is the question of demonstrable efficacy and compliance with the international principles that must be observed when dealing with children and the justice principles set out above [see 3.2.6]. That is, a court will need to be assured that any proposed program adequately protects a child's best interests and is considerate of their development. A court should also consider that any proposed program adequately and fairly deals with risk and harm to vindicate the rights of victims and community and ensures that a child's development and education is directed to ensuring respect for the rights of others. In sum any treatment and education programs must sustainably address the underlying causes of offending and prepare the child for transition back into the community.
- 3.2.19. **Consistency.** The extension of the interrelated principles above is the need for programs to achieve genuine and meaningful change in a child's life. This can only occur if programs are applied consistently and provide consistent care and support. As pointed out by one respondent who works in this area:

these children often need structure and consistency in order to give them a safe environment and build trust and confidence ... we make some progress through routines and consistency, but the progress is often lost once the child returns home and the cycle continues when they return to respite services.<sup>98</sup>

- 3.2.20. Consistency was also alluded to in a report by Legal Aid Tasmania on 'crossover children' — children who have involvement with both the youth justice system and child safety services, and who are over-represented in the youth justice system.<sup>99</sup> In discussing the link between child safety and youth justice, the report discusses the adverse impact of detention on a child, noting

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<sup>98</sup> CCYP Forum, Submission 263.

<sup>99</sup> Tasmania Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Report, 2021) 4.

in particular the effect of detention on remand. Citing a review by the Australian Institute of Criminology, the report observes:

[Y]oung people on remand are likely to be exposed to the detrimental effects of detention but are not there long enough to gain substantial therapeutic or rehabilitative benefit.<sup>100</sup>

3.2.21. Another Australian Institute of Criminology report on care-experienced children and the criminal justice system also emphasised placement instability for children in care as a criminogenic factor and a significant reason for the link between care and crime.<sup>101</sup> Some countries with non-criminal detention options for children under the MACR provide for minimum periods of placements for this reason. For example, in Portugal, measures of internment in educational institutions can only be reviewed after a minimum period of three months after the measure begins or the last review is conducted. This is to ensure both stability in executing the child's personal educational plan and the preservation of public security. Review of other non-institutional measures are not subject to the same limitation.<sup>102</sup> However, as was raised by some respondents in the context of prescribing a separate minimum age of detention and providing for carve-outs, it could be argued that prescribing minimum periods of placement measures may be an erosion of judicial independence. It also is arguably contrary to the very central principle that harmful conduct by children necessitates individualised and tailored responses not generalised ones.<sup>103</sup> These factors support the implementation of sustainability principles relating to treatment programs, but not mandatory rules relating to their content or length.

3.2.22. **Participation and choice.** Children who can express their views should be listened to and considered, and those views given due weight in accordance with their age and maturity [see rights based principles 2.3.2]. It is therefore important that any process of imposing a measure on a child allows the child an opportunity to be heard and to participate in their treatment or measure. As identified by the expert panel on therapeutic interventions in Tasmania, 'choice' was the word heard most in feedback by young people, including having choice within placement.<sup>104</sup> In the context of non-criminal detention measures, which must necessarily involve

<sup>100</sup> Ibid 12, quoting Australian Institute of Criminology, 'Youth Justice in Australia: Themes from Recent Inquiries' (Issues Paper No 605, 2020) 5.

<sup>101</sup> Australian Institute of Criminology, 'Care-Experienced Children and the Criminal Justice System' (Issues Paper No 600, 2020) 2–3.

<sup>102</sup> Anabela Miranda Rodrigues and António Duarte-Fonseca, 'Portugal' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 2, 1027, 1063.

<sup>103</sup> *Expert Panel Advice and Recommendations to the Minister for Children and Youth on the Essential Therapeutic Elements Required for an Improved Service System Response for Tasmanian Children and Young People with Highly Complex Needs* (Report, 2021) 13.

<sup>104</sup> Ibid 8.

judicial process for the reasons identified below, children should be provided with an option to be heard. This is also consistent with the ethos in contemporary youth justice which emphasises the child's participation in processes, partly to encourage responsibility and accountability.

- 3.2.23. **Judicial oversight.** As set out above, a best-interests child protection approach to reducing risks from harmful behaviour by children may be directed to reinforcing the child's respect for the human rights and freedoms of others. They may also include attention to public safety with the aim of effective social reintegration. In various jurisdictions the delivery of therapeutic treatment, education and assistance occurs away from the home, and sometimes in secure, specialist facilities. Whilst states are urged to use non-coercive measures there may be occasions where some degree of coercion and control is necessary to give effect to the institutional measures designed to reduce risk and cater to the child's best interests. For instance, a child may be unwilling or unable to attend treatment or education programs. Alternatively, the nature of their conduct may be that they must remain in special facilities while those programs are being delivered for their own and others safety.
- 3.2.24. All jurisdictions reviewed by the Institute required judicial consideration and approval of orders which operated on the freedom of movement and choice of children, particularly where it involved subjecting children to forms of care, supervision and control which other children are not generally subject to. Ordinarily this occurs following the drafting of proposed treatment, therapy and education plans by specialist child services and relevant experts for review and consideration by the court, which may make any additional measures in the best interests of the child and commensurate to the risks they pose and needs they have.
- 3.2.25. Judicial supervision of proposed care and treatment orders aimed at addressing violent or antisocial behaviour would also be necessary in Tasmania. As a matter of law [see Additional Materials 5.2 ] involuntary restrictions on the liberty of child require:
- The consent of the parent(s) or guardian(s) of a child, and depending on the development of the child, also the consent of the child; or
  - The assumption by the State of guardianship of the child; or
  - The order of a court that a child must be subject to limitations on their freedom of movement and choice.
- 3.2.26. If the MACR is to be raised the need for judicial supervision becomes increasingly important as the autonomy of the child balances or overrides that of the parent(s) or guardian(s). This makes questions about the child's commitment to treatment, therapy, specialist education, or out of home care becomes more complex. The court must in those circumstances determine whether any consent is truly voluntary. Alternatively, where consent is refused the court must determine the best approach to safely ensure that any care and protection measures adopted against the

child (or their parent(s)/guardian(s)) may be effective. To the extent that may involve the *parens patriae* assumption of guardianship by the State, judicial supervision is a legal necessity. This form of judicial consideration and supervision is presently provided for in the *Children, Young Persons and Their Families Act 1997* (Tas).

*A cross-system and child-centred approach in Tasmania*

3.2.27. At present there appears to be a policy choice to separate child protection and youth justice systems in Tasmania, despite the fact that they overlap significantly in terms of their subject matter jurisdictions (currently 10–18 year old children who are at risk). This is in contradistinction to other jurisdictions that adopt a much more blended regulatory approach across children’s developmental pathway. Indeed, whilst it has been jurisprudentially convenient to dichotomise youth justice into ‘welfare’ or ‘justice’ approaches, they do not need to be distinct, nor the sole or dominant frameworks for responding to harmful behaviour. The reasons children offend, and the appropriate responses to it are incredibly complex and dynamic. By consequence a mixture of approaches properly tailored to the needs and bests interest of children, victims and the community are appropriate.

3.2.28. As discussed, the Youth Justice Framework employs restorative, diversionary pathways that are designed to act as alternatives to penal and punitive sanctions. That framework also employs mechanisms to repair harm caused to the victims and the community in a transparent way that involves and gives voice to those affected. Whilst the evidence about the deterrent effect of such programs is inconclusive, there is much more substantial evidence of those programs’ ability to address the needs of victims and the community. As Weatherburn, McGrath and Bartels note:

restorative justice programs are very popular with victims of crime and may in many instances be more effective in giving victims a sense that justice has been done than conventional court proceedings.<sup>105</sup>

3.2.29. At present such programs are only available under the *Youth Justice Act* and therefore are limited to harmful behaviour by children above the MACR. However, there are compelling reasons to retain such programs for children below a higher, reformed MACR as a form of restorative justice.

3.2.30. Rather than focus on a child ‘taking responsibility’ for their conduct — given they are technically not responsible for the act or omission — conferencing could be limited to, and framed in, educative and deliberative terms. In respect of the child, conferencing provides a forum to develop an understanding of the effect of their behaviour on others and to shape moral and intellectual development. The process may also inform the determination of

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<sup>105</sup> Weatherburn, McGrath, and Bartels (n 58) 807.

appropriate care and protection responses under child protection law.<sup>106</sup> Should a victim, or other family or community members choose to participate, such conferences may serve to assuage concerns about the adequacy of state responses to risks posed by children. It may also provide a way to share and heal.

- 3.2.31. Conferences would need to be conducted away from courts in supportive environments. They would also necessarily be limited in respect of at least some of the powers which may be presently exercised in relation to children above the MACR (namely to pay compensation and perform community services).<sup>107</sup> Such a process could be specified as part of a package of orders that make up the supervision, protection and education components of a Care and Protection order under the *Children, Young Persons and Their Families Act*.
- 3.2.32. Other diversionary measures which are used within youth justice regimes, but are not technically reliant on the establishment of criminal responsibility, might also be considered in Tasmania. One notable example is Victoria's therapeutic treatment order system for 10- to 14-year-old children who have demonstrated sexually abusive behaviour.<sup>108</sup> Another example is Switzerland, which allows imposition of protective measures on children, such as placement in an educational or treatment facility, based on needs and not culpability.<sup>109</sup>

### 3.3. Clarifying the roles of first responders

- 3.3.1. Raising the MACR does not mean the state has no role in or capability to respond to dangerous behaviour committed by children. For instance, unlike Tasmania, some jurisdictions provide for prescribed police powers to respond to anti-social behaviour by children below the MACR.<sup>110</sup>
- 3.3.2. All countries considered by the Institute allow some degree of police response to dangerous behaviour by children. The level of intervention and its purpose varies, as do the legal instruments which regulate the relationship between police and children. Police may also work alongside or collaborate with specialist child protection officers to deal with children who exhibit harmful behaviours. This occurs in Canadian provinces such as Ontario,<sup>111</sup> where

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<sup>106</sup> i.e. as an adjunct to family conferences under pt 5 of the *Children, Young Persons and Their Families Act 1997* (Tas).

<sup>107</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 16.

<sup>108</sup> Alissar El-Murr, *Problem Sexual Behaviours and Sexually Abusive Behaviours in Australian Children and Young People* (Child Family Community Australia, Commonwealth of Australia, Paper No 46, 2017) 8 <<https://ncsby.org/sites/default/files/El-Murr%202017.pdf>>.

<sup>109</sup> *Jugendstrafgesetz* [Juvenile Criminal Law Act] (Switzerland) 20 June 2003, arts 10–11.

<sup>110</sup> In Denmark, where the minimum age is 15, police can place children below that age under arrest where they engage in behaviour that would constitute a criminal offence. However, the power of arrest is limited in both its possible duration and the places where a child may be detained. See 8.2.

<sup>111</sup> *Child, Youth and Family Services Act 2017* (Ontario) ss 83–86.

either police or child protection workers (depending on who attends the scene first) may remove children from places where they are a danger to themselves or others [see Additional Materials 7.4.7–7.4.9]. Once a child has been taken to a safe place, the relevant officer may refer the child for assessment by child protection services. Police may be called on to assist child protection workers in the conduct of that assessment.

- 3.3.3. The Ontarian (and broader Canadian) system recognises that police are most likely to be first responders, and most capable of exercising investigative and coercive powers to assist an investigation once it has commenced. Scotland uses a similar approach but is more explicit about the powers, responsibilities and limitations of police when they are dealing with children below the MACR [see Additional Materials 7.4.10].

### **Observations for Tasmania**

- 3.3.4. As a small jurisdiction Tasmania has limited capacity to establish a specific state-wide child protection force that is capable rapidly responding to harmful conduct by children in the community. In the absence of such a specialist service Tasmania police are the most appropriately trained, resourced and distributed body of officers to act as first responders to active situations involving children in conflict with the law. However, Tasmania police currently possess very limited ad hoc power to deal with children who are younger than the MACR. That includes limited or uncertain powers to apprehend, investigate or arrest children who have: acted in a dangerous manner; harmed others; or destroyed property. This is problematic given the statistical increase in harmful behaviour by children who are older than 10 years of age.
- 3.3.5. In Tasmania the most common classes of criminal conduct which 10–18-year-olds may be detained for are robbery (including aggravated robbery) and extortion (including coercion of another person using force or violence). That reflects national statistics which indicate that children commit approximately 42 per cent of robberies and coercive violence offences. This is followed by unlawful entry with intent (children represent 30.6 per cent of the total national offences) and property damage (19 per cent of overall offences). Around half of unlawful entries by children are by those who are 14 or under; for robbery the proportion is just under one third. Noting that it is not yet clear what the MACR will be raised to, and that national crime statistics do not always have the level of granularity required to identify specific offending in set age groups, the data generally indicates the need for reform to ensure that police have appropriately clear and sufficient ad hoc powers. For instance, police need to be able to:
- Intervene in, and where possible halt the commissioning of an act; and/or
  - Obtain evidence necessary for the proof of offence or offender and for the recovery of property.

3.3.6. Less common but also statistically significant are cases of sexual offending by children, especially towards other children. Children perpetrate around 16 per cent of the reported total sexual assaults in Australia. Around half of those offences are perpetrated by children who are between 10 and 14 years old. National statistics do not identify the age of the victims of such behaviour, however international studies indicate that between 30–60 per cent of sexual assaults by children are perpetrated on other children.<sup>112</sup> Furthermore, Warner and Bartels estimate that:

Australian recorded crime data indicate and that offences by young people account for up to 50 per cent of offences against children and 30 per cent of rapes of adolescent girls and women

	<= 14yo	>14yo	Youth % of total offences	Variance
Homicide and related offences	1%	6%	6.8%	5%
Acts intended to cause injury	5%	8%	12.0%	3%
<b>Sexual assault and related offences</b>	<b>8%</b>	<b>8%</b>	<b>16.1%</b>	<b>1%</b>
Dangerous/negligent acts(c)	2%	6%	8.4%	3%
Abduction/harassment	4%	7%	10.5%	3%
Robbery/extortion	<b>15%</b>	27%	<b>41.7%</b>	12%
<b>Unlawful entry with intent</b>	<b>15%</b>	<b>16%</b>	<b>30.6%</b>	<b>1%</b>
Theft	6%	11%	17.1%	4%
Fraud/deception	2%	6%	7.1%	4%
Illicit drug offences	1%	6%	6.9%	5%
Weapons/explosives	2%	6%	8.4%	4%
<b>Property damage</b>	<b>9%</b>	<b>10%</b>	<b>19.0%</b>	<b>1%</b>
Public order offences	3%	7%	9.8%	4%
Offences against justice(e)	0%	2%	2.1%	1%
Miscellaneous offences	1%	5%	5.5%	3%

Figure 3 National Youth offending statistics (ABS, 2020-2021)

3.3.7. It is, in the Institute’s view, essential that there are clearly defined, appropriate and proportionate police powers to investigate and respond to harmful conduct, regardless of the age of the person who has conducted it. That is especially the case as sexual abuse by children is often interfamilial and may be hidden or denied by other family members.<sup>113</sup> This may be compounded by delayed reporting by child victims, a lack of corroborating and forensic evidence, and, as discussed, residual cultural devaluing of the evidence of testimony by children.<sup>114</sup> Lack of certainty about the power of police to question or criminally investigate

<sup>112</sup> Russell Pratt and Robyn Miller, *Adolescents with Sexually Abusive Behaviours and Their Families* (Victorian Government Department of Human Services, 2012) 7.

<sup>113</sup> Warner and Bartels (n 69).

<sup>114</sup> Anne Cossins, ‘Prosecuting Child Sexual Assault: Are Vulnerable Witnesses Protected Enough?’ (2006) 18 *Current Issues in Criminal Justice* 299.

potential suspects on account of their age can lead to substantial miscarriages of justice,<sup>115</sup> or worse, the continued violence, sexual violence or victimisation of another child or adult.

3.3.8. Beyond protecting the rights and interests of victims such powers are important for the rights and interests of children who have been accused of, or are suspected of, harmful behaviour.

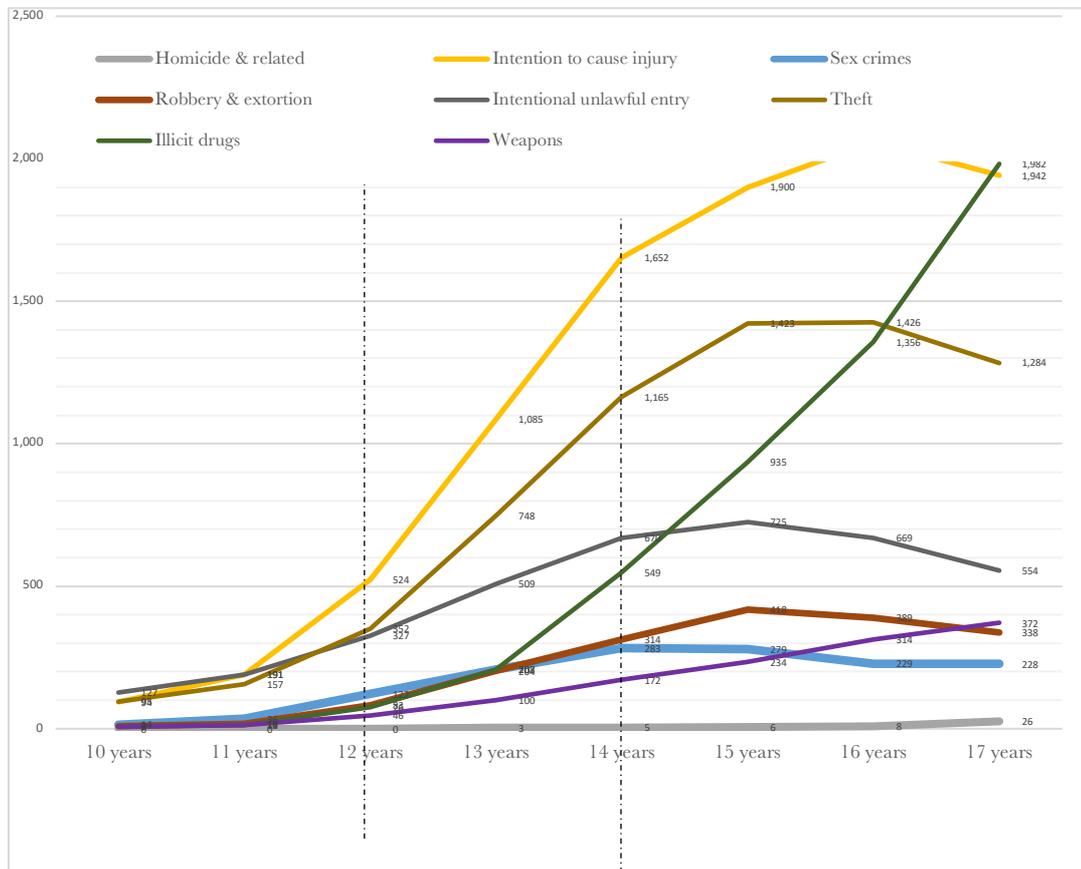


Figure 4 increase in youth offending by age & offence

Regardless of the model chosen to replace criminal responsibility, it is essential that there is proof that a child has conducted, or is likely to conduct behaviour that warrants differential treatment from other children.

3.3.9. Tasmania Police note that ‘the Tasmania community would expect that when they call police to respond to youth offending police have legislated mechanisms to respond’ to these forms of conduct.<sup>116</sup> The Institute agrees that public trust and confidence in the ability of public officers and statutory frameworks to reduce community risk from harmful behaviour is essential for the

<sup>115</sup> For instance, the death of Leigh Leigh in NSW was beset by police reluctance to investigate a large group of male children who had been witnessed physically and sexually assaulting a young girl contemporaneous to her rape and murder on the grounds that ‘that other boys had an involvement in this murder but that in the absence of admissions, securing convictions against them would have been difficult and perhaps not “worth” the public resources necessary to launch such prosecutions.’: Kerry Carrington and Andrew Johnson, ‘Representations of Crime, Guilt [and] Sexuality in the Leigh Leigh Rape/Murder Case’ (1994) 3 *Australian Feminist Law Journal* 3, 23.

<sup>116</sup> Ibid.

sustainability of any law reforms in this space. It is also central to the right of the community to public safety and order [Community Safety Principle 2.4.55], and the rights of individuals to life, liberty, security, fair treatment and restitution [Dignity and Risk Reduction principles 2.4.53 - 2.4.54]. Ensuring that the powers, roles and responsibilities of police as first responders to all forms of harmful behaviour, regardless of who is causing it, should be a central consideration in law reform. The Canadian model is compelling in this regard [see Additional Materials 7.4.7–7.4.9]

### 3.4. Minimum Age of Prosecution

- 3.4.1. An alternative — or an additional — way to clarify and limit the contact between children and the justice system is through the implementation of an absolute or discretionary minimum age of prosecution. This allows for police to use ordinary powers to respond to, investigate and gather evidence on criminal activity but not prosecute children who are alleged to have committed such acts or omissions through the criminal justice system. Instead, collected evidence and allegations are handled within a specialist — generally protective or therapeutic — framework that is specifically designed to accommodate the needs of children. This age of prosecution may be absolute or discretionary.
- 3.4.2. In the **Netherlands**, the *Code of Criminal Procedure* provides an absolute bar on prosecuting children younger than 12 years old. However, children under that age can be criminally investigated — such as being arrested or having their premises searched — before being referred to appropriate child protection authorities.<sup>117</sup> -
- 3.4.3. **Ireland** sets a discretionary minimum age of prosecution at 14 years old (with an MACR of 10), which stipulates that there can be no proceedings following arrest (and potentially remand) without the consent of the Director of Public Prosecutions.
- 3.4.4. Until late last year (2021), **Scotland** utilised both a fixed (12 years) *and* discretionary minimum age of prosecution (12–16 years). Until that time, the MACR was eight years old with a (non-discretionary) minimum age of prosecution of 12 years old. This meant that, under Scottish law, children under 12 years old could be apprehended, arrested and detained in the same way as adults — subject to special rules about police interactions with children — but could not be prosecuted in the courts at all.<sup>118</sup>

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<sup>117</sup> See Jantien Leenknecht, Johan Put and Katrijn Veeckmans, ‘Age Limits in Youth Justice: A Comparative and Conceptual Analysis’ [2020] *Erasmus Law Review* 13, 14 and references therein.

<sup>118</sup> Instead, those children were dealt with through the Scottish Children’s Hearing System. That non-adversarial system operates separately from the courts and is specifically designed to cater to the unique

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- 3.4.5. A discretionary minimum age of prosecution advances several law reform principles. It is appropriately contact, rather than detention focused [Limited Contact Principle] in that it leverages off the criminal justice apparatus, while ensuring a child is diverted from that system. It is also predominantly individualised and tailored to the needs of the child [Individualised Treatment Principle]. The normalised and standard response to harmful childhood behaviour becomes a protective one, with courts and punitive measures being an exception that needs to be justified on a case-by-case basis. On the other hand, it allows the state to prosecute matters that are seriously offensive to the rights and dignity of victims and cause widespread concern by the public, albeit in a more transparent and reviewable way [Principles of Risk Reduction, Dignity, Community Safety, De-escalation].
- 3.4.6. The introduction of a discretionary threshold of prosecution would require the amendment of s 26 of the *Youth Justice Act 1997* (Tas), to limit proceedings being brought against children under a specified age threshold to those approved by the Director of Public Prosecution subject to specific conditions. A possibility might be for those conditions to mirror those of *doli incapax*, or, as with jurisdictions like Denmark [see 8.2.17–8.2.23] following an independent assessment of the child’s health, wellbeing and competency.
- 3.4.7. A discretionary threshold of prosecution would not directly affect the power of arrest and bail. To extend it to those powers, or at least allow it to operate in combination with them, amendments would need to be made to pt 3 of the *Youth Justice Act* to specify that a youth who is under the rebuttable minimum age of prosecution should, for the purposes of apprehension and detention, be treated in the same manner as a child under the MACR [see 4.3], unless certain specified conditions were met that warranted the child being treated in the same matter as a child above the threshold range.<sup>119</sup> Such a process would not limit the ability of police to issue warnings and institute diversionary proceedings under pt 2 of the *Youth Justice Act*. However, the amendments might limit where a child might be cautioned (informally, or formally).<sup>120</sup> It might

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circumstances and needs of children. Scottish children who were between 12 and 16 were also dealt with under the Children’s Hearing System unless the Lord Advocate exercised discretion to permit their criminal prosecution. Hence, the MACR in Scotland was 8, the absolute minimum age of prosecution was 12, and the discretionary age of prosecution was 16. On 17 December 2021, the MACR in Scotland was raised to 12 years old, but the discretionary limitation on prosecution remains.

<sup>119</sup> For instance, that there is not an appropriate safe place to take the child; the child is likely to abscond from the child-safe place; or; the child may be at risk in available child-safe places (for instance from vigilantism); the officer does not have a reasonable belief that the child has a mental impairment or mental illness, but that the child requires a level of protective restraint or detention appropriate and adapted to the risk they pose to the safety and wellbeing of themselves or others.

<sup>120</sup> For instance, in a child-safe place; with a parent or guardian, employee of the Department of Communities or an officer of the CCYP acting as advocate is present to support the child and ensure they understand the nature of the caution.

also be appropriate to limit the length of time a child in the age range is subject to detention or questioning and require that the differential treatment be approved by a senior officer or DPP.

### Special Provision for Serious Offences

- 3.4.8. A common objection to raising the minimum age of criminal responsibility draws on the rare, outlier cases of children who commit serious violent crimes, such as the infamous case of two 10-year-old boys in the United Kingdom who murdered two-year-old James Bulger in 1993. One way that jurisdictions take into account these outlier examples is through special provision for the prosecution of serious crimes.
- 3.4.9. It should be noted that differentiated treatment based on the offence committed already exists in Tasmania, as discussed above regarding the framework of the *Youth Justice Act*. In Tasmania, serious offences listed as ‘prescribed offences’ are outside the scope of diversionary proceedings<sup>121</sup> and are heard in the Supreme Court rather than the Magistrates Court [see Additional Materials 5.7.9 ].
- 3.4.10. The Tasmanian approach relates only to the interventions that may be imposed against the child and applicable criminal procedure. It does not relate to whether or not the child can be held criminally responsible for the offence. However, there are foreign jurisdictions who take this latter approach, where the type of offences for which a child may be held responsible differs based on their age. These include:
- **New Zealand** (MACR 10):<sup>122</sup> Children 10–11 may only be held criminally responsible in a youth court for murder or manslaughter.<sup>123</sup> Children 12–13 are subject to the same rules as 10–11-year-olds, and may also be prosecuted and sentenced for sexual violation<sup>124</sup> or wounding, maiming, disfiguring, or causing grievous bodily harm to any person with intent to cause grievous bodily harm.<sup>125</sup>
  - **Ireland** (MACR 10): Children under 12 years of age may only be held criminally responsible for murder, manslaughter, rape, rape under s 4 of the *Criminal Law (Rape) Amendment Act 1990*,<sup>126</sup> or aggravated sexual assault.<sup>127</sup>

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<sup>121</sup> *Youth Justice Act 1997* (Tas) ss 3, 7.

<sup>122</sup> See Leenknecht, Put and Veeckmans (n 117) 16–7.

<sup>123</sup> *Oranga Tamariki Act [Children’s and Young People’s Well-Being Act] 1989* (NZ) ss 272(1)(a), 275(2)(b), 272(2).

<sup>124</sup> *Crimes Act 1961* (NZ) s 128B, maximum penalty of 20 years’ imprisonment.

<sup>125</sup> *Ibid* s 188(1), maximum penalty of 14 years’ imprisonment.

<sup>126</sup> Sexual assault that includes penetration of the anus or mouth by the penis, or penetration of the vagina by any object held or manipulated by another person.

<sup>127</sup> *Children Act 2001* (Ireland) s 52(2).

- **Hungary, Lithuania, Poland, and Slovakia** also have special provisions permitting criminal responsibility to be attributed to children who commit certain acts or omissions.<sup>128</sup>

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- 3.4.11. If the minimum age of criminal responsibility is raised to 14 in Tasmania, there could be carve-outs that follow similar demarcations as regards the type of offence. While this approach is not recommended by the UN Committee on the Rights of the Child<sup>129</sup> or bodies such as the Law Council of Australia,<sup>130</sup> it may help mitigate against community concerns that the rare case of a child who commits murder or rape will walk free and go unpunished by the criminal law.
- 3.4.12. The data shows it is very rare for children aged 10–14 to commit these most serious offences that are typically subject to carve-outs [see Table 2]. That is especially the case in the 10–12 range. Furthermore, whilst ABS statistics for Tasmania cover only the full youth justice range (10–18), they are evidence that, in this State at least, such the commission of such crimes by children are very rare.

*Table 2 Sentences for prescribed offences*

<b>Principal Offence</b>	<b>Australia Wide (to 15)</b>						<b>TAS</b>
	<b>10</b>	<b>11</b>	<b>12</b>	<b>13</b>	<b>14</b>	<b>15</b>	<b>(10–18)<sup>131</sup></b>
Homicide and related offences <sup>132</sup>	0	0	0	3	5	6	5
Sexual assault and related offences <sup>133</sup>	14	36	122	208	283	279	7
Robbery and extortion	9	18	83	204	314	418	16
Source: Australian Bureau of Statistics							

*5 Carve-out style offences in Australia inc Tasmania<sup>134</sup>*

- 3.4.13. There is no compelling statistical evidence that special provisions are needed to deal with specific crimes for children under 12 or 14. That is particularly the case given the discontinuity of legal principle applicable to legal responsibility that it would introduce into Tasmanian law.

<sup>128</sup> See the table annexed to this report.

<sup>129</sup> *General Comment 24* (n 82) 18 para 25.

<sup>130</sup> Law Council of Australia, ‘Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group Review*’ (2 March 2020) 9.

<sup>131</sup> *Ibid* Table 20.

<sup>132</sup> Includes murder, attempted murder, and manslaughter and driving causing death.

<sup>133</sup> Includes sexual assault and non-assaultive sexual offences.

<sup>134</sup> The table indicates how many offenders there were across Australia in 2019–20 for those offence categories typically subject to carve-outs, as well as the total number of offenders in Tasmania for those categories of offences. Between the general age-distribution figures across Australia and the low number of Tasmanian offenders for each category — this latter figure covering all youth offenders aged 10–18 — the number of children who commit those most serious offences in Tasmania is very low. Data extracted from Australian Bureau of Statistics, *Recorded Crime — Offenders, 2019–20* (Catalogue 4519.0, 11 February 2021) Table 18, 21 (*‘ABS Youth Offender Statistics’*).

- 3.4.14. In the Institute's view carve-outs or special provisions contradict the principle underlying the MACR. That is that persons under a specified age cannot form a *mens rea* to commit a crime *because of their age*. Unlike the rebuttable age threshold of *doli incapax*, the lower age of MACR is absolute and irrebuttable. However, if it is in fact the case that children below the MACR may be responsible for some acts and not others then, by law, the question of responsibility is not simply about age. Rather a child may be criminally responsible *because of their conduct*. This introduces further elements into the determination of whether a child is criminally responsible — namely the act and its consequences — which is the current function of the rebuttable presumption of *doli incapax*. Such an approach raises questions about the need and basis of replacing the rebuttable presumption with an ostensibly non-rebuttable one. It relatedly raises issues with the rights of a child to be free from discriminatory conduct by the state [see Rights Based Principles, 2.3.2 ]. More fundamentally, it would contradict the principle underlying the MACR that harmful behaviour by children under that threshold indicate the child is in need of care and protection, not punishment. Indeed, the more serious the conduct the more important the protective intervention to reduce the risk of the child to themselves and others.
- 3.4.15. The Institute does not recommend carve-outs to the MACR.

## 4 Reform options for Tasmania

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- 4.1.1. In the Institute's view, there is no need to introduce a new legal regime to deal with a change to the MACR. Given the breadth of potential orders that can be made in respect of an 'at risk' child under Tasmanian child protection law, it is possible for any of the above options to be implemented as part of conditions determined necessary to secure the care and protection of a child. However, some reform may be necessary to ensure a joined-up pathway for children below the MACR in conflict with the law to ensure these mechanisms are clear, properly used and effectively employed.
- 4.1.2. Whilst child protection is the standard approach to dealing with children younger than the MACR in conflict with the law across the OECD, that has not always been the case in Tasmania. Indeed, the existence of so many 'cross-over' children indicates that child protection and youth justice interoperate, but not in always in a complementary manner.<sup>135</sup> Approximately 41 per cent of Tasmanian children under 14 who are charged with offences in the Youth Justice system also have a child protection file.<sup>136</sup> This suggests that current care and protection measures do not always reduce the potential risks relating to antisocial and harmful behaviour by children.
- 4.1.3. If a child's journey away from antisocial and harmful behaviour is to be via a child protection pathway, then the law must ensure the path leads back to family, culture and community, and not the youth justice system [Family, culture and community principle see 2.4.38]. Some reform is therefore necessary to ensure child protection properly deals with children who present risks to themselves and others. In particular, the *Children, Young Persons and Their Families Act* requires tailored amendments that ensure it is better able to cater for the specific needs of children who are in conflict with the law.
- 4.1.4. It is also important that Tasmanian law be made clearer and more precise about the role, powers and duties of first responders to offence-like or at-risk behaviour by children. Finally, once children are brought within the child protection space there must be provisions to allow child services, under the supervision of the courts, to implement risk reduction measures tailored to the best interest of the child, those harmed and the community.
- 4.1.5. At a broader level the Institute recommends extending and embedding the law's current discretionary approach to childhood development above the MACR. As with all Australian jurisdictions, the rebuttable presumption of *doli incapax* currently applies in Tasmania for all children who are within a four-year age bracket above the MACR.

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<sup>135</sup> Tasmania Legal Aid (n 99) 3.

<sup>136</sup> *Ibid* 4.

- 4.1.6. Given the variable nature of cognitive, moral and intellectual development, the Institute also suggests further consideration of appropriate legal, policy and institutional forms to allow child protection to be the standardised approach to children above the MACR, unless there are strong and compelling reasons to direct children into the youth justice system.
- 4.1.7. The Institute emphasises the need for individualised care and protection responses that account for a child’s individual circumstances and development and the conduct which brought them into contact with child protection to begin with.
- 4.1.8. The Institute reiterates its view that the long-term sustainability of law reform in this area is dependent on, effective, evidence-based and sustainably resourced programs tailored to children in conflict with the law.

## 4.1. Definitional issues in Tasmanian Criminal Law

- 4.1.1. The MACR under the Tasmania is currently expressed as follows:

**18. Immature age**

(1) No act or omission done or made by a person under 10 years of age is an offence.

- 4.1.2. ‘Offence’ under Tasmanian law includes any statutory crime, whether punished summarily or otherwise.<sup>137</sup> By consequence the MACR in s 18 applies to all criminal and summary provisions in Tasmania.
- 4.1.3. The Tasmanian MACR provision may be contrasted with s 7.1 of the Commonwealth *Criminal Code*, in relation to Commonwealth offences alleged against children, which states that:
- A child under 10 years old *is not criminally responsible* for an offence.
- 4.1.4. Notably while the age threshold for the Tasmanian MACR and Commonwealth MACR are the same, their expression and operative effect differ. Specifically, the Tasmanian MACR operates to deprive an act of being legally characterised as an offence for the purposes of the any Tasmanian law (not just the criminal code, but all indictable or summary crimes contained in any statute).
- 4.1.5. Unlike the Tasmanian articulation, the Commonwealth code refers to an act as an offence, but specifies that the child is not responsible and therefore cannot be criminally liable for its commission. Other Australian jurisdictions adopt differing wording to describe MACR, but like

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<sup>137</sup> *Acts Interpretation Act 1931* (Tas) s 46. All offences are picked up by *Criminal Code Act 1924* (Tas) s 4 and Criminal Code, s 1.

the Commonwealth, their focus is on the (lack of) responsibility of the child, rather than the act or omission itself not constituting an offence.<sup>138</sup>

- 4.1.6. Tasmania's unique wording, which specifies that the act or omission *is not an offence* (and also therefore not a crime), has a practical operative effect on statutory powers which are enlivened by the commissioning or suspected commissioning of an offence.
- 4.1.7. In the Institute's view the wording (not just the numerical age) of s 18 of the *Criminal Code* as it relates to the MACR should be re-written to bring it into alignment with other Australian jurisdictions [see Additional Materials 5.5.14] which do not deprive the act of its legal character as an offence. Specifically, the MACR provision should clarify that an act or omission by a person who is under the MACR is characterised as an offence under Tasmanian law, but the child under the relevant age is 'not responsible for' that offence, or alternatively 'is excused from' that offence.
- 4.1.8. Amending s 18 of the *Criminal Code* will ensure that there are no unforeseen gaps in the law relating to harmful behaviour by any person against any other. That is, law reforms may be directed to limiting the scope, or precluding the operation of existing laws that relate to offences or suspected offences rather than requiring that an entirely bespoke system be established for a limited class of individuals. For instance, it will allow for the law to address the potential for so-called 'Fagin' offences, or adults recruiting children to commit offences so as to escape responsibility [see 4.6], the establishment of crime scenes, direction powers or other powers arising from or relating to statutory offences [see Additional Materials 5.1.20].

**Recommendation 1. Section 18 of the Criminal Code should be rephrased to specify that no child under the MACR is criminally responsible for an act or omission.**

- 4.1.9. The Institute prefers the simplicity of the wording of s 7.1 of the Commonwealth *Criminal Code*. The benefit of adopting that provision is that there would be uniformity in respect of two analogue provisions that apply to Tasmanian children as residents of a federal state.
- 4.1.10. Because the conduct of a child would still amount to an offence, it would continue to fall within the provisions of the *Youth Justice Act* given it currently applies to persons who are more than '10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred'.
- 4.1.11. To avoid confusion and ensure clarity about first response powers the Institute would recommend:

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<sup>138</sup> The various articulations of the MACR are set out in Additional Materials 5.5.15.

- Amending the age of 10 years old throughout the *Youth Justice Act* and replacing it with the new MACR; and
- If the MACR is raised to 14, re-define prescribed offences in s 3 of the *Youth Justice Act* to include all offences which are currently proscribed for youth under 14 and explicitly include them in the prescribed offences applying to 14, 15 and 16 year-olds.

## **4.2. Clarifying the legal character of harmful behaviour by children younger than the MACR**

4.2.1. Perhaps the most important issue in raising the MACR is how the law will deal with a larger cohort of children who have a statistically higher probability of acting in harmful or antisocial ways. At present Tasmania Police have extremely limited powers to deal with children younger than the MACR. Indeed, the two main sources of power to deal with children are:

- The *Mental Health Act 2013* (Tas) which provides Tasmania Police with the *ad hoc* power to apprehend and take a child into protective custody for the purposes of assessment, treatment and care, but only if the officer has a reasonable belief that the child has a mental illness; or
- The *Children, Young Persons and Their Families Act 1997* (Tas), under which Tasmania Police may also deal with children who are being assessed as ‘at risk’ from, amongst other things, lack of adequate supervision and control by a parent or guardian. These powers can only be exercised at the request of the Secretary of the Department of Communities pursuant to an assessment authorised by a Magistrate.

4.2.2. In the Institute’s view these laws would not be sufficient to deal with harmful behaviour by children older than the current MACR. However only minor amendments are necessary to ensure that Tasmanian law is capable of ensuring appropriate first response powers.

### **Mental health law is not an appropriate framework for all harmful childhood behaviour**

4.2.3. Whilst police do have powers under the *Mental Health Act* to apprehend a person of any age who represents a risk to themselves or others,<sup>139</sup> this is a limited power and should not be improperly used or overused. The power is limited because it, necessarily, requires that a police officer have a reasonable belief that the child is suffering a mental illness. Harmful or unlawful behaviour

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<sup>139</sup> Police may apprehend and detain children below the MACR under the *Mental Health Act 2013* (Tas), or under restriction orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas). If a Mental Health Officer or a police officer reasonably believes that a child poses a likely risk to the safety of themselves or other people, then the officer can take a person into protective custody without a warrant if they also believe that the person has a mental illness and should be examined, and if necessary assessed and treated for a mental health disorder: *Mental Health Act 2013* (Tas) ss 17–19.

under the Act cannot, of itself, be taken as evidence of a mental illness. Hence, protective custody under the mental health regime is only available when there is some clear association between the harmful behaviour and a cognitive impairment or mental dysfunction of a child. The power should not be overused to deal with all harmful behaviour by children, because doing so risks:

- Improperly assuming that harmful childhood behaviour is the result of aetiological dysfunction; or
- Implying that mental health dysfunctions are a cause of crime-like behaviour;
- Placing resource burdens on public health services — by requiring they become a triaging and care service for childhood antisocial behaviour — which are already limited in their ability to address mental health problems affecting young people.

### **Child protection law for ‘offence like’, ‘in need’ and ‘at risk’ behaviour**

4.2.4. Tasmania Police (and any other child protection officers employed by the Department of Communities) do not currently have *ad hoc* powers to deal with children under the *Children, Young Persons and Their Families Act 1997* (Tas).

4.2.5. That would remain the case even if the *Criminal Code* provisions relating to MACR clarify the conduct is an offence for the purpose of Tasmanian law. Rather, police are limited to:

- Taking reasonable steps to prevent the occurrence or further occurrence of the ‘abuse or neglect’ of a child — which all adults are under a general duty to do, and principally involves reporting the abuse or neglect to the Secretary or a Community-Based Intake Service;<sup>140</sup> or
- Reporting knowledge, or reasonable suspicion of child abuse or neglect, which the police officer forms in the course of their official duties, to the Secretary or a Community-Based Intake Service.<sup>141</sup>

4.2.6. Under the Act, ‘abuse or neglect’ are defined as:<sup>142</sup>

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|---|
| (a) sexual abuse; or  |
| (b) physical or emotional injury or other abuse, or neglect, to the extent that — |

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<sup>140</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 13.

<sup>141</sup> *Ibid* s 14.

<sup>142</sup> *Ibid* s 3

- (i) the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or
- (ii) the injured, abused or neglected person's physical or psychological development is in jeopardy

- 4.2.7. Police may be requested to assist in the assessment of a child who has been reported as abused or neglected to determine if they are 'at risk' and require care and protection under the Act.<sup>143</sup> The Act provides wide ranging inquiry, entry, search and seizure powers to assist in the conduct of an assessment.<sup>144</sup> Police may also take a child to a place to be assessed under the Act. However, as noted these powers are not self-initiated (ad hoc). They also predominantly require the Secretary or the officer to obtain a warrant. A child may be determined to be at risk if they are, or are likely to be, subject to violence, abuse or neglect. That extends to situations in which parents are 'unable to exercise adequate supervision and control over the child'.<sup>145</sup>
- 4.2.8. The current Tasmanian approach to children under 10 years old is broadly consistent with how other jurisdictions deal with antisocial and violent behaviour by children, albeit with less specificity than is found elsewhere.<sup>146</sup> Namely, first responders apprehend and deal with the risk then triage children into child protection. Once a child has been placed in a safe, secure place, police powers are limited to assisting in the conduct of assessment or care and protection orders for the child [see Additional Materials 5.5.17]. However, the Institute considers the present Tasmanian child protection regime lacks a degree of breadth and clarity necessary to adequately appropriately respond to the increase in number and seriousness of offence-like behaviours under a higher MACR. In particular, the Institute considers the present criteria of 'abuse or neglect' and 'at risk' to be too narrowly confined for the purposes of criminal offending by children; and conversely the role of police in reporting and responding to such conduct to be too ill-defined and abstract.

## **Powers and criteria to apprehend**

- 4.2.9. The Institute recommends adopting the approach of other jurisdictions that articulate the role of first responders under child protection law. The powers, duty and limits on appropriate responses to harmful behaviour by children in those jurisdictions are enlivened any of the following three ways:<sup>147</sup>

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<sup>143</sup> Ibid s 19.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid s 4(1)(c).

<sup>146</sup> See, eg, 7.4.

<sup>147</sup> See, eg, discussion of Canadian provinces in Additional Materials 7.4.8.

- 1) A child having committed a serious offence or been involved in persistent offending for which they would otherwise be responsible; or
- 2) The child is involved in conduct that is ‘offence like’ an ‘otherwise be’ a criminal offence; or
- 3) The behaviour of a child indicates that they are ‘at risk’ and ‘in need of protection’ by law.

4.2.10. Notably, the jurisdiction to act in relation to offence-like behaviour does not mean that a police officer has the same powers that they would if the conduct was that of an adult [see Additional Materials 7.4 ]. Similarly, the jurisdiction to respond to at risk behaviour does not grant a police officer all the powers of a child protection worker. Rather these powers and their limits are ordinarily prescribed by legislation.

4.2.11. Some jurisdictions adopt a dualist approach. That is, they direct police to respond to behaviour which is *either*: a serious or persistent offence, or behaviour which generally indicates a child is at risk and requires care and protection.

4.2.12. The Institute prefers this dualist approach. That is because, on the one hand:

- Police who act as first responders are more likely to understand and be familiar with the criminal offences set out under the *Criminal Code* and *Police Offences Act 1935* (Tas) than to be competent to evaluate whether a child is at risk; and
- The *Criminal Code* provides an extensive and articulated omnibus of harmful and antisocial behaviours; and
- Both of these factors serve to provide greater clarity, continuity and certainty to police in relation to harmful and antisocial conduct.

4.2.13. On the other hand, the Institute considers that:

- Given children under the MACR are not criminally responsible, it is important to ensure first responder powers are appropriately connected to and associated with child protection law; and
- Once a child has been directed into the child protection space, there is a suitable nexus between the offence-like behaviour and the criterion which may be used to determine the necessary care and protection responses; and
- Jurisdictions that adopt a dualist approach often have specialist child protection officers who may work alongside or collaborate with police. Adopting a dualist approach allows for such specialist officers to be integrated into police or child protection in Tasmania in the future.

4.2.14. At present the implementation of a dual approach to police/first responder jurisdiction requires some reform and amendment. Specifically, the Institute would recommend:

- 1) Broadening the definition of ‘at risk’ to include children who are a risk to themselves or others; and
- 2) Providing the police with precise and well-defined *ad hoc* powers to act as first responders to children who are at risk.

### **Broadening the definition of ‘at risk’**

- 4.2.15. Whilst it is definitionally possible to describe criminal-like behaviour by children as a product of parental neglect, the Institute’s view is that should not be the only way in which child protection legislation defines such behaviour. Specifically, the Institute is concerned that behaviour is not automatically attributed to neglect or the incapacity to maintain, supervise and control children. Doing so would serve to generalise about the diverse and complex drivers of harmful behaviour and risk stigmatising and labelling parent(s)/guardian(s) and communities. Indeed, such an approach would be contrary to the broader importance that the *Children, Young Persons and Their Families Act* attributes to the relationship between children, families and communities.<sup>148</sup> In a broader setting it would signal a return to an outmoded welfare philosophy which treated disadvantage and deviance by children as a consequence of bad parenting and sought to remove children from the source of the neglect (i.e., their parents and communities). Such policies have a problematic history in Australia [see 2.4.29–2.4.37] and should not be returned to in an express or implied way.
- 4.2.16. Other jurisdictions categorise dangerous and/or anti-social behaviour under child protection law in a much more direct and explicit way that reflects the approaches set out above. Namely legislation specifies that a child is in need of care and protection because:
- They are involved in serious or persistent ‘offence like’ conduct; and/or
  - Because their behaviour generates a risk to that child or other people; or
  - Both of these things (a dualist approach).<sup>149</sup>
- 4.2.17. The Institute recommends Tasmania expand the definition of when a child is ‘at risk’ under the *Children, Young Persons and Their Families Act* to include similarly explicit criterion. For the reasons set out above [Principle of family, culture and community see 2.4.38], the Institute does not

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<sup>148</sup> See especially *Children, Young Persons and Their Families Act 1997* (Tas) s 10C.

<sup>149</sup> New Zealand, for instance, like Tasmania, describes children as being in need of care or protection if their behaviour suggests their parents or guardians are ‘unable and unwilling to care for that child’. However, it further includes in its definition: ‘the child or young person has behaved, or is behaving, in a manner that is, or is likely to be, harmful to the physical or mental or emotional well-being of the child ... or to others ... [and] in the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the well-being of the child’: *Children, Young Persons, and Their Families Act 1989* (NZ) s 14 (emphasis added).

consider it necessary to modify the definition of ‘abuse and neglect’ to incorporate violent or antisocial behaviour.

**Recommendation 2. The *Children, Young Persons and Their Families Act 1997 (Tas)* should be amended to clarify that children who cause risk to themselves or others come within the jurisdiction of the Act.**

4.2.18. Assuming that 18 of the *Criminal Code* is amended in the form set out above, the Institute would recommend amending section 4 of the *Children, Young Persons and Their Families Act 1997 (Tas)* to specify that a child is at risk if the child:

- Has caused, is causing or is likely to cause serious harm to themselves or others (high risk behaviour); or
- Has been involved in ongoing or offence like behaviour which is of the quantity, nature, or magnitude to raise concern for the child’s wellbeing (persistent offence-like behaviour); or
- Has conducted themselves in a manner which would, if proven, would constitute an offence under the *Criminal Code* (serious offence-like behaviour).

4.2.19. These reforms would not, of themselves, provide first responders with powers to deal with at-risk children but it would ensure that the relevant form of behaviour is properly categorised for the purposes of tailoring appropriate responses under child protection law. Reform recommendations relating to appropriate responses to dealing with harmful behaviour by children are set out below [see 4.3].

4.2.20. In the Institute’s view it would not be for police to make determinations about persistent offence-like behaviour. The Institute accepts that it may be appropriate for Tasmania Police to maintain their own records relating to their dealings with children. However, those records should be kept separate to adult records, and be subject to limited access and not be retained for longer than is necessary to conduct appropriate police work.

4.2.21. The primary role of police in relation to children under the MACR should be as first responders, with the aim of protecting the child, others, and the community from risk. The secondary role and duty of police officers should be to take that child to a child-safe-place and report the intervention, and any relevant conduct by the child, to the Department responsible for the administration of the *Children, Young Persons and Their Families Act*. It is that Department which should maintain a record relating to any child’s contact with public authorities. Once the threshold of persistent offence-like behaviour is met it is that Department which should determine whether an appropriate assessment, care and protection response is required. This

duty may be sometimes exercised in consultation and partnership with law enforcement authorities.

### 4.3. Clarifying first responder powers

4.3.1. Beyond defining when a child's harmful behaviour might require protective intervention it is necessary to clarify the nature and scope of permissible intervention, particularly by first responders. The general approach across the jurisdictions reviewed by the TLRI is for police and/or specialist child protection workers to:

- Apprehend children who are younger than the MACR — and in many cases under a discretionary minimum age of prosecution — based on specific legislative conditions (i.e., high risk or serious offence-like behaviour); and
- Take them to a child-safe place; and,
- Where necessary, make a report to appropriate child services.

4.3.2. The Institute would recommend that Tasmania adopt a similar approach.

4.3.3. The Institute recommends inserting a provision into pt 3 of the *Children, Young Persons and Their Families Act*, to specify that police or other designated first responders (a designated employee of the Secretary under the Act) who:

- Reasonably believe that a child that is younger than the MACR:
  - Is 'at risk' under s 4 of the Act — which would include their conduct creating risks to themselves or others if the above recommendations are adopted; or
  - Has committed or is likely to commit an offence.
- May apprehend that child, in a reasonable manner, without a warrant, and:
  - Return the child to their parent or guardian; or
  - If it is not safe, reasonable and appropriate to leave a child in the care of their parent or guardian take the child to a designated child-safe-place, specified under legislative instrument; and
  - If necessary, or mandated, report the matter to the Secretary of the Department of Communities.

4.3.4. The Institute recommends providing designated employees of the Secretary of the Department of Communities with first responder powers. This would allow for the employment of specialist child protection workers who may assist or collaborate with police. However, to the extent coercive force is necessary to apprehend children and take them to a safe place, the Institute recommends that child protection workers seek the assistance of a police officer. That approach

would be largely consistent with child protection provisions relating to first response approaches to violent and antisocial behaviour in other jurisdictions [see Additional Materials 7.4].

- Appropriate resourcing, design and implementation of child-safe places — including options for security, supervision and care — is a necessary adjunct to this recommendation [see 3.2.11–3.2.17].

4.3.5. The Institute considers the provisions of pt 5 of the Ontarian *Child, Youth and Family Services Act 2017* to be a model approach in collaborative first response powers and duties between police (peace officers) and child protection workers. The Institute also notes the general international legal obligation to establish specialist units within the police force to deal with children.<sup>150</sup>

### **Statutory/regulatory limits on police power**

4.3.6. The Institute further recommends precisely clarifying the powers police have to apprehend a child who is younger than the MACR. Given the nature of harmful behaviour that occurs between 10 and 14 there may be situations in which it is important to question a child about immediate risks to themselves or others and to identify evidence or property that may be at risk of being lost or destroyed. These matters should be clarified by statute, or alternatively legislative instrument and specify:

- What degree of coercion or restraint is permissible in apprehending a child in the exercise of the duty to take them to a child-safe place;
- How a child may be questioned after apprehension, who may conduct the questioning, who must be present during questioning, and where questioning may occur;
- In which situations an officer must notify the Secretary of the Department of Communities of the matter, and in which situations that requirement is only discretionary; and
- How long police should be permitted to retain records about a child and when such records must be either relinquished to the Secretary of the Department of Communities and/or destroyed.

4.3.7. The Institute notes that most OECD countries allow police to keep records of ‘offence-like’ behaviour by children younger than the MACR, albeit in separate databases, subject to access restrictions and requiring deletion or transfer to another department in some jurisdictions after a set amount of time (e.g., 3 years). The Institute further notes the more general international legal obligation to keep records of offending by children confidential, closed to third parties and limited authorised persons or those persons involved in the disposal of a matter.<sup>151</sup>

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<sup>150</sup> *Beijing Rules* (n 83) rule 12.

<sup>151</sup> *Ibid* rule 21.

- 4.3.8. The Institute recommends that these powers, functions and duties should be determined in consultation with the Department of Communities, CCYP, and Tasmania Police.
- 4.3.9. The Institute considers the provisions of pt 4 of the *Age of Criminal Responsibility (Scotland) Act 2019* (UK) (see Additional Materials 7.4.10) to be a model approach to setting out roles, responsibilities and restrictions on police powers in relation to children under the MACR.

**Recommendation 3. The roles, responsibilities and restrictions for police dealing with children younger than the MACR should be clarified by statute**

### **Powers of forensic investigation**

- 4.3.10. In addition to the above powers, it is important that police retain the ability to collect forensic evidence, particularly in matters relating to sexual offending between children or involving children. Police presently have the power to collect forensic evidence from children under the MACR in limited circumstances set out in div 2 pt 4B of the *Forensic Procedures Act 2000* (Tas). That Act mandates that police obtain either the consent of an appropriate parent/guardian or an order of a magistrate to conduct a forensic procedure and take samples from a child. The Institute considers this approach is appropriate and not in need of any substantive reform except to reflect any new MACR. That would involve either altering the lower age threshold in s 8(3) of the Act (i.e., if the new MACR is 12 not 14), or removing s 8(3) altogether. In addition, any references to the age of 10 in div 2 pt 4B should be amended to replace 10 years-old with the new MACR. The Institute recommends that Tasmania Police, the Department of Communities and CCYP work together to settle upon an appropriate time period for the retention of forensic records in public indexes, and how and who may access them after collection.

**Recommendation 4. Powers to collect forensic evidence should be amended to reflect any new MACR**

## **4.4. Using the Child Protection Framework to respond to ‘at risk’ conduct**

- 4.4.1. Once a child has been brought within the jurisdiction of the *Children, Young Persons and Their Families Act* the Secretary of the Department has wide ranging powers to initiate assessments. That includes obtaining warrants for police to conduct investigations into conduct which generates risks to a child [Additional Materials 5.5.17]. It also contains provisions for the

Secretary to apply for broad ranging care and protection orders to alleviate the risks to (and caused by) a child. The nature of the order is sufficiently broad to encompass any child protection response which the court considers to be in the best interests of the child, including specifying conditions for supervision, guardianship, care, protection, health, welfare or education.<sup>152</sup> The order may also require that a child is placed under the guardianship or supervision of a body that provides out-of-home care. The Institute does not consider that these provisions require substantial amendment, so long as the criteria set out above — especially those expanding the definition of ‘at risk’ — are incorporated into the Act.

- 4.4.2. By specifying that a child is at risk if they are involved in persistent or serious offence-like behaviour the Secretary and ultimately a court can tailor appropriate responses to reduce that risk.
- The Institute reiterates that the capacity of the Secretary and court to determine appropriate responses are contingent upon the availability of services and support appropriate to the risks posed by, and to, a child.
  - Most essentially the approach adopted to deal with any risk needs to be properly resourced, adequate, and responsive to the needs of the child, victim, and community [see 3.2.11–3.2.17].
- 4.4.3. The Institute would recommend minor amendments to the present child protection regime to better accommodate a broader range of ‘at risk’ considerations, namely offence-like behaviour or behaviour which indicates a child is a risk to themselves or others.

## **Amendments to Care and Protection Regime**

- 4.4.4. Ensuring that Tasmania’s child protection approach appropriately responds to a child’s risk to others and the community may be achieved by amending the *Children, Young Persons and Their Families Act* to:
- 1) Specify in s 10E of the Act that, in determining the best interests of a child, the criteria to be taken into account may include:
    - The need to identify, understand and appropriately respond to risks a child may pose to themselves, to others or the community and to reduce the likelihood of such risks re-occurring in the child’s future;

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<sup>152</sup> This includes involving the child, parents, guardians, and community representatives (where these parties are not the source of the risk to the child) in decisions about how to best respond to risks to the child. The Act also makes it clear that those responses must be formulated on the principle that a ‘child should only be removed from his or her family if there is no other reasonable way to safeguard his or her wellbeing’ and that if a child must be removed ‘contact between the child and his or her family and community should be encouraged and supported’ *Children, Young Persons and Their Families Act 1997* (Tas) s 10C, and see also pt 5 div 2, especially s 22(3)(d).

- The child's social needs including their capacity to understand, respect and uphold the dignity, value, rights and freedoms of themselves and others.
- 2) Expand the considerations relevant to family group conferences in pt 5 div 1 to include arrangements to respond to and reduce any risks the child poses to themselves, others, or the community, as part of and complementary to arrangements for the 'care and protection' of the child (either by expanding the term in ss 31(1), 36(2), 37(1), 38 or by a general definition applicable to the division).
- 3) Clarify (as a new paragraph) under s 42(4) that a court may make an order providing for appropriate educational, therapeutic or other restorative measures to reduce any risks a child poses to themselves, others, or the community.
- 3) Require (as a new paragraph) under s 42(6) that a court may not make a care and protection order unless the factors for which a child has been assessed as 'at risk' and the potential for the risks continuing or re-occurring have been considered and responded to.

### **Rules of evidence relating to restrictive care and protection orders**

- 4.4.5. As set out above the present child protection regime in Tasmania allows for various measures to be put in place in response to children who are at risk, which may include risks arising from a lack of supervision and control. The measures adopted may include therapeutic, educational, reporting and removal options.<sup>153</sup> Notably these options act as limits on the freedom and liberty of a child, and in some cases may be imposed against the wishes of parents and guardians.<sup>154</sup> Given that is the case it is important that such orders are determined by a court, in the exercise of judicial power and subject to the rules of evidence.
- 4.4.6. At present, the *Children, Young Persons and Their Families Act* does not require that the rules of evidence be applied in matters relating to assessment, care or protection orders.<sup>155</sup> This is the result of 2013 amendments to the Act which removed the requirement for the court to apply

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<sup>153</sup> For instance, the Tasmanian Safe Placement Guidelines on Problem Sexual Behaviour and Sexually Abusive Behaviour envision a range of measures including mandated therapy, safety monitoring, and removal from other family members (as a last resort). Sexual Assault Support Service, *Standards of Practice for Problem Sexual Behaviours and Sexually Abusive Behaviour Treatment Programs* (2016).

<sup>154</sup> This is possible because of the particular status of children under the law, and the rights and obligations of parents to limit and control their rights and freedoms in their best interests [see 5.8]. However, in the absence of the voluntary agreement of parents and children to commit a child to an appropriate framework of measures to reduce the risk of harmful behaviour by or to that child, the present act requires that coercive power over a child is determined by the exercise of judicial power by the Courts. *Re Children Young Persons and Their Families Act 1997* and *Re Application by Stephen James Hayes* [2006] TASSC 101, [47] (Slicer J).

<sup>155</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 63.

the rules of evidence to applications for care and protection orders ‘except where the Court determines otherwise’.<sup>156</sup> Whereas this amendment is justifiable in relation to protective orders designed to protect a child *from* harm it is less justified if such orders are used to protect others from a child’s conduct. That is especially the case when the orders impose obligations or restrictions on the rights and liberty of a child. It is also important when there are contested facts or the child denies having acted in the manner which has attracted state intervention. In such cases it is important that a child is afforded procedural fairness, and the protections of the rules of evidence and appropriate review of contested facts and law by an independent and impartial body.

- 4.4.7. The Institute recommends that the Act specify an appropriate standard of evidence in cases where an application for care and protection of a child is based on their offence-like behaviour or behaviour which indicates a child is a risk to themselves or others. In particular, s 63 of the Act should specify that the Court ‘is not bound by the rules of evidence, unless the Court determines it is in the best interests of the child or a party to the proceedings that the rules of evidence should apply’.

**Recommendation 5. The *Children, Young Persons and Their Families Act* should be amended to specify that a court may determine the rules of evidence apply to a matter relating to the care and protection of a child.**

## 4.5. Compensation

- 4.5.1. There is a gap in compensation for victims of property damage inflicted by children younger than the age of criminal responsibility. Given the increase in physical and property offences by children older than 10 years reform may be necessary to ensure the rights of victims are maintained post reform.
- 4.5.2. There are three primary ways that victims of crime can be compensated:
- by a compensation order after a criminal conviction,
  - through instituting a civil claim for damages, or
  - under a statutory compensation scheme.
- 4.5.3. For a child younger than the MACR, the first option is not possible. However, the practical reality of children of that age being competent and capable of paying compensation for violent

<sup>156</sup> *Children, Young Persons and Their Families Amendment Act 2013* (Tas).

or property offences is unlikely. The same is true of civil liability, which is technically available, but unlikely to be practical or viable in the circumstances.

- 4.5.4. The Institute considers that the third option, the statutory system to compensate victims of crime — notably by virtue of the operation of s 4(1)(a) of the *Victims of Crime Assistance Act 1976* (Tas) — is sufficient to deal with injuries by children who have not attained a sufficient age to be criminally responsible [see Additional Materials 7.5.10]. However, the Institute would recommend expanding the scope of the compensation that may be provided in such cases to include property damage, where the victim is able to establish the loss is not covered by an insurance or other liability scheme. This will balance the loss of court ordered compensation that could have previously been made for children over 10 years old under s 47 of the *Youth Justice Act*.

**Recommendation 6. Victims of crime compensation should be expanded to cover property damage caused by children who are younger than the MACR.**

## 4.6. Recruitment of children

- 4.6.1. One argument sometimes raised in the debate over MACR is that the raising of the age will encourage or increase the incidence of ‘Fagin offences’ — where adults or older young offenders exploit a child to offend on their behalf, knowing the child cannot be held criminally responsible.<sup>157</sup> In such cases it is essential that the criminal responsibility of the child must be separated from that of the adult engaging in this exploitative behaviour.
- 4.6.2. The existing crimes of incitement and/or conspiracy under the Tasmanian *Criminal Code* can serve to hold the adult criminally responsible for using children to commit crimes.<sup>158</sup> However, other jurisdictions have more specific offences dealing with recruitment of children that impose higher penalties as a deterrent to Fagin style behaviour.<sup>159</sup>
- 4.6.3. In other Australian jurisdictions this is dealt with by criminalising the recruiting of children to commit a crime on behalf of an adult.<sup>160</sup> The punishment for this crime is ordinarily 10 years imprisonment. For instance, pt 1 div 11A of the Victorian *Crimes Act 1958* prohibits recruiting a child (the definition of recruit means to ‘incite, direct or induce’) in the following manner:

<sup>157</sup> CCYP Forum Responses 262, 264, 266, 272, 286.

<sup>158</sup> *Criminal Code* (Tas) ss 297, 298.

<sup>159</sup> *Crimes Act 1900* (NSW) s 351A; *Criminal Code* (ACT) s 655(2); *Crimes Act 1958* (Vic) pt 1 div 11A.

<sup>160</sup> *Crimes Act 1900* (NSW) s 351A.

(1) An adult aged 21 years or more must not recruit another person to engage in criminal activity, knowing that the other person is a child.

Penalty: Level 5 imprisonment (10 years maximum).

(2) For an adult to be guilty of an offence under subsection (1), the adult must know that it is likely the child will engage in the criminal activity that is the subject of the recruiting.

...

A person may be found guilty of the offence referred to [above] whether or not the child referred to in that section—

(a) engages in criminal activity; or

(b) is prosecuted for, or is found guilty of, any offence.

(3) For the purposes of subsection (1), the ages of the adult and the child are to be ascertained at the time of the recruitment.

- 4.6.4. The Institute recommends that Tasmania adopt a recruitment provision to deter any potential for adults to act against the best interests of children through inciting, directing or inducing them to commit offences. Doing so will be important to obviate the potential for more mature children to be recruited into physically abusive and coercive crimes on behalf of adults. The Institute prefers the Victorian formulation set out above as the most expansive and clear deterrent against recruitment of children to commit criminal acts.

**Recommendation 7. A new provision should be added to the *Criminal Code* to proscribe the intentional recruitment of children to commit an offence.**

## 4.7. Federal considerations

- 4.7.1. Tasmanian criminal and child protection laws operate within a federal context, raising questions of nationally consistent treatment of children across the Commonwealth. This question has come to the forefront of law reform policy given the differing proposals for the age to which MACR should be raised. As noted, the Meeting of Attorneys-General has agreed to 12 years old, whereas a number of peak bodies, NGOs and international organisations have called for the age to be set at 14 years old. The Australian Capital Territory Government has also, reportedly, determined to set its age at 14. The majority of respondents to the CCYP Forum argued that the Tasmanian MACR should also be set at 14. It is unlikely that all States and Territories will raise their own MACR beyond the nationally agreed new age of 12 years

old. As a result, there is a potential that different jurisdictions in Australia will have different MACR thresholds in the future.

- 4.7.2. There is no constitutional or other legal bar to each jurisdiction setting a different MACR. Indeed, for much of the 20<sup>th</sup> century the MACR differed across Australia. However, for the last two decades Australia has enjoyed a uniform approach to the MACR. Moving away from that uniform position generates federal issues, which are both technical and principle-based in nature.
- 4.7.3. There are two sources of technical legal issues. These are variation between Tasmania's MACR and the MACR in other States or Territories, and the potential for inconsistency with Commonwealth criminal law.
- 4.7.4. The potential of varied MACR thresholds across the federation generates uncertainties about interstate transfers of children who may be detained in one State to another. This may arise where that is either not permitted by law due a higher MACR, or because there are simply no facilities capable of detaining children of that age group because of the higher MACR.
- 4.7.5. In Tasmania interstate transfers of young prisoners is provided for in pt 7 of the *Youth Justice Act 1997* (Tas). Raising the MACR to 14 (for instance) would remove the legal mechanism by which children in that age group who are held in custodial sentence in other states (which have MACRs of 12) may be transferred to Tasmania. This may be resolved by introducing an exception under the Act to allow children in that age range to be brought to secure facilities in Tasmania. Specifically, the exception would need to clarify that the Act sentence or order of the other jurisdiction has effect in Tasmania notwithstanding the age of the child and, pursuant to that exception, Tasmanian laws apply 'with necessary adaptations'.
- 4.7.6. If the Commonwealth does not raise its MACR to the same level as Tasmania, then Tasmanian children below the State MACR will remain liable for federal offences. These include offences like cyber-crime, trafficking and terrorism offences (for which Australian children have been charged before). A list of possible federal offences applicable to children is contained in Annex B. Children who are charged with a federal offence are prosecuted in State courts and ordinarily placed into custodial sentence in that State. The State may not override Commonwealth law or relevant sentencing procedure.
- 4.7.7. In both situations above arrangements would need to be made to accommodate children in youth detention notwithstanding they would not be responsible under state law.
- 4.7.8. In a broader setting the potential for discontinuity in age thresholds generates legal inequality across the federation. Of course, Tasmania's Parliament is free to diverge from nationally uniform laws if it considers that its duty to uphold the peace, order and good governance of the State necessitates doing so. It is one thing for Tasmanian children to be treated less favourably

than children in other states (as was relatively recently the case in respect of the MACR). It is another for Tasmania to adopt a paragon approach which provides greater rights and protections for its citizens. However, movement away from a uniform position should not be taken lightly as it undermines the concept that all Australians are equal before the law and enjoy the same protections of the law regardless of where they reside. As the ALRC emphasised in its recommendation for national uniformity, Australian children ‘should not be liable to be charged with a criminal offence in one State for an act which if committed in another would not attract liability only by reason of his or her age’.<sup>161</sup>

- 4.7.9. While it is true that, in a federation legal supremacy to determine criminal laws is divided between the various States and the Commonwealth, each jurisdiction shares in and benefits from common law principles. Uniform statutory laws lend to progressive development of common law, ensuring greater clarity and refinement of principle and rights under shared laws. This is especially important in jurisdictions like Tasmania which do not benefit from the same quantum of jurisprudence that is produced in more populated states.
- 4.7.10. Equally important is the role of international law and international legal organisations to the facilitation of the progressive development and compliance with human rights norms. International law and international legal organisations’ jurisdiction are over (nation) states — in Australia the national, federal government — not subdivisions of states — in Australia the States and Territories. Moving away from a uniform national approach suggests that the question of MACR is not one for the federal government, and reduces the capacity for scrutiny and pressure to be brought to bear on Australia as sovereign member of the community of nations to act in compliance with international human rights standards.
- 4.7.11. As has been discussed, MACR is not the only mechanism which determines how children in conflict with the law are dealt with by the state and its instrumentalities. Should Tasmania choose to remain consistent with other jurisdictions (i.e., to raise the age to 12, not 14), it may still use other legal measures to reduce the exposure of children to the criminal justice system, and especially the courts and punitive detention. This includes retaining *doli incapax* for children above the MACR (ensuring they are not unnecessarily punished for crimes for which they have no responsibility), but also introducing a minimum age of prosecution (ensuring they do not unnecessarily enter the criminal justice system if they are incapable of forming criminal responsibility). It may also include other protections such as a minimum age of detention or minimum age of prosecution for children who are older than the MACR, but within an age range that remain protected from the full force of the criminal justice system. Whilst the

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<sup>161</sup> Australian Law Reform Commission (n 35) [18.16].

Institute has outlined those potential safeguards elsewhere, it does not make specific recommendations given they lie beyond the reach of the MACR.

## 4.8. *Doli Incapax*

- 4.8.1. As with the question of whether the MACR, the TLRI is not requested to, and does not take a view on whether the present upper threshold of *doli incapax* should be raised, or if it should what age it should be raised to. However, the question of the MACR and absolute age of discretion [see 5.1.14]) are intrinsically linked, not only within the Code provision in which they are found, but also in acting as legislative bookends for the *doli incapax* threshold in which children are *prima facie* assumed to lack *mens rea*.<sup>162</sup> This *doli incapax* threshold is a fundamental and longstanding component of the common law's approach to determining the criminal responsibility of children. This raises questions about whether only one component of the threshold should be subject to reform, or the broader threshold should be reconsidered.
- 4.8.2. The ALRC also recognised the 'arbitrariness' of age thresholds — whilst accepting their importance in clarifying certain unassailable rights for children in conflict with the law.<sup>163</sup> This legal position has recently been confirmed by Dahl et al [see 2.4.14] whose review of developmental science indicates that generalised legal demarcations to reflect cognitive development are based on pragmatic policy, not scientific or health practice.<sup>164</sup> *Doli incapax* is a longstanding feature of the criminal law which allows for a transition period between assumed absolute incapacity and assumed absolute capacity. This threshold, as the High Court reconfirmed in *RP v The Queen*, serves to 'ameliorate the harshness of the criminal law' against children who have not yet developed to warrant its application.<sup>165</sup> As such the plurality concluded that *doli incapax* retains its contemporary relevance and 'it is not self-evident that the policy of [supporting *doli incapax*] is outmoded in requiring that the prosecution prove the child understood the moral wrongness of the conduct'.<sup>166</sup> That is, it demarcates a protective age bracket within which any child's maturity is not assumed [Principle of individualised treatment].
- 4.8.3. As Lord Lowry explained in *C v DPP* the protection afforded by *doli incapax* serves to limit the potential that children unnecessarily become subjects of criminal law

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<sup>162</sup> *C v DPP* [1996] AC 1, [18].

<sup>163</sup> *Ibid.*

<sup>164</sup> Dahl et al (n 28).

<sup>165</sup> *RP v The Queen* (2016) 259 CLR 641, 651.

<sup>166</sup> *Ibid* 650 (Kiefel, Bell, Keane and Gordon JJ).

It is perhaps just possible to argue that the test should now be regarded as even legally obsolete. The test was designed to restrict the punishment of children and should not be used where no question of punishment arises. This argument has to face the difficulty that *the test traditionally protects the child from conviction*, whereas the choice between punishment and other treatment is only made after conviction.

...

A long and uncontradicted line of authority [stipulates that] ... ‘guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt’. No doubt, the emphatic tone of some of the directions was due to the court’s anxiety *to prevent merely naughty children from being convicted of crimes*.<sup>167</sup>

- 4.8.4. Thomas Crofts from the Sydney Institute of Criminology has similarly argued that *doli incapax* plays an important function as a brake on the discretion to prosecute children:

by making prosecution less straightforward, the presumption should ideally cause police and prosecutors to pause and consider whether there is a need for prosecution at all or whether there are more appropriate alternative diversionary responses that could be used.<sup>168</sup>

- 4.8.5. In this way the presumption has the ability to contribute to the principal of limited contact, or, at the very least the diversionary principles already articulated in Tasmania’s Youth Justice framework.

- 4.8.6. Whilst the Committee on the Rights of the Child has discouraged states from using ‘two minimum ages of criminal responsibility’ (i.e. MACR and age of discretion) it has done so on the grounds that the MACR should be raised to a minimum of 14 and with a recommended age of 16.<sup>169</sup> It also has observed that such dualist systems are not ‘protective’ in practice and that they leave ‘much to the discretion of the court and results in discriminatory practices’.<sup>170</sup> The Institute accepts these general observations, but could find no evidence of discriminatory conduct in relation to the use of *doli incapax* in Tasmania, nor that it had been used as anything other than a protective function, especially since the High Court decision of *RP v The Queen*.<sup>171</sup> The Institute further notes that the present political disagreement between relevant public offices is whether the MACR should be 12 or 14, and there is very little likelihood of the age being set at 16 as the Committee on the Rights of the Child has encouraged. Given that is the

<sup>167</sup> *C v DPP* [1996] AC 1, [37] (citing Professor Glanville Williams) and [64] (emphasis added).

<sup>168</sup> Thomas Crofts, ‘Reforming the Age of Criminal Responsibility’ (2016) 46 *South African Journal of Psychology* 441.

<sup>169</sup> *General Comment 24* (n 82) 7.

<sup>170</sup> *Ibid.*

<sup>171</sup> *RP v The Queen* (2016) 259 CLR 641.

case the Institute acknowledges the position of the Committee, but urges the retention of the age of discretion as the upper threshold of *doli incapax* given its demonstrable protective character in this jurisdiction.

- 4.8.7. The Institute recommends retaining the presumption of *doli incapax* as a judicial gatekeeper function for children who are within an appropriate developmental range above the specified age. In keeping with the recommendation for uniformity between the two codes applying to Tasmania as a State in the Federation, the Institute would recommend that the words of s 7.2 of the Commonwealth *Criminal Code* be applied in respect of the upper threshold of *doli incapax* under s 18 of the Tasmanian *Criminal Code*.

**Recommendation 8. The presumption of *doli incapax* should be retained.**

- 4.8.8. Raising the MACR will have a correlative effect both the temporal length of the threshold test for *doli incapax* and its placement as a balance point between lower (seven years then ten years) and upper thresholds (21 years then 18 years) of childhood irresponsibility and adulthood.
- 4.8.9. *Doli incapax* serves to render the MACR more elastic; extending its operation further into childhood development unless there are in that it extends its operation to an upper absolute age of discretion — presently 14. The MACR is in fact an intersecting point in a staged continuum to the upper, absolute age of discretion. Below that threshold the law stipulates a child ‘cannot’ form the intention to commit a crime, above that threshold, the law presumes that a child ‘prima facie’ cannot form the intention. That is because, according to Blackstone, in that second stage of childhood, ‘the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the [child’s] understanding and judgment’.<sup>172</sup>
- 4.8.10. As the Australian Law Reform Commission explained, the presumption operates as a ‘a practical way of acknowledging young people’s developing capacities [and] allows for a *gradual transition* to full criminal responsibility’.<sup>173</sup> Indeed, historically at least, the closer a child was to the MACR the stronger the presumption, the closer to the upper threshold of discretion, the weaker the presumption.<sup>174</sup> Whilst the High Court has highlighted the problematic nature of such historic approaches — given they lend to the suggestion that ‘children mature at a uniform rate’<sup>175</sup> — they are indicative of the status of the presumption as a continuum to full criminal responsibility, within which the MACR is an intersecting part. The High Court merely

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<sup>172</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–9) vol iv, ch 2.

<sup>173</sup> Australian Law Reform Commission (n 35) [18.20] (emphasis added).

<sup>174</sup> *R (A Child) v Whitty* (1993) 66 A Crim R 462, 465; *DK v Rooney* (Unreported, Supreme Court of New South Wales, 3 July 1996) (McInerney J).

<sup>175</sup> *RP v The Queen* (2016) 259 CLR 641.

reinforced the underlying principle that each child within that temporal stage requires individualised assessment of their understanding and judgment, without reference to their years and days. As noted above, this is a protective assumption designed to protect children over a stage of developmental maturation from being inappropriately subject to criminal law.

4.8.11. By raising the lower threshold (MACR), but not the upper threshold (absolute age of discretion) the temporal breadth of the threshold will effectively be reduced. That is, assuming the upper threshold remains the same then:

- If the lower threshold is 12, then the effective *doli incapax* threshold is two (2) years after which a child is presumed to be capable of *mens rea*;
- If the lower threshold is 14, then the *doli incapax* threshold is rendered void and the child is immediately assumed to be capable of forming *mens rea* once they reach that age.

4.8.12. The first reduction in temporal operation suggests that children develop intellectual and moral responsibility rapidly once they reach the MACR. The second suggests that children either are or are not capable of criminal responsibility, without a transitional stage where they must be assessed on an individualised basis. Both positions, but clearly more the latter, mark a move away from the graduated approach to criminal responsibility of children under the common law. Nor do these positions reflect the contemporary scientific understanding of the diverse and complex nature of human development [see 2.4.14–2.4.15]. Neither source of authority supports the view that children mature rapidly, let alone at a specific time.

4.8.13. Whilst the MACR — as a demarcation point of the presumed first stage of childhood (infancy) — and age of majority — as a demarcation point for the final stage of childhood — have been reformed in Tasmania, the absolute age of discretion — as the midway point of childhood — has not. The Institute can identify no rational justification for the age of 14 other than the fact that it was settled in the seventeenth century and has been ‘dogmatically’ adhered to ever since.<sup>176</sup> If the lower end of the *doli incapax* threshold is to be subject to evidence based law reform then the upper threshold should be subject to a similar reconsideration. In fact, leaving the age of discretion out of that reform process would serve to compound arbitrary age distinctions in an area where individualised and nuanced approaches are needed.

4.8.14. The historic justification for fixing the absolute age of discretion (the upper rebuttable threshold of *doli incapax*) in the common law at 14 years old is also no longer rationally justifiable in relation to our understanding of the graduated and diverse nature of human development. At the time 14 was the presumed legal age that were believed to have ‘reached’ puberty and the

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<sup>176</sup> A W G Kean, ‘The History of the Criminal Liability of Children’ (1937) 53 *Law Quarterly Review* 364, 368–9. The age of 14 appears to have been settled upon as the age at which a boy could not physically or intellectually commit a sex crime, citing H J Stephen and J F Stephen, *New Commentaries on the Laws of England* (Butterworths, 1863) vol 4, 172. See *R v Waite* [1892] 2 Q B 600, 601.

demarcation point between the second and third stages of childhood (0–7, 7–14, 14–21) [see 5.1.10–5.1.13]. The historical assumptions about human development (specifically puberty) which led to settling on 14 as representative of the absolute age of discretion are no longer supported (if they ever were) by contemporary evidence.<sup>177</sup>

- 4.8.15. Of course revisiting the upper age on the grounds that it is no longer supported by evidence produces an irreconcilable outcome — namely because puberty is now understood to begin much earlier than 14, and for most children before 12 (the lower of the two proposed MACRs).<sup>178</sup> The absolute age of discretion cannot be lower than the irrebuttable presumption of criminal incapacity. Clearly physical developmental changes are no longer a relevant consideration. What remains of the core common law doctrine is the protective age threshold above the MACR which allows for a gradual transition to full competency. Whether two years is sufficient for such a transition would need to be subject to some scrutiny and evidence-based consideration. If the MACR is raised to 14 the result would be to void an ancient and fundamental common law principle — notably that a transition period is necessary — which should certainly be subject to considered review.
- 4.8.16. The Institute reiterates its concern about overreliance on interpretations of developmental neuroscience which suggest that children uniformly suffer from a general impairment of responsibility purely as a result of the age bracket they fall into [see 2.4.11–2.4.13]. However, to the extent that the science is used to support moving the minimum age upward, it should also be considered in relation to the absolute age of discretion.
- 4.8.17. If it is correct that the science indicates that that a child must never be presumed to form criminal intent until a much later life stage than previously recognised, then that same scientific evidence should be interrogated to determine what period beyond that absolute age the graduated transition period should last for. Such a review lies beyond the expertise of the TLRI and the terms of this reference. However, the Institute notes that given the evidence about neurological changes in the 12–16 age range the UN Committee on the Rights of the Child ‘commends States parties that have a higher minimum age, for instance 15 or 16 years of age’, or at least limit the application of their criminal justice system in relation to children under 16 consistent with art 40(3) of the *Convention on the Rights of the Child*.<sup>179</sup> Whilst the majority of states in the OECD have not raised their MACRs in line with the former recommendation, those

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<sup>177</sup> In Australia around 16 per cent of girls and 7 per cent of boys have begun puberty by age of 8–9 years old, by 10–11 years old the majority have begun the process (74 per cent girls/53 per cent boys) and by 12–13 almost all children (92 per cent of girls / 66 per cent of boys) show signs of puberty. Ben Edwards, ‘Growing Up in Australia: The Longitudinal Study of Australian Children’ (Australian Institute of Family Studies, Family Matters No 95, December 2014) Figure 1 <<https://aifs.gov.au/sites/default/files/fm95a.pdf>>.

<sup>178</sup> Ibid.

<sup>179</sup> *General Comment 24* (n 82) 6 para 22.

with upper discretionary bars on prosecution or presumptions of irresponsibility have an average age of 16.5 years old (see Appendix A, p 163).

- 4.8.18. A final consideration is the general question of when children are deemed to be competent under law generally. As discussed [see 2.4.18] the acceptance that children may have the capacity to make decisions that may have long term effects on their physical and mental health (Gillick Competence) was justified by reference to the potential that the same children may be responsible for acts that affect the physical and mental health of others. The resultant common law age threshold for bodily self-determination of children is 16 years old.<sup>180</sup> Below that age children are subject to an individualised assessment of capacity based on their particular circumstances and development. Given the interface and linkages between the Gillick Competence to the age of criminal responsibility, the upper threshold of the former may be a relevant consideration in any potential reform of the latter. Continuity of legal principle is an important aspect of the rule of law and evidence of the rational basis of legal rules.
- 4.8.19. The Institute suggests that any reform of the MACR also consider its effect on *the doli incapax* threshold and whether it is necessary to also revise its upper threshold (absolute age of discretion). This would give rise to consideration of the appropriateness and continuing necessity of a transition period beyond the MACR. That question should be addressed based on the best available evidence, and in consultation with those involved in the criminal justice system about how long a protective assumption about children's capacity to understand their acts are wrong.

**Recommendation 8 (continued). Consideration should be given to whether the upper absolute age of discretion should move along with the lower MACR.**

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<sup>180</sup> *Gillick v West Norfolk and Wisbeck Area Health Authority* [1986] AC 112. In accepting *Gillick* as reflecting the common law in Australia in *Marion's Case*, the High Court stated that the rule applied until the child 'achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed' and therefore lacks 'the certainty of a fixed age rule', so it may be that in certain circumstances the rule extends to the age of majority in Australia: *Marion's Case* (1992) 175 CLR 218, 237–8.

## Part II

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# BACKGROUND AND MATERIALS

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## 5 Background

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### 5.1. Concepts & Terminology

- 5.1.1. An important preliminary step in considering the implications of raising the minimum age of criminal responsibility (MACR) in Tasmania is clarifying its meaning, and the meaning of associated terms.
- 5.1.2. During the present public discussion and debate about the Australian/Tasmanian MACR, the term has taken on different meanings, and sometimes conflated with related, but distinct concepts. For instance, in some discussions the term has been used synonymously with (minimum age of) criminal detention. That is, MACR is often used to describe when children may be subject to a term of imprisonment. That is technically correct, but not representative of the predominant way in which MACR operates in the criminal (youth) justice system. Certainly, there can be no punitive detention without criminal responsibility. However, it is not always the case – and with respect to youth justice it is rarely the case – that a finding of criminal responsibility results in a person being detained. MACR has also been used to describe the threshold age at which children may come into contact with police, prosecutors and judicial authorities. This is largely correct in the Tasmanian/Australian context. However, it is not true of all jurisdictions: in some countries children *under* the MACR may be investigated by police, prosecuted, brought before public authorities or subject to judicial orders restricting their liberty [see Part III]. This means that MACR may not always be an entirely accurate comparative indicator of how and when children are dealt with by state authorities across the world.

### Child / Youth

- 5.1.3. Article 1 of the United Nations *Convention on the Rights of the Child* defines a child as ‘every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier’.

- 5.1.4. In Tasmania, the *Age of Majority Act 1973* (Tas) sets the threshold at which a person becomes an adult at 18 years old.<sup>181</sup> People who are below that age are referred to by a range of legal terms. Within the *Age of Majority Act 1973* (Tas) itself, persons younger than the age of majority are described as ‘infants’ or ‘minors’. The Act does not distinguish between these terms but they have historically been used to describe the legal relationship between a non-adult (infant) and their adult guardian and a non-adult (minor) and adult persons or entities who are not their guardian.<sup>182</sup> Notably the Act does not refer to persons under 18 as ‘children’ – largely because the legal term has been used to describe the familial relation between two persons of any age.<sup>183</sup>
- 5.1.5. Since the enactment of the *Age of Majority Act 1973* (Tas), legal language and the conception of the rights of children have developed significantly.<sup>184</sup><sup>185</sup> This is reflected in a shift in language across Tasmanian statutes, albeit inconsistently, which have abandoned older terminology and preferred to refer to people below the age of majority as children, youth or young people. However, there is some variation in this terminology and (unlike ‘minor’ or ‘infant’) none are defined with general application.<sup>186</sup> Thus,
- ‘Child’ in most Tasmanian legislation refers to persons who are under 18,<sup>187</sup> however it also is defined to include: people in lower age brackets (under 17,<sup>188</sup> 13<sup>189</sup>); familial or adopted children of any age<sup>190</sup>; or is not defined at all<sup>191</sup>; and
  - ‘Young person’ is used variously to refer to all persons under 17;<sup>192</sup> persons who are 16 to 17;<sup>193</sup> and persons who have not attained 18 years of age;<sup>194</sup> and

<sup>181</sup> *Age of Majority Act 1973*, s 3.

<sup>182</sup> See e.g. *Stevenson v State of Tasmania* [2008] TASSC 27 (10 June 2008); *Magistrates Court (Civil Division) Rules 1998*, r 3; *Wills Act 2008*, s 4; *Minors Contracts Act 1988*, s 3; *Probate Rules 2017*, r 3.

<sup>183</sup> See ie. *Guardianship and Custody of Infants Act 1934*.

<sup>184</sup> *Convention on the Rights of the Child* (n 1), Article 1.

<sup>185</sup> It is also consistent with the move to provide legal autonomy and voice to children; indeed the root of the term ‘infant’ means to be ‘unable to speak’.

<sup>186</sup> That is, in the *Age of Majority Act* or *Acts Interpretation Act*.

<sup>187</sup> *Anti-Discrimination Act 1998*, s 3; *Children, Young Persons and Their Families Act 1997*, s 3; *Child Protection (International Measures) Act 2003*, s 4; *Community Protection (Offender Reporting) Act 2005*, s 3; *Criminal Code Act 1924*, s 105A; *Evidence (Children and Special Witnesses) Act 2001*, s 3; *Health Complaints Act 1995*, s 3; *Misuse of Drugs Act 2001*, s 3; *Magistrates Court (Children's Division) Act 1998*, s 3; *Public Health Act 1997*, s 3.

<sup>188</sup> *Sentencing Act 1997*, s 4;

<sup>189</sup> *Child Care Act 2001*, s 3;

<sup>190</sup> *Status of Children Act 1974*, s 2; *Adoption Act 1988*, s 3; *Testator's Family Maintenance Act 1912*, s 2; *Relationships Act 2003*, s 3; *Duties Act 2001*, s 4.

<sup>191</sup> *Family Violence Act 2004*; see also *Evidence Act 2001*, s 3 which self referentially defines child to mean ‘child of any age’.

<sup>192</sup> *Criminal Code Act 1924*, s 125C

<sup>193</sup> *Children, Young Persons and Their Families Act 1997*, s 3

<sup>194</sup> *Commissioner for Children and Young People Act 2016*, s 3.

- 5.1.6. ‘Youth’ is often used synonymously with ‘child’<sup>195</sup> so that, in the same legislation the former refers to ‘a person who has not attained the age of 18 years’, whereas the former has a functionally identical meaning of ‘any person under the age of 18 years’.<sup>196</sup> However, it is also used to describe persons between the current MACR (10) and the current age of majority (18);<sup>197</sup>

#### *Children / child*

- 5.1.7. Noting the shifting and inconsistent nature of Tasmanian law, this report refers to all people younger than the age of majority as ‘children’ (plural) or ‘child’ (singular).

#### *Age of Majority*

- 5.1.8. The report refers to the upper age threshold between childhood and adulthood as ‘age of majority’. This was historically 21-years-old and is now 18 years old in Tasmania.
- 5.1.9. Other terms are avoided unless discussing specific legislative definitions – most notably the provisions of the *Youth Justice Act 1997* (Tas) as they relate to children who are suspected of committing, or found to have committed, criminal offences.

### **Common law stages of childhood**

- 5.1.10. The common law historically divided childhood into three seven year stages. While the age divisions between the stages has been reformed, the dividing age (14) has not, and certain definitional conceptions remain relevant to contemporary Tasmanian law (notably *doli incapax*). The three dividing stages of childhood were explained by Chambers in 1767 as follows:

Till seven we are infants and incapable of crime. At fourteen we become regularly answerable for moral activities, and at twenty-one are admitted to the full enjoyment of all social powers and civil rights.<sup>198</sup>

- 5.1.11. These three stages were described by Blackstone as follows:<sup>199</sup>

*infantia* [infancy], from birth till seven years of age; *pueritia* [youth *lit.* ‘boyhood’], from seven to fourteen; and *pubertas* [puberty] from fourteen upwards [until 21 as the age of majority].

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<sup>195</sup> i.e. *Education Act 2016*, s 5.

<sup>196</sup> *Police Offences Act 1935* (Tas), s 3.

<sup>197</sup> *Youth Justice Act 1997* (Tas), s 3.

<sup>198</sup> Robert Chambers, *A Course of Lectures on the English Law*, ed. T.M. Curley (Oxford: Clarendon Press, 1986), I, 328.

<sup>199</sup> Blackstone *Commentaries on the Laws of England, Vol 4: Of Public Wrongs*, (Oxford University Press; The Oxford Edition of Blackstone, reprint 2016, 1769), 13.

*Age of discretion*

- 5.1.12. The age at which a child could ‘answerable for moral activities’ (see Chambers above) and punished for their crimes was described by Blackstone as ‘the age of discretion’.<sup>200</sup>

*Doli Incapax*

- 5.1.13. While infants were irrebuttably presumed to be below the age of discretion (equivalent to contemporary ‘minimum age of criminal responsibility’), children between that age and the nominal age of puberty (7-14) could be determined capable of discretion. Blackstone described this test for capacity as follows:

the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that ‘*malitia supplet aetatem*’ [malice is held equivalent to age]. Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Also, under fourteen, though an infant shall be prima facie adjudged to be *doli incapax* [incapable of guilt]; yet, if it appear to the court and jury that he was *doli capax* [capable of guilt], and could discern between good and evil, he may be convicted and suffer death.

*Absolute age of discretion*

- 5.1.14. After a child reached ‘puberty’ they were irrebuttably considered to have reached the age of discretion, albeit with certain limitations based on their legal status as a child. Blackstone explained this age division as follows:<sup>201</sup>

The law of England does in some cases privilege an infant under the age of twenty one, as to common misdemeanors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences: for, not having the capacity to do those things, which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit) for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty one.

**Crime**

<sup>200</sup> Blackstone *Commentaries on the Laws of England, Vol 4: Of Public Wrongs*, (Oxford University Press; The Oxford Edition of Blackstone, reprint 2016, 1769), 13.

<sup>201</sup> Ibid.

5.1.15. A crime is technically a major or serious offence punishable upon indictment as provided by the *Criminal Code*.<sup>202</sup> However, the term is generally also used to refer to lesser offences, set out in other statutes such as the *Police Offences Act 1935* (Tas).<sup>203</sup> Offences are ‘any contravention of, or failure to comply with, a law for which a person is liable to be punished, whether summarily or otherwise’.<sup>204</sup> In the present case the broader meaning of crime is relevant as the MACR applies to all offences, not just serious crimes.

#### *Punishment.*

5.1.16. The unifying feature of all crimes is the notion of punishment, generally in the form of penalties or imprisonment imposed by the state for conduct that society has deemed harmful and unacceptable. The punishment seeks to protect society via a range of functions, variously described.<sup>205</sup> Most commonly understood and discussed is the notion of deterrence – that is for the state to impose involuntary conditions that are sufficiently unpleasant to deter either: the person from committing further breaches of the law; or other potential offenders from committing that offence. However, punishment protects societies and individuals through a range of other functions, not least to protect and vindicate the rights of victims. As the High Court explained in *Munda v Western Australia*:<sup>206</sup>

The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

## **Criminal Responsibility**

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<sup>202</sup> *Acts Interpretation Act 1931* (Tas), s 46.

<sup>203</sup> By virtue of s 36 of the *Acts Interpretation Act 1931* (Tas), criminal responsibility for all such offences are subject to the provisions of the *Criminal Code*, regardless of what Tasmanian statute they are set out in.

<sup>204</sup> *Acts Interpretation Act*, s 46. All offences are picked up by *Criminal Code Act 1924* (Tas), s 4 and *Criminal Code*, s 1.

<sup>205</sup> See i.e. *Sentencing Act 1997*, s 3.

<sup>206</sup> (2013) 249 CLR 600, per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ at 620.

5.1.17. In Tasmania ‘criminal responsibility’ means ‘liability to punishment as for an offence’.<sup>207</sup>

Criminal responsibility here may be distinguished from bare responsibility, in that a person might technically be physically responsible for an act which is described as an offence but not be liable for actually committing it under law. That is because criminal law is only concerned with punishing acts that a person meant to do, was reckless about doing or was grossly negligent about. This is a fundamental principle of fairness that underlies the criminal law and ensures that people are not declared guilty unless they had a guilty mind. This common law position is codified in section 13(1) of the *Criminal Code* which stipulates:

No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event –

(a) that the person does not intend or foresee as a possible consequence; and

(b) that an ordinary person would not reasonably foresee as a possible consequence.

5.1.18. In substance this means that a person cannot be guilty of a criminal offence ‘unless all acts of the accused forming the ingredients of the crime are voluntary and intentional’.<sup>208</sup>

### **Minimum Age of Criminal Responsibility (MACR)**

5.1.19. Under Article 40 (3) of the *Convention on the Rights of the Child*, of which Australia is a party, states are obliged to ‘[establish] a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’. Similarly, there is a longstanding presumption in the common law that children below a certain age are not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and therefore cannot have possessed the requisite mental element to commit a crime.<sup>209</sup> Historically this minimum age of criminal responsibility (MACR) was 7 years of age. The MACR is now 10 years old in every Australian jurisdiction.

5.1.20. Children below the MACR are unconditionally (irrebuttably) presumed to be incapable of forming the mental elements necessary for criminal responsibility [see above]. In Tasmania any act or omission by a child under the MACR is not an offence (and by proxy, not a crime).

5.1.21. In 2007 the United Nations Committee on the Rights of the Child encouraged States parties ‘to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue

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<sup>207</sup> *Criminal Code*, s 1.

<sup>208</sup> *Vallance v R* (1961) 108 CLR 56, per Dixon CJ at 60.

<sup>209</sup> Hale, *The History of the Pleas of the Crown* (1736), vol 1, pp 25-28; *Blackstone's Commentaries on the Laws of England*, Book IV, 1st ed. (1769)

to increase it to a higher age level'.<sup>210</sup> In 2019 the Committee revised its recommended MACR to 14 years.<sup>211</sup>

- 5.1.22. In 2021 the Attorneys-General of each of the Australian jurisdictions agreed that this age should be set at 12 years old.

### **Presumed Age-Range of Criminal Incapacity (*doli incapax*)**

- 5.1.23. Children who are above the MACR have remained subject to the presumption that they are unable to form the mental elements necessary for criminal responsibility until they reach an 'age of discretion' threshold [see 0].

- 5.1.24. Under the common law, the absolute age of discretion was 14 years old (presumed puberty), which remains the statutory upper threshold for the operation of a presumption of mental incapacity to commit a crime.<sup>212</sup> This 'doli incapax' presumption is based on the principle that children develop and mature differently, so that a child's 'capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the [child's] understanding and judgment'.<sup>213</sup> Capacity (*doli capax*) may only be established if the prosecution proves the child knew that it was 'morally wrong to engage in the conduct that constitutes the physical element or elements of the offence'.<sup>214</sup> This can only be established, if the prosecution adduces evidence, beyond reasonable doubt that the child:

knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence ... [as opposed to] awareness that his or her conduct is merely naughty or mischievous ... [requiring] proof that the child knew the conduct was "seriously wrong" or "gravely wrong". No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.

- 5.1.25. The Australian Law Reform Commission (ALRC) explained that the existence of a rebuttable presumption of criminal non-responsibility is:

[A] practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility.<sup>215</sup>

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<sup>210</sup> Committee On The Rights Of The Child 'Children's Rights In Juvenile Justice : General Comment No. 10' (2007), CRC/C/GC/10, 25 April 2007, [32]

<sup>211</sup> Committee On The Rights Of The Child 'Children's Rights In Juvenile Justice General Comment No. 24 (201x), replacing General Comment No. 10' (2019), CRC/C/GC/24, 18 September 2019, [33]

<sup>212</sup> *R v ALH* (2003) 6 VR 276, [75].

<sup>213</sup> *Blackstone's Commentaries on the Laws of England*, Book IV, 1st ed. (1769), pp. 23-24.

<sup>214</sup> *RP v R* (2016) 259 CLR 641, per Kiefel, Bell, Keane and Gordon JJ at 649.

<sup>215</sup> Australian Law Reform Commission (n 35), [18.20].

*Minimum age of prosecution*

- 5.1.26. In some jurisdictions, children may be criminally liable for an offence, but not subject to ordinary criminal prosecution. Rather they may be subject to hearings and determination of guilt by a specialist, non-adversarial body designed specifically for children. For instance, until December 2021 the MACR in Scotland was 8 years old, but children between 8 and 12 years could not be prosecuted through the ordinary criminal process. They were investigated and dealt with under ordinary police powers, but referred to a supported children's hearing system, overseen by a lay tribunal constituted of specialists, on non-offence grounds. Scottish children who were between 12 and 16 were also ordinarily dealt with under the children's hearing system, unless the Lord Advocate approved their prosecution because of its severity, or because a prosecution is required to produce a specific legal result (e.g., disqualification for dangerous driving).<sup>216</sup> Hence, the MACR in Scotland was (until 2022) 8 but the minimum age of prosecution was 12. On 17 December 2022 the MACR in Scotland was raised to 12, but the discretionary limitation on prosecution remains.

**5.2. Detention**

- 5.2.1. Detention means the involuntary restriction of liberty of a person by another person who is not their lawful guardian (if they have one). However, the restriction on liberty must be beyond the threshold applied to the general public or to a particular class of people who may be subject to legal restrictions on liberty 'required for an orderly society'.<sup>217</sup> For instance, 'the inability during a pandemic to leave one's premises to engage in many of the usual activities of life', is not a form of detention that gives rise to an individual right or legal remedy for any individual person.<sup>218</sup>
- 5.2.2. A person who is detained must necessarily not control the parameters or conditions of their detention or release – although they may have consented to the detention itself (i.e., a person who admits themselves to psychiatric care). The place in or the time for which liberty is restricted are not relevant, so long as the person (or their guardian) does not exercise control over them. Hence, the requirement that a person stay in their home for specific periods is a form of detention – amounting to imprisonment<sup>219</sup> – if that person may not leave their home during those periods.

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<sup>216</sup> *Criminal Procedure (Scotland) Act 1995*, s 42.

<sup>217</sup> *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 220 (Edelman J).

<sup>218</sup> *Ibid.*

<sup>219</sup> *DPP (Tas) v King* (2020) 283 A Crim R 237, 245 (Blow CJ).

## Detention by the state

5.2.3. With limited exceptions, it is a constitutional principle in Australia that the

Involuntary detention of a person in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing *criminal guilt*.<sup>220</sup>

5.2.4. Put simply, a person can only be detained if they have committed a crime, and the only authority who can determine whether they have committed a crime is a judge. There are limited categories of exception to this rule, which allow for ‘non-punitive’ executive detention where it is reasonable and connected to a lawful purpose. Within criminal law this would include:

- **Police Custody.** Following arrest, a person may be detained in custody for a reasonable time to:
  - Collect evidence and testimony relevant to the offence for no more time than is necessary (ordinarily no more than four hours before the person is brought before a judicial officer);<sup>221</sup> and/or
  - Take the person detained before a judicial officer (judge or magistrate).
- **Detention without bail** pending a trial. So long as the length and nature of the detention is reasonably necessary and proportionate to one of these exceptions, it is legitimate because the detention is not considered ‘punitive’.

5.2.5. Outside of the criminal process, the exceptions are limited to very specific historic categories (the power of parliament to punish for contempt, the military power of court martial) or to the protection of the individual or the community from specific risks. These exceptions are ordinarily explained and justified by reference to the punitive or protective character of the detention. They include the ability for the executive to detain a person for their own protection (mental health, drug treatment), or to protect the community (infectious disease, chemical, biological and radiological emergencies, or the detention of those suspected of being disloyal during wartime).<sup>222</sup>

5.2.6. While the High Court has accepted that these categories of exception are not closed – and there may be other legitimate reasons to protectively detain persons – it has emphasised that they are extremely limited and, indeed, exceptional.

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<sup>220</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

<sup>221</sup> *Criminal Law (Detention and Interrogation) Act 1995* (Tas), s 4; *Crimes Act 1914* (Cth), ss 23C–23DA. See *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 (11 November 2015); *Williams v R* (1986) 161 CLR 278.

<sup>222</sup> *Fardon v Attorney-General* (Qld) [2004] HCA 46; (2004) 223 CLR 575.

### 5.3. The legal status of children

- 5.3.1. As with all common law jurisdictions, Tasmanians who are below the age of majority are subject to common but differentiated rights, duties and obligation than adults. This is because of the formative and developmental nature of childhood and the recognition that children have unique needs and dependencies.
- 5.3.2. Children, particularly young children, do not enjoy all of the same rights, freedoms and liberties as adults who are not under guardianship<sup>223</sup>. Rather, the general liberty of a child is subject to the supervision and control of that child's parent or guardian who are responsible to 'nurture, control and protect' that child.<sup>224</sup>
- 5.3.3. The parent or guardian's duty to protect a child's welfare extends to 'every aspects of a child's life' – including their present and future physical, mental and emotional needs.<sup>225</sup> In pursuing this responsibility a parent may restrict the rights and freedoms of a child that an adult may otherwise enjoy, which includes, under present law, using proportionate restraint or corporal punishment.<sup>226</sup>
- 5.3.4. It may also extend to controlling the child's movement and liberty.<sup>227</sup> Hence the question of whether a child is unlawfully detained considers whether the parent or guardian consented to that detention, not whether it was strictly involuntary on behalf of the child. Indeed, a person who frees a child from their parent, or places a child at liberty from their parent's control – even if the child requests it – unlawfully detains that child.<sup>228</sup>
- 5.3.5. The guardianship power is not complete and the authority of a parent over their child may be modified by a range of factors, including 'the operation of the general law, by statutory limitations or by the independence which children are entitled to assert, without extra-familial pressure, as they mature'.<sup>229</sup>
- 5.3.6. The law recognises that childhood development is not consistent: children mature over time and at different stages; and childhood development is affected by a range of physical, psycho-social, genetic and environmental factors. Consequently, the exact nature of the differentiated legal status of children may vary depending on objective (i.e., age bracket, legal subject) or

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<sup>223</sup> *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 237, 290-293, 311.

<sup>224</sup> *J v Lieschke* (1987) 162 CLR 447 at 462 per Brennan J.

<sup>225</sup> *Fountain v. Alexander* (1982) 150 CLR 615, per Gibbs C.J. at p 626

<sup>226</sup> *Lane v James* [2010] TASM 19. Proportionality is tested in relation to what is "moderate and reasonable".

<sup>227</sup> *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 58 (Gummow J).

<sup>228</sup> *Ibid.*

<sup>229</sup> *Department of Health & Community Services v JWB & SMB ("Marion's Case")* (1992) 175 CLR 218 (6 May 1992)

subjective (i.e., individual maturity, specific offence) factors. Generally, the closer a child is to the threshold of adulthood, and the greater their emotional and intellectual development, the more common and less differentiated their rights and duties are to those of adults. In *Re Woolley*, McHugh J explained this graduated transition to adulthood as follows:

Children are presumed to be incompetent at birth and gradually to acquire legal competence for various purposes at different stages of their development until they reach the age of majority (18), in which case they are presumed to have full legal capacity. The capacity of the child varies according to the gravity of the particular matter and the maturity and understanding of that child.<sup>230</sup>

## 5.4. Children who engage in dangerous or anti-social behaviour

5.4.1. Section 18 of the Tasmanian *Criminal Code*<sup>231</sup> describes the principles of criminal responsibility relating to ‘immature age’ as follows:

- (1) No act or omission done or made by a person under 10 years of age is an offence.
- (2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.

5.4.2. The first subsection (s 18(1)) of the provision establishes the ‘minimum age of criminal responsibility’ (historically ‘infancy’ [see 5.1.12]) in Tasmania. The second subsection (s 18(2)) sets the age of discretion threshold after which a child is presumed to have the mental capacity to be responsible for the mental elements of a crime. Between the MACR and age of discretion the presumption of *doli incapax* exists [see 5.1.13], which establishes the presumed age that a child above the MACR does not possess the requisite intellectual and moral development to appreciate the difference between right and wrong and thus the intention to actually commit a criminal offence.<sup>232</sup>

5.4.3. Before 2000, s 18(1) set the MACR at seven years based on the common law concept of infancy. This limit was the lowest in the country. Across Australia, the MACR was 10 years in all other jurisdictions except for the Australian Capital Territory, where the MACR was eight years.

<sup>230</sup> *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1.

<sup>231</sup> *Criminal Code Act 1924* (Tas), sch 1 (‘*Criminal Code*’).

<sup>232</sup> *RP v The Queen* [2016] HCA 53, [8]

5.4.4. The lack of a uniform national standard across Australia was criticised by the Australian Law Reform Commission (ALRC) in its 1997 report, *Seen and Heard: Priority for Children in the Legal Process*.<sup>233</sup> The ALRC stated that:

All Australian jurisdictions should agree on and legislate a uniform age of criminal responsibility. A child should not be liable to be charged with a criminal offence in one State for an act which if committed in another would not attract liability only by reason of his or her age.<sup>234</sup>

5.4.5. Notably, the ALRC was less concerned with the justification and evidence for what a minimum age should be than the need for certainty and uniformity across Australia. The Inquiry recognised that:

there is an element of arbitrariness when setting age thresholds, especially given the great variations in capacity between individual children. However, setting an age provides certainty for both the law and children.<sup>235</sup>

5.4.6. Given the majority of jurisdictions at that time set the age to 10, the ALRC recommended the two outlier jurisdictions, Tasmania and the Australian Capital Territory amend their laws to achieve national consistency.<sup>236</sup>

5.4.7. While the 1997 ALRC Report has been variously cited as the impetus for Tasmania's law reform, the Tasmanian Government had already announced its intention to raise the age to 10 in line with other States prior to the publication of that report. This formed part of the reforms to youth justice in the Youth Justice Bill 1997 (Tas). Clause 3 of the Bill defined 'youth' as 'a person who is more than 10 years old but less than 18 years old' at the time the relevant offence occurred. As such, any person younger than 10 would not be subject to the criminal justice system.

5.4.8. The Youth Justice Bill 1997 passed into legislation in 1997 and received royal assent in 1998. It was cognate with the *Children, Young Persons and Their Families Act 1997* (Tas) which provided for the care and protection of children. The two Acts had been passed at the same time and were intended to commence concurrently. However, due to budget constraints, commencement was delayed. Further, implementation of the *Children, Young Persons and Their Families Act 1997* (Tas) was ultimately considered less urgent, given that a number of changes underpinning it were already in place.

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<sup>233</sup> Australian Law Reform Commission (n 35).

<sup>234</sup> *Ibid*, [18.16].

<sup>235</sup> *Ibid*.

<sup>236</sup> *Ibid*, Recommendation 194.

- 5.4.9. As such, in 1999, the Youth Justice (Consequential Amendments) Bill was introduced to enable implementation of the higher-priority *Youth Justice Act 1997* (Tas) to proceed independently. The Bill passed, and the Act came into effect on its commencement on 1 February 2000, together with the *Youth Justice Act 1997* (Tas). Among its provisions, the *Youth Justice (Consequential Amendments) Act 1999* (Tas) amended s 18(1) of the *Criminal Code*, substituting ‘10’ in place of ‘7’. This raised the MACR to 10 years in Tasmania.
- 5.4.10. With the commencement of the *Children and Young People Act 1999* (ACT) on 1 December 2000, a uniform age of criminal responsibility was achieved across Australia.

## 5.5. MACR in Tasmania

- 5.5.1. Section 18 of the Tasmanian *Criminal Code*,<sup>237</sup> describes the principles of criminal responsibility relating to ‘immature age’ as follows:
- (1) No act or omission done or made by a person under 10 years of age is an offence.

(2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.
- 5.5.2. The first subsection (s 18(1)) of the provision establishes the ‘minimum age of criminal responsibility’ (incapax) in Tasmania. The second subsection (s 18(2)) sets the age of discretion threshold after which a child is presumed to have the mental capacity to be responsible for the mental elements of a crime. Between the MACR and age of discretion the presumption of *doli incapax* exists, which a which establishes the presumed age that a child above the MACR does not possess the requisite intellectual and moral development to appreciate the difference between right and wrong and thus the intention to actually commit a criminal offence.<sup>238</sup> That presumption is known as ‘doli incapax’.
- 5.5.3. Before 2000, s 18(1) set the minimum age of criminal responsibility at seven years. This limit was the lowest in the country. Across Australia, the minimum age was 10 years in all other jurisdictions except for the Australian Capital Territory, where the minimum age was eight years.
- 5.5.4. The lack of a uniform national standard across Australia was criticised by the ALRC in its 1997 report, *Seen and Heard: Priority for Children in the Legal Process*.<sup>239</sup> The ALRC stated that:

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<sup>237</sup> *Criminal Code Act 1924* (Tas), sch 1 (‘*Criminal Code*’).

<sup>238</sup> *RP v The Queen* [2016] HCA 53, [8]

<sup>239</sup> Australian Law Reform Commission (n 35).

All Australian jurisdictions should agree on and legislate a uniform age of criminal responsibility. A child should not be liable to be charged with a criminal offence in one State for an act which if committed in another would not attract liability only by reason of his or her age.<sup>240</sup>

5.5.5. Notably, the ALRC was less concerned with the justification and evidence for what a minimum age should be so much as the need for certainty and uniformity across Australia. The Inquiry recognised that:

there is an element of arbitrariness when setting age thresholds, especially given the great variations in capacity between individual children. However, setting an age provides certainty for both the law and children.<sup>241</sup>

5.5.6. Given the majority of jurisdictions at that time set the age to 10, the ALRC recommended the two outlier jurisdictions, Tasmania and the Australian Capital Territory amend their laws to achieve national consistency.<sup>242</sup>

5.5.7. While the 1997 ALRC Report has been variously cited as the impetus for Tasmania's law reform, the Tasmanian Government had already announced its intention to raise the age to 10 in line with other States prior to the publication of that report. This formed part of the reforms to youth justice in the Youth Justice Bill 1997 (Tas). Clause 3 of the Bill defined 'youth' as 'a person who is more than 10 years old but less than 18 years old' at the time the relevant offence occurred. As such, any person younger than 10 would not be subject to the criminal justice system.

5.5.8. The Youth Justice Bill 1997 passed into legislation in 1997 and received royal assent in 1998. It was cognate with the *Children, Young Persons and Their Families Act 1997* which provided for the care and protection of children. The two Acts had been passed at the same time and were intended to commence concurrently. However, due to budget constraints, commencement was delayed. Further, implementation of the *Children, Young Persons and Their Families Act 1997* was ultimately considered less urgent, given that a number of changes underpinning it were already in place.

5.5.9. As such, in 1999, the Youth Justice (Consequential Amendments) Bill was introduced to enable implementation of the higher-priority Youth Justice Act 1997 to proceed independently. The Bill passed, and the Act came into effect on its commencement on 1 February 2000, together with the Youth Justice Act 1997. Among its provisions, the Youth Justice (Consequential

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<sup>240</sup> Ibid, [18.16].

<sup>241</sup> Ibid.

<sup>242</sup> Ibid, Recommendation 194.

Amendments) Act 1999 amended s 18(1) of the Criminal Code, substituting ‘10’ in place of ‘7’. This raised the age of criminal responsibility to 10 years in Tasmania.

5.5.10. With the commencement of the Children and Young People Act 1999 (ACT) on 1 December 2000, a uniform age of criminal responsibility was achieved across Australia.

### **MACR under the Tasmanian *Criminal Code***

5.5.11. As noted above [5.5.1], the MACR is defined in section 18 of the Tasmanian Criminal Code to mean that ‘[n]o act or omission done or made by a person under 10 years of age is an offence’.

5.5.12. ‘Offence’ under Tasmanian law includes any statutory crime, whether punished summarily or otherwise.<sup>243</sup> By consequence the MACR in s 18 applies to all criminal and summary provisions in Tasmania.

5.5.13. The Tasmanian MACR provision complemented section 7.1 of the Commonwealth *Criminal Code*, in relation to Commonwealth offences alleged against children, which states that:

A child under 10 years old is not criminally responsible for an offence.

5.5.14. Notably while the age threshold for the Tasmanian MACR and Commonwealth MACR are the same, their expression and operative effect differ. Specifically, the Tasmanian MACR operates to deprive an act of being legally characterised as an offence for the purposes of any Tasmanian law (not just the *Criminal Code*, but all indictable or summary offences contained in any statute). The Commonwealth MACR however, allows the act to be characterised as an offence, but specifies that the child is not responsible and therefore cannot be criminally liable for its commission. Other Australian jurisdictions adopt differing wording to describe MACR, but like the Commonwealth, their focus is on the (lack of) responsibility of the child, rather than the act or omission itself not constituting an offence.

5.5.15. The MACR is described variously as:

- Australian Capital Territory ‘A child under 10 years old is *not criminally responsible* for an offence’;<sup>244</sup>
- NSW ‘It shall be conclusively presumed that *no child* who is under the age of 10 years *can be guilty of an offence*’;<sup>245</sup>
- Northern Territory “A person under the age of 10 years *is excused from criminal responsibility* for an act, omission or event”;

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<sup>243</sup> *Acts Interpretation Act 1931*, s 46. All offences are picked up by *Criminal Code Act 1924*, s 4 and Criminal Code, s 1.

<sup>244</sup> *Criminal Code 2002 (ACT)* s 25

<sup>245</sup> *Children (Criminal Proceedings) Act 1987 (NSW)*, s 5

- Queensland “A person under the age of 10 years *is not criminally responsible* for any act or omission”;<sup>246</sup>
- South Australia, ‘A person under the age of 10 years *cannot commit an offence.*’;<sup>247</sup>
- Victoria, ‘It is conclusively presumed that a child under the age of 10 years *cannot commit an offence.*’;
- Western Australia, “A person under the age of 10 years *is not criminally responsible for any act or omission.*”<sup>248</sup>

5.5.16. Tasmania’s (and possibly Victoria’s) articulation of the MACR specifies that the act or omission *is not an offence* (and also therefore not a crime). This has a practical operative effect on statutory powers which are enlivened by the commissioning or suspected commissioning of an offence. Those powers include:

- The ability of police and the courts to respond to ‘youth who [have] committed, or is alleged to have committed, an offence’ under the *Youth Justice Act*. That includes powers under that Act to divert or warn children who admit the commission of an offence,<sup>249</sup> or to request a community conference between a youth and any victim of an offence.<sup>250</sup> It also includes specifically tailored powers to arrest youth who are committing or likely to repeat an offence, or who are likely to conceal or destroy evidence relating to an offence.<sup>251</sup>
- Broader police powers set out in the *Criminal Code, Police Offences Act, Criminal Law (Detention and Interrogation) Act*, including:
  - Arresting persons who is committing a crime or whom a police officer suspects is committing a crime.<sup>252</sup>
  - Taking persons into custody and detaining them for a reasonable time for the purposes of questioning the person, or carrying out investigations in which the person participates, in order to determine his or her involvement, if any, in relation to an offence;<sup>253</sup>
  - Declaring a crime scene for the purpose of preserving, searching for or gathering evidence that ‘an offence or a crime has been committed at or near that place’ or ‘that place that is relevant to an offence or crime’.<sup>254</sup>

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<sup>246</sup> *Criminal Code 1899* (Qld), s 29

<sup>247</sup> *Criminal Code 1935* (SA), s 5.

<sup>248</sup> *Criminal Code Act Compilation Act 1913* (WA), s 29

<sup>249</sup> *Youth Justice Act*, Part 2, Div 2

<sup>250</sup> S 24.

<sup>251</sup> Part 3.

<sup>252</sup> *Criminal Code*, s 27

<sup>253</sup> *Criminal Law (Detention and Interrogation) Act 1995*, s 4.

<sup>254</sup> *Police Offences Act 1935*, s 63.

- Investigative forensic procedures (including the taking of samples from a suspected offender) of a person in custody or who is charged – by consequence of the fact that a person who is incapable of committing an offence cannot be taken into custody or charged.<sup>255</sup> Under the *Forensic Procedures Act 2000* (Tas) children under the MACR may be subject to forensic sampling if their parents voluntarily agree to the investigation, or if a Magistrate makes an order. However, no powers exist to make an order to prove the commission of a crime – instead the purposes are for the identification of the child, deceased or missing persons, or to differentiate the young child's forensic material from other forensic material found at a particular crime scene.<sup>256</sup>

## Doli Incapax under the Tasmanian Code

- 5.5.17. The Youth Justice Bill 1997 did not amend the 14-year age threshold for this presumption (i.e., moving it to 17 with the move of the MACR from 7 to 10), in the *Criminal Code*. The upper threshold is contained in s 18(2) of the Tasmanian *Criminal Code*, specifically:

No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.

- 5.5.18. In practice this meant that the threshold span of *doli incapax* was reduced from seven years to four years by the 1999 amendments.

- 5.5.19. The equivalent *doli incapax* provision in the Commonwealth *Criminal Code Act 1995* (Cth) is found in section 7.2, which states:

(1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

(2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

- 5.5.20. Unlike the Commonwealth Act, the Tasmanian provision is silent on the burden of proof, leaving the matter to the common law, which places it on the prosecution to prove beyond reasonable doubt.<sup>257</sup> A further notable distinction is that the Commonwealth *doli incapax* focuses on the actual knowledge of the child whereas the Tasmanian provision focuses on that child's *capacity* to know. However, limited Tasmanian jurisprudence suggests that the concept of capacity 'equates capacity to know with actually knowing'. That same authority suggests that

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<sup>255</sup> *Forensic Procedures Act 2000*, pt 2.

<sup>256</sup> *Forensic Procedures Act 2000*, s 34J.

<sup>257</sup> *R v Owen* [1830] EngR 518; (1836) 4 C & P 236; *R v Smith* (1845) 1 Cox 260; *R v Gorrie* (1919) 83 JP 136; *B v R* (1958) 44 Cr App R 1 (DC); *F v Padwick* [1959] Crim LR 439.

capacity extends beyond mere mental capacity to the question of whether a child is able to appreciate why a particular act or omission ought not to be done or made.<sup>258</sup> That authority also suggests that in ‘appropriate cases’ inquiring into capacity may involve considering both ‘intellectual maturity as well as ability’.<sup>259</sup>

## 5.6. Children below MACR

- 5.6.1. Tasmania Police have limited powers to act against children under 10 years old, even if they are observed to be actively committing behaviour that would, if conducted by an adult, be a criminal offence. Given the absolute rarity of such antisocial conduct, and the fact that the behaviour of young children remains predominantly within the ambit of parental/guardian responsibility, this is not a major issue. However, outlier cases do exist, and in some cases, parents are incapable of appropriately or completely responding to behaviour by a child which endangers themselves or others. In those cases, the principal powers are supportive and protective in nature (rather than coercive and punitive).
- 5.6.2. In Tasmania, police can restrain a child under the MACR in extreme cases where this is necessary for the immediate defence of another person or property. However, they cannot detain a child.<sup>260</sup> Police powers are limited to speaking with the child, reporting the case to Child Safety Services, or contacting the parents.
- 5.6.3. The *Children, Young Persons and Their Families Act 1997* (Tas) provides for the beneficial and protective care and protection of children.<sup>261</sup> In particular the Act is concerned with protecting children (meaning any person under 18) who are ‘at risk’. The Act defines ‘at risk children’ as those who:<sup>262</sup>
- have been, are being, or are likely to be, abused or neglected (including abuse, physical abuse or neglect, and emotional injury);<sup>263</sup>
  - live with or are frequently in contact with someone who is reasonably likely to carry out threats of killing, abusing, or neglecting them;
  - is a child whose safety, psychological wellbeing or interests are affected or likely to be affected by family violence;

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<sup>258</sup> *M v J* [1989] TASRp 17 (13 October 1989) 222 per Neasey J

<sup>259</sup> *Ibid.* p 223.

<sup>260</sup> TasPol Answers (n 305).

<sup>261</sup> *S v Sielito* [1999] TASSC 119.

<sup>262</sup> *Children, Young Persons and Their Families Act 1997*, s 4.

<sup>263</sup> *Ibid* s 3(1).

- is not adequately cared for by their parents or guardians, which includes the child's guardians being unable or unwilling to maintain, exercise adequate supervision or control or prevent the child from suffering abuse or neglect;
  - does not without lawful excuse, attend a school, or other educational or training institution, regularly.
- 5.6.4. Notably, the Act does not extend the definition of an 'at risk' child to children who place other children, adults or the community at risk through harmful, dangerous or antisocial behaviour. However, it may be arguable that such behaviour may be interpreted as evidence that the guardians of a child are unable or unwilling 'to exercise adequate supervision and control over the child'. Proof of such a failure by parents or guardians would require 'clear, cogent or strict proof' on the balance of probabilities that the dangerous or antisocial behaviour was the result of the parents' neglect.<sup>264</sup>
- 5.6.5. The process begins with the Secretary of the Department of Communities.<sup>265</sup> Where the Secretary believes or suspects on reasonable grounds that a child is 'at risk', they may assess the circumstances of the child,<sup>266</sup> including applying to the Court for an assessment order.<sup>267</sup>
- 5.6.6. The Secretary may request the assistance of police in the course of collecting evidence relevant to the assessment. This includes, subsequent to a warrant, the ability of a police officer to search and seize evidence from any place, to make records, take evidence from any person 'who may be in a position to provide information relevant to the assessment to answer any question to the best of that person's knowledge, information or belief' and take the child into temporary custody.<sup>268</sup>
- 5.6.7. Whilst such powers are open and applicable to any person, they are written in a way which tends to focus on parents, guardians and adults, rather than the at-risk child. For instance, while the Act does not preclude the police doing what is necessary to take a child who is unwilling to be assessed or taken into temporary custody, it does not clearly define the limits of police powers in respect of the child. This may be more of an issue in circumstances where the assessment relates to the antisocial behaviour of the child, particularly older children.

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<sup>264</sup> *D and Others (Children)* [2013] TASMC 34, [43]; *Children, Young Persons and Their Families Act 1997*, s 63.

<sup>265</sup> Section 113 of the *Children, Young Persons and Their Families Act 1997* (Tas) provides that the Department of Community and Health Services is to administer the Act. However, this Department has since split into the Department of Communities and the Department of Health. The former is now responsible for children, youth, and families services.

<sup>266</sup> *Ibid* s 18(1).

<sup>267</sup> *Ibid* s 22.

<sup>268</sup> *Ibid* s 19, 20.

- 5.6.8. It is open to the Secretary to apply for a restraint order or interim restraint order in addition to or separate to an assessment order.<sup>269</sup> Such orders may be made against children, but only those who are above the MACR of 10 years old. This may be issued against the at-risk child, or against another child (and, of course, adult) who is generating the risk to that child.<sup>270</sup>
- 5.6.9. If the Secretary considers a child to be at risk following an assessment, they may apply to the Court for a care and protection order over that child. The Secretary can also apply for an interim care and protection order at the same time as, or whilst an assessment is ongoing if there is a *prima facie* case of ongoing risk to the child;<sup>271</sup> it is not necessary that the evidence be complete or properly tested.<sup>272</sup> The order can do any such thing the court considers appropriate to reduce the risk in the child's best interests, including specifying conditions for supervision, guardianship, care, protection, health, welfare or education.<sup>273</sup> It also allows for orders to be made to grant custody to:
- a guardian of the child;
  - a member of the child's family; or
  - the chief executive officer of a non-Government organisation that provides facilities for the residential care of children, or a person who holds a position similar in nature to that of chief executive officer in such an organisation;
  - the Secretary.
- 5.6.10. These conditions may be determined in cooperation with the child's current parents or guardians in a family group conference. The child may attend such a conference, or be represented by an advocate.<sup>274</sup> Notably, court proceedings under the Act are not subject to or bound by the rules of evidence and are determined informally on the balance of probabilities.<sup>275</sup>
- 5.6.11. The conditions of a care and protection order are binding on all persons they are directed to, including the child.<sup>276</sup> Notably a breach of an order is an offence, which would not be

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<sup>269</sup> Ibid ss 23, 43.

<sup>270</sup> An example of when this might be applicable is when the at-risk child has been sexually abusing a sibling, has threatened to do so, or has shown certain inclinations such that the sibling could be deemed 'likely to be' abused. If these circumstances come to the attention of the Secretary, it can give rise to a reasonable belief or suspicion that the child is 'at risk' for the purposes of the Act. This, in turn, triggers the various mechanisms for the child's protection, including imposing a restraint order on the abuser if the Court finds appropriate.

<sup>271</sup> *Children, Young Persons and Their Families Act 1997* (Tas), s 42(3)(a).

<sup>272</sup> *Marshall v B* [2007] TASSC 97

<sup>273</sup> *Children, Young Persons and Their Families Act 1997* (Tas) Part 5, Div 2, esp s 22(3)(d).

<sup>274</sup> Ibid. ss 34-35.

<sup>275</sup> Ibid. s 63.

<sup>276</sup> Ibid. s 42(5).

enforceable against a child below the MACR, and would be presumed not to apply to a child who was *doli incapax*.

5.6.12. Where guardianship or custody is transferred to and invested in the Secretary, the Secretary may:

- place the child in the care of any person or any body of persons or entities;
- give such directions as to the care of the child in the place in which the child resides as the Secretary considers appropriate;
- make arrangements for the education of the child;
- make educational, financial, health, or other care arrangements for the child

that are in the best interests of the child and ensure for their physical, intellectual, psychological and emotional development, having regard to the desirability of securing stable living arrangements for the child.<sup>277</sup> Notably there are no provisions for making arrangements to reduce harmful behaviour that the child has committed and is likely to continue to commit unless appropriately dealt with. There are also no provisions for assisting a child to understand and take responsibility for their conduct as mechanism to reduce future antisocial behaviour (such as may be found in the *Youth Justice Act*).

## **Mental Health Act**

5.6.13. There are two mechanisms within the *Mental Health Act 2013* that could operate as protection against child exhibiting ongoing threats of violence, provided those threats are related to mental illness: protective custody and restraint once inside a facility.

### *Protective custody*

5.6.14. Mental illness is defined in s 4 of the Act as where a person experiences a serious impairment of thought or serious impairment of thought of mood, volition, perception, or cognition. This impairment can be either temporary, repeated, or continual. However, a person is *not* to be taken as having a mental illness merely because they have engaged in illegal conduct or antisocial activity.

5.6.15. If a Mental Health Officer or a police officer reasonably believes that a person poses a likely risk to the safety of themselves or other people, then the officer can take a person into protective custody if they also believe that the person has a mental illness and should be examined.<sup>278</sup> This process does not require a warrant.<sup>279</sup> Once a person is taken into protective custody, they must

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<sup>277</sup> Ibid. s 69.

<sup>278</sup> *Mental Health Act 2013* (Tas) s 17(1).

<sup>279</sup> Ibid s 17(2).

be escorted to a place authorised as an assessment centre under the Act to undergo an examination for their mental health.<sup>280</sup>

- 5.6.16. Due to the definition of mental illness and the express exclusion of illegal conduct or antisocial activity per se, this mechanism of protective custody cannot be used only where an otherwise mentally healthy child makes threats of violence, or commits violence, against another. However, if the conduct has been part of a broader pattern of behaviour showing a serious impairment of mood, then this provision may have some application.
- 5.6.17. It is important to note that, unlike restraining orders, this type of restraint rests on the reasonable belief of officers and is not imposed on application. While one may call the police, one cannot specifically apply to have someone taken into protective custody.

### *Restraint*

- 5.6.18. Under the *Mental Health Act 2013* (Tas), a reference to restraint may be chemical, mechanical, or physical restraint. This is done by medication; by a device that controls the person's ability to freely move around; or by the use of bodily force to do the same, respectively.<sup>281</sup>
- 5.6.19. If someone is subject to an order that they be diagnosed for the condition of their mental health, or an order that they be treated professionally for their mental illness, then they are considered an 'involuntary patient'.<sup>282</sup> Involuntary patients may be placed under restraint in certain circumstances and subject to certain conditions.<sup>283</sup> One precondition is that the restraint be authorised as necessary for a 'prescribed reason', which includes restraint to ensure the safety of the patient or of other persons.<sup>284</sup> If the patient is under 18, authority must be granted by the Chief Civil Psychiatrist.
- 5.6.20. Another class of patients are 'forensic patients', who are those persons admitted to a place approved as a secure mental health unit.<sup>285</sup> Similar provisions providing for restraint apply to them, and authority for any restraint of a person under 18 must be granted by the Chief Forensic Psychiatrist.<sup>286</sup>
- 5.6.21. Across both classes of patients, despite the need for a 'prescribed reason', the Act makes clear that the provisions do not prevent the 'emergency short-term physical restraint of a patient' to prevent the person harming themselves or other people, or to break up a fight involving the

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<sup>280</sup> Ibid s 18–19.

<sup>281</sup> Ibid s 3(1).

<sup>282</sup> Ibid s 3(1).

<sup>283</sup> Ibid s 57.

<sup>284</sup> Ibid s 57(6).

<sup>285</sup> Ibid s 3(1).

<sup>286</sup> Ibid s 95.

patient, among other circumstances.<sup>287</sup> However, the Act makes clear that no authority is given to restrain a patient for punishment.<sup>288</sup>

- 5.6.22. These provisions for restraint operate in an even more limited way than protective custody. A host of requirements must be satisfied, and it is certainly not a type of restraint that any person can apply for to be imposed on another. Nevertheless, in cases where a child's threatening behaviour is connected to mental illness, the provisions can operate to protect those around them within the facilities into which they are admitted.

#### *Restriction orders*

- 5.6.23. Within the statutory framework relating to mental health, the *Criminal Justice (Mental Impairment) Act 1999* (Tas) also provides for 'restriction orders' which require the person to be admitted to and detained in a secure mental health unit. However, this Act relates only to persons who have been deemed unfit to stand trial, or have been found not guilty of offences due to insanity. Therefore, these restriction orders have no general application to children outside trial processes who are threatening or endangering others.

## **5.7. Youth Justice Act 1997**

- 5.7.1. Children who are above the MACR may, in addition to the supportive and protective laws set out above, be subject to penal (albeit not always punitive) criminal laws. In particular, children who are above the MACR fall within the special jurisdiction of the *Youth Justice Act 1997* (Tas). The Act applies to 'youth' who are between 10 and 17, specifically those who are:

10 or more years old but less than 18 years old at the time when the *offence* the person has committed, or is suspected of having committed, occurred.<sup>289</sup>

- 5.7.2. The *Youth Justice Act 1997* adopts a 'justice model' approach to dealing with offending behaviour by children. That model focuses attention on 'the offence that a child has committed rather than the child'.<sup>290</sup> In its Second Reading Speech, the tabling minister explained that

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<sup>287</sup> *Ibid* s 57(4), 95(4).

<sup>288</sup> *Ibid* s 57(3), 95(3).

<sup>289</sup> *Youth Justice Act 1997* (Tas), s 3

<sup>290</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 1997, 82 (Thomas John Cleary, Minister for Transport on behalf of the Minister for Community and Health Services) ('YJA Second Reading Speech'), 4.

The most significant change promoted in the legislation [is] the emphasis on the accountability of the young person for their actions and the diversionary process by which some offenders may be kept out of the court system.<sup>291</sup>

- 5.7.3. Before the *Youth Justice Act 1997* (Tas), the system of youth justice was found in the *Child Welfare Act 1960* (Tas). As discussed in the Second Reading Speech for the *Youth Justice Act*, the old system viewed ‘offending [as] a symptom of an underlying disturbance in a child, resulting from parental neglect or some other circumstances outside the child’s control’, and as such focused on ‘the “needs” rather than the “deeds” of youth offenders’.<sup>292</sup> This focus is typical of the ‘welfare’ model to youth justice which largely regards children as products of their environment rather than self-determining agents, and therefore emphasises treatment rather than punishment.<sup>293</sup>
- 5.7.4. Under the *Child Welfare Act 1960* (Tas), Court processes did not require the young person’s participation and were slow in a way that meant the connection between the offence and consequence could be lost. Further, this system had a more interventionist approach to responsibility, with young persons sentenced to detention made Wards of State — the state assumed responsibility for the child, rather than parents or guardians.<sup>294</sup>

### **From welfare to justice**

- 5.7.5. The *Youth Justice Act 1997* (Tas) shifts the philosophical framework of youth justice away from the welfare model and to a ‘justice model’ based on restorative justice, emphasising accountability and focusing attention on ‘the offence that a child has committed rather than the child’.<sup>295</sup> This shift towards accountability is reflected in the diversionary processes which involve closer involvement of the young person and their family and more opportunities for the victim to participate in the resolution of the offence. The aim was for quicker resolution as well as minimal state intervention and greater family involvement.
- 5.7.6. The objects of the Act include, *inter alia*, to ensure that a youth who has committed (or is alleged to have committed) an offence is:

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<sup>291</sup> Ibid.

<sup>292</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 1997, 82 (Thomas John Cleary, Minister for Transport on behalf of the Minister for Community and Health Services) (‘YJA Second Reading Speech’).

<sup>293</sup> Neal Hazel, *Cross-National Comparison of Youth Justice* (Report, 2008) 23–4.

<sup>294</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 1997, 82 (Thomas John Cleary, Minister for Transport on behalf of the Minister for Community and Health Services) (‘YJA Second Reading Speech’). 82–3.

<sup>295</sup> Ibid 83.

- made aware of [their] rights and obligations under the law and of the consequences of contravening the law;
- given appropriate treatment and rehabilitation and, if necessary, appropriately sanctioned;
- dealt with in a manner that takes into account the youth's social and family background and that enhances the youth's capacity to accept personal responsibility for [their] behaviour;
- provided with appropriate opportunities to repair any harm caused by the commission of the offence to the victim of the offence and the community and to reintegrate himself or herself into the community.<sup>296</sup>

5.7.7. In addition, it is an object of the Act to enhance and reinforce the roles of guardians, families and communities in:

- minimising the incidence of youth crime;
- sanctioning and managing youths who have committed offences; and
- rehabilitating youths who have committed offences and directing them towards the goal of becoming responsible citizens.<sup>297</sup>

5.7.8. These objectives are to be pursued with regard to a series of principles, including that:<sup>298</sup>

- the youth is to be dealt with, either formally or informally, in a way that encourages the youth to accept responsibility for [their] behaviour;
- that the community is to be protected from illegal behaviour;
- victims are given the opportunity to participate in the process of dealing with the youth;
- guardians are to be encouraged to fulfil their responsibility for the care and supervision of the youth and should be supported in their efforts to fulfil this responsibility;
- guardians should be involved in determining the appropriate sanction;
- detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary;
- any sanctioning of a youth is to be designed so as to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways;
- any sanctioning of a youth is to be appropriate to the age, maturity and cultural identity of the youth;
- any sanctioning of a youth is to be appropriate to the previous offending history of the youth.

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<sup>296</sup> Section 4.

<sup>297</sup> Section 4.

*Focus on diversion*

- 5.7.9. The legislation provides two levels of mechanisms to ensure that young people committing minor offences are diverted from ‘prolonged Court procedures’<sup>299</sup> such that ‘[c]onsequences will follow actions more immediately’ — an approach believed to be ‘more in line with the way young people learn’.<sup>300</sup> These are contained in Part 2 of the Act, ‘Diverting youths from court system’.
- 5.7.10. Importantly, these diversionary processes are unavailable for the most serious offences. Under the Act, the diversionary proceedings in pt. 2 apply only where the child admits to committing an ‘offence’.<sup>301</sup> Section 3 defines ‘offence’ as ‘any offence other than a prescribed offence’. What offences fall within the category of ‘prescribed offences’ differs based on the age of the child. For each age group, additional offences can be prescribed by regulations in force under the Act. As a matter of procedure, children charged with prescribed offences are heard in the Supreme Court, since the Act only confers jurisdiction on the Magistrates Court (Youth Justice Division) to hear charges against youth for ‘an offence’.<sup>302</sup> As a result, children convicted of prescribed offences can be sentenced under the *Sentencing Act 1997* (Tas), not subject to the restrictions under the *Youth Justice Act 1997* (Tas) in this regard.

**Tiered Divisions of Offences**

- 5.7.11. For offences other than prescribed offences, the first tier of diversion is contained in Division 2. This involves cautioning against further offending, done informally by any police officer<sup>303</sup> or done formally by a police officer authorised to do so by the Commissioner of Police.<sup>304</sup> In practice, informal cautions are used as a response to minor behaviour requiring immediate intervention only, such as failure to wear a bike helmet, skateboarding where it is prohibited, and causing minor public disorder. If the child has already had prior formal cautions, the offending is more serious, or other circumstances exist that result in a need to escalate police intervention, then police will resort to formal cautions or community conferencing, the latter being the second ‘tier’ of diversionary processes, discussed below.<sup>305</sup> If a formal caution is required, it can also require the offender to commit to various undertakings, such as apologising

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<sup>299</sup> Ibid 83.

<sup>300</sup> Ibid 84.

<sup>301</sup> *Youth Justice Act 1997* (Tas) s 7.

<sup>302</sup> Ibid s 161.

<sup>303</sup> Ibid s 8.

<sup>304</sup> Ibid ss 3, 10(1).

<sup>305</sup> Letter from Commissioner Darren Hine to Tasmania Law Reform Institute, 14 July 2021 (Tasmania Police’s responses to the TLRI’s questions) (‘TasPol Answers’).

to the victim or paying compensation.<sup>306</sup> Guardians or other responsible adults are to be present whenever practicable during these formal cautions,<sup>307</sup> again reflecting a desire to have greater involvement of the youth's family rather than the state.

- 5.7.12. The second tier of diversion is community conferencing, where an independent facilitator assists the offender and victim to reach agreement on how the offence is to be resolved.<sup>308</sup> Recognising the potential costs and intrusiveness of this method, it is designed to be available in more limited circumstances. Police may refer a matter to be handled in a community conference where a youth admits to committing an offence and the police officer believes that the matter warrants more than an informal caution.<sup>309</sup> If the court establishes guilt, the court may also make an order for a community conference to be convened as an alternative to sentencing.<sup>310</sup>
- 5.7.13. Importantly, the outcomes of community conferences are legally enforceable. If the community conference requires a youth to enter into an undertaking and the youth fails to perform obligations arising thereunder, the youth becomes liable to be prosecuted.<sup>311</sup> Police may also request for the matter to be brought to court if either the youth, the police officer, or the victim (if they are present) do not agree to the imposition of a sanction, meaning that the conference 'fails to reach a decision'.<sup>312</sup>
- 5.7.14. This diversionary process does not apply to youth who commit 'prescribed offences', which are tried in the Supreme Court rather than the Youth Justice Division of the Magistrates Court (s 161).
- If the youth is between 10-14 years old those prescribed offences are murder, manslaughter, or attempted murder.
  - If the youth is between 14 and 16 any of those offences as well as aggravated sexual assault; rape; persistent sexual abuse of a child); armed robbery; aggravated armed robbery; being found prepared for the commission of a crime, armed with a dangerous or offensive weapon or instrument); evading apprehension or interception by a police officer.
  - If the youth is 17 any of those offence as motor vehicle; marine, and traffic offences.

## Sentencing Options

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<sup>306</sup>*Youth Justice Act 1997* (Tas), s 10(2).

<sup>307</sup> *Ibid* s 10(4)(a).

<sup>308</sup> *Ibid* pt 2, div 3.

<sup>309</sup> *Ibid* s 9(1)(b).

<sup>310</sup> *Ibid* s 37.

<sup>311</sup> *Ibid* s 20(2)(d).

<sup>312</sup> *Ibid* s 17(4), s 20(2)(b).

- 5.7.15. For youth offenders who go through the court process, the Act also provides for a wide range of sentencing options for the court, outlined in Part 4. This includes the introduction of some previously-unavailable options, such as Community Service Orders.<sup>313</sup> The range of dispositions are designed to allow greater flexibility in the way that cases involving youth offenders are addressed.
- 5.7.16. In choosing between which action is most appropriate, Tasmania Police will consider factors such as:
- the age of the offender;
  - prior offending history, including the use of diversionary interventions such as cautions;
  - the time lapse between offences (if multiple);
  - the seriousness of the offence;
  - legislative requirements;
  - the ability of the child to understand the impact of their behaviour;
  - personal circumstances;
  - whether the child has admitted to the offence; and
  - the child's preparedness to participate in diversionary processes.<sup>314</sup>
- 5.7.17. Consistent with the intention of the Act, diversionary processes are used in preference to court processes where appropriate. However, if the child does not admit the offending, is unwilling to cooperate with the diversionary process, has a significant history of offending, or has had prior diversion or prosecution for offences, police will resort to pursuing prosecution of the child.<sup>315</sup>
- 5.7.18. Approximately half of all juvenile files in Tasmania are diverted, though juvenile file outcomes are not publicly reported by age.<sup>316</sup> Of the diverted files the most common measures (in order) are:
1. Informal cautions;
  2. Formal cautions; and
  3. Community conferencing.

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<sup>313</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 1997, 82 (Thomas John Cleary, Minister for Transport on behalf of the Minister for Community and Health Services) ('YJA Second Reading Speech'), 83–4.

<sup>314</sup> TasPol Answers (n 305).

<sup>315</sup> *Ibid.*

<sup>316</sup> In 2019–20, 47% of juvenile files were diverted: Tasmania Police, *Corporate Performance Report: Annual 2019–20 (June 2020)* (Report, 2020) 43. This compares to 46% in 2018–19, 45.1% in 2017–18, and 57.5% in 2016–17 as reported in the respective Corporate Performance Reports. While these numbers have declined from 2012, a change in the data collation system in 2016 means that comparison of pre-2016 and post-2016 data may not be accurate.

5.7.19. This order corresponds with the degree of seriousness of the measure, with informal cautions being the least serious.

## 5.8. Restraint Orders

5.8.1. Outside of extreme circumstances and where the behaviour is of an ongoing nature, apprehended violence orders are the primary legal means of protection from someone committing or threatening to commit acts of violence, stalking, or harassment. The purpose of such orders is to stop the behaviour, prevent the behaviour, or prevent its escalation. In Tasmania, there are two types of apprehended violence orders:

- Restraint orders under the *Restraint Orders Act 2019* (Tas); and
- Orders under the *Family Violence Act 2004* (Tas).

5.8.2. Beyond apprehended violence orders, there are other mechanisms that may also restrict the behaviour or movement of people. These include area restriction orders that prevent offenders from loitering in specified areas, protective custody and restraint under the *Mental Health Act 2013* (Tas), and restriction orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

5.8.3. As will be shown, not all are capable of applying to young people exhibiting ongoing threats of violence.

5.8.4. Restraint orders in Tasmania are provided for in the *Restraint Orders Act 2019* (Tas). This legislation replaces and updates Part XA of the *Justices Act 1959* (Tas) which originally provided for such orders, though it largely replicates the old framework.<sup>317</sup>

5.8.5. Restraint orders can be granted if any of four scenarios are proved on the balance of probabilities.<sup>318</sup>

- First, where a person has caused personal injury or property damage and is ‘likely again’ to cause such damage unless restrained. Personal injury includes that which affects physical or mental condition.<sup>319</sup>
- Second, where they have threatened to cause such injury or damage and are likely to carry out their threat unless restrained.
- Third, where ‘a person has behaved in a provocative or offensive manner’ which is ‘likely to lead to a breach of the peace’, and are likely to behave again in this way unless restrained.
- Fourth, where a person has been stalking another.

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<sup>317</sup> Restraint Orders Bill 2019 (Tas).

<sup>318</sup> *Restraint Orders Act 2019* (Tas) s 6(2).

<sup>319</sup> *Ibid* s 6(1). This was a clarification explicitly made in the new Act.

- 5.8.6. There is also provision for the Court to make an interim restraint order while the proceedings for the restraint order are pending.<sup>320</sup> Additionally, police may apply for an electronic interim restraint order if the time and place of the behaviour make it ‘not practicable to immediately apply for a restraint order’ at the Court’s registry, and the behaviour is likely to continue and give rise to an assault.<sup>321</sup>
- 5.8.7. For ordinary restraint orders, applications are made to the Magistrates Court, and may be made by a police officer, the person affected, their guardian or administrator if the person is a child, or another person if the Court allows.<sup>322</sup>
- 5.8.8. The orders included in the restraint order may, among other things, restrain a person from behaving in a certain manner; approaching or contacting the affected person; entering or accessing certain premises; possessing firearms; stalking another person; or causing another person to engage in the conduct that the respondent is restrained from doing.<sup>323</sup> A restraint order remains active for as long as the justices consider necessary to protect the person, or until an order revoking the restraint order is made.<sup>324</sup>
- 5.8.9. The factual scenarios grounding a restraint order in s 6 are specified by reference to ‘a person’, and do not require the respondent to be of a certain age or to have committed any offence, unlike some foreign jurisdictions.<sup>325</sup> Further, they are broadly worded and should cover conceivable instances of children who exhibit ongoing threats of violence, regardless of whether there is a relationship between the child and the person affected.
- 5.8.10. Where the respondent is under 18 years old, the *Youth Justice Act* confers jurisdiction on the Youth Justice Division of the Magistrates Court to hear and determine the application.<sup>326</sup> While this provision makes reference only to the *Justices Act 1959*, the new *Restraint Orders Act 2019* allows for proceedings to be transferred to the Magistrates Court (Youth Justice Division) or the Magistrates Court (Children’s Division) where this is appropriate.<sup>327</sup> However, because the jurisdiction of the *Youth Justice Act* only extends to ‘youth’ – that is children who are between 10 and 18 – the interoperation of the legislation appears to preclude applications for restraining orders being made against children who are under the MACR. Indeed, the process for

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<sup>320</sup> Ibid s 12.

<sup>321</sup> Ibid s 13.

<sup>322</sup> Ibid s 5.

<sup>323</sup> Ibid s 6(5).

<sup>324</sup> Ibid.

<sup>325</sup> For example, in the United Kingdom, restraining orders attach only to convictions or acquittals. Therefore, they require the commission of an offence, whether or not the person is ultimately held criminally responsible after a trial: *Sentencing Act 2020* (UK) s 360 (on conviction); *Protection from Harassment Act 1997* (UK) s 5A (on acquittal).

<sup>326</sup> *Youth Justice Act 1997* (Tas), s 161(1)(c).

<sup>327</sup> *Restraint Orders Act 2019* (Tas) s 17(11)–(12).

enforcing<sup>328</sup> and penalising<sup>329</sup> contraventions of restraining orders are themselves criminal in nature and would not apply to children below the MACR, making them largely inapplicable to this age cohort.

- 5.8.11. If the age is raised without provision for alternative non-criminal consequences for breach, there will be a larger cohort of children against whom orders are not legally enforceable.
- 5.8.12. In this context, it is noteworthy that certain other Australian jurisdictions impose minimum age limits on the respondent against whom a restraint order can be sought.
- In Western Australia, the *Restraining Orders Act 1997* (WA) provides a consolidated framework for all restraining orders, whether of a general nature or specific to the family violence context. Section 50 provides that no restraining orders are to be made against a child who is under 10 years of age.
  - Similarly, in the Australian Capital Territory, s 69(1) of the *Personal Violence Act 2016* (ACT) provides that a child younger than 10 years old cannot be the respondent to an application for a protection order. If the child is 10–14 years old, they are taken to have ‘impaired decision-making ability’ unless the court ‘otherwise orders’,<sup>330</sup> and this has implications for their legal representation in the relevant proceedings.<sup>331</sup>
  - The Northern Territory sets an even higher threshold. Under s 11(2) of the *Personal Violence Restraining Orders Act 2016* (NT), the respondent/defendant to a personal violence restraining order must be at least 15 years old.
  - New Zealand sets a threshold even higher still. Under s 12 of the *Harassment Act 1997* (NZ), an application for a protection order cannot be made against anyone under *17 years old*, unless the minor is or has been married or in a civil union or de facto relationship.
- 5.8.13. Despite how raising the MACR will impact on the enforcement of restraining orders, this impact should not be overstated. While there is no clear data on how many restraint orders are imposed on children between 10–14 years old and how often they are breached, the numbers from larger datasets indicate that it will be low.<sup>332</sup>
- 5.8.14. Across Australia in 2019–20, there were 48 instances of children under 14 committing an ‘offence against justice’ — a group which includes ‘breaching a violence or non-violence order’.

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<sup>328</sup> Ibid s 21(2).

<sup>329</sup> Ibid s 21(1).

<sup>330</sup> *Personal Violence Act 2016* (ACT) s 69(2).

<sup>331</sup> Ibid s 70.

<sup>332</sup> There is no publicly available information for how many restraint orders were imposed on persons between 10–14 years old in Tasmania. The available data merely indicates that in 2018–19, there were 1,253 applications for restraint orders lodged in the Tasmanian Magistrates Court as a whole Magistrates Court of Tasmania, *Annual Report 2018 – 2019* (Report, 19 November 2019) 29.

While breaches of these orders constitute just under a quarter of offences in the overall group,<sup>333</sup> the statistic does not allow a conclusive determination of how many of the 48 instances within the specified age range were indeed breaches of orders.<sup>334</sup> As these figures are Australia-wide, they indicate that there are relatively few occasions where a child under 14 has breached a violence or non-violence order.

## Family Violence Orders

- 5.8.15. The *Family Violence Act 2004* (Tas) provides for the issuing of various protection orders: Family Violence Orders,<sup>335</sup> Police Family Violence Orders,<sup>336</sup> and interim Family Violence Orders.<sup>337</sup> These are used to protect those subject to family violence by imposing conditions on the behaviour and movement of persons who have committed or are likely to commit a family violence offence.
- 5.8.16. However, due to the scope of relationships covered by the *Family Violence Act* and the definition of ‘family violence’, such orders are unlikely to have application against children aged 10–14.
- 5.8.17. Unlike certain other jurisdictions, such as New South Wales,<sup>338</sup> Queensland,<sup>339</sup> or the Australian Capital Territory,<sup>340</sup> the Tasmanian family violence legislation does not encompass violence in familial relations, such as parent–child or inter-sibling relationships. Rather, s 7 of the Tasmanian Act limits family violence to certain conduct committed against a person’s ‘spouse or partner’ or, in the case of property damage, against property owned by an ‘affected child’. Spouse or partner extends only to marriages or significant relationships within the meaning of the *Relationships Act 2003* (Tas). The *Family Violence Act* extends the definition of ‘significant relationship’ in the latter act, but only to cover circumstances where one or both of the parties to the couple are not yet adult, but are between 16–18 years old.
- 5.8.18. Therefore, except in the case of a child who causes damage to property owned by another child affected by family violence,<sup>341</sup> family violence orders would not apply to children as respondents.

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<sup>333</sup> For the overall ‘offences against justice’ category, there were 3 for age 10, 3 for age 11, 17 for age 12, 25 for age 13: *ABS Youth Offender Statistics* (n 385) Table 18.

<sup>334</sup> For the overall ‘offences against justice’ category, there were 3 for age 10, 3 for age 11, 17 for age 12, 25 for age 13: *Ibid* Table 21.

<sup>335</sup> *Family Violence Act 2004* (Tas) s 16.

<sup>336</sup> *Ibid* s 14.

<sup>337</sup> *Ibid* s 23.

<sup>338</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4.

<sup>339</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 11A.

<sup>340</sup> *Family Violence Act 2016* (ACT) s 9.

<sup>341</sup> *Family Violence Act 2004* (Tas) s 4(1).

- 5.8.19. As with ordinary restraint orders, certain Australian jurisdictions impose minimum age limits on the respondent against whom a family violence protection order is sought, even where familial relationships are covered. These largely reflect the provisions outside of the family violence context.
- The Western Australian *Restraining Orders Act 1997* (WA) provides a consolidated framework in Western Australia for all restraining orders. Section 50 provides that no restraining orders are to be made against a child who is under 10 years of age.
  - Similarly, in the Australian Capital Territory, s 75(1) of the *Family Violence Act 2016* (ACT) provides that a child younger than 10 years old cannot be the respondent to an application for a protection order. The same presumption as to ‘impaired decision-making ability’ applies to children aged 10–14 years, as with ordinary restraint orders.<sup>342</sup>
  - In the Northern Territory, s 14(3) of the *Domestic and Family Violence Act 2007* (NT) provides that the respondent/defendant to a domestic violence order must be at least 15 years old.
  - In Queensland, the *Domestic and Family Violence Protection Act 1989* (Qld) covers familial relationships.<sup>343</sup> However, while there is no explicit age limit — a child may be named as the respondent in a domestic violence order<sup>344</sup> — there is an indirect one. Section 12D(2) limits occasions where children can be respondents to where a spousal relationship, intimate personal relationship or informal care relationship exists between the child and the other named party. As an informal care relationship cannot exist between a child and a parent,<sup>345</sup> a parent would not be able to apply for an order against a child threatening violence. Similarly, because the informal care relationship must be owing to ‘disability, illness or impairment’ of the person being cared for,<sup>346</sup> one sibling looking after another in an ordinary family relationship also does not satisfy the definition in a way that would allow the sibling carer to apply for a protection order.
  - As with restraint orders, New Zealand has an age threshold higher than any in Australia. Familial relationships are covered under the *Domestic Violence Act 1995* (NZ).<sup>347</sup> However, per s 10(1) an application for a protection order cannot be made against anyone under 17 years old, unless the minor is or has been married or in a civil union or de facto relationship.

## Area Restriction Orders

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<sup>342</sup> *Family Violence Act 2016* (ACT) s 75(2).

<sup>343</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 11.

<sup>344</sup> *Ibid* s 12D(1).

<sup>345</sup> *Ibid* s 12C(5).

<sup>346</sup> *Ibid* s 12C(2).

<sup>347</sup> *Domestic Violence Act 1995* (NZ) s 3–4.

- 5.8.20. The *Sentencing Act 1997* provides for the Court to make an area restriction order against an offender. This prevents them from being able to loiter in the specified area or class of areas, whether at all times or during certain specified times.<sup>348</sup> Breach of such order is a criminal offence.<sup>349</sup> While these are not targeted at personal violence in the same way as restraint orders or family violence orders, they nonetheless restrict the movement of a person.
- 5.8.21. However, these do not always apply for youth offenders, and would certainly not apply to those below the minimum age of criminal responsibility. First, the *Youth Justice Act* provides for its own sentencing framework. The provisions of the *Sentencing Act 1997* only apply in limited circumstances, such as where the Court is sentencing a person who is 18 years old or above,<sup>350</sup> or where the Supreme Court is hearing the matter.<sup>351</sup> Second, a finding of criminal guilt is a precondition for such an order.<sup>352</sup> Therefore, in cases where area restriction orders *can* be imposed on children, raising the minimum age will remove it as an option for addressing risks posed by children who fall outside the criminal justice system due to the minimum age.

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<sup>348</sup> *Sentencing Act 1997* (Tas) s 70.

<sup>349</sup> *Ibid* s 71.

<sup>350</sup> *Youth Justice Act 1997* (Tas), s 161A(1).

<sup>351</sup> *Ibid* s 107.

<sup>352</sup> *Sentencing Act 1997* (Tas) s 70(1).

## 6 Additional law reform

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*If the minimum age of criminal responsibility (MACR) is raised in Tasmania what, if any, additional law reform would be required to ensure community safety and promote the wellbeing of those children aged less than the MACR who exhibit harmful behaviours?*

### 6.1. General points of concern

- 6.1.1. If the age of criminal responsibility is raised, those below the minimum age are outside the scope of the criminal justice system entirely. As a result, the diversionary processes and corrective sanctions in the *Youth Justice Act* would be excluded from options available to authorities handling children engaging in violent or anti-social behaviour. However, this deficiency could be remedied by other legislation outside of the criminal justice context, as exists in other jurisdictions where the minimum age is higher or where there are limits to what sanctions may be imposed on a child found criminally responsible. Countries typically adopt one of two mechanisms:
- A quasi-criminal legal regime for those under the minimum age who commit acts that would qualify as offences if the child were older, or
  - The provision of intervention measures under their child welfare or child protection systems.
- 6.1.2. This is discussed further below in the outline of approaches in other jurisdictions.
- 6.1.3. Regardless of what measures are adopted to replace the options currently available for those aged 10–14, it is vital that they adopt a trauma-informed approach to children engaging in violent or anti-social behaviour, focus on supporting the parents and carers in the child’s home environment, and educate the child to assist them in developing an understanding of their conduct.<sup>353</sup>
- 6.1.4. A trauma-informed approach begins with an acknowledgement that the potentially-criminal behaviour may be manifestations of underlying problem factors in the child’s life. As such, in the implementation of measures to address the behaviour and any underlying causes, it will be important to gain an understanding of the child’s background and family or social environment. This may be done through a requirement that the relevant authority imposing or implementing

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<sup>353</sup> These needs were raised in many responses to the CCYP’s post-forum survey.

a measure considers a report into the child's circumstances as prepared by qualified professionals. For example, in Portugal, the court may impose certain educational measures on children under the MACR. However, the court must be informed of the child's personality through a social inquiry report prepared by the relevant governmental service and, where the measure is institutionalisation in an educational centre, through an expert psychological evaluation.

- 6.1.5. Further, it should also be noted that raising the minimum age at which children can be held criminally responsible may suggest a departure from the 'justice model' emphasising accountability in favour of a return to the welfare model that the Act was designed to change. Any reforms implemented along with a raised minimum age must ensure adequate focus on the 'deeds' — the offence committed. It should also strive to retain those aspects of the Act that promote restorative justice, such as involvement of the victim and their family or guardians in any resolution of misbehaviour, even if the misbehaviour is not subject to the possibility of criminal liability.
- 6.1.6. One example of a hybrid model focusing on both 'needs' and 'deeds' can be found in Portugal. While the MACR in Portugal is 16, children aged 12–16 who commit acts qualifying as crimes can be subject to educational measures under a separate law, including placement in an educational institution. Two conditions must be met to trigger the law's application:
- first, the existence of a fact qualifying as a crime in law, and
  - second, the need for the child to receive education in the law's values.<sup>354</sup>
- 6.1.7. Similarly, when choosing the appropriate measure to apply, the court is to have regard to both the interest of the child as well as the seriousness and nature of the offending behaviour. These two aspects reflect a balancing of welfare and punitive considerations.

## 6.2. 'Fagin offences': The Exploitation of Children by Older Offenders

- 6.2.1. In Charles Dickens' *Oliver Twist*, Fagin is an adult who teaches children how to steal and has them commit the crimes on his behalf in exchange for shelter. Named after this character, 'Fagin offences' refer to where adults or older offenders exploit children to commit offences on their behalf. This is a concern commonly raised in the debate about MACR, including in

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<sup>354</sup> Anabela Miranda Rodrigues and António Duarte-Fonseca, 'Portugal' in Frieder Dünkler et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 2, 1027, 1044–5.

responses to the post-forum survey<sup>355</sup> — that Fagin offences will increase if there is a larger cohort of children who cannot be held criminally responsible for the behaviour.

- 6.2.2. However, while the child may not be held criminally responsible because of their age, this does not prevent the adult from being held criminally responsible for inciting another to commit a crime or conspiring to do the same. Admittedly, there may be a gap where the prosecutor cannot prove a specific crime and the exploitation is of a more general nature. In Victoria, a ‘Fagin’s law’ was introduced in 2017 to deal with this problem, creating an offence broader than the existing offence of incitement.<sup>356</sup>
- 6.2.3. The Victorian amendment inserted into the Victorian *Crimes Act 1958* a new div 11A, titled ‘Recruiting a child to engage in criminal activity’. Child is defined as anyone under 18 years of age and ‘recruit’ means to incite, direct, or induce.<sup>357</sup> It applies where an adult aged 21 years or older recruits another person to engage in criminal activity, knowing that the person is a child, and knowing that it is likely the child will engage in that activity.<sup>358</sup> Importantly, a person can be found guilty regardless of whether the child actually engages in the criminal activity or is prosecuted or found guilty of any offence.<sup>359</sup> Therefore, even if the age of criminal responsibility were raised, the adult could still be held criminally responsible for recruiting them. However, there is a limitation on the type of offending that is relevant. For this section of the law, ‘criminal activity’ is limited to conduct that constitutes an offence punishable on first conviction with imprisonment for life or for a term of five years or more.<sup>360</sup> This covers crimes such as theft, robbery, and drug trafficking.<sup>361</sup>
- 6.2.4. A similar law could be introduced in Tasmania if the existing incitement and conspiracy offences in s 298 and 297 of the *Criminal Code* prove insufficient in dealing with these situations.

### 6.3. Young Federal Offenders and Federal Implications

- 6.3.1. The adjudication of federal crimes is primarily the responsibility of state and territory courts.
- 6.3.2. As regards jurisdiction, s 39(2) of the *Judiciary Act 1903* (Cth) vests state courts with federal jurisdiction subject to certain limitations and exceptions. Section 68(2) makes specific provision

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<sup>355</sup> See Responses 262, 264, 266, 272, 286.

<sup>356</sup> ‘Fagin’s law: New Victorian Offence to Target Adults Procuring Kids to Commit Crimes’, *ABC News* (online, 5 December 2016) <<https://www.abc.net.au/news/2016-12-05/fagins-law-targets-adults-getting-kids-to-commit-crime-victoria/8091696>>.

<sup>357</sup> *Crimes Act 1958* (Vic) s 321LA.

<sup>358</sup> *Ibid* s 321LB.

<sup>359</sup> *Ibid* s 321LC.

<sup>360</sup> *Ibid* s 321LA.

<sup>361</sup> *Sentencing Act 1991* (Vic) n 19 (table of maximum penalties in the endnotes to the legislation).

for federal criminal jurisdiction. It provides that state or territory courts exercising jurisdiction with respect to state or territory offences shall have ‘the like jurisdiction with respect to persons who are charged with’ Commonwealth offences, subject to the section and to s 80 of the *Constitution*. Section 80 provides that indictable Commonwealth offences shall be by jury and held in the State where the offence was committed, or in a place otherwise prescribed by Parliament if the offence was not committed within any State.

- 6.3.3. As regards procedure, ss 68(1) and 79 of the *Judiciary Act 1903* (Cth) allow for state and territory procedural laws to be picked up and applied to federal prosecutions in state and territory courts. This has been interpreted by the High Court as capturing laws regarding sentencing.<sup>362</sup> Part IB of the *Crimes Act 1914* (Cth) similarly makes certain aspects of state and territory laws applicable to federal offenders. While this framework may give rise to discrepancies in the sentencing of federal offenders, the High Court has found the state-by-state basis administration of federal criminal law to be valid.<sup>363</sup>
- 6.3.4. Further in relation to procedure, the *Crimes Act 1914* (Cth) makes special provision in s 20C for a ‘child or young person’ charged with or convicted of a federal offence. It provides that they ‘may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory’, allowing for young federal offenders to be dealt with in specialist juvenile justice systems in the states and territories. However, due to the requirement that the child or young person be ‘charged with or convicted of’ a federal offence, pre-court diversionary options that precede the laying of a charge would likely be unavailable.<sup>364</sup>
- 6.3.5. While some Federal courts have jurisdiction to hear federal offences, they play a very limited role in the criminal justice system.<sup>365</sup>
- 6.3.6. The original jurisdiction of the High Court includes jurisdiction to hear trials of indictable federal offences, but this has not been exercised since 1933. The Court hears criminal matters in exercise of the Court’s appellate jurisdiction as the highest court of appeal for federal, state, and territory criminal law.
- 6.3.7. The Federal Court has general jurisdiction over civil matters by virtue of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), but does not have general jurisdiction over criminal matters. However, it has summary jurisdiction for certain federal criminal matters as conferred by a limited number of federal statutes, such as s 133A of the *Copyright Act 1968* (Cth). The *Federal Court of*

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<sup>362</sup> *Putland v The Queen* (2004) 204 ALR 455 cited in Australian Law Reform Commission, ‘Sentencing of Federal Offenders’ (Issues Paper No 29, 2005) [3.28] 60.

<sup>363</sup> ALRC ‘Sentencing of Federal Offenders’ (n 362) 61 [3.32] fn 136 and the references therein.

<sup>364</sup> *Ibid* [15.13].

<sup>365</sup> *Ibid* 59–65.

*Australia Act 1976* (Cth) does not provide for criminal juries, and as such the Federal Court has no capacity to hear indictable federal offences.

- 6.3.8. The Family Court has original jurisdiction under the *Family Law Act 1975* (Cth) in relation to family law matters. Ancillary to its role in hearing civil disputes, the Court has a limited criminal jurisdiction, such as where someone contravenes an order imposed under the constitutive Act.
- 6.3.9. There is already some difficulty in harmonising sentencing options, and these could be exacerbated if a young federal offender simply falls outside of the criminal justice system in Tasmania.<sup>366</sup>
- 6.3.10. Inconsistencies between Tasmanian laws and Commonwealth laws on the capacity of young people to be criminally responsible may also enliven the operation of s 109 of the Constitution. Under s 7.2 of the *Criminal Code Act 1995* (Cth), a child aged between 10–14 years can only be criminally responsible for an offence if they know that their conduct is wrong. The same terminology is used in the *Crimes Act 1914* in s 4N. If Tasmania raises the *irrebuttable* minimum age to 14 years, while the *rebuttable* presumption of *doli incapax* remains in place at the Commonwealth level for those aged 10–14, may generate a s 109 inconsistency as regards the fault element in cases of young persons charged with federal offences in Tasmania and render Tasmanian law inoperative to the extent of this inconsistency.

## 6.4. Impact on Interstate Prison Transfers

- 6.4.1. The potential of varied MACR thresholds across the federation raises potential problems with interstate transfers of children who may be detained in one state to another. This may arise where that is either not permitted by law due a higher MACR, or because there are simply no facilities capable of detaining children of that age group because of the higher MACR.
- 6.4.2. A hypothetical example of this issue would arise if child A, who is 12 years old, lives with their father in state X where the MACR is also 12 (meaning the child is criminally responsible in that state). Child A participates in a criminal act with their father that results in both being subject to custodial sentences. The mother and all other family members of child A live in state Y, where

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<sup>366</sup> See [7.83] 125 in *Sentencing of Federal Offenders* (ALRC Issues Paper No 29) about *Curry v Morrison* where a community-based order could not be used for an adult federal offender, because of a divergence of maximum penalties set out in the Commonwealth offence provision, and the state legislation (picked up by s 20AB of the Crimes Act).

See [7.99]–[7.100] in *Sentencing of Federal Offenders* (ALRC Issues Paper No 29) about s 20AB of the Crimes Act which allows courts when sentencing federal offenders to impose alternative sentences available under state or territory law. However, the state or territory laws with respect to that alternative sentence only apply insofar as they are not inconsistent with the laws of the Commonwealth (s 20AB(3)).

the MACR is 14. An order is sought to transfer child A to state Y, where they will be more likely to be visited, supported and cared for by their close family members. It is accepted by all parties that doing so is in the best interests of the child and essential to their rehabilitation. However, state Y does not have provisions or policies in place for the individual punitive detention of children under 14 and all children in youth detention in state area are over that age.

- 6.4.3. In Tasmania, interstate transfers of prisoners are governed by the *Prisoners (Interstate Transfer) Act 1982* (Tas). However, this does not apply to young persons — ‘state sentence of imprisonment’ is defined in s 3(1) as not including sentences served in detention centres within the meaning of the *Youth Justice Act 1997* (Tas) or sentences under any Act relating to the punishment of persons who committed offences when they were younger than 18 years-old.
- 6.4.4. Rather, interstate transfers of young prisoners are provided for in Part 7 of the *Youth Justice Act 1997* (Tas). This Act makes provisions for the sentences of those transferred prisoners.
- 6.4.5. Under s 156, if the offender is transferred *from* Tasmania to another state, any sentence imposed on them or order made in relation to them ceases to have effect in Tasmania, except in respect of time already served or orders already carried out. Under s 157, if the offender is transferred *to* Tasmania from another state, any sentence imposed on them or order made in relation to them by a court of the sending state is taken to be imposed or made by the specified court in Tasmania. The sentence or order has effect in Tasmania as such and Tasmanian laws apply ‘with necessary adaptations’.
- 6.4.6. If Tasmania raised its minimum age, and a prisoner was to be transferred to Tasmania from another jurisdiction where the minimum age was lower, this may lead to a situation where the Tasmanian court specified in the arrangement is ‘taken to have’ imposed a sentence or made an order in relation to a young offender, even though the Tasmanian court could not have imposed such a sentence or made such an order in relation to a young person offending against Tasmanian law.

## 7 . Alternative Legal Frameworks in Other Jurisdictions

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*How has the issue of MACR and the balancing of community versus individual rights and interests been approached in other jurisdictions?*

*What options are there for an alternative legal framework to ensure children who exhibit harmful behaviours receive appropriate community support directed at addressing the risk factors for their behaviour?*

- 7.1.1. There are various different ways that youth justice systems around the world attempt to balance the community versus the individual when a child engages in violent or anti-social behaviour, and to ensure that risk factors behind such behaviour are addressed. These include:
- special provisions for serious offences,
  - the use of non-criminal detention, or
  - allowing for a child to be investigated but not to be prosecuted.

### **Special Provision for Serious Offences**

- 7.1.2. A common objection to raising the minimum age of criminal responsibility draws on the rare, outlier cases of children who commit serious violent crimes, such as the infamous case of two 10-year-old boys in the United Kingdom who murdered two-year-old James Bulger in 1993. One way that jurisdictions take into account these outlier examples is through special provision for the prosecution of serious crimes.
- 7.1.3. It should be noted that differentiated treatment based on the offence committed already exists in Tasmania, as discussed above regarding the framework of the *Youth Justice Act 1997* (Tas). In Tasmania, serious offences listed as ‘prescribed offences’ are outside the scope of diversionary proceedings<sup>367</sup> and are heard in the Supreme Court rather than the Magistrates Court.
- 7.1.4. The Tasmanian approach relates only to the interventions that may be imposed against the child and applicable criminal procedure. It does not relate to whether or not the child can be held criminally responsible for the offence. However, there are foreign jurisdictions who take

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<sup>367</sup> *Youth Justice Act 1997* (Tas), ss 3, 7.

this latter approach, where the type of offences for which a child may be held responsible differs based on their age. New Zealand is one jurisdiction that adopts such an approach.<sup>368</sup>

### *New Zealand*

- 7.1.5. The minimum age of criminal responsibility in New Zealand is 10, below which children cannot be convicted of an offence and are instead dealt with under the care and protection system. For children aged 10–14, there is a rebuttable presumption against criminal responsibility alike the *doli incapax* presumption in Australia.<sup>369</sup> However, children under 14 years of age can only be prosecuted for certain crimes.
- **Children aged 10–11 years** may only be prosecuted for murder or manslaughter.<sup>370</sup> The child is tried and charged in the youth court and then sentenced in the adult criminal court<sup>371</sup> according to the law that applies to adults.<sup>372</sup>
  - **Children aged 12–13 years** may be prosecuted for murder or manslaughter in the way that 10–11 year old children can be, but also for those offences that attract a maximum penalty of life imprisonment or imprisonment for at least 14 years.<sup>373</sup> This covers crimes such as sexual violation<sup>374</sup> or wounding, maiming, disfiguring, or causing grievous bodily harm to any person with intent to cause grievous bodily harm.<sup>375</sup> Children committing these serious offences other than murder or manslaughter are both tried and sentenced in the youth court.<sup>376</sup>

### *Ireland*

- 7.1.6. A similar model that makes special provision for certain serious crimes exists in Ireland.<sup>377</sup> In Ireland, the minimum age of criminal responsibility is 10.<sup>378</sup> However, children under 12 years of age may only be charged with murder, manslaughter, rape, rape under s 4 of the *Criminal*

<sup>368</sup> See Jantien Leenknecht, Johan Put and Katrijn Veeckmans, ‘Age Limits in Youth Justice: A Comparative and Conceptual Analysis’ [2020] (August)(1) *Erasmus Law Review* 16–7.

<sup>369</sup> *Crimes Act 1961* (NZ) s 22.

<sup>370</sup> *Oranga Tamariki Act [Children’s and Young People’s Well-being Act] 1989* (NZ) s 272(1)(a).

<sup>371</sup> *Ibid* s 275(2)(b).

<sup>372</sup> *Ibid* s 272(2).

<sup>373</sup> *Ibid* s 272(1)(b).

<sup>374</sup> *Crimes Act 1961* (NZ) s 128B, maximum penalty of 20 years’ imprisonment.

<sup>375</sup> *Ibid* s 188(1), maximum penalty of 14 years’ imprisonment.

<sup>376</sup> *Oranga Tamariki Act 1989* (NZ) s 272(2A), s 272A.

<sup>377</sup> Australian Human Rights Commission, Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group Review* (26 February 2020) 13.

<sup>378</sup> *Children Act* (Ireland) 8 July 2001, s 52(1)–(2).

*Law (Rape) Amendment Act 1990*,<sup>379</sup> or aggravated sexual assault.<sup>380</sup> Outside of these prescribed offences, only children aged 12 or older may be held criminally responsible. Further, where a child under 14 years of age is charged with an offence, further proceedings against the child are not automatically permissible and may only be taken with the consent of the Director of Public Prosecutions. However, consent is not required for proceedings about remand in custody or bail.<sup>381</sup>

- 7.1.7. Among the 38 countries in the Organisation for Economic Co-operation and Development (OECD), in addition to Ireland and New Zealand, Hungary, Lithuania, Poland, and the Slovak Republic also have similar provisions.<sup>382</sup> The crimes ‘carved out’ for prosecution at a young age typically include homicide, rape, aggravated sexual assault, and robbery (stealing something with the use or threatened use of force to person or property).
- 7.1.8. If the minimum age of criminal responsibility is raised to 14 in Tasmania, there could be carve-outs that follow similar demarcations as regards the type of offence. While this approach is not recommended by the UN Committee on the Rights of the Child<sup>383</sup> or bodies such as the Law Council of Australia,<sup>384</sup> it may help mitigate against community concerns that the rare case of a child who commits murder or rape will walk free and go unpunished by the criminal law.
- 7.1.9. However, as cautioned by the CRC, care must be taken to avoid enacting these models solely due to political pressure. The data shows it is rare for children aged 10–14 to commit those most serious offences typically subject to carve-outs, though there is a noticeable increase from the 10–12 age range to the 13–14 age range. Most commonly, children in the 10–14 group commit unlawful entry with intent, assault, theft, and property damage offences.<sup>385</sup>
- 7.1.10. The below table indicates how many offenders there were across Australia in 2019–20 for those offence categories typically subject to carve-outs, as well as the total number of offenders in Tasmania for those categories of offences. Between the general age-distribution figures across Australia and the low number of Tasmanian offenders for each category — this latter figure covering all youth offenders aged 10–18 — the number of children who commit those most serious offences in Tasmania is very low.

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<sup>379</sup> Sexual assault that includes penetration of the anus or mouth by the penis, or penetration of the vagina by any object held or manipulated by another person.

<sup>380</sup> *Children Act* (Ireland) 8 July 2001, s 52(2).

<sup>381</sup> *Ibid* s 52(4).

<sup>382</sup> See the table annexed to this report.

<sup>383</sup> Committee on the Rights of the Child, *General Comment No 24 (2019) on Children’s Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [25] (*‘General Comment No 24’*).

<sup>384</sup> Law Council of Australia, Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group Review* (2 March 2020) 9.

<sup>385</sup> Australian Bureau of Statistics, *Recorded Crime – Offenders, 2019–20* (Catalogue 4519.0, 11 February 2021) Table 18, 21 (*‘ABS Youth Offender Statistics’*).

Principal Offence	Age						Total in TASMANIA
	10	11	12	13	14	15	(10–18) <sup>386</sup>
Homicide and related offences <sup>387</sup>	0	0	0	3	5	6	5
Sexual assault and related offences <sup>388</sup>	14	36	122	208	283	279	7
Robbery and extortion	9	18	83	204	314	418	16
Source: Australian Bureau of Statistics							

7.1.11. When the suggestion of carve-outs was put to those who attended the *Age of Innocence* forum, more respondents were against the idea than supportive of it. Those who did not support carve-outs cited the CRC position, the need to keep things simple, and/or the need to allow judges discretion to deal with individual children on a case-by-case basis. Of those who were supportive of a model involving carve-outs, the type of offences was largely consistent with those mentioned above. Respondents listed homicide, sexual assault, causing grievous bodily harm, and, in one response,<sup>389</sup> dealing illicit substances.

## 7.2. Non-Criminal Detention

7.2.1. The use of detention outside of the criminal justice system is another method that many jurisdictions adopt to balance competing interests of the community and the individual and to address underlying causes of offending. These are not ‘punitive’ in the sense of being punishment after conviction for a crime, but may be ‘punitive’ in the sense of being involuntary. They are typically centred around educational and other rehabilitative programs, and may be available for children below the minimum age of criminal responsibility, or both for those below and above the minimum age.

7.2.2. It should also be emphasised that the use of any such non-criminal facilities still involves deprivation of liberty, and in most cases involuntary deprivation of liberty. This perception was explicitly recognised by one respondent in the post-forum survey, who saw the temporary removal of a child from their normal environment as a way to allow the child to gain a new perspective while protecting the community.<sup>390</sup> As another respondent observed about children under the MACR who engage in serious offending:

<sup>386</sup> Ibid Table 20.

<sup>387</sup> Includes murder, attempted murder, and manslaughter and driving causing death.

<sup>388</sup> Includes sexual assault and non-assaultive sexual offences.

<sup>389</sup> Response 272.

<sup>390</sup> Response 266.

These individuals would still require detaining. All it does is change the label from ‘custodial facility’ to ‘youth protection’ or whatever other label. The outcome isn't different.<sup>391</sup>

- 7.2.3. Despite this, having some form of placement measure was mentioned in many responses to the post-forum survey as an option to address the rare cases of serious offending by children under the MACR, if it were raised.<sup>392</sup> Among these responses, many emphasised the need for educational, medical/psychiatric, and therapeutic support within these facilities.
- 7.2.4. Tasmania currently does not have any facilities for non-criminal detention for purposes explicitly tied to the commission of acts that would qualify as offences. Rather, any such non-criminal detention would occur under the child protection system, where children may be placed in out of home care, including in special institutions where their needs require. However, a recent expert panel on the out of home care system in Tasmania identified a lack of adequate therapeutic residential placement options for the most serious cases of children whose trauma manifests in their engagement in extreme risk-taking or anti-social behaviours.<sup>393</sup>
- 7.2.5. In terms of countries that have non-criminal detention for those under the MACR, Denmark and Portugal are examples discussed in detail within the case studies annexed to this report.
- 7.2.6. In Denmark, children below the MACR of 15 can be subject to placement in various types of residential institutions, including secure residential institutions with high levels of physical restriction. This occurs under the auspices of either social welfare legislation or a recent law enacted to combat juvenile delinquency, and the measures are decided by multidisciplinary panels including but not limited to judges.
- 7.2.7. Portugal has a MACR of 16. However, children aged 12–16 who commit acts qualifying as crimes can trigger a special system of educational interventions, the most serious of which is internment in an educational centre. These educational centres may be open, semi-open, or closed, indicating how freely a child may leave the centre. Closed regimes only accommodate those aged 14 years or older.
- 7.2.8. Other examples where provision is made for detention of a protective, preventative, educational, or therapeutic nature can be found in Japan, Italy, and Korea, all of whom have a MACR of 14. In Japan, children under 14 who violate laws of a criminal nature are subject to a separate law that provides for protective measures. Children under 11 may be committed by the Family Court under these laws to a juvenile training school or to a child educational and

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<sup>391</sup> Response 283.

<sup>392</sup> See Responses 264, 266, 267, 268, 269, 270, 275, 277, 279, 283, 284, 289, 290, 293, 294, 296, 299.

<sup>393</sup> *Expert Panel Advice and Recommendations to the Minister for Children and Youth on the Essential Therapeutic Elements Required for an Improved Service System Response for Tasmanian Children and Young People with Highly Complex Needs* (Report, 2021) 8, 12–13 (*Expert Panel on Essential Therapeutic Elements for Service System Response*).

training home designed to care for delinquent or potentially delinquent children. Similarly, in South Korea, children aged 10–14 who have violated or may be prone to violating criminal laws may be subject to protective detention in juvenile reformatories under a separate law. Juvenile reformatories for those under the MACR are also available in Italy for those children aged under 14 who commit acts that would otherwise be a crime, or who are dangerous. The same measures are also available where the child is between 14–18 but lacked the mental capacity required for a finding of guilt.

- 7.2.9. Regarding therapeutic interventions in particular, certain countries have residential measures devoted to medical or psychological treatment for those under the MACR who engage in behaviour that would otherwise constitute a criminal offence. For example, the Court for Youth in the Czech Republic in exercise of its civil jurisdiction may assign a child to therapeutic, psychological or other suitable programs in a Centre for Educational Assistance under the Ministry of Education. Alternatively, a child may be placed in protective treatment if deemed necessary, which is administered by the Ministry of Health in special facilities.<sup>394</sup> The availability of such services and measures to address otherwise-criminal behaviour younger than the MACR can help ensure that children receive the help they require where they are subject to certain risk factors for offending.
- 7.2.10. If the MACR is raised to 14, there should be some provision for out-of-home placement to address those circumstances of serious offending where the child's behaviour renders it inappropriate for them to stay at home or in the care of foster families. Any such facility should have a focus on educational programs and other activities individualised to the child in an individual care plan; adopt a trauma-informed approach to childhood offending; be staffed by multi-disciplinary professionals across the mental health, therapeutic, pedagogic, and other relevant fields; and have sufficient supports for the transition back into society after placement.
- 7.2.11. Alternatively, adjustments could be made to the existing out of home care placement options with more intensive supports, namely special packaged care or therapeutic residential care. Both are provided by non-government organisations on a contract basis. However, this placement option would, like detention, be an option of last resort, only used where other less restrictive measures are inappropriate. Therefore, a more supportive therapeutic residential placement option capable of addressing the needs of children whose trauma manifests in extreme risk-taking or anti-social behaviours is required — the kind identified in the expert panel as currently absent in Tasmania, as mentioned above.

## **Stability of care, support and supervision**

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<sup>394</sup> *Juvenile Justice Act* (Czech Republic) 2003, s 93.

7.2.12. Regardless of the architecture, stability is crucial. While this factor was not frequently mentioned in the survey responses, it is important in ensuring the success of any educational or treatment program designed to address the underlying causes of offending and prepare the child for transition back into the community. As pointed out by one respondent who works in this area:

these children often need structure and consistency in order to give them a safe environment and build trust and confidence ...we make some progress through routines and consistency, but the progress is often lost once the child returns home and the cycle continues when they return to respite services.<sup>395</sup>

7.2.13. Consistency was also alluded to in a report by Legal Aid Tasmania on ‘crossover children’ — children who have involvement with both the youth justice system and child safety services, and who are over-represented in the youth justice system.<sup>396</sup> In discussing the link between child safety and youth justice, the report discusses the adverse impact of detention on a child, noting in particular the effect of detention on remand. Citing a review by the Australian Institute of Criminology, the report observes:

[Y]oung people on remand are likely to be exposed to the detrimental effects of detention but are not there long enough to gain substantial therapeutic or rehabilitative benefit.<sup>397</sup>

7.2.14. Another Australian Institute of Criminology report on care-experienced children and the criminal justice system also emphasised placement instability for children in care as a criminogenic factor and a significant reason for the link between care and crime.<sup>398</sup>

7.2.15. As regards stability, one should note that some countries with non-criminal detention options for children under the MACR provide for minimum periods of placements for this reason. For example, in Portugal, measures of internment in educational institutions can only be reviewed after a minimum period of three months after the measure begins or the last review is conducted. This is to ensure both stability in executing the child’s personal educational plan and the preservation of public security. Review of other non-institutional measures are not subject to the same limitation.<sup>399</sup> However, as was raised by some respondents in the context of prescribing a separate minimum age of detention and providing for carve-outs, it could be argued that prescribing minimum periods of placement measures may be an erosion of judicial

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<sup>395</sup> Response 263.

<sup>396</sup> Tasmania Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Report, 2021) 4.

<sup>397</sup> Ibid 12, quoting Australian Institute of Criminology, ‘Youth Justice in Australia: Themes From Recent Inquiries’ (Issues Paper No 605, 2020) 5.

<sup>398</sup> Australian Institute of Criminology, ‘Care-Experienced Children and the Criminal Justice System’ (Issues Paper No 600, 2020) 2–3.

<sup>399</sup> Rodrigues and Duarte-Fonseca (n 354) 1063.

independence. Further, in the view of the expert panel in the context of therapeutic residential out of home care placements, stipulated length of stays is contrary to the idea of tailoring the support to the individual children engaged in offending behaviour.<sup>400</sup>

*Participation and choice*

- 7.2.16. It is important that any process of imposing a measure on a child allows the child an opportunity to be heard and to participate in their treatment or measure. As identified by the expert panel on therapeutic interventions in Tasmania, ‘choice’ was the word heard most in feedback by young people, including having choice within placement.<sup>401</sup> In the context of non-criminal detention measures which must necessarily involve judicial process for the reasons identified below, children should be provided with an option to be heard. This is also consistent with the ethos in contemporary youth justice of emphasising the child’s participation in processes, partly to encourage responsibility and accountability.

*Deprivation of liberty absent judicial power*

- 7.2.17. The final concern is the question of which authority is entitled to impose the measure on children under the MACR. The present Youth Justice Act framework was, in part, enacted due to concerns about the legal rights afforded to children in conflict of the law under the previous welfare model. This was explained in the second reading speech to the Youth Justice Bill as follows:<sup>402</sup>

The existing legislation does not protect the 'due process' rights of young people during or after the court decision. Under the act the decision about what actually happens to a young person after the court order can largely be determined not by the court but by the Department of Community and Health Services. The secretary or his delegate can determine whether the child is placed in institutional care and where the child is required to live, with whom and for how long.

Detention by administrative decision is an outdated practice and does not comply with the standards of justice enjoyed by adults.

- 7.2.18. Beyond the fact that such approaches are outdated, they are arguably contrary to the constitutional principle that involuntary detention by the state should, with very limited exceptions, only occur as the result of the exercise of judicial power. In the case of children, the question of voluntariness is a mixed question of fact and law that considers the age of the child,

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<sup>400</sup> *Expert Panel on Essential Therapeutic Elements for Service System Response* (n 393) 13.

<sup>401</sup> *Ibid* 8.

<sup>402</sup> Second Reading Speech, pp 82-83.

the responsibility and control over their ordinary freedoms that a parent or guardian may have, and therefore whether one or both parties agree to the detention. However, assuming both parent and child do not agree to the conditions of involuntary detention, and the state has not assumed guardianship itself, the exercise of power by a state executive officer would appear to breach the constitutional rules relating to the separation of judicial power.

- 7.2.19. The constitutional limitation also means that, while a multi-disciplinary panel of decision-makers may reflect a holistic approach to addressing the needs and deeds of children in conflict with the law, adjustments must be made when translating models such as the Denmark system to the Tasmanian context. Multiple responses to the post-forum survey raised the desirability of decisions about children being made by multi-disciplinary teams spanning the legal, psychiatric, child development, social work or counselling, and educational domains.<sup>403</sup> Therefore, in Tasmania, it may be a requirement that certain medical, psychiatric, and/or pedagogical experts assess the child and report to the Court on the suitable measure as an expert witness. However, the ultimate measure must be ordered by a court as is the case in jurisdictions such as Japan, South Korea, Italy, and Czech Republic, among others.

### 7.3. Minimum Age of Detention

- 7.3.1. Some jurisdictions limit the possibility of imprisoning children by providing for minimum ages of detention. This may refer to either or both unsentenced detention or sentenced detention. Unsentenced detention covers where a child is held in detention awaiting the outcome of their court matter after being charged, or where they have been found or have pleaded guilty and are awaiting sentence. Sentenced detention is where a period of detention is imposed as a sentence after a finding of guilt.<sup>404</sup> For children generally — not merely those in the 10–14 age range — a lack of bail support means that children may be held in detention on remand or for breach of bail, only to be released once their case is heard.<sup>405</sup>
- 7.3.2. The CRC recommends that State parties provide for a minimum age below which children cannot be legally deprived of their liberty, such as 16 years of age.<sup>406</sup> The Royal Commission into the Protection and Detention of Children in the Northern Territory also recommended a minimum age of detention to be set at 14, excepting those who have committed a serious crime or pose a serious risk to the community.<sup>407</sup> In the post-forum survey, a number of responses

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<sup>403</sup> See Responses 263, 267, 268, 269, 278, 282, 286, 289, 299.

<sup>404</sup> Australian Institute of Health and Welfare ('AIHW'), *Youth Justice in Australia 2019–20* (Report, 2021) 18–21.

<sup>405</sup> Tasmania Legal Aid (n 396) 18–19.

<sup>406</sup> *General Comment No 24* (n 383) [89].

<sup>407</sup> AIHW, *Youth Justice in Australia 2019–20* (n 404) 42.

were also supportive of a separate age of detention, most commonly suggesting 16 years of age.<sup>408</sup> Of those that were not supportive (fewer than were supportive),<sup>409</sup> reasons included the already low number of children in detention,<sup>410</sup> a reduction of judicial independence,<sup>411</sup> and the desirability of ‘keep[ing] it simple’.<sup>412</sup>

- 7.3.3. Tasmania does not provide for a minimum age of detention. However, it should be noted that children aged 10–14 are very rarely, if ever, in sentenced or unsentenced detention in Tasmania.
- 7.3.4. According to the Australian Institute of Health and Welfare, the number of young people in detention on an average day in Tasmania is **zero for ages 10–13**, and **0.5 for age 14** in the period 2019–20.
- 7.3.5. While these figures have slightly fluctuated in the past four reporting periods starting from 2015–16, the total number in the 10–14 year-old age range has not exceeded 2.5 people in detention on an average day.<sup>413</sup> In terms of young people in detention during the *year*, the ages 10–12 saw zero children in detention in Tasmania, while the 13 year old age group figures were not published — this can be because of small numbers, confidentiality, and/or reliability concerns.<sup>414</sup> In the previous reporting period, 2018–19, there were six children aged 10–14 in detention during the year in Tasmania.<sup>415</sup>
- 7.3.6. One country that has a minimum age of sentenced detention and unsentenced detention is France. Unlike most countries, France does not have a minimum age of criminal responsibility. Any child capable of understanding and willing their act, or understanding the meaning of criminal proceedings, can be found criminally responsible. However, only children aged 13 or older may be subject to penalties, including imprisonment. Under 13, only educational measures may be imposed. While this may include placement in a range of institutions, these do not have the kind of physical restriction found in juvenile prisons or detention centres. Children under 13 years of age also cannot be placed in pre-trial detention.
- 7.3.7. Currently, Tasmania’s *Youth Justice Act 1997* contains the general principle that ‘detaining a youth in custody should only be used as a last resort and should only be used for as short a time

<sup>408</sup> See Responses 268, 269, 272, 276, 288, 290, 292, 293, 294, 298, 299.

<sup>409</sup> See Responses 273, 274, 283, 284, 289.

<sup>410</sup> Response 283.

<sup>411</sup> Response 283.

<sup>412</sup> Response 289.

<sup>413</sup> AIHW, *Young people in detention on an average day by age, sex, and Indigenous status, Tasmania, 2015–16 to 2019–20* (Catalogue JUV 134, 28 May 2021) Table 138c.

<sup>414</sup> AIHW, *Young people in detention during the year by age, states and territories, 2019–20* (Catalogue JUV 134, 28 May 2021) Table S74b; notes and symbols.

<sup>415</sup> AIHW, *Young people in detention during the year by age, states and territories, 2018–20* (Catalogue JUV 132, 15 May 2020) Table S74b.

as necessary'.<sup>416</sup> This is reflected in provisions that set preconditions for imposing detention orders — the Court can only make detention orders if it has considered 'all other available sentences' and 'is satisfied that no other sentence is appropriate in the circumstances of the case'.<sup>417</sup> Further, limitations may exist with respect to how long a youth can be detained. Under a detention order, the period of detention must not be imposed if an adult who committed the offence could not be imprisoned for it, and in any case, must not exceed 2 years.<sup>418</sup> This time limit applies also to the imposition of cumulative orders where a youth is serving or has been sentenced to a period of detention for another offence.<sup>419</sup>

- 7.3.8. At the Commonwealth level, there are also special provisions regarding sentencing options for certain crimes. For example, in the context of terrorism offences, s 104.28 of the *Criminal Code Act 1995* (Cth) does not allow for an interim control order to be requested, made, or confirmed in relation to a person under 14.

## 7.4. Investigation Without Prosecution

- 7.4.1. Another option that may be used to balance the goals of individual responsibility and community protection, while avoiding the negative effects of lengthy engagement with the criminal justice system, is to provide for an age threshold under which children may be investigated but not prosecuted.
- 7.4.2. Currently in Tasmania, police have no legislated power to act against someone under the MACR even if they are observed actively offending. Admittedly, it is rare for an offence in this age group to be reported to police, rather than handled by parental or school authorities. However, where it is reported, police are limited to speaking with the child, reporting the case to Child Safety Services, or contacting the parents. In extreme cases, they can restrain a child if this is required for the immediate defence of another person or property. However, even in such circumstances, they could not detain them. While police can investigate the offence, the lack of power to act against a child offender below the MACR extends to an inability to collect forensic evidence, such as in cases of alleged sexual assault committed by a child under 10.<sup>420</sup>

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<sup>416</sup> *Youth Justice Act 1997* (Tas), 5(1)(g).

<sup>417</sup> *Ibid* s 80.

<sup>418</sup> *Ibid* s 81.

<sup>419</sup> *Ibid* ss 85–6.

<sup>420</sup> TasPol Answers (n 305). See *Forensic Procedures Act 2000* (Tas) s 4 (law does not apply to children under 10, except for limited cases under pt 4B where a saliva sample or cheek swab can be taken for identification purposes). See also s 5 (law does not apply to the carrying out of forensic procedures on persons alleged to be a victim of an offence).

- 7.4.3. Tasmania Police observe that if the age were raised, ‘it is not feasible to deal with [offending in the 10–13 years age group] in the same way as for children under 10’, given that the rate and seriousness of offending in this cohort is more significant, though still a small percentage of overall crime.<sup>421</sup> As regards the aspect of community protection, Tasmania Police note that ‘the Tasmania community would expect that when they call police to respond to youth offending police have legislated mechanisms to respond’.<sup>422</sup>
- 7.4.4. Compared to Tasmania where there is entirely no power to act against a child under the MACR, some countries allow for certain criminal investigation procedures to be carried out. Such a system exists in the Netherlands, where the *Code of Criminal Procedure* provides that children under 12 cannot be prosecuted for an offence committed. The explicit linking of the MACR to *prosecution* was a deliberate choice to allow for children to be criminally investigated – such as be arrested or have their premises searched.<sup>423</sup>
- 7.4.5. Similarly, in Denmark where the MACR is a comparatively-high 15 years of age, children can be subject to a range of investigative processes including arrest, detention for a limited time, body inspections, and search of premises. While there are limitations on the use of these measures, they are nevertheless available when the circumstances truly require.
- 7.4.6. When contemplating the feasibility of conferring powers of investigation and/or other criminal investigation procedure mechanisms on the Tasmania Police to act against children under the new MACR, caution must be had to not introduce unnecessary complexity. Any new laws must take into account the practical realities of police responses to offending. For example, it would be problematic to provide for a *minimum* age of investigation of an alleged offender, because in reality, in most cases police do not know the age of an offender when investigating. More generally, linking different police responses to different ages ‘is also likely to lead to errors in the application of the law — especially where the age of a child may not be immediately obvious’.<sup>424</sup>

#### *First Response Powers*

- 7.4.7. The Institute is unaware of any jurisdictions which prohibit police acting as responders to harmful, dangerous or anti-social behaviour by children below or above the MACR. Rather police powers may be limited or subject to special rules relating to children who are known or

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<sup>421</sup> TasPol Answers (n 305).

<sup>422</sup> Ibid.

<sup>423</sup> See Leenknecht, Put and Veeckmans (n 368) 14 and references therein.

<sup>424</sup> TasPol Answers (n 305).

suspected to be below the MACR. A good example of the approaches to utilising police as first responders can be seen in the Canadian Federation.

7.4.8. A similar first responder approach is used across the Canadian provinces, however they are divided into three main definitional approaches to police jurisdiction over children under the MACR. These are:

- 1) The child is acting in a way that would **‘otherwise be’** a criminal offence (Alberta,<sup>425</sup> British Columbia<sup>426</sup>, Nova Scotia<sup>427</sup>, Ontario<sup>428</sup> and Saskatchewan<sup>429</sup>);
- 2) The child is **‘in need of protection’** because they are acting in a way that is causing serious danger to themselves or others or have killed a person<sup>430</sup> (New Brunswick,<sup>431</sup> Newfoundland and Labrador<sup>432</sup>, Northwest Territories<sup>433</sup>, Nova Scotia<sup>434</sup>, Nunavut<sup>435</sup>, Ontario<sup>436</sup>, Prince Edward Island<sup>437</sup>, Saskatchewan<sup>438</sup> and Yukon<sup>439</sup>), or because their behaviour is a result of an actual or assumed lack of supervision and control (Manitoba<sup>440</sup>);  
or
- 3) **Both** of these things (Ontario, Nova Scotia, Saskatchewan).

7.4.9. Larger provinces such as Ontario divide first responder responsibility between police and specialist child protection officers; with police being permitted to exercise child protection

<sup>425</sup> In Alberta, a peace officer may only report the matter to a director (a designated person pursuant to the relevant legislation) if a child under 12 commits an offence. *Child, Youth and Family Enhancement Act, RSA 2000*, c C-12 s 5

<sup>426</sup> *Child, Family and Community Service Act, RSBC 1996*, c 4 s 15

<sup>427</sup> *Children and Family Services Act, SNS 1990*, c 5 s 27

<sup>428</sup> *Child, Youth and Family Services Act, 2017, SO 2017*, c 14, Sch 1 s 84

<sup>429</sup> *Child and Family Services Act, SS 1989-90*, c C-7.2 s 8

<sup>430</sup> The exact act required to fall within this category varies across jurisdictions but all include killing and seriously injuring another person. The definitions adopted by Nova Scotia and Ontario legislations are broader in this regard as they cover acts that would otherwise be more minor offences (e.g. damage to property) if it is due to the failure or inability of the person having charge of the child to supervise the child adequately. *Child, Youth and Family Services Act, 2017, SO 2017*, c 14, Sch 1 s 74(2)(m); *Children and Family Services Act, SNS 1990*, c 5 s 22(2)(m)

<sup>431</sup> *Family Services Act, SNB 1980*, c F-2.2 ss 31(1)(i) & 31(5)

<sup>432</sup> *Children, Youth and Families Act, SNL 2018*, c C-12.3 s 10(1)(p)

<sup>433</sup> *Child and Family Services Act, SNWT 1997*, c 13 s 7(3)(s)

<sup>434</sup> *Children and Family Services Act, SNS 1990*, c 5 s 22(2)(l)

<sup>435</sup> *Child and Family Services Act, SNWT (Nu) 1997*, c 13 s 7(3)(o)

<sup>436</sup> *Child, Youth and Family Services Act, 2017, SO 2017*, c 14, Sch 1 s 74(2)(l)

<sup>437</sup> *Child Protection Act, RSPEI 1988*, c C-5.1 s 9(s)

<sup>438</sup> *Child and Family Services Act, SS 1989-90*, c C-7.2 s 11(c)

<sup>439</sup> *Child and Family Services Act, SY 2008*, c 1 s 21(1)(j)

<sup>440</sup> In Manitoba, a child is in need of protection where, among various other scenarios, he/she is without adequate care, supervision or control, or is beyond the control of a person who has the care, custody or charge of the child. A peace officer may apprehend the child without warrant and take the child to a place of safety if on reasonable and probable grounds the peace officer believes a child is in need of protection. This potentially covers a child under 12 who is in conflict of the law. *Child and Family Services Act, CCSM* c C80 s 17(2) & 21(1)

powers if they encounter harmful behaviour by children younger than the MACR.<sup>441</sup> In all cases police have, depending on the circumstances either a discretion or obligation to report the child to appropriate child protection authorities.<sup>442</sup> In the majority of provinces, the police officer is empowered to take the child to either a safe place, a parent or both depending on the circumstances without a direction or warrant.<sup>443</sup> Once the conduct of the child has been reported, specialist child protection services may be enlivened by warrant or by direction from appropriate public officers. This ordinarily takes the form of an assessment into the safety and wellbeing of a child. Where necessary police may be requested to assist child protection workers in the undertaking of assessments, gather evidence, recover or move a child to a place of guardianship or treatment. The Vancouver Police Regulations Manual explains the procedure as follows:<sup>444</sup>

When a child under 12 acts contrary to the law, they may be taken by a peace officer and delivered to a parent. A written or verbal referral shall be made to the Ministry of Children and Families under the following circumstances:

- a. The parent indicates total disregard or a lack of concern
- b. The parent shows despair or cannot act for some reason
- c. The child is involved in a crime of violence, extreme vandalism or repeated occurrences of criminal behaviour, or exhibits indications of severe underlying problems

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3. In all cases, if the child has killed, assaulted or endangered another person, the incident must be reported prior to the end of shift to the Director or the person designated by the Ministry of Children and Families as required under the Child, Family and Community Service Act. A member shall document the incident and note that it was reported to the Ministry of Children and Families on a GO report.

7.4.10. Scotland similarly empowers police to be in-community first responders, empowering officers to apprehend and take a ‘child to a place of safety and keep the child there if the constable is satisfied that it is necessary to do so to protect any other person from an immediate risk of

<sup>441</sup> *Child, Youth and Family Services Act 2017* (Ontario), ss 83-86.

<sup>442</sup> In Alberta police are limited to this action until they may only report the child’s behaviour to a child protection Director, unless the child is at risk of neglect and abuse. *Child, Youth and Family Enhancement Act, RSA 2000*, c C-12 s 5, 18(12).

<sup>443</sup> *Child, Family and Community Service Act, RSBC 1996*, c 4 s 15; *Children and Family Services Act, SNS 1990*, c 5 s 27; *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1 s 84; *Child and Family Services Act, SS 1989-90*, c C-7.2 s 8.

<sup>444</sup> Vancouver Police Department *Regulations & Procedures Manual* (2021), 1.6.47(i) Child Under 12 Acting Contrary to Law

significant harm or further such harm.’ Scottish law further limits the manner in which a police officer may exercise that duty, namely by specifying that the officer:<sup>445</sup>

- must, as soon as practicable, inform the parent that the child has been taken to a safe place;
- only keep that child in that safe place for as long as is necessary to put in place arrangements for the care and protection of the child, or to obtain samples from the child, and in both cases for no longer than 24 hours;
- try to obtain the consent of the child before using any force and then only use reasonable force as is necessary and only ‘as a last resort’ and, so far as is practicable, explain to the child why the constable considers force must be used;
- only take the child to a police station as a last resort and never place the child in a police cell;
- where the child is behaving in a violent, dangerous, sexually violent or coercive way or has caused or risked causing serious physical harm to another person:
  - only search the child pursuant to a warrant issued by a sheriff if it is likely there is relevant evidence of that conduct on the child, or any premises or vehicle;
  - only question the child with the consent of the child’s guardian, or an order made by a sheriff, according to an interview plan – provided to the child, support services and guardian – setting out the time period, length, location and number of interviews, and the support and assistance for the child at the interview; and
  - only take prints and samples from a child pursuant to a sheriff’s order and only hold them for as long as is necessary to establish that a child requires intervention, after which they must be destroyed.

## **7.5. Compensation for victims of acts or omissions by children**

7.5.1. There are three ways that victims may receive financial compensation for the harm suffered:

- Under a compensation order imposed by the court;
- Applying through a state-funded statutory victim compensation scheme; or
- Seeking an award of damages pursuant to a civil action against the offender.

7.5.2. Raising the minimum age of criminal responsibility directly affects only court-ordered compensation. However, it will also indirectly affect the type of injuries for which victims can be recompensed. For example, compensation for property damage is possible under a compensation order or civil claim, but not under a statutory compensation scheme. This could

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<sup>445</sup> *Age of Criminal Responsibility (Scotland) Act 2019* (UK), Part 4, Chapter 1.

create a gap in damage that can be financially redressed, particularly since property damage is a category of offence for which those in the 10–14-year group are most frequently convicted.<sup>446</sup>

## Court-Ordered Compensation

- 7.5.3. Legislation grants courts the power to order a convicted offender to pay compensation as part of their sentence. For youth offenders, this power is conferred by s 47(2)(c) of the *Youth Justice Act 1997* (Tas). This provides that the Court may make a compensation order in addition to imposing one of the sentencing options under s 47(1). Unlike with adult offenders where compensation orders are mandatory where the offence is burglary, stealing or unlawfully injuring property,<sup>447</sup> there are no mandatory compensation orders for youth offenders.
- 7.5.4. It is also worth noting that the Court must consider the financial circumstances of the child when imposing a fine<sup>448</sup> or compensation order,<sup>449</sup> and compensation takes priority over fines if the child has insufficient resources to pay both.<sup>450</sup>
- 7.5.5. Sections 98 and 99 provide the particulars for a compensation order. As to what constitutes compensable injury, this may be ‘injury suffered, expenses incurred or loss suffered by the other person’ and/or the ‘loss or destruction of, or damage to, offence-affected property’.<sup>451</sup>
- 7.5.6. While victims — or the prosecutor on their behalf — may apply for such an order to be made, such application is not a requirement. Courts may impose the orders on their own motion.<sup>452</sup> This is consistent with the purpose of this power as giving victims ‘easy access to civil justice’.<sup>453</sup> The judge, with their familiarity of the factual circumstances of the case, can ‘expeditiously determine whether and what compensation to order. This saves the victim the time, expense, inconvenience and possible additional trauma of having to institute a civil proceeding. Not doing so may deprive the victim of ready access to just compensation, leaving them with an understandable sense of grievance.’<sup>454</sup>
- 7.5.7. Under the *Youth Justice Act 1997* (Tas), offenders may also be made to pay compensation even if they are diverted from the formal court process under either the first or second tier of diversionary processes.

<sup>446</sup> *ABS Youth Offender Statistics* (n 385) Table 21. In Tasmania, there were 103 cases (across all convicted offenders aged 10–18) in 2019–20: Table 20.

<sup>447</sup> *Sentencing Act 1997* (Tas) s 68(1)(a).

<sup>448</sup> *Youth Justice Act 1997* (Tas), s 58.

<sup>449</sup> *Ibid* ss 58, 98(2).

<sup>450</sup> *Ibid* s 47(3).

<sup>451</sup> *Ibid* s 98(1).

<sup>452</sup> *Ibid* s 98(3).

<sup>453</sup> *RK v Mirik* (2009) 21 VR 623, [11].

<sup>454</sup> *Ibid*.

- In the first tier, an officer authorised to administer a formal caution may require the child to enter into an undertaking to pay compensation to the victim or any other person who suffers harm.<sup>455</sup> This covers both compensation for harm suffered by property or by a person.
- In the second tier, children may similarly be required to enter into an undertaking to pay compensation as their sanction from a community conference.<sup>456</sup>

7.5.8. Notably, the above mechanisms are premised on the commission of an offence. Since compensation orders attach to a sentence, one of the preconditions to the making of a compensation order is that the ‘youth has been found guilty of an offence’.<sup>457</sup> Similarly, the diversionary processes apply to ‘a youth who admits committing an offence’.<sup>458</sup> Therefore, raising the minimum age of criminal responsibility will limit this avenue as a form of redress to victims of youth offending, as raising the age enlarges the cohort of people whose acts or omissions are not ‘offences’<sup>459</sup>.

7.5.9. In the absence of court ordered compensation other avenues remain open to the victim.<sup>460</sup> They may apply for compensation under a statutory compensation scheme for victims of crime or they may pursue damages in a civil claim. Admittedly, these require the victim to be more active in their pursuit of compensation.

## Statutory Compensation Schemes

7.5.10. All Australian jurisdictions have statutory schemes that allow victims of crime to apply for compensation. In Tasmania, this is governed by the *Victims of Crime Assistance Act 1976* (Tas). Unlike court-ordered compensation, these schemes require victims to make an application to the Criminal Injuries Compensation Commissioner within three years of the offence.<sup>461</sup> Victims should also report the alleged crime to police and try to assist with the investigation process — the Commissioner ‘shall not’ make an award if they believe a person has failed to do what they should reasonably have done in assisting with the ‘identification, apprehension, or prosecution’ of the alleged perpetrator.<sup>462</sup>

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<sup>455</sup> *Youth Justice Act 1997* (Tas), s 10(2)(a).

<sup>456</sup> *Ibid* s 16(b)–(c).

<sup>457</sup> *Ibid* s 99(1)(a).

<sup>458</sup> *Ibid* s 7.

<sup>459</sup> *Criminal Code* (n 237) s 18(1).

<sup>460</sup> The *Sentencing Act 1997* (Tas) s 68(8) explicitly provides that court-ordered compensation does not take away from or affect the right to recover damages or be indemnified ‘so far as it is not satisfied by payment or recovery of compensation’ under that section. While there is no equivalent provision in the *Youth Justice Act*, there is also no explicit provision limiting victims from being able to pursue another avenue of compensation.

<sup>461</sup> *Victims of Crime Assistance Act 1976* (Tas) s 7(1)–(1A).

<sup>462</sup> *Ibid* s 5(3A).

- 7.5.11. Importantly in the context of raising the minimum age of criminal responsibility, there is no requirement that the claimant be a victim of an ‘offence’. Rather, compensation may be awarded even if no one has been charged with, or found guilty of, an offence. Section 4(1)(a) explicitly covers cases where the act causing injury ‘would have constituted an offence, but for the fact that the other person *had not attained a specified age*, or was insane’ or had legal justification for their act.<sup>463</sup> Therefore, unlike with compensation orders, raising the age will not result in a diminishing cohort of victims who can claim compensation for injuries suffered.
- 7.5.12. A benefit of statutory crime compensation schemes, particularly for victims of youth offenders, is that assistance is State-based. Rather than recovery being dependent on the individual’s capacity to pay, victims have access to a dedicated pool of funds out of which awards are paid – the Criminal Injuries Compensation Fund, an account established in the Public Account of the State.<sup>464</sup> While the Commissioner may make orders directing offenders to pay any such amount as ordered under an award,<sup>465</sup> this is merely repayment to the Crown for what is drawn from the Fund.<sup>466</sup> Further, if there are insufficient funds in the Fund to pay an award, an amount sufficient to allow the award to be paid is to be transferred into the Fund from the main Public Account.<sup>467</sup> Victims will not be left without compensation simply because an offender is impecunious.
- 7.5.13. However, while statutory schemes offer victims a more reliable means of compensation, the amount is capped.<sup>468</sup> The limits are dependent on whether the victim is directly or indirectly affected, and the amounts are prescribed in s 4 of the *Victims of Crime Assistance Regulations 2010* (Tas). The maximum award that can be made is \$30,000 for a primary victim where there is a single offence. These amounts are less than what victims may be able to secure in an award of damages from a successful civil claim.<sup>469</sup>
- 7.5.14. There are also limits as regards the type of injuries that can be recompensed. Most prominently, property damage and motor vehicle deaths or injuries are not covered.<sup>470</sup>
- 7.5.15. For motor vehicle accidents, if a child recklessly drives a car and this results in death or injury, a claim can be made to the Motor Accidents Insurance Board under the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas).

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<sup>463</sup> Ibid s 4(1)(a) (emphasis added).

<sup>464</sup> Ibid s 11.

<sup>465</sup> Ibid s 7A.

<sup>466</sup> Ibid s 11.

<sup>467</sup> Ibid s 11(4).

<sup>468</sup> Ibid s 6A.

<sup>469</sup> Law Council of Australia, *Victims of Crime Compensation Schemes: Issues Paper 7*, Royal Commission into Institutional Responses to Child Sexual Abuse, 4 July 2014, [15].

<sup>470</sup> *Victims of Crime Assistance Act 1976* (Tas) s 6(1)(c).

7.5.16. However, property damage may be one area where victims of child offenders are left with more limited ways of redressing injury. If the minimum age of criminal responsibility is raised to 14, and a 12-year-old child sets fire to a house and causes property damage, or throws stones through a shopfront window, or vandalises public property, the victim may only claim compensation by pursuing a civil claim. However, in the case of a young offender, they may not be worth suing.

## Civil Claim

7.5.17. Beyond court-ordered compensation and the statutory compensation scheme, there is the ability to claim compensation through the civil courts. Unlike in criminal law, there is no minimum age under which children cannot be liable in civil law, including for tortious wrongs. While there is no prescribed minimum age, young age may nevertheless be relevant to civil liability.

- For torts requiring an element of intent, age may be relevant to their capacity to form the specific requisite intention.<sup>471</sup>
- For negligence, young age can influence the standard of care to which the defendant is held, though there are no fixed age thresholds to prescribe a definitive altered standard of what is ‘reasonable’ for minors.<sup>472</sup>

7.5.18. However, even if a child can be held tortiously liable for trespass to the person or for negligence — likely the most common torts to be used — there is a genuine question as to whether they have the financial means to sufficiently compensate for injury, and therefore, whether they are worth suing. While the intuitive response may be to pursue a case against the child’s parents or legal guardians, Australian law does not hold parents or legal guardians generally responsible for harm done by their children.<sup>473</sup> A case of parental negligence will only be successful if the plaintiff establishes that the defendant parent had a sufficient degree of control or supervision, or that they permitted the child to have some inherently dangerous object likely to do harm.<sup>474</sup> In the first *McHale* decision in the High Court, the plaintiff was unsuccessful against the father, even though the father admitted he had given his son the metal ‘dart’ — a sharpened metal rod — that ultimately injured the plaintiff. Windeyer J stated that a parent does not incur

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<sup>471</sup> Ibid [19].

<sup>472</sup> *McHale v Watson* (1965) 115 CLR 199, 213–14, 231–3.

<sup>473</sup> *McHale v Watson* (1964) 111 CLR 384, 386. It is worth noting that some other international jurisdictions have laws providing for civil parental liability. For example, in Arizona, liability is imputed to parents or legal guardians for ‘malicious or wilful misconduct of a minor’ that causes injury or property damage, whether or not they ‘could have anticipated the misconduct for all purposes of civil damages’: Ariz Rev Stat Ann § 12-661.

<sup>474</sup> *Hart v A-G (Tas)* (1959) 14 Tas R 1, [44], referencing *Smith v Leurs* (1945) 70 CLR 256.

responsibility if their child misuses a thing that ‘could reasonably be expected to use safely’ and the misuse was not reasonably foreseeable. If the father had given the boy a gun, ‘pocket knife, a wooden sword, or even a toy bow and arrow’, the results may have been different. But, in *McHale*, this was not the case.<sup>475</sup>

- 7.5.19. While claiming damages from a civil action requires proof of liability to a less onerous standard of proof of the balance of probabilities, rather than beyond reasonable doubt, the practical consideration of what can be recovered from a child is important. This is especially so, given that unlike court-ordered compensation or statutory compensation schemes, instituting adversarial proceedings carries not only greater cost but also greater risk. The victim is not guaranteed to succeed and loss may even potentially result in an adverse costs order. Therefore, civil actions impose a greater financial and procedural burden for a victim who wishes to be awarded compensation.
- 7.5.20. Using the previous hypothetical as an example. A 12-year-old sets fire to a house and causes property damage, completely unbeknownst to the parents — perhaps the child was walking home from school by themselves. If the age is raised, the child cannot be held to have committed an offence, and therefore no redress is forthcoming from a compensation order following conviction. The statutory compensation scheme for victims of crime similarly offers no redress, as it does not cover property damage. The injured party would have to pursue a civil claim. Not only is this not guaranteed to succeed, it also relies on identifying and locating the defendant, which may not always be possible, and also the injured party having sufficient financial and time resources to pursue the claim.
- 7.5.21. This is a potential lacuna that may need to be addressed if the age is raised.

### **Claiming from multiple different avenues of compensation**

- 7.5.22. There is no blanket prohibition on claiming from multiple avenues of compensation in Tasmania. However, if civil proceedings have been instituted or could be instituted, this may have an effect on claiming from statutory compensation schemes. Section 5 of the *Victims of Crime Assistance Act 1976* (Tas) provides that if the victim ‘has, or had, an adequate remedy in civil proceedings in respect of that conduct’, the Commissioner may refuse to make an award.
- 7.5.23. Further, in determining the amount to award, the Commissioner shall also take into account ‘any amount recovered by or for the person, by way of damages or compensation’, or that ‘would, in the opinion of the Commissioner, be likely to be so recovered, if proper action was taken’ by the victim or a person on their behalf.

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<sup>475</sup> *McHale v Watson* (1964) 111 CLR 384, 401.

## Part III

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# CASE STUDIES

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## 8 Overview

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- 8.1.1. This part considers three case studies of how foreign jurisdictions address situations where a child under the minimum age of criminal responsibility engages in behaviour that would otherwise constitute criminal conduct. The three countries, Denmark, Portugal, and France were selected to show a diverse range of approaches. Denmark represents the heavily welfare-based Nordic tradition with a relatively high minimum age of 15; Portugal represents a hybrid welfare- and responsibility-based model with an even higher minimum age of 16; while France represents a country where there is no prescribed MACR at all – only limits imposed on the type of measures that may be imposed after a finding of guilt.
- 8.1.2. A common feature is police involvement in detecting and investigating criminal conduct and the existence of limits within criminal procedure. These limits vary between jurisdictions, but typically apply to arrest and pre-trial custody, such as the duration for which a child can be held under arrest.
- 8.1.3. As regards the measures available to handle violent, criminal, or anti-social behaviour committed by those younger than the minimum age of criminal responsibility, all the countries have an out-of-home placement option as a measure of last resort. However, there are significant differences in how this measure is executed, including in the type of institution and limits on the age of children placed therein. Denmark has a range of residential institutions of varying security levels. Security refers to *physical* security or restrictions, such as patrolled boundaries. The most severe type of placement has restrictions matching those found in high-security prisons. However, there are age limits on who may be placed in the various type of institutions, and those with greater levels of security are generally available only to those above 12 years of age. Meanwhile, Portugal runs a system of educational centres in open, semi-open, or closed regimes. This refers not to physical security measures, but rather to the degree of restriction on purposes for which an interned child may leave the institution. This system is strictly for those children between 12–16. Finally, France has a large variety of different educational placement options, with the most restrictive type available only to those older than 13 years. Restriction denotes legal restriction — threat of imprisonment for non-compliance — rather than physical security measures.

8.1.4. There are also differences regarding the authority that may hand down an out-of-home placement measure. In France and Portugal, the measures are ordered by judges in court proceedings. Meanwhile, in Denmark, it is multidisciplinary bodies composed of judges, municipal representatives, and either police employees or pedagogical-psychological experts. This has particular implications in the Australian context, where involuntary deprivation of liberty is generally classed as punitive detention and may only be ordered by a court exercising federal judicial power under ch III of the *Constitution*.<sup>476</sup> Therefore, while lessons may be drawn from jurisdictions with multi-disciplinary decision-makers, caution must be had when translating such models into Australian mechanisms.

Younger than the minimum age of criminal responsibility						
Country	MACR	Police	Record if a measure is imposed	Out-of-home placement below the MACR in relation to criminal behaviour <sup>477</sup>		
				Authority	Age limit	Level of restriction
Tasmania	14	Yes	–	–	–	–
Denmark	15	Yes	Yes, for certain acts. Recorded as an ‘as if’ charge.	Multidisciplinary bodies, including judges and non-judges.	12–18 for partially closed or more secure institutions. Limit may be dispensed with in exceptional cases.	A range: open, partially closed, secured, and specially secured. This refers to levels of <i>physical</i> security.
Portugal	16	Yes	Yes, but register is separate from adult criminal records. <sup>478</sup>	Judges in the family and youth court.	12–16	A range: open, semi-open, and closed. This refers to levels of restriction on free movement in and out of the centres.
France	N/A	Yes	Yes.	Judges in the youth courts.	Depends on the facility. Some are 13+ only	A range. Even ‘closed’ placements refer only to <i>legal</i> closure – the threat of imprisonment if a child ‘escapes’.

<sup>476</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

<sup>477</sup> This distinction is important, as there are usually out-of-home placement options under child protection legislation. This table focuses on where the children are deprived of their liberty in relation to certain behaviour which would constitute criminal behaviour if they were above the age.

<sup>478</sup> Rodrigues and Duarte-Fonseca (n 354) 1050.

## 8.2. Case study 1: Denmark (MACR = 15)

- 8.2.1. The Danish legal system is part of the Nordic tradition of justice, which more closely resembles continental European civil law systems than Anglo-Saxon common law systems. Nordic youth justice systems are characterised by close collaboration between justice and child welfare systems<sup>479</sup> as well as an absence of specialised juvenile courts — once a child reaches the minimum age of criminal responsibility, they are sentenced according to the same criminal code and in the same courts as adults.<sup>480</sup> In 2014, a proposal was presented for lowering the MACR to 12 and creating a special juvenile court for those aged 12–18.<sup>481</sup> However, this did not materialise.
- 8.2.2. Despite that children above the MACR remain subject to the same system as adults, there are some special dispositions available and limitations on what measures may be imposed on children. There is different and more lenient treatment allowed for them.<sup>482</sup> For example, while the same sentence applies to both adults and children, that the offender had not reached 18 years of age when the offence was committed is prescribed as a mitigating factor.<sup>483</sup>

### Minimum Age

- 8.2.3. The minimum age of criminal responsibility in Denmark is 15.<sup>484</sup> There are no carve-outs for specific offences. Prior to the 20<sup>th</sup> century, the minimum age was 10. Concomitant to child welfare reforms in the early 1900s, the age was raised from 10 to 14. It was again raised in 1930 to 15. This age has remained constant since, barring a short period between 1 July 2010 and 1 March 2012 where it was lowered to 14 in an effort to deter crime. This change had been contrary to the recommendations of the juvenile crime commission established by the government's Ministry of Justice. The Committee on the Rights of the Child ('CRC') also expressed concern in its concluding observations to Denmark's fourth periodic report to the

<sup>479</sup> See the brief discussion on 'SSP cooperation' in Britta Kyvsgaard, 'Youth Justice in Denmark' (2004) 31 *Crime and Justice* 349, 377. SSP denotes the School and Recreation Administration, local Social and Health administration, and the local police. The type and extent of cooperation between these authorities varies between municipalities.

<sup>480</sup> Tapio Lappi-Seppälä, 'Nordic Youth Justice' (2011) 40(1) *Crime and Justice* 199, 199–200.

<sup>481</sup> Anette Storgaard, 'Denmark' in Scott H Decker and Nerea Marteache (eds), *International Handbook of Juvenile Justice* (Springer, 2<sup>nd</sup> ed, 2017) 267, 269; 'Danish government to drop plans to reduce criminal minimum age', *The Local* (online 20 March 2017) <<https://www.thelocal.dk/20170320/denmark-government-to-drop-plans-to-reduce-criminal-minimum-age/>>.

<sup>482</sup> Kyvsgaard (n 479).

<sup>483</sup> *Straffeloven* [Criminal Code] (Denmark), s 82. See also s 33(3) (if the offender is under 18 at the time the offence was committed, imprisonment cannot exceed eight years).

<sup>484</sup> *Ibid* s 15 ('Acts committed by children under the age of 15 are not punishable').

- CRC.<sup>485</sup> Studies have shown that it did not achieve the goal of reducing crime.<sup>486</sup> Regardless, the subsequent government re-established 15 as the minimum age at which children are subject to the criminal justice system.<sup>487</sup>
- 8.2.4. Before a child reaches the age of 15, they are handled by child welfare authorities under social services legislation. However, where they are suspected of having committed criminal conduct, there remains some engagement with the criminal justice system through police investigation procedures. Police can investigate the crime to determine the extent of the crime, to ascertain whether other persons are suspected of being involved, and to seize items to be returned (such as stolen goods).<sup>488</sup>
- 8.2.5. Children under the minimum age may also be arrested. Where a child under 15 is suspected of having committed criminal conduct, the provisions of ch 75b of the *Administration of Justice Act (Retsplejeloven)* apply. This permits police to detain children under 15 where the general requirements of arrest in s 755 are satisfied and the purpose of detention cannot be achieved with less intrusive measures.<sup>489</sup> Section 755, in ch 69 regarding arrest, allows arrest where a person is reasonably suspected of a criminal offence subject to public prosecution and where arrest is necessary to prevent further offending, ensure the offender's provisional presence, or to prevent their association with others.
- 8.2.6. Further to the added requirement that arrest be a measure of last resort to achieve the purposes of detention, there are also limits on force, location, and duration of the arrest. The restraint must be as lenient and gentle as possible.<sup>490</sup> Handcuffs and similar force must not be applied against the child.<sup>491</sup> Further, they are to be placed in an office or like area. They may only be placed alone in a waiting room, detention room or like area where necessary for security reasons or exceptionally required for the sake of investigation and other placement is not possible. They must never be placed in a detention centre or prison.<sup>492</sup> Detention must be as short as possible and generally be no longer than six hours. Where they are placed in an ordinary office, this time period may be extended where important investigative considerations

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<sup>485</sup> Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Denmark*, 56<sup>th</sup> sess, UN Doc CRC/C/DNK/CO/4 (7 April 2011) [65] ('*Denmark Concluding Observations*').

<sup>486</sup> Stogaard (n 481) 269; Anna Piil Damm et al, 'Lowering the Minimum Age of Criminal Responsibility: Consequences for Juvenile Crime and Education' (Working Paper, Department of Economics and Business Economics, Aarhus University, 2017) 11–12.

<sup>487</sup> Damm (n 486) 3–4, 11–12.

<sup>488</sup> Committee on the Rights of the Child, *Fourth Period Report of States Parties Due in 2008: Denmark*, UN Doc CRC/C/DNK/4 (22 January 2010) [553] ('*Denmark 4<sup>th</sup> Report*').

<sup>489</sup> *Administration of Justice Act (Retsplejeloven)* (Denmark) s 821A.

<sup>490</sup> *Ibid* s 821A(3).

<sup>491</sup> Kyvsgaard (n 479) 366.

<sup>492</sup> *Retsplejeloven* [Administration of Justice Act] (Denmark) s 821A(3); *Denmark 4<sup>th</sup> Report* (n 488) [554].

so require. This is not permitted if they are placed alone in a waiting room, detention room or similar area. In no circumstance may detention exceed 24 hours.<sup>493</sup>

- 8.2.7. Certain parties must also be notified of any arrest. The police must notify the municipal council with a view that a representative from the council is present during interviews and interrogation. The police must also notify the parents or legal custodians of the child as soon as possible, who must also be granted access to attend the interrogation as far as this can be done. These procedures may, however, be omitted in certain circumstances, such as where the detention has been very short or where the conduct would generally only result in a fine.<sup>494</sup>
- 8.2.8. In addition to arrest, other investigative procedures may be undertaken against a child under 15 just as with adults. These include wiretapping and other communications interference; body inspections; search of premises; seizure of items; and other investigative steps in ch 75A. However, the police cannot take the child's fingerprints, personal photographs, or blood or saliva samples for later identification.<sup>495</sup>
- 8.2.9. In certain circumstances, the child's conduct will be recorded on the Central Police Register as an 'as if charge', meaning that the person would have been charged with an offence had they been of an age where criminal responsibility is possible.<sup>496</sup> This register is not accessible by the general public and is only used as a tool for police investigation.<sup>497</sup>
- 8.2.10. Registration of charges depends on the age and the offence involved. For offences that are not crimes, registration only takes place regarding children under 15 where it is necessary for the proper execution of police work, such as searches. For those aged 12–15, registration occurs where the seriousness of the circumstances require. It will normally be necessary for murder, robbery, rape, and for serious violence, vandalism, arson, drug, and enrichment offences. For enrichment offences, this is particularly so where the child is a serial offender. For those aged 10–12, it must satisfy not only the above requirement, but also be particularly serious for registration to occur. Under 10 years of age, conduct is not registered, even if it would amount to a crime.<sup>498</sup> However, where the violation is one of the *Penal Code*, *Firearms Act*, or the *Narcotic Drugs Act*, an *anonymised* record is made in all cases for statistical purposes.<sup>499</sup>

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<sup>493</sup> *Retsplejeloven* [Administration of Justice Act] (Denmark) s s 821A(4); *Denmark 4<sup>th</sup> Report* (n 488) [554].

<sup>494</sup> *Retsplejeloven* [Administration of Justice Act] (Denmark) s 821D.

<sup>495</sup> *Ibid* s 821B.

<sup>496</sup> *Damm* (n 486) 15.

<sup>497</sup> *Stoorgard* (n 481) 275.

<sup>498</sup> *Executive Order on the Processing of Personal Data in the Central Criminal Register (Criminal Register)* (BEK nr 881 af 04/07/2014) app 2 s 11.

<sup>499</sup> *Ibid* app 2 s 11(3).

- 8.2.11. Aside from arrest due to suspected commission of criminal conduct, police may also intervene against children below the minimum age who pose a danger to themselves or others.
- 8.2.12. First, there is a general power to intervene against persons in order to avert threats to public order or personal health. This may open the possibility of detention for a child, since this power is not limited by age or criminal guilt.<sup>500</sup> Any deprivation of liberty must be a last resort, be as gentle and short as possible, and not last beyond six hours.<sup>501</sup>
- 8.2.13. Second, where the child is unable to take care of themselves due to the consumption of alcohol or other intoxicants or drugs and is posing a danger to themselves, to others, or to public order or security, the police may deprive them of liberty if other interventions are inadequate for protecting public order and personal safety. As above, the deprivation of liberty must be as gentle and for as short a duration as possible.<sup>502</sup> If the child taken is under 12, they may not be placed in *detention*. If the child is 12–15 years old, they can be placed in detention only where another placement is unsafe due to their behaviour. However, if such detention is required, they must be examined by a doctor and must not be detained for longer than four hours unless it is not possible within this time to transfer care of the child to someone else who can take good care of them.<sup>503</sup>
- 8.2.14. Third, if the person is unable to take care of themselves due to illness, injury, or helplessness, and is posing a danger to themselves, to others, or to public order or security, similar measures may be taken as in the case of intoxication. There are no specific provisions as regards age in this circumstance.<sup>504</sup>
- 8.2.15. Finally, if a child is found in conditions that involve a danger to their own safety or health, and the situation is not one of intoxication or being otherwise unable to take care of themselves, there is also an ability to deprive them of their liberty if other less-intrusive measures are insufficient to avert the danger to the child. A six-hour limit on duration applies as far as possible.<sup>505</sup>
- 8.2.16. Aside from certain processes such as those discussed above — criminal investigation procedures, safety-related deprivation of liberty, and recording of the ‘as if charge’ — it falls to municipal social authorities to handle the child engaging in violent, criminal, or anti-social

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<sup>500</sup> Stoorgard (n 481) 274.

<sup>501</sup> *Politiloven* [Police Activities Act] (Denmark) s 5.

<sup>502</sup> *Ibid* s 11.

<sup>503</sup> *Ibid* s 12; Stoorgard (n 481) 274.

<sup>504</sup> *Politiloven* [Police Activities Act] (Denmark) s 10.

<sup>505</sup> *Ibid* s 13.

behaviour. It is their responsibility to settle the case and determine whether further measures are necessary.<sup>506</sup>

## Authorisation & supervision

- 8.2.17. Two of the key decision-making bodies to note in this area are the Children and Young People Committee (*Børn og unge-udvalgets*) and the Juvenile Delinquency Board (*Ungdomskriminalitetsnævnet*). They can authorise measures under the *Social Services Act (Serviceloven)* and, in the case of the latter Board, its constitutive act, the *Law on Combatting Juvenile Delinquency (Lov om bekæmpelse af ungdomskriminalitet) 2018*.
- 8.2.18. The Juvenile Delinquency Board is a relatively recent creation. It is an independent board appointed in all police districts and established under the *Law on Combatting Juvenile Delinquency 2018*. The chairman and vice-chairmen of the Board are judges, but the Board is also composed of police employees and municipal employees. This reflects a holistic approach<sup>507</sup> to juvenile delinquency prevention beyond merely matters of law. When the Board meets, one person from each ‘sector’ participates in the decision-making. However, some decisions can be made by a chairman or vice-chairman alone — a judge.<sup>508</sup>
- 8.2.19. The Board is engaged where a child aged 10–18 has been suspected or, in the case of children over 15, convicted, of certain crimes: offences against the person or other serious crimes violating the *Penal Code, Narcotic Drugs Act, Firearms Act, or the Knife Act* and where there is a risk of the child committing further crime.<sup>509</sup> In practice, this covers dangerous crimes and certain serious crimes that may attract imprisonment. Dangerous crimes include violent crimes, rape, extortion, and robbery. Other serious crimes include burglary, fraud, aggravated vandalism, arson, car theft, sale of drugs, or violation of gun laws.<sup>510</sup> The crimes that have most often led to a referral to the Board are crimes against the person, most of which are violent, constituting 90% of referred cases.<sup>511</sup>
- 8.2.20. Where the child is 10–15 years old, which is younger than the minimum age of criminal responsibility, police screen cases and may choose to refer them to the Board. In this screening

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<sup>506</sup> Damm (n 486) 10.

<sup>507</sup> *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 1.

<sup>508</sup> ‘Om os [About us]’, *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/om-os/index.html>>.

<sup>509</sup> *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 2(2).

<sup>510</sup> ‘Om os [About us]’, *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/om-os/index.html>>.

<sup>511</sup> Ministry of Justice, *A Partial Evaluation of the Juvenile Delinquency Board* (Report, 2021) 2 <<https://www.justitsministeriet.dk/wp-content/uploads/2021/05/Naevnsmoedet-En-devaluering-af-Ungdomskriminalitetsnaevnet..pdf>>.

process, the police may obtain information about the child from the local authorities.<sup>512</sup> If the case is referred, the municipal social welfare authorities must assess the child and the case and make a recommendation as to how the case should be decided.<sup>513</sup> In the Board meetings, a representative from the municipal authority will present this information to the Board. The child and their custodians must also be present at the meeting, and the child has an opportunity to be heard on their perspective.<sup>514</sup> Indeed, in practice, the widespread perception among professionals is that children have good opportunities to express their views, and children themselves have stated that the experience was not as unpleasant as they expected.<sup>515</sup>

- 8.2.21. The goal is to reach agreement between all involved parties and parental or custodian consent is sought where possible. However, measures may ultimately be decided without such consent. This is most common for decisions involving placement of the child (such as placement in residential institutions). In a 2021 review, it was reported that just over one third of placement decisions lacked parental consent. For other measures, lack of consent is not as common.<sup>516</sup>
- 8.2.22. The Board does not have any criminal function and therefore it cannot impose a criminal sanction or decide on whether or not the child has engaged in a criminal act. Rather, their role is to decide the most appropriate social measure.<sup>517</sup> Once the Board has made a decision, implementation is the responsibility of municipal authorities. Supervision is conducted by a juvenile probation service established by the Act.<sup>518</sup> If the child fails to comply, the case may be referred back to the Board.<sup>519</sup> In most cases, the Board's decision is final and cannot be appealed. However, where the child is older than 12 and the decision is of a more intrusive nature, such as placement in a secured residential institution, the child can complain to the National Board of Appeal.<sup>520</sup>
- 8.2.23. The Children and Young People Committee (*Børn og unge-udvalgets*) also has competence to make certain decisions about how children are handled, including those children who are at risk of committing crime. This is a committee in the municipal council consisting of two members

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<sup>512</sup> Ibid; *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 11.

<sup>513</sup> 'Henvist til nævnet [Referred to the Board]', *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/henvist-til-naevnet/index.html>>.

<sup>514</sup> 'Om os [About us]', *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/om-os/index.html>>.

<sup>515</sup> Ministry of Justice (n 511) 3.

<sup>516</sup> Ibid 5.

<sup>517</sup> 'Om os [About us]', *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/om-os/index.html>>.

<sup>518</sup> See *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, ch 6.

<sup>519</sup> Ministry of Justice (n 511) 3.

<sup>520</sup> 'Kan jeg klage? [Can I Complain?]', *Ungdoms Kriminalitets Nævnet* [Juvenile Delinquency Board] (Web Page) <<https://www.ungdomskriminalitetsnaevnet.dk/kan-jeg-klage/index.html>>.

from the municipal council, a judge, and two pedagogical-psychological experts. It is the Committee's role to make decisions on coercive interventions against children, including non-consensual out-of-home placement of a child or detention during a period of placement. They receive case submissions and recommendations from the municipal social administration for children and young people or the social administration for people with disabilities.<sup>521</sup> As regards non-consensual out-of-home placement, the recommendation for the coercive measure must include, among other things, a paediatric examination, an action plan, the purpose and duration of the measure, and a summary of the interview between the administration and the child conducted to determine the child's perspective and attitude to the measure.<sup>522</sup> Once a case is submitted, the Committee makes a decision to follow or reject the recommendation. Their decisions can be appealed to the National Board of Appeal.<sup>523</sup>

- 8.2.24. Since the enactment of the *Law on Combatting Juvenile Delinquency (Lov om bekæmpelse af ungdomskriminalitet) 2018*, the Juvenile Delinquency Board has taken over some areas of competence from the Committee.<sup>524</sup> For example, where the measure is out-of-home placement of a child *without parental consent*, the Committee may not make a decision where the case has already been referred to the Juvenile Delinquency Board.<sup>525</sup> However, if the child is already undergoing a period of placement, the Committee can decide on whether a child can be detained during the placement — whether they can be physically restrained to prevent them from leaving the placement.<sup>526</sup>

## Measures

- 8.2.25. There is a range of measures that may be imposed on children younger than the minimum age of criminal responsibility by the Committee or the Board. These are primarily found under the *Social Services Act (Serviceloven)* and the *Law on Combatting Juvenile Delinquency (Lov om bekæmpelse af*

<sup>521</sup> 'Børn og unge-udvalget [Children and Youth Committee]', *Københavns Kommune* [City of Copenhagen] (Web Page) <<https://www.kk.dk/b%C3%B8rn-og-unge-udvalget>>.

<sup>522</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 59; 'Sagens behandling i børn- og ungeudvalget [The Case is Being Considered by the Children and Youth Committee]', *Ankestyrelsen* [National Board of Appeal] (Web Page) <<https://ast.dk/born-familie/hvad-handler-din-klage-om/sager-om-born-og-unge/anbringelse-uden-samtykke/sagens-behandling-i-born-og-ungeudvalget>>.

<sup>523</sup> 'Børn og unge-udvalget [Children and Youth Committee]', *Københavns Kommune* [City of Copenhagen] (Web Page) <<https://www.kk.dk/b%C3%B8rn-og-unge-udvalget>>.

<sup>524</sup> Ministry of Children and Social Affairs and Ministry of Justice, *Ud af kriminalitet og tilbage i trivsel (Out of Crime and Back to Well-Being)* (Handbook, 2019) 63 <<https://www.ungdomskriminalitetsnaevnet.dk/wp-content/uploads/2019/02/ud-af-kriminalitet-og-tilbage-i-trivsel-haandbog-til-behandling-af-sager-omfattet-af-lov-om-bekaempelse-af-ungdomskriminalitet.pdf>>.

<sup>525</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 58(4).

<sup>526</sup> *Voksenansvarsloven* [Law on Adult Responsibility for Children and Young Persons at a Placement Facility] (Denmark) 1 January 2017, s 11(2); *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 4.

*ungdomskriminalitet*) 2018 and are expanded on in multiple other statutes and executive orders, including the *Law on Adult Responsibility for Children and Young Persons Placed in Care (Voksenansvarsloven)* and the related Executive Order no 810.<sup>527</sup>

- 8.2.26. Focusing on the case of a child younger than the minimum age of criminal responsibility exhibiting criminal behaviour or other social or behavioural problems, the most serious intervention involves out-of-home placements. This can occur without either the child's consent or the consent of their parents when there is a reasonable presumption that the child's problems cannot be solved if they stay at home, and there is an 'obvious risk' that their health or development will suffer serious harm, including due to criminal behaviour or other social or behavioural problems.<sup>528</sup>
- 8.2.27. Various out-of-home placements are possible: with a foster family, in dormitory-like residences, or the more severe option of residential institutions. There are varying types of residential institutions: open residential institutions; partially closed residential institutions; partially closed wards at residential institutions; secured residential institutions; or, in the most severe of circumstances, specially secured wards in secured residential institutions.<sup>529</sup> The point of difference is the extent to which physical measures are in place to restrict the child's liberty, which in turn depends on their need for treatment.
- 8.2.28. Regarding the option of residential institutions, placements in anything but an open residential institution is generally only available for those aged 12–18.<sup>530</sup> Except for specially secured wards,<sup>531</sup> this age limit may be dispensed with in relation to children under 12 in exceptional circumstances.<sup>532</sup> Because this range covers children both below and above the minimum age of criminal responsibility, and because of the overlap between the welfare and criminal justice systems, there is potential intermixing of children institutionalised for different reasons. In the same institution, there may be children who have been *convicted* of an offence and are serving their sentence of imprisonment in the institution, mixing with children who are younger than the age but are at risk of committing criminal conduct.<sup>533</sup> In practice, however, even placement

<sup>527</sup> *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 4.

<sup>528</sup> *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 14(2); *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 58.

<sup>529</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 66(1)(7).

<sup>530</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 63A, 63B, 63C; *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 15, 16, 17.

<sup>531</sup> *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 8.

<sup>532</sup> *Ibid* s 5(3), 7(2).

<sup>533</sup> Stoorgard (n 481) 283.

of children under 15 in a secured institution is reportedly rare.<sup>534</sup> Therefore, while theoretically possible, it is unlikely that young children will be mixing with convicted serious offenders.

- 8.2.29. Regarding the level of restriction, partially closed institutions are those where the exterior doors and windows can be locked.<sup>535</sup> Placement in such an institution will be justified where the ability to lock the doors and windows or to physically restrain the child is crucial for the child's social pedagogical treatment. It is done to protect the child from serious damage to their health or development due to their criminal behaviour, substance abuse problems, or other behavioural or adjustment problems.<sup>536</sup>
- 8.2.30. Secure residential institutions have security levels matching those of high security prisons, including perimeter walls, electronic monitoring, closed gates, entrance control, surveillance by guards,<sup>537</sup> and it is permitted for the windows and doors to be constantly locked.<sup>538</sup> This more restrictive type of placement will only be justified in a limited number of circumstances, including where the child poses a danger of harm to themselves or other people, and that risk cannot be properly averted by other more lenient measures.<sup>539</sup> There are also strict requirements for the duration of the measure. For children over 15 who are there because of a risk of harm to themselves or others, they may be placed there for a maximum of three months, dispensable for a new period of a maximum of three months if necessary.<sup>540</sup> The total duration must not exceed 12 months.<sup>541</sup> For those children under 15, only one three-month renewal may be granted.<sup>542</sup> The total duration must not exceed nine months.<sup>543</sup>
- 8.2.31. For those children exhibiting particularly violent or mentally harmful behaviour such that placement in even a secured residential institution is insufficient and unjustifiable, they may be

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<sup>534</sup> In 2020, there were five children under 15 placed in a partly closed residential institution or partly closed ward in an open residential institution, and four children placed in a locked ward: Statistikbanken [Statistics Denmark], *Children and Young Persons Placed outside of Own Home per 31<sup>st</sup> December by Place of Accommodation, Age and Sex* (ANBAAR15, 18 June 2021).

<sup>535</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 63A(2); *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 5.

<sup>536</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 63A; *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 15.

<sup>537</sup> Stoorgard (n 481) 283.

<sup>538</sup> *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 6(2).

<sup>539</sup> *Serviceloven* [Social Services Act] (Denmark) 6 August 1998, s 63B; *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 16.

<sup>540</sup> *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 9.

<sup>541</sup> *Ibid* s 9(6).

<sup>542</sup> *Ibid* s 9.

<sup>543</sup> *Ibid* s 9(6).

placed in a specially secured ward.<sup>544</sup> These wards are located in secured institutions, but are physically separated from other wards and designed to cater to those children with a more far-reaching need for help due to their behaviour.<sup>545</sup> The same duration limits apply as with secured institutions if the basis of placement is particularly violent behaviour.<sup>546</sup> If the basis of the placement is mentally harmful behaviour, there must be a written medical assessment showing that the child is exhibiting current symptoms of diagnosis before this type of placement is allowed.<sup>547</sup>

- 8.2.32. In terms of the level of security possible, secured institutions seem to resemble prisons. However, rather than prison guards, the social welfare institutions are staffed by civilians<sup>548</sup> with socio-educational training.<sup>549</sup> Further, the focus of placements is never punishment, but rather, the well-being and development of the child. The *Social Services Act* expressly provides that the institutions must actively work to support the education, employment, and crime prevention as regards the children.<sup>550</sup> The focus on help rather than punishment also explains why the measures used, at least theoretically, relate not to the gravity of the behaviour but rather to the situation of the child. The principle of proportionality is therefore irrelevant in determining what measure to apply.<sup>551</sup>

## Conclusion

- 8.2.33. In summary, the Danish juvenile justice system is characterised by a relatively high minimum age of criminal responsibility, an absence of specialised juvenile courts, and a heavy focus on socio-pedagogical treatment for those under the minimum age. While the police are involved in the initial investigatory processes and in referring serious cases for social intervention consideration, the handling of cases where children have exhibited violent, criminal, or anti-social behaviour is left to municipal social welfare authorities. These authorities typically have multi-disciplinary membership spanning the legal, criminal, and pedagogical-psychological domains, reflecting a holistic approach to prevention of further ‘offending’. As for the measures that may be imposed on children who pose a risk to themselves or others, the most restrictive measures involve placement in specially secured wards in secured residential institutions. These

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<sup>544</sup> *Serviceoven* [Social Services Act] (Denmark) 6 August 1998, s 63C; *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 17.

<sup>545</sup> *Ibid* s 8.

<sup>546</sup> *Ibid* s 9.

<sup>547</sup> *Serviceoven* [Social Services Act] (Denmark) 6 August 1998, s 63C(3); *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 17.

<sup>548</sup> Stoorgard (n 481) 283.

<sup>549</sup> Kyvsgaard (n 479) 367.

<sup>550</sup> *Serviceoven* [Social Services Act] (Denmark) 6 August 1998, s 67.

<sup>551</sup> Kyvsgaard (n 479) 366.

resemble youth detention centres in Australia. However, it must be emphasised that the intervention is tailored to the needs of the child with a view to protecting them from harm and diverting them from further engagement in harmful behaviours. Any social intervention, even those involving severe restriction of personal liberty, is always based on needs, rather than the child's deeds.

### 8.3. Case study 2: Portugal (MACR = 16)

- 8.3.1. Portugal has long had specialised law establishing a juvenile justice system. This system has evolved through three key eras from a paternalistic-repressive model, to a strongly welfare-based model, to the current model which falls between a welfare and punitive model.<sup>552</sup> In the current model, the child is seen as bearing a degree of responsibility for their acts rather than merely a product of their circumstances. However, the law still recognises their need for learning or training. This model is the result of a reform at the turn of the 21<sup>st</sup> century. It is characterised by two laws: one that governs protective intervention for children in danger (the *Law on the Protection of Children and Young People in Danger (Lei de Promoção e Protecção de Crianças e Jovens em Perigo*, Law n.º 149/99, of 1<sup>st</sup> September ('LPCJ')), and the other that governs educational intervention for children who have committed acts qualifying as crimes (*Educational Guardianship Law (Lei Tutelar Educativa)*, Law n.º 166/99, of 14<sup>th</sup> September ('LTE')).<sup>553</sup> Under the latter, the goal is 'education in the law', meaning to socialise and educate the children on the community values protected by the criminal law.<sup>554</sup>

#### Minimum Age

- 8.3.2. Portugal has fixed the minimum age of criminal responsibility at 16 years of age, below which children are 'not imputable'.<sup>555</sup> There are no carve-outs for specific offences. Below this age, there are two key age thresholds relevant to when children engage in violent, anti-social, or criminal behaviour. First, children aged 12–16 can be subject to educational intervention under the LTE when they commit an act that would qualify as a *crime*.<sup>556</sup> Status offences — conduct that is only criminal by virtue of the child's age and would not be an offence if committed by an adult — do not trigger these interventions.<sup>557</sup> Second, if the child is under 12 years of age, they may only be subject to protective intervention as a child in danger under the LPCJ. This reflects a consideration that, while the goals of educative intervention do not align with the psychological condition of a child under 12, their commission of an act qualifying as a crime may

<sup>552</sup> Maria João Leote de Carvalho, *Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends* (Report, 2014) 3–5 ('*Alternatives to Custody*').

<sup>553</sup> *Ibid* 3–5.

<sup>554</sup> *Ibid* 3.

<sup>555</sup> *Código Penal Português* [Penal Code of Portugal] (Portugal) art 19.

<sup>556</sup> *Lei Tutelar Educativa* [Educational Guardianship Law] (Portugal) 14 September 1999, art 1 ('*LTE*').

<sup>557</sup> de Carvalho, *Alternatives to Custody* (n 552) 5.

nevertheless indicate that state intervention is necessary.<sup>558</sup> However, if they do *not* constitute a child in danger, their act will have no legal consequences.<sup>559</sup>

8.3.3. The system of protective intervention under the LPCJ defines child or young person as a person younger than the age of 18 or, in the case of an ongoing intervention, younger than 21.<sup>560</sup>

Therefore, for children aged 12–16, the protective and educational systems may overlap. The rules and procedures in the two laws support this, allowing for the enforcement of protection measures under the LPCJ in association with, or instead of, educational measures under the LTE.<sup>561</sup>

8.3.4. This case study focuses on educational interventions under the LTE for children aged 12–16. This system is clearly triggered by criminal behaviour and therefore is more traditionally linked to the concept of ‘youth justice’. The LTE falls within the responsibility of family and youth courts.

## Investigation Procedures

8.3.5. Investigation and interrogation procedures are conducted by the Public Prosecution Service, who are assisted by police and government services in charge of social integration.<sup>562</sup> The processes are governed by the principle that procedures should be as speedy as possible.<sup>563</sup> Investigations are conducted for the purpose of determining whether the two pre-conditions for educational interventions are established: first, the existence of a fact qualifying as a crime in law, and second, the need for the child to receive education in the law.<sup>564</sup>

8.3.6. These two conditions reflect the underlying rationale of the system as based on *both* the child’s deed and the child’s needs. It requires both the necessity of responsibility for social damage caused by acts of a certain gravity (crimes) and the necessity of educational intervention.<sup>565</sup> As such, if either condition is not satisfied, the process will be dismissed — if the offence is not proven by sufficient evidence or the Public Prosecution Service concludes that the conduct did not manifest a need for education in the law.<sup>566</sup> Even if dismissed, the case is nevertheless filed if

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<sup>558</sup> Rodrigues and Duarte-Fonseca (n 354) 1033–4 n 11.

<sup>559</sup> Committee on the Rights of the Child, *Periodic Reports Due in 1997: Portugal*, UN Doc CRC/C/65/Add.11 (26 February 2001) [466] (*Portugal 2<sup>nd</sup> Report*).

<sup>560</sup> *Lei de Promoção e Protecção de Crianças e Jovens em Perigo* [Law on the Protection of Children and Young People in Danger] (Portugal) 1 September 1999, art 5(a) (*LPCJ*).

<sup>561</sup> de Carvalho, *Alternatives to Custody* (n 552) 11.

<sup>562</sup> *LTE* (n 556) art 75.

<sup>563</sup> *Ibid* art 44.

<sup>564</sup> Rodrigues and Duarte-Fonseca (n 354) 1044–5.

<sup>565</sup> *Ibid* 1035.

<sup>566</sup> *Ibid* 1044–5.

the acts would be punishable by up to three years' imprisonment.<sup>567</sup> It is possible that the case will proceed even if the Public Prosecution Service does not deem an educational measure necessary, and conversely, the Service may deem a measure necessary only for the court to disagree and dismiss the case.<sup>568</sup>

- 8.3.7. As in the situation of Denmark discussed above, there are certain limits that apply to investigative or other criminal procedures, particularly arrest and pre-trial detention.
- 8.3.8. Regarding arrest, children under 16 can only be arrested in flagrante delicto or on judicial order.<sup>569</sup> In the former situation, this is only justified where the crime is punishable by imprisonment, and detention can only be maintained where the act is a crime against persons punishable by more than three years' imprisonment, or multiple acts corresponding to a total term of imprisonment that exceeds three years' maximum.<sup>570</sup> The child must be brought before a judge in no more than 48 hours.<sup>571</sup> In the situation where arrest relies on judicial order, the parents or legal representatives must have been informed unless doing so would render the order unenforceable.<sup>572</sup> In any event, *after* arrest, the police unit arresting the child must communicate this immediately to the parents, legal representatives, or guardians.<sup>573</sup>
- 8.3.9. Regarding pre-trial detention in a custodial educational centre, this precautionary measure is a measure of last resort available only where there is strong evidence of the offence; an educational measure will probably be applied and a need to educate the child is observed; there is a well-founded danger of escape or commission of further crimes;<sup>574</sup> other available precautionary measures are inadequate;<sup>575</sup> and the conduct is of sufficient gravity.<sup>576</sup> Other precautionary measures are placing the child with their guardians and imposing obligations on the child; or guarding the child in a public or private institution.<sup>577</sup> The conduct will be of sufficient gravity where it carries a maximum term of at least five years' imprisonment, or consists of two or more crimes against the person punishable by a maximum term of at least three years' imprisonment.<sup>578</sup> As will be discussed in greater detail below in relation to the educational measures available, educational centres may be open, semi-open, or closed. This

<sup>567</sup> Ibid 1045.

<sup>568</sup> de Carvalho, *Alternatives to Custody* (n 552) 12–13; Ibid 1045.

<sup>569</sup> *LTE* (n 556) art 51(1).

<sup>570</sup> Ibid art 52.

<sup>571</sup> Ibid art 51(1)(a).

<sup>572</sup> Ibid art 53; *Portugal 2<sup>nd</sup> Report* (n 559) [483].

<sup>573</sup> *LTE* (n 556) art 53.

<sup>574</sup> Ibid art 58.

<sup>575</sup> de Carvalho, *Alternatives to Custody* (n 552) 20; Rodrigues and Duarte-Fonseca (n **354**) 1056.

<sup>576</sup> *LTE* (n 556) art 58.

<sup>577</sup> Ibid art 57.

<sup>578</sup> Ibid art 58(2); Rodrigues and Duarte-Fonseca (n **354**) 1057.

indicates the level of restriction at the institution. Only if the child is over 14 may they be detained at a closed institution.<sup>579</sup> Finally, any pre-trial detention has a maximum duration of three months, extendable by a maximum of three months more if the case proves to be particularly complex.<sup>580</sup>

## Hearings

- 8.3.10. The process of hearing the case centres on confirming whether there is sufficient evidence of the offence and whether there is a need for educational measures. During this process, the court must be informed about the child's personality. One way this evidence is obtained is through a social inquiry report provided by the Directorate General of Reintegration and Prison's Services ('DGRSP'), an auxiliary body within the state administration of juvenile justice. If the proposed measure is internment in an educational centre — the most restrictive of the measures available — the report must also include a psychological evaluation. If the internment is to be in a *closed* centre, there needs to be a further expert report on the child's personality.<sup>581</sup> Aside from this social inquiry report, judicial authorities can also request other information from the Directorate General, a public entity, or a private body.
- 8.3.11. Cases are usually heard by one judge sitting alone, though in the case of internment measures there is the additional presence of two specialised lay judges.<sup>582</sup> Involvement of the parents is emphasised at all stages of the proceedings<sup>583</sup> and the child retains the rights and guarantees typical to criminal procedure, such as the right to a defence lawyer.<sup>584</sup> In fact, the participation of a defence lawyer is positively required in all judicial proceedings to ensure the child's rights are adequately protected. If a child cannot afford legal representation, the judge appoints one who acts without charge.<sup>585</sup>
- 8.3.12. It must also be noted that there is an option for the prosecutor to suspend proceedings if the offence is punishable by *less* than five years' imprisonment, and the child has proposed an acceptable plan of conduct showing that they can properly behave in the future.<sup>586</sup> The development of this plan can be assisted by mediation services if required, and these measures

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<sup>579</sup> *LTE* (n 556) art 58(3).

<sup>580</sup> *Ibid* art 60.

<sup>581</sup> Rodrigues and Duarte-Fonseca (n 354) 1045–6.

<sup>582</sup> *LTE* (n 556) art 30; de Carvalho, *Alternatives to Custody* (n 552) 13.

<sup>583</sup> de Carvalho, *Alternatives to Custody* (n 552) 13.

<sup>584</sup> See *ibid* 13–14.

<sup>585</sup> *Ibid* 14.

<sup>586</sup> *LTE* (n 556) art 84; Rodrigues and Duarte-Fonseca (n 354) 1047.

reflect a desire to achieve consensual solutions where possible between the judicial authorities, the child, and their parents or guardians.<sup>587</sup>

- 8.3.13. If proceedings are conducted and an educational measure imposed, the measure is registered on a specific registration regime separate from adult criminal records. Registered measures can affect both procedural considerations such as the application of prevention orders as well as substantive considerations such as the choice on how long a measure is to be imposed for. It also has statistical research significance.<sup>588</sup>

## Measures

- 8.3.14. If proven that the child committed facts qualifying as an offence of sufficient gravity *and* there is a manifested need for education in law, a closed catalogue of measures is available to the court. These are exhaustively listed in art 4 of the LTE in order of increasing restriction on the child's conduct of life. The majority are non-institutional: admonition; restriction of the right to drive motorbikes; reparation; economic compensation or work for the benefit of the community; imposition of rules of conduct; imposition of obligations; attendance at training programs; and educational measures. The only institutional measure is the most severe measure: admission to an educational centre.
- 8.3.15. Before expanding on the final measure, it must be noted that the determination of what constitutes the most appropriate measure is based on two aspects reflecting the bifurcated rationale of the system and the compromise between a welfare and punitive model. The choice of measure is not solely dependent on a consideration of the child's needs. While the interest of the child is a guiding factor in the choice,<sup>589</sup> the court must also consider the seriousness of the committed offences.<sup>590</sup> In this sense, a proportionality calculus is involved and the court must consider the gravity of the offence, the damage caused (whether moral or material), the type and manner of commission of the offence, as well as the demonstrated degree of understanding or intent.<sup>591</sup>
- 8.3.16. As an overriding principle, the court is to give preference to those measures that represent less intervention in the child's autonomy and conduct of life.<sup>592</sup> Therefore, admission to an educational centre is a measure of last resort as it involves the greatest restriction of the child's liberty. The centres are administered by the DGRSP and can be implemented using one of

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<sup>587</sup> de Carvalho, *Alternatives to Custody* (n 552) 13–14.

<sup>588</sup> Rodrigues and Duarte-Fonseca (n 354) 1050.

<sup>589</sup> LTE (n 556) art 6(3).

<sup>590</sup> de Carvalho, *Alternatives to Custody* (n 552) 18; see also *Portugal 2<sup>nd</sup> Report* (n 559) [473].

<sup>591</sup> Rodrigues and Duarte-Fonseca (n 354) 1040.

<sup>592</sup> LTE (n 556) art 6(1).

three regimes of varying levels of openness to the outside world: open, semi-open, or closed.<sup>593</sup> They can accommodate 14, 12, or 10 children, respectively.

- 8.3.17. In open regimes, children live and are educated in the centre, but they may be allowed to spend weekends and holidays with family, as well as attend other school, education, training, employment, sports, and leisure activities outside, unaccompanied. What the child can do is determined by their detailed personal educational plan approved by the court.<sup>594</sup> This plan is a written document prepared by the technical expert caring for the child in the centre, drawn up with the child's participation and through consultation with various multidisciplinary professionals ranging from medical professionals, psychological experts, social services personnel, and pedagogical experts.<sup>595</sup>
- 8.3.18. In semi-open regimes, a child is educated in the centre and also attends various activities inside the centre, such as social, sports, and leisure activities. However, depending on the child's personal education plan, these other various activities may also occur outside the centre and the child may also visit family outside the centre if permitted.<sup>596</sup>
- 8.3.19. In closed regimes, the child lives and is educated in the centre, and all the aforementioned activities are limited to being undertaken inside. The child may only go outside of the centre to attend judicial duties, health needs, or for other exceptional reasons. While outside, the child must be under surveillance.<sup>597</sup>
- 8.3.20. Due to the extremely restricted nature of closed centres, there are limits as to which implementation regime can be used for a given child. These are based on age and severity of the offence. A closed regime can only be imposed on a child at least 14 years old at the time the measure is applied.<sup>598</sup> As for offending, a semi-open regime is justified only where the act corresponds to an offence against the person punishable by over three years' imprisonment, or two or more offences punishable by over three years' imprisonment.<sup>599</sup> Meanwhile, for a closed regime, the acts must correspond to an offence punishable by more than five years' imprisonment, or two or more offences against persons punishable by more than three years' imprisonment.<sup>600</sup>

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<sup>593</sup> Ibid art 4(3).

<sup>594</sup> de Carvalho, *Alternatives to Custody* (n 552) 18.

<sup>595</sup> Rodrigues and Duarte-Fonseca (n 354) 1061.

<sup>596</sup> de Carvalho, *Alternatives to Custody* (n 552) 18.

<sup>597</sup> Ibid 18.

<sup>598</sup> *LTE* (n 556) art 17(4)(b).

<sup>599</sup> Ibid art 17(3).

<sup>600</sup> Ibid art 17(4).

- 8.3.21. There are also varying time limits on the minimum and maximum periods a child is to be interned for. Internment in an open or semi-open regime can last between three months to two years, while a closed regime attracts internment for six months to two years.<sup>601</sup> This latter period can be extended to three years in the case of acts qualifying as more grave offences.<sup>602</sup>
- 8.3.22. Like most institutional placement measures in juvenile justice, the goal of such internment is to take the child out of their usual environment, help them internalise values according to the law, and provide them with resources to live a crime-free, socially and legally responsible life in the future.<sup>603</sup> To achieve this goal, internment interventions are structured around a variety of pedagogical programs run by qualified multidisciplinary teams, including clinical and therapeutic experts. Such programs cover education, various types of training, social and cultural activities, sports, health, and whatever else is required for the individual.<sup>604</sup> The formal education and training programs are the most valued by those interned.<sup>605</sup> Each child is cared for by a technical expert in the centre and this person follows, guides, and supervises the child's process, liaises with the child's family and social circles, and prepares whatever documentation is necessary to comply with the court's decision.<sup>606</sup>
- 8.3.23. If a child escapes or fails to return to the centre at the time specified in the documentation authorising their leave, they may be transferred to another centre or, as a last resort, restrained by physical force or pre-emptively by isolation from other people or areas in the centre.<sup>607</sup> It may also be possible for a judge to increase the length of the measure without altering what regime they are interned under or to replace it with a more restrictive regime.<sup>608</sup>
- 8.3.24. While in practice the centres appear to be comprehensive in addressing both welfare and punitive aims, certain criticisms have been made. First, while the centres are staffed with qualified professionals from a range of disciplines in order to ensure children receive individualised care tailored to their needs, some express concerns about a lack of therapeutically-focused custodial measures for those children suffering from mental health

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<sup>601</sup> Ibid art 18.

<sup>602</sup> Where the act corresponds to an offence punishable by more than eight years' imprisonment, or to two or more offences against the person punishable by more than five years' imprisonment: *ibid* art 18(3).

<sup>603</sup> *Ibid* art 17; Rodrigues and Duarte-Fonseca (n **354**) 1060–1.

<sup>604</sup> de Carvalho, *Alternatives to Custody* (n 552) 18.

<sup>605</sup> Maria João Leote de Carvalho, 'Rehabilitating and Educating for Responsible Autonomy: Two Sides of a Path to Personal and Social Well-Being' in Roberto Carneiro (ed.), *Youth, Offense and Well-being: Can Science Enlighten Policy?* (CEPCEP Universidade Católica Portuguesa, 2018) 227, 242 <[https://run.unl.pt/bitstream/10362/46561/1/C.1.\\_Rehabilitating\\_and\\_Educating\\_for\\_Responsible.pdf](https://run.unl.pt/bitstream/10362/46561/1/C.1._Rehabilitating_and_Educating_for_Responsible.pdf)> 242.

<sup>606</sup> Rodrigues and Duarte-Fonseca (n **354**) 1062.

<sup>607</sup> *Ibid* 1069–70.

<sup>608</sup> *Ibid* 1064.

problems.<sup>609</sup> Second, prior to 2015, there was no formalised procedure in the LTE to monitor the child's reintegration back into the community after their internment. However, a law in 2015 introduced the possibility of post-internment supervision for three months to a year.<sup>610</sup>

- 8.3.25. Before concluding, it should be noted that institutional placements are also possible under the LPCJ child protection regime<sup>611</sup> for children under 12 in conflict with the law, or where the pre-conditions for activation of the LTE system are not satisfied for a child aged 12–16 but the child is in danger — for example, where there is insufficient proof of acts qualifying as criminal conduct. However, there are certain differences from the educational intervention system. First, child welfare institutions cannot be run on a closed or semi-closed regime. They must be operated in an open regime where the child can freely enter and exit and the parents or guardians may freely visit within operating hours.<sup>612</sup> Second, child protection measures are not *necessarily* authorised by judicial order. Rather, the Children and Youth's Protection Committees established by the LPCJ are non-judicial institutions declared by administrative order<sup>613</sup> with multidisciplinary representation spanning social services, police authorities, youth associations, health services, and others.<sup>614</sup> However, the Committee's activities are supervised by the Public Prosecution Services, and where a measure is not consented to by the child or the parents, the Committee must report the case to the PPS, who may ultimately bring the case before a court for a court-ordered measure.<sup>615</sup>

## Conclusion

- 8.3.26. The minimum age of criminal responsibility in Portugal is 16. When children under this age commit acts that would otherwise amount to criminal conduct, there are two mechanisms to handle their cases. If they are under 12, they are only subject to the child protection legislation if they are a child in danger. Meanwhile, those aged 12–16 may be subject to educational intervention if the acts qualifying as a crime are proven and there is a manifested need for education in the law. This cohort may *also* be subject to the protection measures either instead of, or in conjunction with, educational interventions. The two preconditions for application of the LTE reflects the way in which the Portugal juvenile justice system operates on a model

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<sup>609</sup> Fostering Alternative Care for Troubled Minors and Centre for Studies in Human Development, *Project FACT for Minors: Fostering Alternative Care for Troubled Minors* (Final Report, 2018) 6–8.

<sup>610</sup> de Carvalho, 'Rehabilitating and Educating for Responsible Autonomy' (n 605) 246 n 18 <[https://run.unl.pt/bitstream/10362/46561/1/C.1.\\_Rehabilitating\\_and\\_Educating\\_for\\_Responsible.pdf](https://run.unl.pt/bitstream/10362/46561/1/C.1._Rehabilitating_and_Educating_for_Responsible.pdf)>.

<sup>611</sup> *LPCJ* (n 560) arts 35(1)(f), 49–54.

<sup>612</sup> *Ibid* art 53.

<sup>613</sup> *Ibid* art 12.

<sup>614</sup> *Ibid* art 17, 20.

<sup>615</sup> de Carvalho, *Alternatives to Custody* (n 552) 10 n 11.

spanning the welfare and punitive dimensions of delinquent behaviour. The deed must be accounted for in any measure taken, but emphasis is equally placed on ensuring the child receives individualised support from multidisciplinary professionals.

## 8.4. Case study 3: France (no strict MACR)

- 8.4.1. In the realm of youth justice, the French system is founded on mitigated criminal responsibility due to age, priority placed on educational rather than punitive law enforcement measures, and courts that have specialised jurisdiction over children.<sup>616</sup> While there has been a trend towards more repressive mechanisms reflecting a ‘tough on crime’ approach,<sup>617</sup> some scholars adopt a less pessimistic interpretation to argue that they remain in line with educational and diversionary goals.<sup>618</sup>
- 8.4.2. First, a preliminary note on the applicable rules. Since the immediate aftermath of World War II, the French law on juvenile justice has been contained in Ordinance No 45-174 of 2 February 1945. However, most provisions of this ordinance are repealed by Ordinance No 2019-950 of 11 September 2019 to come into force on the postponed date of 30 September 2021 (originally 31 March 2021). This new ordinance codifies the rules in the *Code of Criminal Justice for Minors*. This case study will therefore only make reference to the new set of rules in the code.

### Minimum age

- 8.4.3. Unlike the two case studies above, and indeed the majority of countries around the world, French law does not explicitly fix an age threshold below which children will not be criminally responsible. The CRC has expressed concern over this lack of a definitive minimum age.<sup>619</sup>
- 8.4.4. ‘Minors’ are defined in art 388 of the *Civil Code* to mean those persons under 18 years of age. As long as the minor is capable of discernment — that is, they are capable of having understood and willed their act, or understood the meaning of the criminal proceedings they are subject to<sup>620</sup> — they will be criminally responsible for the crimes, misdemeanours, or contraventions of which they have been found guilty.<sup>621</sup> This rule is codified in both the general *Penal Code* and the *Code of Criminal Justice for Minors*.<sup>622</sup> Like the common law presumption of *doli incapax* in

<sup>616</sup> Anne Wyvekens, ‘The French Juvenile Justice System’ in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer, 1<sup>st</sup> ed, 2006) 173, 173; see also Committee on the Rights of the Child, *Third and Fourth Periodic Reports of States Parties Due in 2007: France*, UN Doc CRC/C/FRA/4 (21 February 2008) 96–7 [574] (*‘France 3<sup>rd</sup> and 4<sup>th</sup> Report’*).

<sup>617</sup> Calvin Peeler, ‘Always a Victim and Never a Criminal: Juvenile Delinquency in France’ (1997) 22 *North Carolina Journal of International Law* 875.

<sup>618</sup> Anne Wyvekens, ‘The French Juvenile Justice System’ in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer, 1<sup>st</sup> ed, 2006) 173, 173; 185–6.

<sup>619</sup> Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: France*, UN Doc CRC/C/FRA/CO/4 (22 June 2009) [98] (*‘France 3<sup>rd</sup> and 4<sup>th</sup> Report Concluding Observations’*).

<sup>620</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L11-1.

<sup>621</sup> *Code penal* [Penal Code] (France) art 122-8.

<sup>622</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L11-1.

operation in Australia, there is a presumption that minors under 13 years of age are not capable of discernment.<sup>623</sup> While judicial interpretation has previously found very young children incapable of discernment<sup>624</sup> and some scholars cite an ‘age of reason’ below which minors lack the capacity to discern the consequences of their acts,<sup>625</sup> this is not fixed, and certainly not codified in legislation.<sup>626</sup>

- 8.4.5. Instead of a fixed threshold for *responsibility* or *culpability*, French law sets a strict framework of control on the judicial responses that youth courts can apply. When a child is found guilty of a criminal offence, they may be subject to educational measures at any age, but may only have penalties imposed on them after they have reached 13 years old.<sup>627</sup> Additionally, there are certain obligations or prohibitions that can be pronounced together with an educational measure, such as an obligation to undertake a civic training course. Some of these are limited by an additional age threshold and cannot be imposed on children below 10 years old.<sup>628</sup>
- 8.4.6. Therefore, as a general statement, ‘even a very young child may be found criminally liable’ but only educative measures can be applied.<sup>629</sup> For those incapable of discernment, they cannot be subject even to the educational measures as this relies on a finding of guilt.<sup>630</sup>
- 8.4.7. While there is no strict limit on criminal responsibility per se,<sup>631</sup> this discussion will treat 13 years of age as the threshold and explore how children under this age are handled at various stages if they engage in violent, anti-social, or otherwise criminal behaviour. Further, while juvenile courts have dual competence to hand down measures of educational assistance under the child protection system,<sup>632</sup> not all measures intended for the protection of juvenile delinquents are necessarily also seen as possible measures of educational assistance.<sup>633</sup>

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<sup>623</sup> Ibid art L11-1.

<sup>624</sup> Cour de Cassation [French Court of Cassation], 55-05.772, 13 December 1956 reported in (1956) Bull Crim n° 840 (concerning a 6-year-old child lacking sufficient capacity of reason and who therefore could only be released without the imposition of even educational measures).

<sup>625</sup> Calvin Peeler, ‘Always a Victim and Never a Criminal: Juvenile Delinquency in France’ (1997) 22 *North Carolina Journal of International Law* 875.

<sup>626</sup> Sylvain Jacopin, ‘Presumption(s) and minority in criminal law’ (2020) 1(1) *Journal of Criminal Science and Comparative Criminal Law* 27.

<sup>627</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) arts L11-3, L11-4.

<sup>628</sup> Ibid arts L112-1–L112-3.

<sup>629</sup> Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1992: France*, UN Doc CRC/C/3/Add.15 (4 June 1993) [161] (*France Initial Report*). The statement about pre-trial detention in [161] is no longer current law.

<sup>630</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L11-3.

<sup>631</sup> See, eg, Committee on the Rights of the Child, *Fifth Periodic Reports of States Parties Due in 2012: France*, UN Doc CRC/C/FRA/5 (28 January 2015) 93 [658]–[659] (*France 5<sup>th</sup> Report*).

<sup>632</sup> Wyvekens (n 616) 180.

<sup>633</sup> Flore Capelier, ‘Educational Assistance’ (2012) 7 *Journal Du Droit Des Jeunes* [Youth Law Journal] 54.

Therefore, this case study focuses only on measures available under the youth justice framework.

## Investigative Procedures

- 8.4.8. As in Denmark, there are age limits on certain investigative procedures and other matters of criminal procedure. First, children under 13 years of age cannot be placed in pre-trial detention.<sup>634</sup> Second, children under 13 years of age generally cannot be held in police custody.<sup>635</sup> Children aged 10–13 may be held in custody only in exceptional circumstances and for no longer than twelve hours — exceptionally, this may be extended by a period no longer than an additional twelve hours.<sup>636</sup> To be justified, this requires there to be plausible reasons to suspect that the 10–13-year-old child has committed or attempted to commit a crime or an offense punishable by at least five years' imprisonment, and the measure must be the only way to achieve the objectives of custody.<sup>637</sup> It also must be done with the prior agreement and under the control of a prosecutor or the examining magistrate. In fact, from the moment the child is held by the police for an identity check, the prosecutor must be informed,<sup>638</sup> as must the parents.<sup>639</sup> The public prosecutor or magistrate must also appoint a doctor to examine the child.<sup>640</sup> As this exception only applies to children aged 10–13, those under 10 are not legally allowed to be held in police custody in any circumstance.
- 8.4.9. Unlike Denmark, there is no specific legislative framework on how children are to be otherwise dealt with in the course of police work. However, this question has been addressed in an internal circular dated 22 February 2006 from the Ministry of the Interior.<sup>641</sup> Those instructions emphasise that even though juvenile delinquents are not to be dealt with using a lax or indifferent attitude, any treatment must always have absolute respect for their dignity. This instruction makes clear that children can be arrested, although, as aforementioned, there are limits on matters such as taking children into police custody. The instructions also state that the use of coercion may prove necessary, even against children, but must be particularly measured

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<sup>634</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L334-1.

<sup>635</sup> *Ibid* art L413-6.

<sup>636</sup> *Ibid* art L413-1.

<sup>637</sup> The objectives of custody are listed in the *Code de procédure pénale* [Code of Criminal Procedure] (France) art 62-2. Includes allowing the execution of investigations, guarantee the person will be available for presentation before the public prosecutor, or to prevent the person from tampering with evidence.

<sup>638</sup> Jocelyne Castaignède and Nathalie Pignoux, 'France' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 1, 483, 514.

<sup>639</sup> Wyvekens (n 616) 179.

<sup>640</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L413-4.

<sup>641</sup> *France 3<sup>rd</sup> and 4<sup>th</sup> Report* (n 616) 101 [600].

and strictly limited to what the needs of questioning require. It reiterates that any measures of intervention must be part of a graduated use of force, emphasising this to be particularly the case with young delinquents. While there is no specific prohibition against handcuffing a child, the general rule applies — handcuffs are only justified where the person poses a danger to themselves or others, or may escape.<sup>642</sup>

## Hearing

- 8.4.10. Once a child has engaged in criminal behaviour, or is suspected of so doing, the prosecutor's office has some leeway in determining whether to present them before a court.<sup>643</sup> If they believe that *not* prosecuting the child is better suited to ensuring compensation for the victim, stopping any disturbance arising from the offence, and diverting the offender, they may choose to pursue alternatives to prosecution.<sup>644</sup> Outside of formal procedures, similar prosecutorial initiatives may also be undertaken as a preventative measure before an offence occurs. Wyvekens cites the example of a Community Justice Centre summoning the parents of loitering children.<sup>645</sup>
- 8.4.11. Alternatively, the prosecutor may request that an investigation be opened by the investigating magistrate. As France has an inquisitorial system of criminal justice, the investigating judge oversees the investigation with the help of assigned police. They act as an impartial arbiter to establish the truth through discovering evidence, a process for which they can order arrests, communications interception, or for the police to conduct lawful inspections.<sup>646</sup> Where the offence in question is only a misdemeanour or a minor offence rather than a crime, the juvenile judge as an investigating magistrate can act upon merely contact by a judicial police officer. After the investigation is complete, the juvenile judge may decide there is insufficient evidence and issue a settlement; judge the case but be limited to pronouncing educational measures; or send the case to the juvenile court.<sup>647</sup> This latter judicial body is composed of a presiding youth court magistrate and two lay judges. They primarily judge misdemeanours or minor offences committed by children, or crimes committed by children under 16. They are authorised to impose penalties, though this is not relevant for those children under 13 years of age. In the

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<sup>642</sup> 'Circular N° PN / CAB / N° 06-010051: What to Do with Minors during Police Interventions and When They Are Placed under the Responsibility of the National Police or Gendarmerie' (2006) 5 *Journal Du Droit Des Jeunes* [Youth Law Journal] 48.

<sup>643</sup> Wyvekens (n 616) 181.

<sup>644</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France)) art L422-1; the alternatives are specified in the general criminal procedure code as this measure is not limited to minors: *Code de procédure pénale* (n 637) art 41-1.

<sup>645</sup> Wyvekens (n 616) 181.

<sup>646</sup> *Ibid* 178.

<sup>647</sup> Jocelyne Castaignède and Nathalie Pignoux, 'France' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 1, 483, 517.

most serious of cases involving children 16–18 years old, the juvenile assizes court may be seized — this is a court of three professional magistrates and a citizen jury.<sup>648</sup>

- 8.4.12. Regardless of the forum, from the moment of arrest, a lawyer is present at every stage of the procedure to assist the child and ensure the protection of their rights.<sup>649</sup>

## Measures

- 8.4.13. If guilt is established,<sup>650</sup> the measures that may be incurred by a child under 13 may only be of an educational nature: a judicial warning or a judicial educational measure.<sup>651</sup> A decision to impose an educational measure is recorded on the child’s criminal record in the *Casier Judiciaire National* (National Criminal Records) but is automatically expunged after three years.<sup>652</sup>
- 8.4.14. While educational measures are characterised as a ‘sanction’,<sup>653</sup> it is nevertheless aimed at protecting, assisting, educating, and integrating the child, and ensuring they have access to care.<sup>654</sup> It can take various forms and have various different obligations attached, all of which are designed to offer the child individualised support on the basis of their personal, family, health, and social situation.<sup>655</sup> To achieve this individualised measure, a judge or court must carry out an investigation of the child’s personality, social situation, and family situation before they can pronounce an educational measure against a child convicted of a felony, an offence, or a contravention of the most serious class.<sup>656</sup> This process can be assisted by services in the relevant public sector body, the Directorate of Judicial Protection of Youth. One service is the court’s educational service (SEAT), who collects socio-educational information on the child, consults with and guides the child and their families, and proposes educational solutions.<sup>657</sup> Another are the multidisciplinary centres for educational action. They assist the judicial officer through investigations, working with the child as well as their broader social environment.<sup>658</sup>

<sup>648</sup> Wyvekens (n 616) 183.

<sup>649</sup> Jocelyne Castaignède and Nathalie Pignoux, ‘France’ in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 1, 483,517.

<sup>650</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L11-3, book V title I ch I.

<sup>651</sup> *Ibid* art L111-1.

<sup>652</sup> *Ibid* arts L631-1– L631-3. See also Claire Sands, *Growing Up, Moving On: The International Treatment of Childhood Criminal Records* (Report, 2016) 39–40.

<sup>653</sup> Made clear in the language of *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L111-1.

<sup>654</sup> *Ibid* art L112-1.

<sup>655</sup> *Ibid* art L112-2.

<sup>656</sup> *Ibid* book III title II ch I.

<sup>657</sup> Wyvekens (n 616) 183; ‘Les Services de Milieu Ouvert [Open Environment Services]’, *Ministère de la Justice* (Web Page, 2017) <<http://www.justice.gouv.fr/justice-des-mineurs-10042/la-dir-de-la-protection-judiciaire-de-la-jeunesse-10269/les-services-de-milieu-ouvert-18683.html>>.

<sup>658</sup> Wyvekens (n 616) 183.

These requirements and services reflect an emphasis on the personality of the child as well as their broader social and familial environment to ensure that any measure imposed is helpful and suited to the particular child's case.

- 8.4.15. As for how an educational measure is implemented, this may be done by the child being monitored in an 'open environment'. This means the child is kept in their current environment but frequently visited by a person or service qualified in managing children. That person or service assists and advises the family and reports to the judge on the progress of the rehabilitation or education.<sup>659</sup> If this measure proves unsuccessful, the judge or court can impose additional measures.
- 8.4.16. As mentioned above, various different obligations can be attached to an educational measure, including a 'placement module' where the child is entrusted for a maximum of one year to either a family or other trustworthy person; a government establishment under the Directorate of Judicial Protection of Youth; or an authorised private educational institution or establishment.<sup>660</sup> Focusing on the second option, for children under 13, these placements aim to remove the child from their natural environment in order to reintegrate them into daily social life through a number of organised school, professional, cultural or sporting activities, while also allowing them to continue their education or vocational training as the case may be.<sup>661</sup>
- 8.4.17. The Directorate oversees a variety of placement structures. Some are small structures providing long-term lodging, such as a social children's home (*maison d'enfants à caractère social*)<sup>662</sup> which may operate as either a boarding facility or as an open home where children receive education or vocational training outside the home.<sup>663</sup> Others are secure educational centres (*centres éducatifs renforcés*) for those more delinquent or marginalised children who are in danger of recidivism and potential imprisonment (if possible for their age).<sup>664</sup> The children receive constant support from a multidisciplinary team of staff including educators and psychologists and stay with only a

<sup>659</sup> 'Les Mesures d'action Éducative en Milieu Ouvert Prononcées par le Juge des Enfants [The Measures of Educational Action in an Open Environment Pronounced by the Children's Judge]', *Village de la Justice* (Web Page 2015) <<https://www.village-justice.com/articles/Les-mesures-action-educative,19547.html>>.

<sup>660</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L112-2.

<sup>661</sup> 'Les Établissements de Placement [Placement Institutions]', *Ministère de la Justice* (Web Page, 2010) <<http://www.justice.gouv.fr/justice-des-mineurs-10042/la-dir-de-la-protection-judiciaire-de-la-jeunesse-10269/les-etablissements-de-placement-18684.html>>.

<sup>662</sup> Jocelyne Castaignède and Nathalie Pignoux, 'France' in Frieder Dünkler et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 1, 483,509.

<sup>663</sup> 'Maison d'Enfants à Caractère Social (MECS) [Social Children's Home (MECS)]', *Action-Sociale* (Web Page) <<https://annuaire.action-sociale.org/etablissements/protection-de-l-enfance/maison-d-enfants-a-caractere-social-177.html>>.

<sup>664</sup> Wyvekens (n 616) 184–5; Jocelyne Castaignède and Nathalie Pignoux, 'France' in Frieder Dünkler et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 1, 483,509.

small group of 6–8 other children.<sup>665</sup> The centres are based around programs run in sessions, and each session round cannot exceed six months.<sup>666</sup>

- 8.4.18. The most restrictive option of a *closed* educational centre (*centres éducatifs fermés*) is explicitly excluded from the placement provisions under an educational measure.<sup>667</sup> However, it must be noted that ‘closed’ denotes *legal* rather than *physical* closure. If the child attempts to escape, they may be incarcerated. In this sense, closed educational centres differ from the structures traditionally run by the Directorate.<sup>668</sup> These centres are only available for those aged 13 or above.<sup>669</sup>
- 8.4.19. From what is written on these placement establishments, and given that even the most ‘secure’ option is ‘closed’ only in the sense of legal closure, it does not appear that placement institutions in France feature the same degree of *physical* security or restriction as that which can be found in Denmark. However, since criminal penalties can be imposed in France from 13 years of age, compared to the higher threshold of 15 in Denmark, France has a smaller cohort of children who are outside the possibility of punitive detention.
- 8.4.20. Aside from these measures that are imposed *after* an offence has been committed and guilt established, there are also various prevention mechanisms in place to combat juvenile delinquency. These are largely undertaken at the local level through various partnerships of governmental bodies and non-governmental organisations. While not necessarily targeted towards juvenile delinquency *per se*, they seek to prevent problematic behaviour before it arises. Most of these measures revolve around helping parents exercise their authority or working with schools to help those children who are at risk of school marginalisation and dropping out, or have already done so.<sup>670</sup> There are also health-based measures, including some aimed at addressing youth drug or alcohol addiction.<sup>671</sup>

## Conclusion

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<sup>665</sup> ‘Centre Éducatif Renforcé] (Web Page) <<https://justice.ooreka.fr/astuce/voir/481287/centre-educatif-renforce>>.

<sup>666</sup> ‘Les Établissements de Placement [Placement Institutions]’, *Ministère de la Justice* (Web Page, 2010) <<http://www.justice.gouv.fr/justice-des-mineurs-10042/la-dir-de-la-protection-judiciaire-de-la-jeunesse-10269/les-etablissements-de-placement-18684.html>>.

<sup>667</sup> *Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art L112-14.

<sup>668</sup> Jocelyne Castaignède and Nathalie Pignoux, ‘France’ in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 1, 483,509.

<sup>669</sup> Wyvekens (n 616) 185.

<sup>670</sup> See generally Wyvekens (n 616) 175–7; *France 5<sup>th</sup> Report* (n 631) 90 [627]–[634].

<sup>671</sup> *France 5<sup>th</sup> Report* (n 631) 90 [627]–[631].

8.4.21. In summary, France is relatively unique in its lack of a fixed minimum age of criminal responsibility. While there may be an ‘age of reason’ below which a very young child cannot have discernment — and therefore cannot be criminally responsible — this is neither codified in legislation nor universally recognised in the literature. In place of a minimum age, French law imposes strict limits on what measures can be imposed. Below the age of 13, penalties cannot be applied. Only educational measures may be used. Various obligations may be attached to an educational measure, including a ‘placement module’. This can be executed at a number of different locations, including government-run institutions of multiple kinds. However, even those with a high degree of restriction on the child’s liberty are restricted only in a legal sense, rather than denoting physical closures. Finally, it should be noted that, at least within the criminal justice system, the ability to impose any measure relies on a finding of guilt and cannot be used as a diversionary process away from formal court proceedings entirely.

## Appendix A : MACR and doli-incapax equivalent presumptions in OECD countries

NOTE: ages are not inclusive – i.e., 14–18 means older than 14, but under 18.

Tribunal = judicial (i.e., courts), non-judicial (e.g., government department workers, psychiatric specialists, etc), or mixed (combination of both judicial and non-judicial persons)

Country	'MACR' <sup>672</sup>	Criminal Detention <sup>673</sup>	Protective Detention <sup>674</sup>	Tribu nal	<i>Rebuttable threshold</i> <sup>675</sup>	MACR carve-outs (raised or lowered minimum age thresholds)	Notes
<b>Australia</b>	10 <sup>676</sup>						
<b>Austria</b>	14 <sup>677</sup>				14–18	Raised MACR for moderate misdemeanours: children aged 14–16 cannot be subject to criminal penalties where their misconduct does not involve serious fault and the application of youth justice is not necessary for preventing recidivism. <sup>678</sup>	A child aged between 14–18 will not be punished where the lacked the maturity to understand their actions to be illegal or to follow the law. <sup>679</sup>

<sup>672</sup> This is the prescribed minimum age of criminal responsibility, but does not necessarily reflect the minimum age at which a child can be criminally punished for an act. For example, in New Zealand, if a child commits a crime that does not fall within the more serious categories, the minimum age is 14. However, if a child commits murder, the minimum age is the prescribed 10 years old. Therefore, there is a *raised* MACR where the offence does *not* fall within the prescribed categories.

<sup>673</sup> Minimum age of criminal detention. This refers to the lower age limit for a *judicial* reaction of custodial detention. Therefore, this will necessarily be the same or higher than the MACR.

<sup>674</sup> Minimum age of protective detention. This refers to the lower age limit where a child can be placed in institutions for purposes other than as punishment for criminal offending, including for protective, social welfare, or educative purposes.

<sup>675</sup> Or equivalent presumptions concerning the capacity of children to understand the wrongfulness of acts and act accordingly.

<sup>676</sup> All States and the Commonwealth.

<sup>677</sup> *Jugendgerichtsgesetz* [Juvenile Court Act] (Austria) 1988, s 1(1)-(2).

<sup>678</sup> *Ibid* s 4(2)(2).

<sup>679</sup> *Ibid* s 4(2)(1).

<b>Belgium<sup>680</sup> (federal)</b>	12 <sup>681</sup>	12					Custodial measures/sentences are always in specialised institutions. General lower limit is 14, but custodial sentences may be imposed on children aged 12 or 13 in exceptional circumstances. <sup>682</sup>
<b>Belgium (Flemish)</b>	12 <sup>683</sup>	12					Custodial measures/sentences are always in specialised institutions. The general lower limit is 14, but custodial sentences may be imposed on children aged 12 or 13 in exceptional circumstances. <sup>684</sup> For ‘long detention’, the limit is even higher, imposed only on those children aged over 16 years. Previously there was an ‘exceptional circumstances’ exception to this age requirement, but this was held to contravene the principle of legality and therefore annulled. <sup>685</sup>
<b>Belgium (French)</b>	0 <sup>686</sup>	12					Custodial measures/sentences are always in specialised institutions. General lower limit is 14, but custodial sentences may be imposed on children aged 12 or 13 in exceptional circumstances. <sup>687</sup>

<sup>680</sup> Belgium is a federal state with three Communities: Dutch (Flemish), French, and German. Since the sixth state reform in 2014, competence over judicial reactions to juvenile delinquency was largely transferred to the Communities. Decree regulations made by the Communities would replace the substantive provisions of the federal Youth Protection Act (1965), though the federal Committee still retains competence over the organisation of youth courts. The German community has yet to finalise its youth justice framework.

<sup>681</sup> *Ordonnantie betreffende de Jeugdhulpverlening en Jeugdbescherming* [Statute on Youth Care and Child Protection] (Belgium) 16 May 2019, art 17(2) (irrebuttable presumption of non-responsibility).

<sup>682</sup> Ibid art 73, 74, 85, 86.

<sup>683</sup> *Jeugddelinquentedecreet* [Flemish Decree on Juvenile Delinquency] (Belgium) 15 February 2019, art 4(2) (irrebuttable presumption of non-responsibility).

<sup>684</sup> Ibid arts 35–7.

<sup>685</sup> *Grondwettelijk Hof* [Belgian Constitutional Court], decision n° 22/2021, 11 February 2021, [B.55.2]–[B.56]; ‘*Geen langdurige gesloten begeleiding meer mogelijk voor jeugddelinquenten onder de 16 jaar* [Long-term closed supervision is no longer possible for juvenile delinquents under the age of 16]’, *Dillen Advocaten* (Web Page, 2021)

<<https://www.dillenadvocaten.be/documents/news-items/kl2529221-geen-langdurige-gesloten-begeleiding-meer-mogelijk-voor-jeugddelinquenten-onder-de-16-jaar.xml?lang=nl>>.

<sup>686</sup> The French community’s decree does not specify a lower age limit. However, minors under 12 at the time of the offence may only be subject to the provisional measures listed in art 101(4) or the final measure of a reprimand, in art 109 of *Décret portant le code de la Prévention, de l’Aide à la jeunesse et de la Protection de la Jeunesse* [Decree on Prevention, Youth Aid and Youth Protection] (Belgium) 18 January 2018 (‘*French Decree*’): see Jantien Leenknecht, Johan Put and Katrijn Veeckmans, ‘Age Limits in Youth Justice: A Comparative and Conceptual Analysis’ [2020] (1) *Erasmus Law Review* 13.

<sup>687</sup> French Decree (n 686) art 124.

<b>Canada</b>	12 <sup>688</sup>					
<b>Chile</b>	14 <sup>689</sup>					Sanctions listed under art 6 include socio-educative internment in a close or semi-closed regime.
<b>Colombia</b>	14 <sup>690</sup>	14 <sup>691</sup>				While children from 14 years old onwards can be held criminally responsible, they do not establish a criminal record as with adults. <sup>692</sup>
<b>Costa Rica</b>	18 <sup>693</sup>		12	Judicial		While the Penal Code applies only to those aged 18 and above, children between 12–18 are subject to the Juvenile Criminal Justice Law when they commit an act classified as an offence or contravention of the Penal Code or other laws. <sup>694</sup> Once commission of the act is proven, the law provides for a range of sanctions, from socio-educational sanctions such as a reprimand or paying reparation, to guidance and supervision orders such as orders to enrol in a formal education or vocational centre or to be interned at a rehabilitation centre for substance abuse. As a last resort there are also penalties involving deprivation of liberty: home confinement; internment during free time; or internment in a specialised centre. <sup>695</sup> The final measure is for exceptional cases only, where the child has committed an intentional crime that would be punishable by at least six years' imprisonment, or where they have unjustifiably failed to comply with previous measures imposed. The maximum

<sup>688</sup> *Criminal Code* (Canada) s 13 ('No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.')

<sup>689</sup> *Responsabilidad Penal Adolescente* [Adolescent Criminal Responsibility Law] (Chile) 2007, art 3 ('This law shall be applied to those who, at the moment in which the execution of the crime has begun, are over fourteen and under eighteen years of age, who, for the purposes of this law, are considered adolescents.')

<sup>690</sup> *Código de Infancia y Adolescencia* [Code for Children and Adolescents] (Colombia) arts 139, 142 (art 142 provides that persons under the age of 14 shall not be judged or declared criminally liable or deprived of their liberty).

<sup>691</sup> *Ibid* art 161 (for the purposes of criminal responsibility, deprivation of liberty is only applicable to persons aged 14–18 at the time of committing the act. It shall only be used as a pedagogical measure). Deprivation of liberty is defined in art 160 to mean any form of placement in a public or private establishment, ordered by a judicial authority, from which the child cannot leave by their own free will. When a child is deprived of their liberty, it must be done in specialised care establishments under the family welfare system; if there are no such establishments, they shall be provisionally released or subject to house arrest: art 162.

<sup>692</sup> *Ibid* art 159.

<sup>693</sup> *Código Penal* [Penal Code] (Costa Rica), art 17 ('This Code shall apply to persons over eighteen years of age').

<sup>694</sup> *Ley de Justicia Penal Juvenil* [Juvenile Criminal Justice Law] (Costa Rica) 3 April 1996, art 1.

<sup>695</sup> *Ibid* art 121.

						<p>period of an internment measure is 10 years for those aged 12–15, and fifteen years for those aged 15–18.<sup>696</sup></p> <p>If the child is under 12, they are not subject to the law but their case must be referred to the National Children's Trust (the autonomous government institution in charge of child protection).<sup>697</sup></p>
<b>Czech Republic</b>	15 <sup>698</sup>		Possible under MACR	Judicial		<p>Children under 15 who commit an action otherwise punishable as a criminal offence can have educational and/or protective measures imposed on them by the Court for Youth under the <i>Juvenile Justice Act 2003</i>.<sup>699</sup> However, they are in no case criminally liable and the measures are ordered by the court in exercise of its civil jurisdiction.<sup>700</sup></p> <p>For example, they may be assigned to a therapeutic, psychological, or other suitable program in a Centre for Educational Assistance.<sup>701</sup> A more serious measure is placement in 'protective education', which is a type of home education carried out in facilities of the Ministry of Education.<sup>702</sup> Protective education is mandatory for children aged 12–15 who commit an otherwise punishable offence that attracts imposition of an exceptional punishment (prescribed in the Penal Code). It is optional for those under 15 if the act was otherwise criminal and the measure is necessary to ensuring the child's proper upbringing.<sup>703</sup></p> <p>Children may also be placed in protective treatment, which is a type of medical treatment carried out in the facilities of the Ministry of Health.<sup>704</sup> This lasts as long as is necessary to</p>

<sup>696</sup> Ibid art 131.

<sup>697</sup> Ibid art 6.

<sup>698</sup> *trestní zákoník* [Criminal Code] (Czech Republic) 2009, s 25 ('Anyone who has not reached the fifteenth year of age at the time of committing an offence, shall not be criminally liable.');

*Zákon o soudnictví ve věcech mládeže* [Act on the Liability of Juveniles for Illegal Acts and on Juvenile Justice] (Czech Republic) 2003, art 89(1) ('A child under fifteen years of age is not criminally liable') (*Juvenile Justice Act* (Czech Republic) 2003).

<sup>699</sup> *Juvenile Justice Act* (Czech Republic) 2003 (n 698) s 89(2). The list of measures are contained in s 93.

<sup>700</sup> Ibid s 96; Helena Válková and Jana Hulmáková, 'Czech Republic' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2nd ed, 2010) vol 1, 265, 267.

<sup>701</sup> *Juvenile Justice Act* (Czech Republic) 2003 (n 698) s 93(1)(d).

<sup>702</sup> Ibid s 93(1)(f).

<sup>703</sup> Ibid s 93(2)–(3)

<sup>704</sup> Ibid s 93(1)(g); Válková and Hulmáková (n 700) 267.

						ensure proper healing, but must be reviewed at least every 12 months. <sup>705</sup> All measures are guided by the principle of restorative justice and the goal of restoring and reintegrating the child into their family and social environment, while also preventing further misconduct. <sup>706</sup> Any measure must also be proportionate to the type and dangerousness of the act committed. <sup>707</sup>
<b>Denmark</b>	15 <sup>708</sup>		12 except in rare cases <sup>709</sup>			It is possible for children aged 12–18, or under 12 in exceptional circumstances, to be placed in secure institutions. <sup>710</sup> If this is recommended, and the parents do not consent, the decision is made by municipal social authorities with multidisciplinary membership of judges, child experts, and police or council members. Placement in a secure institution of children under 15 is reportedly rare. <sup>711</sup>
<b>Estonia</b>	14 <sup>712</sup>		12, or 10 in exceptional	Judicial		Children aged 7–14 who commit unlawful acts that meet the elements of offences or misdemeanours (s 1(1)–(2)) are subject to the <i>Juvenile Sanctions Act 1998</i> . <sup>714</sup> The most severe measure under this Act is committal to a School for Students with Special Needs ('SSSN'). <sup>715</sup> This is

<sup>705</sup> *Juvenile Justice Act* (Czech Republic) 2003 (n 698) s 93(5).

<sup>706</sup> Válková and Hulmáková (n 700) 256–6; *ibid* s 3(1).

<sup>707</sup> *Juvenile Justice Act* (Czech Republic) 2003 (n 698) s 3(3).

<sup>708</sup> *Straffeloven* [Criminal Code] (Denmark), s 15 ('Acts committed by children under the age of 15 are not punishable.') Those who offend under the minimum age are given 'as if charges'.

<sup>709</sup> *Voksenansvarsbekendtgørelsen* [Executive Order on Adult Responsibility for Children and Young Persons at a Placement Facility] (BEK no 810 of 13/08/2019) s 5(3), 7(2).

<sup>710</sup> *Servicebogen* [Social Services Act] (Denmark) 6 August 1998, s 63B; *Lov om bekæmpelse af ungdomskriminalitet* [Law on Combatting Juvenile Delinquency] (Denmark) 18 December 2018, s 16.

<sup>711</sup> In 2020, there were five children under 15 placed in a partly closed residential institution or partly closed ward in an open residential institution, and four children placed in a locked ward: Statistikbanken [Statistics Denmark], *Children and Young Persons Placed outside of Own Home per 31<sup>st</sup> December by Place of Accommodation, Age and Sex* (ANBAAR15, 18 June 2021).

<sup>712</sup> *Karistusseadustik* [Penal Code] (Estonia) 6 June 2001, s 33 ('A person is capable of guilt if, at the time of commission of the act, he or she is mentally capable and at least fourteen years of age.') Offending committed by those under 14 are described as 'an unlawful act corresponding to the necessary elements of a criminal offence prescribed by the Penal Code' or 'elements of a misdemeanour prescribed by the Penal Code or another Act': *Alaealise mõjutusvahendite seadus* [Juvenile Sanctions Act] (Estonia) 1 January 1998, s 1.

<sup>714</sup> *Ibid* ss 1(2), 2.

<sup>715</sup> *Ibid* s 3(9).

			circumstances <sup>713</sup>			<p>available for children at least 12 years old, or in exceptional circumstances, children at least 10 years old and who has committed a crime.<sup>716</sup></p> <p>In any case, it is a measure of last resort used only where previous measures have been unsuccessful in rehabilitating and deterring the child. It can be imposed for a maximum of two years.<sup>717</sup> Under this measure, the child is under constant disciplinary supervision and is prohibited from leaving except when otherwise provided by the school's statute.<sup>718</sup> Despite the restriction, the treatment still emphasises educative and therapeutic rehabilitation.<sup>719</sup></p> <p>Measures under the <i>Juvenile Sanctions Act</i> are imposed by Juvenile Committees, which have seven members: persons with experience in education, social welfare, health care, a police officer, a probation officer, a staff employee of the county government, and a secretary.<sup>720</sup> However, children can only be sent to a SSSN with permission from a judge in a court ruling.<sup>721</sup></p>
<b>Finland</b>	15 <sup>722</sup>		12			<p>Children older than 12 may be interned for up to 90 days in a secure children's Special Care Unit within the child welfare system for 'special care'. Staff in these homes have authority to impose short-term restriction of liberty to the extent required to provide the care necessary.<sup>723</sup> The decision is made by a local authority, but the child must first be assessed by a multidisciplinary team including a psychologist, psychiatrist and social worker.<sup>724</sup></p>

<sup>713</sup> *Alaealise mõjutusvahendite seadus* [Juvenile Sanctions Act] (Estonia) 1 January 1998, s 6(3).

<sup>716</sup> *Ibid* s 6(3).

<sup>717</sup> *Ibid* s 6.

<sup>718</sup> *Ibid* s 6<sup>1</sup>(7).

<sup>719</sup> Judit Strömpl and Anna Markina, 'Children's Rights and the Juvenile Justice System in Estonia' (2017) 25 *Juridica International* 66, 70 n 26.

<sup>720</sup> Jaan Ginter and Jaan Sootak, 'Estonia' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2nd ed, 2010) vol 1, 399, 400.

<sup>721</sup> *Ibid* 405.

<sup>722</sup> *Rikoslaki* [Criminal Code] (Finland) 1889, ch 3 s 4 (515/2003) ('Prerequisites for criminal liability are that the perpetrator had reached the age of fifteen years at the time of the act and is criminally responsible'); *Laki nuorista rikoksentehtävistä* [Young Offenders Act] (Finland) 1940.

<sup>723</sup> *Lastensuojelulaki* [Child Welfare Act] (Finland) 2007, s 71.

<sup>724</sup> Hart D, *Corrections or Care? The Use of Custody for Children in Trouble* (Report, 2015) 8–9.

<b>France</b>	0 <sup>725</sup>	13			7–18	<p>Only children aged 13–18 can be subject to a penal sentence or sanction, including imprisonment. However, children under 13 can in theory still be ‘criminally responsible’ if they have discernment, though may only be subject to educational measures (if below 10 years old) or educational sanctions (if above 10).</p> <p>It may be the case that infants below the age of reason have no capacity to discern the consequences of their acts and therefore cannot be subject even to the educational measures,<sup>726</sup> but this age is not fixed.</p> <p>The test of ‘discernment’ for those aged up to 18 is not unlike a <i>doli incapax</i> test.</p>
<b>Germany</b>	14 <sup>727</sup>				14–18	<p>Juveniles (those aged 14–18) will only incur criminal liability if they have sufficient moral and intellectual maturity to understand the wrongfulness of their actions and act accordingly. If they do not have this maturity, a judge may order those measures available for family and guardianship matters.<sup>728</sup></p>
<b>Greece</b>	15 <sup>729</sup>		12 <sup>730</sup>	Judicial		<p>Minors are defined as those between 12–18 years old.<sup>731</sup> While the MACR is 15, measures may be imposed on those minors under that age. The thresholds are:</p> <p>12–15: cannot be held criminally liable for an offence. Can be subject to rehabilitative/reformatory or therapeutic</p>

<sup>725</sup> Children under 13 are presumed incapable of discernment (*Code de la justice pénale des mineurs* [Code of Criminal Justice for Minors] (France) art LII-1), but there is no express absolute threshold below which children cannot be held criminally responsible (*Code penal* [Penal Code] (France) art 122-8). However, there are limits to what reactions can be had to offending behaviour. Youth under 10 who are found guilty of a criminal offence can only be subject to ‘educational measures’; those under 13 can only be subject to ‘educational measures’ or ‘educational sanctions’, while those above 13 can be subject to penalties as well, including criminal detention.

<sup>726</sup> Cour de Cassation [French Court of Cassation], 55-05.772, 13 December 1956 reported in (1956) Bull Crim n° 840 (concerning a 6-year-old child).

<sup>727</sup> *Strafgesetzbuch* [Criminal Code] (Germany) s 19 (‘Whoever is under 14 years of age at the time of the commission of the offence is deemed to act without guilt.’ The section is titled ‘Lack of criminal responsibility of children’). Youth justice is regulated by the *Jugendgerichtsgesetz* [Youth Courts Law] (Germany) 1974, which applies to persons older than 14 but not yet 21: art 1.

<sup>728</sup> *Jugendgerichtsgesetz* [Youth Courts Law] (Germany) 1974, s 3.

<sup>729</sup> Ποινικός κώδικας [Penal Code] (Greece) 1951, art 126(1) (the offence committed by a minor of twelve to fifteen years of age shall not be imputed to him).

<sup>730</sup> Minors between 12–15 can be subject to rehabilitative/reformatory measure, which includes placement of the minor in an appropriate State, municipal, community, or private educational institution: *ibid* arts 122, 126(1).

<sup>731</sup> *Ibid* art 121(1).

						measures, <sup>732</sup> including placement in an educational institution. 15: can be held criminally liable but rehabilitative or therapeutic measures should still be imposed, unless the circumstances necessitate the last-resort measure of juvenile detention <sup>733</sup> The measures are imposed by the Juvenile Court after consideration of the child's character, social condition, and environment, as well as the report submitted by the Juvenile Court Aid or a probation officer. <sup>734</sup>
<b>Hungary</b>	12 <sup>735</sup>	14 <sup>736</sup>			12–14	12 is a lowered MACR. The MACR for offences generally = 14. Children aged 12–14 may be held criminally responsible for homicide, voluntary manslaughter, battery, robbery and plundering, if they had the capacity to understand the nature and consequences of their acts. <sup>737</sup>
<b>Iceland</b>	15 <sup>742</sup>					Reactions are categorised as 'penalties' or 'measures'. For those aged 12–14, only measures may be imposed. <sup>738</sup> In all cases, 'penalties' shall only be imposed on juveniles (aged 12–18) when a 'measure' appears to be impractical. <sup>739</sup> Measures include placement in a reformatory institution, but no imprisonment, custodial arrest or community service work can be imposed in addition to such placement. <sup>740</sup> A measure or penalty involving the deprivation of liberty is a last resort. <sup>741</sup>

<sup>732</sup> Ibid art 126(1). Reformatory measures are provided for in art 122 and range from a reprimand to placement of the minor in an appropriate State, municipal, community, or private educational institution. Therapeutic measures are provided for in art 123, and are imposed where the minor's condition requires special treatment, such as in cases of mental illness or substance exposure. They can be imposed only after diagnosis and pursuant to the opinion of a multidisciplinary group of doctors, psychologists and social workers: art 123(2). In certain cases of drug use, psychiatric expertise is also required.

<sup>733</sup> Ibid arts 126–7.

<sup>734</sup> Angelika Pitsela, 'Greece' in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2nd ed, 2010) vol 2, 627.

<sup>735</sup> *Büntető Törvénykönyvről* [Penal Code] (Hungary) 2012, s 16. The provisions of ch XI apply to juvenile offenders (aged 12–18) as exceptions to the provisions of the rest of the Criminal Code: s 105.

<sup>736</sup> This derives from the provision that 'penalties' (as opposed to 'measures') may only be imposed on juveniles older than 14: *ibid* s 106(2).

<sup>737</sup> Ibid s 16 ('Persons under the age of fourteen years at the time the criminal offense was committed shall be exempt from criminal responsibility').

<sup>738</sup> Ibid s 106(2).

<sup>739</sup> Ibid s 106(2).

<sup>740</sup> Ibid s 108.

<sup>741</sup> Ibid s 106(3).

<sup>742</sup> *Penal Code* (Iceland) 12 February 1940, art 14 ('No person shall be punished for a deed committed before he or she attained the age of 15 years').

<b>Ireland</b>	10 <sup>743</sup>	18 <sup>744</sup>				10 is a lowered MACR. The MACR for offences generally = 12. Children aged 10–12 may only be charged and held criminally responsible for murder, manslaughter, rape, rape under s 4 of the <i>Criminal Law (Rape) (Amendment) Act 1990</i> , or aggravated sexual assault. <sup>745</sup>	For children under 14 charged with an offence, the Director of Public Prosecutions must consent to further proceedings (except for proceedings for remand in custody or bail). <sup>746</sup> The amendment to the <i>Children Act 2001</i> in 2006 abolished the rebuttable presumption of incapacity that applied to children aged 7–14. <sup>747</sup>
<b>Israel</b>	12 <sup>748</sup>	12–14 <sup>749</sup>					
<b>Italy</b>	14 <sup>750</sup>		Possible under MACR.		14–18		Children aged 14–18 will only be imputable if they had the capacity to understand and want to commit the deed. <sup>751</sup> Minors under 14 who commit acts that would be otherwise be a crime, and who are dangerous, can be ordered to be placed in a judicial reformatory or on probation. <sup>752</sup> This also applies where the minor is between 14–18 but did not have

<sup>743</sup> *Children Act* (Ireland) 8 July 2001, s 52(1) as amended by *Criminal Justice Act* (Ireland) 16 July 2006, s 129.

<sup>744</sup> Children cannot be sentenced to ‘imprisonment’: *Children Act* (Ireland) 8 July 2001, s 156 (‘No court shall pass a sentence of imprisonment on a child or commit a child to prison’). They may only be placed in Children Detention Schools (for children aged 10–16) or Children Detention Centre (for children aged 16–18) by a ‘children detention order’: s 142. These are targeted at providing education and training programmes: s 158. The age limits corresponding to each type of institution are listed in s 147.

<sup>745</sup> *Ibid* s 52(1).

<sup>746</sup> *Ibid* s 52(4).

<sup>747</sup> *Ibid* s 52(3).

<sup>748</sup> חוק העונשין [Penal Law of Israel] (Israel) 1977, s 34F (A person shall not be held criminally liable for an act committed before he has reached the age of twelve). In the West Bank, under Israeli military law (which applies to Palestinian children), no person under the age of 12 can be arrested or prosecuted in a military court: *Military Order 1651* (Israel) 2009, s 191, cited in ‘Minimum Ages of Criminal Responsibility in Asia’, *Child Rights International Network* (Web Page) <<https://archive.crin.org/en/home/ages/asia.html>>.

<sup>749</sup> Previously, Israeli civilian law prohibited custodial sentences for children under 14: (previously) *Youth Law (Adjudication, Punishment and Methods of Treatment)* (Israel) 1971, s 25(d). However, a new law passed on 2 August 2016 allows for the imprisonment of minors under 14 where they have been convicted of ‘serious crimes such as murder, attempted murder or manslaughter’: Knesset, ‘Knesset gives final approval to bill allowing imprisonment of terrorists under the age of 14’ (Press Release, 3 August 2016) <[https://main.knesset.gov.il/en/News/PressReleases/Pages/Pr12206\\_pg.aspx](https://main.knesset.gov.il/en/News/PressReleases/Pages/Pr12206_pg.aspx)>. The serving of the sentence is, however, deferred until the child reaches the age of 14: ‘New Israeli law allows children as young as 12 to be jailed’, *Defence for Children International, Palestine* (Online Article, 11 August 2016) <[https://www.dci-palestine.org/new\\_israeli\\_law\\_allows\\_children\\_as\\_young\\_as\\_12\\_to\\_be\\_jailed](https://www.dci-palestine.org/new_israeli_law_allows_children_as_young_as_12_to_be_jailed)>.

<sup>750</sup> *Codice Penale* [Penal Code] (Italy) 1930, art 97 (A person who, at the time of the commission of the offence, was under the age of fourteen years shall not be liable). Children below this age are automatically acquitted.

<sup>751</sup> *Ibid* art 98.

<sup>752</sup> *Ibid* art 224.

						the capacity required under art 98. <sup>753</sup> Admission to a judicial reformatory is a ‘special security measure’. <sup>754</sup> Minors under 14 may be admitted to judicial asylum. <sup>755</sup>
<b>Japan</b>	14 <sup>756</sup>		11~12 <sup>757</sup>	Judicial		<p>Children under 14 who violate laws and regulations of a criminal nature are subject to the <i>Juvenile Act 1948</i>. They may therefore be subjected to protective measures, including commitment by the Family Court to a juvenile training school (<i>shonen-in</i>).<sup>758</sup> This is an institution administered by the Ministry of Justice and provides corrective education to juveniles.<sup>759</sup> Children as young as 11 may be sent there.<sup>760</sup></p> <p>Another measure is commission to institutions under child welfare law, including to a child education and training home (<i>jidojiritsushien-shisetsu</i>) or to a home for defendant children (<i>jidoyogo-shisetsu</i>) designed to care for delinquent or potentially delinquent children.<sup>761</sup></p> <p>In determining the appropriate preventative or protection measure, the judge in the Family Court will consider the investigation report, Family Court probation officer’s report, the judge’s own research and inquiry, as well as the results of the hearing.<sup>762</sup></p>

<sup>753</sup> Ibid art 224.

<sup>754</sup> Ibid art 223.

<sup>755</sup> Ibid art 222.

<sup>756</sup> [Penal Code] (Japan) 1907, art 41 (An act of a person less than 14 years of age is not punishable).

<sup>757</sup> The *shōnen hō* [Juvenile Act] (Japan) 15 July 1948 does not prescribe an express lower limit. However, as stated in the consideration of Japan’s third periodic report to the CRC, the amendments to the Juvenile Law in 2007 removed the prohibition on admitting children under 14 to Juvenile Training Schools, as the options of probation or child welfare institutions (of a more open nature) were considered insufficient to address juveniles who had ‘extremely serious and complicated character disorders’ or were repeatedly engaging in malicious delinquent behaviour despite repeated placements in those institutions. Now, family courts can send such juveniles under 14 years of age, ‘approximately 12 years of age or above’, to the schools: Committee on the Rights of the Child, *Third periodic report of States parties due in 2006: Japan*, UN Doc CRC/C/JPN/3 (25 September 2009) [173].

<sup>758</sup> *shōnen hō* [Juvenile Act] (Japan) 15 July 1948, s 24.

<sup>759</sup> Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1996: Japan*, UN Doc CRC/C/41/Add.1 (5 August 1996) [261].

<sup>760</sup> Don Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate, 2009) 201 n 65.

<sup>761</sup> Guang-Xu Jin, ‘Japan – The Criminal Responsibility of Minors in the Japanese Legal System’ (2004) 75(1–2) *Revue internationale de droit pénal* 409.

<sup>762</sup> Jae Joon Chung, ‘Japan’ in Scott H Decker and Nerea Marteache (eds), *International Handbook of Juvenile Justice* (Springer, 2<sup>nd</sup> ed, 2017) 207, 208.

<b>Republic of Korea</b>	14 <sup>763</sup>		12	Judicial		Children aged 10–14 who violate laws relating to criminal punishment, or who may be prone to do so, are subject to the <i>Juvenile Act 1995</i> . <sup>764</sup> They may therefore be subjected to various types of protective detention listed under art 32, imposed by the Juvenile Department of the Family Court or of a district court.  Measures include entrusting the juvenile to an institution within the auspices of the <i>Child Welfare Act</i> (such as facilities for protection and treatment) <sup>765</sup> or transferring them to a Juvenile Reformatory for a short term (max. six months per art 33(5)) or a long term (max. two years per art 33(6)). Only children aged 12 or over may be transferred for a long-term period. <sup>766</sup>
<b>Latvia</b>	14 <sup>767</sup>					Note s 65(2) which sets out the limitations on how long deprivation of liberty can occur, depending on the nature of the offence.
<b>Lithuania</b>	14 <sup>768</sup>				14 is a lowered MACR. The MACR for offences generally = 16. <sup>769</sup> Children aged 14–16 can only be held criminally responsible for those offences listed under art 13(2) of the Criminal Code: murder (Article 129), serious impairment to health (Article 135), rape (Article 149), sexual harassment (Article 150), theft (Article 178), robbery (Article 180), extortion of property (Article 181), destruction of or damage to property (paragraph 2 of Article 187), seizure of a firearm, ammunition, explosives or	The Criminal Code expressly provides that children below the age of 14 years may be subject to ‘reformatory sanctions or other measures’. <sup>771</sup> Article 82 provides that minors aged under 18 (art 81(1)) who have committed a misdemeanour or a crime and has been released from criminal responsibility — presumably including due to age — may be subject to certain reformatory sanctions, including placement in a ‘special reformatory facility’.

<sup>763</sup> Criminal Act (Korea) 18 September 1953, art 9 (‘The act of a person under fourteen years of age shall not be punished’).

<sup>764</sup> Juvenile Act (Korea) 1 December 1995, art 4.

<sup>765</sup> Child Welfare Act (Korea) 4 August 2011, arts 15, 52(3)

<sup>766</sup> Juvenile Act (Korea) 1 December 1995, art 32(4).

<sup>767</sup> *Krimināllikums* [Criminal Code] (Latvia) 17 June 1998, s 11 (‘A natural person who, on the day of the commission of a criminal offence, has attained fourteen years of age may be held criminally liable. An underaged person, that is, a person who has not attained fourteen years of age, may not be held criminally liable’). Criminal liability of minors under 18 are specially provided for in chs VII and XI of the Code.

<sup>768</sup> *Lietuvos Respublikos baudžiamasis kodeksas* [Criminal Code of the Republic of Lithuania] (Lithuania) 26 September 2000, arts 13(1)–(2).

<sup>769</sup> *Ibid* art 13(1).

<sup>771</sup> *Ibid* art 13(3).

						explosive materials (Article 254), theft, racketeering or other illicit seizure of narcotic or psychotropic substances (Article 263), damage to vehicles or roads and facilities thereof (Article 280). <sup>770</sup>	
<b>Luxembourg</b>	0						<p>Children aged under 18 at the time of violating the criminal law are brought before the juvenile court rather than the criminal court. The juvenile court applies measures of protection, care, and/or education.<sup>772</sup> This may include placing the child in a State re-education establishment (State Socio-Educational Centre)<sup>773</sup> which are semi-open. Solitary confinement is possible for serious offences.<sup>774</sup> There is no lower limit for this juvenile protection system.</p> <p>However, the Public Prosecutor's Office may request authorisation from the juvenile court to proceed against a 16–18-year-old child where it considers the measures available to the juvenile court insufficient.<sup>775</sup></p> <p>For a child aged under 16 years, the juvenile court may also decline to hear the case and remit it to the Public Prosecutor's Office to be proceeded with the normal criminal procedures, if the court considers the measures available to it insufficient.<sup>776</sup></p>
<b>Mexico</b>	12 <sup>777</sup>	14 <sup>778</sup>					The <i>Constitution</i> states that those children under 12 years old <i>who have been found guilty</i> of a crime (either having committed or participated in its commission) shall only be subject to

<sup>770</sup> Ibid art 13(2).

<sup>772</sup> *Loi du 10 Août 1992 Relative à la Protection de la Jeunesse* [Law of 10 August 1992 Relating to the Protection of Young People] (Luxembourg) 10 August 1992, art 2.

<sup>773</sup> Ibid art 1(4); see Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1996: Luxembourg*, UN Doc CRC/C/41/Add.2 (11 April 1997) [731].

<sup>774</sup> See Committee on the Rights of the Child, *Second Periodic Reports of States Parties Due in 2001: Luxembourg*, UN Doc CRC/C/104/Add.5 (19 July 2004) [251]–[252].

<sup>775</sup> *Loi du 10 Août 1992 Relative à la Protection de la Jeunesse* [Law of 10 August 1992 Relating to the Protection of Young People] (Luxembourg) 10 August 1992, art 32; see Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1996: Luxembourg*, UN Doc CRC/C/41/Add.2 (11 April 1997) [718].

<sup>776</sup> Ibid.

<sup>777</sup> The Constitution of Mexico provides that juvenile justice covers those ranging from 12–18 years old: at art 18 ('The Federation, the States and the Federal District shall establish, within the field of their respective powers, an integral justice system for minor offenders that shall be used for those persons that have been found guilty of committing or participating in a crime as stated by the law and that their age ranges from twelve years old and less than eighteen years old ... People under twelve years of age who have been found guilty of having committed or participated in a crime as stated by the law shall only be subjected to social assistance'). See also *Decreto por el que se expide la Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes* [National Law of the Integral System of Criminal Justice for Adolescents] 2016, art 1.

<sup>778</sup> Ibid art 31 provides that deprivation of liberty is an extreme and exceptional measure and may only be imposed on adolescents over fourteen years of age.

							social assistance. This suggests that those under 12 are still held criminally responsible, but that the measures they may be subject to cannot be of a criminal nature. The <i>National Law of the Integral System of Criminal Justice for Adolescents</i> , applicable throughout the Republic at both federal and state levels therefore applies to 12–18-year-olds. <sup>779</sup>
<b>Netherlands</b>	12 <sup>780</sup>						
<b>New Zealand</b>	10 <sup>781</sup>				10–14	10 is a lowered MACR. The MACR for offences generally = 14. Only in three situations may proceedings be commenced against children aged 10–14. <sup>782</sup> 10 or 11: murder or manslaughter 12 or 13: serious offences where the maximum penalty is or includes life imprisonment or at least 14 years' imprisonment. <sup>783</sup> Or, where they are a previous offender and the maximum penalty is or includes imprisonment for at least 10 years, but less than 14 years. <sup>784</sup>	Children between 10–14 may only be convicted of an offence if 'he or she knew either that the act or omission was wrong or that it was contrary to law'. <sup>785</sup>
<b>Norway</b>	15 <sup>786</sup>						Note, children under 18 cannot be sentenced to more than 15 years. <sup>787</sup>

<sup>779</sup> Ibid art 1.

<sup>780</sup> Wetboek van Strafvordering [*Code of Criminal Procedure*] (Netherlands) 1926, s 486 ('No person may be prosecuted for an offence committed before he reached the age of twelve years.') The link to *prosecution* explicitly means that those under twelve can still be investigated 'where facts or circumstances give rise to the reasonable suspicion that a person younger than twelve years committed a criminal offence': at s 437. Note also that sanctions in *Wetboek van Strafrecht* [Criminal Code] 1886, s 77(h) are not linked to specific age requirements, although the duration of custodial sentences are: s 77i (juvenile detention for those under 16 years can only be imposed for a maximum of 12 months, while for those over 16 the maximum duration is 24 months): see Leenknecht, Put and Veeckmans (n 686) 14–15.

<sup>781</sup> *Crimes Act 1961* (NZ) s 21 ('No person shall be convicted of an offence by reason of any act done or omitted by him or her when under the age of 10 years.')

<sup>782</sup> *Oranga Tamariki Act [Children's and Young People's Well-being Act] 1989* (NZ) s 272.

<sup>783</sup> For example, sexual violation under *Crimes Act 1961* (NZ) s 128B (maximum penalty of 20 years' imprisonment).

<sup>784</sup> Likely to include, for example, aggravated robbery under *ibid* s 235 (maximum penalty of 14 years' imprisonment).

<sup>785</sup> *Ibid* s 22(1).

<sup>786</sup> *Lov om straff (straffeloven)* [Penal Code] (Norway) 1 October 2015, s 20 ('A person who at the time of the act is under 15 years old, is not criminally liable')

<sup>787</sup> *Ibid* s 33.

							Further, where a child under 18 is sentenced to imprisonment, Correction Services may transfer that inmate to serve the prison sentence in a childcare institution. <sup>788</sup>
<b>Poland</b>	15 <sup>789</sup>		13 (?) <sup>790</sup>	Judicial	15–17	<p>15 is a lowered MACR.</p> <p>The MACR for offences generally = 17.<sup>791</sup> Children aged 15–17 can only be held criminally responsible for those offences listed under art 10(2) of the <i>Penal Code</i> if the circumstances and the child's mental development warrant this liability, particularly where education or corrective measures previously applied have proven ineffective.</p> <p>The listed offences are: attempted assassination of the President (art 134), murder or homicide (art 148. § 1, 2 or 3), causing grievous bodily harm (art 156 § 1 or 3), causing a fire or an explosion which imperils life, health, or property (art 163 § 1 or 3), hijacking (art 166), causing a catastrophe (art 173 § 1 or 3), rape with particular cruelty or with another person (art 197 § 3), hostage-taking (art 252 § 1 or 2) and robbery (art 280).</p>	<p>Children between 13–17 who commit a penal act (including behaviour defined by the <i>Penal Code</i> as an offence) will be subject to correctional proceedings under the Law of 26 October 1982 concerning juvenile justice.<sup>792</sup> However, they are not held liable before the criminal court, and are instead addressed before the family court with educational or corrective measures.<sup>793</sup> This includes placement in a youth educational centre or in a correctional facility if other measures are insufficient for rehabilitation.<sup>794</sup></p> <p>The measures are applied by judges in Family Courts, and the judge will consider the interests of the child, the need to make positive changes in their personality and behaviour, the need to support the child's parents or guardians in fulfilling their roles, the degree of the child's antisocial attitude and behaviour, the circumstances and nature of the act they committed, and how effective other measures have been in resocialising the child.<sup>795</sup></p> <p>The same law also applies to prevent and combat deprivation, such as with juveniles who show signs of</p>

<sup>788</sup> *Straffegjennomføringsloven* [Execution of Sentences Act] (Norway) 2002, s 12, cited in Linda Gröning & Hilde Švrljuga Sætre, 'Criminal Justice and Detention' in Malcolm Langford, Marit Skivenes & Karl Harald Søvig (eds), *Children's Rights in Norway* (Universitetsforlaget, 2019) 167.

<sup>789</sup> *Kodeks Karny* [Penal Code] (Poland) 1997, art 10(2). Though, note that juveniles aged 13–17 can be convicted of a criminal offence by the family court under the *Postępowanie w sprawach nieletnich* [Law on Procedure in Juvenile Cases] (Poland) 26 October 1982 on procedure in juvenile cases, though under this law they may only be subject to educational or reformatory measures rather than penal sanctions such as deprivation of liberty.

<sup>790</sup> While the Law of 26 October 1982 does not prescribe a minimum age for measures combatting deprivation, the category of minors subject to this law due to *committing a penal act* is limited to those between 13–15 years old.

<sup>791</sup> *Kodeks Karny* [Penal Code] (Poland) 1997, art 10(1) ('Whoever commits a prohibited act after having attained the age of 17 years shall be liable under the provisions of this Code').

<sup>792</sup> [Law of 26 October 1982] (Poland) 1982, art 1.

<sup>793</sup> Monika Noszczyk-Bernasiewicz, 'Juvenile Delinquency in Poland: Dimensions and Selected Forms of Response' (2015) 2 *Chowanna* 275, 279.

<sup>794</sup> *Postępowanie w sprawach nieletnich* [Law on Procedure in Juvenile Cases] (Poland) 1982, arts 5–6.

<sup>795</sup> Barbara Stańdo-Kawecka, 'Poland' in Scott H Decker and Nerea Marteache (eds), *International Handbook of Juvenile Justice* (Springer, 2<sup>nd</sup> ed, 2017) 348, 358.

							misbehaviour, <sup>796</sup> and there is no prescribed minimum age in this context. <sup>797</sup>
<b>Portugal</b>	16 <sup>798</sup>		12				Children aged 12–16 who commit acts qualified by law as a crime can be subject to protective educational measures under <i>Lei Tutelar Educativa 1999</i> (Guardianship and Education Law) No 166/99. <sup>799</sup> Article 4 lists the tutelary measures, which includes internment in an open, semi-open or closed educational centre, corresponding to different seriousness of offending. <sup>800</sup> The degree of openness indicates how restricted the child's liberty is, such as their ability to leave the centre freely and unaccompanied. <sup>801</sup> Only minors at least 14 years old may be interned at <i>closed</i> centres. <sup>802</sup>
<b>Slovak Republic</b>	14 <sup>803</sup>				14–15	Raised MACR for sexual abuse = 15. A child may only be held criminally liable for sexual abuse (s 201) if they are at least 15 years old. <sup>804</sup>	Children aged 14–15 who, at the time of the offence, lacked the 'mental and moral state' to recognise the unlawfulness of the action or exercise self-restraint will not be criminally liable. <sup>805</sup> Sanctions under the act are divided into penalties and protective measures. <sup>806</sup> The court has jurisdiction to impose protective measures even if the offender, otherwise punishable, is not criminally liable. <sup>807</sup> Protective measures also involve restriction of personal freedom, and may be imposed only 'to protect the society from criminal offences or acts considered as criminal under this Act'. <sup>808</sup> One

<sup>796</sup> Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Poland*, UN Doc CRC/C/8/Add.11 (11 January 1994) [274].

<sup>797</sup> *Postępowanie w sprawach nieletnich* [Law on Procedure in Juvenile Cases] (Poland) 1982, art 1.

<sup>798</sup> *Código Penal Português* [Penal Code of Portugal] (Portugal), art 19 ('Minors under 16 are not imputable.') The Penal Code expressly states that special rules apply as regards dispositions for juvenile offenders (aged 16–21): at art 9.

<sup>799</sup> *Lei Tutelar Educativa* [Educational Guardianship Law] (Portugal) 14 September 1999, art 1.

<sup>800</sup> *Ibid* arts 4(3), 17.

<sup>801</sup> Maria João Leote de Carvalho, *Alternatives to Custody for Young Offenders, National Report on Juvenile Justice Trends* (Report, 2011–12) 18.

<sup>802</sup> *Lei Tutelar Educativa* [Educational Guardianship Law] (Portugal) 14 September 1999, art 17(4)(b).

<sup>803</sup> *Trestný Zákonník* [Criminal Code] (Slovak Republic) 2 July 2005, s 22(1). Chapter IV of the Code makes special provision for the prosecution of young offenders.

<sup>804</sup> *Ibid* s 22(2).

<sup>805</sup> *Ibid* s 95(1).

<sup>806</sup> *Ibid* s 31.

<sup>807</sup> *Ibid* s 7a(2).

<sup>808</sup> *Ibid* s 31(3).

							measure is protective re-education, to be executed in special re-educational institutions. <sup>809</sup> Section 105 explicitly provides that where a child aged 12–14 commits a certain offence that may otherwise have been punished by life imprisonment, ‘the court shall impose protective re-education through civil proceedings also upon a motion filed by a prosecutor’. The court can do the same for others aged under 14 who have committed what would otherwise qualify as a criminal offence, where it is necessary to ensure their proper re-education.
<b>Slovenia</b>	14 <sup>810</sup>	16	Possible under MACR.				The law draws a distinction between children aged 14–16 (minor), and those aged 16–18 (older minor). Only educational measures may be applied to minors. This includes committal to an educational institution or a juvenile correction institution (as distinct from juvenile prison). <sup>811</sup> Only older minors may be sentenced to imprisonment in <i>juvenile prison</i> , and only if the offence attracts a minimum sentence of at least five years’ imprisonment if the offence had been committed by an adult. <sup>812</sup> Children under 14 in conflict with the law are dealt with by social welfare agencies (Social Work Centres) and no criminal sanctions or educational or safety measures may be administered against them. <sup>813</sup> However, they can be committed to an institution by the welfare agencies in cases of parental neglect or where their personality or behavioural

<sup>809</sup> Ibid ss 33, 102–105.

<sup>810</sup> *Kazenski Zakonik* [Criminal Code] (Republic of Slovenia) 1 November 2008, art 21 (‘Anyone who has committed an offence when he was not yet fourteen years of age (a child) cannot be the perpetrator of the offense.’)

<sup>811</sup> For information on how the juvenile correction institution, Radeče Correctional Home, operates, see ‘Radeče Correctional Home’, *Republic of Slovenia* (Web Page, 2021) <<https://www.gov.si/en/state-authorities/bodies-within-ministries/prison-administration/about-the-prison-administration/prevzgojni-dom-radece/>>.

<sup>812</sup> Committee on the Rights of the Child, *Third and Fourth Periodic Report of States Parties Due in 2008: Slovenia*, UN Doc CRC/C/SVN/3-4 (17 April 2012) [356]–[357]; Katja Filipčič, ‘Slovenia’ in Frieder Dünkel et al (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Forum Verlag Godesberg, 2<sup>nd</sup> ed, 2010) vol 3, 1289, 1297.

<sup>813</sup> Committee on the Rights of the Child, *Second Periodic Report of States Parties Due in 1998: Slovenia*, UN Doc CRC/C/70/Add.19 (18 June 2003) [265]; Katja Filipčič, ‘Slovenia’ (n 812) 1294.

						problems so necessitate. <sup>814</sup> In substance, these are the same as institutional educational measures imposed by courts. <sup>815</sup>
<b>Spain</b>	14 <sup>816</sup>					Children aged under 14 years who commit acts that would be offences will not be held criminally liable, but will be subject to protection measures under the Civil Code and other laws. In such cases, the Prosecutor's Office is to forward to the protection authorities the relevant information for their assessment. <sup>817</sup>
<b>Sweden</b>	15 <sup>818</sup>					Imprisonment can only be imposed on a child under 18 'if there are exceptional grounds to do so', and where such grounds exist, 'the court must then preferably impose a sanction of institutional youth care instead of imprisonment'. <sup>819</sup>
<b>Switzerland</b>	10 <sup>820</sup>	15 <sup>821</sup>			10–18	Children aged 10–18 may only be culpable if they had the capacity to understand the wrongfulness of their act and act in accordance with that understanding. <sup>822</sup> The <i>Juvenile Criminal Law Act</i> provides for protective measures and penalties. Penalties may only be imposed on culpable children, but protective measures are based on needs and do not require culpability. <sup>823</sup> One protective measure is

<sup>814</sup> Katja Filipčič, 'Dealing with Juvenile Delinquents in Slovenia' (2004) 75 *International Review of Penal Law (Revue internationale de droit pénal)* 493, cited in Cipriani (n 760) 105 n 40; Filipčič, 'Slovenia' (n 812) 1301.

<sup>815</sup> Katja Filipčič, 'Dealing with Juvenile Delinquents in Slovenia' (n 814) 493.

<sup>816</sup> *Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores* [Organic Law 5/2000 of 12 January regulating the criminal responsibility of minors] (Spain) 12 January 2000, art 1(1).

<sup>817</sup> *Ibid* art 3.

<sup>818</sup> *Brottsbalken* [Criminal Code] (Sweden) 1962, ch 1 s 6 ('No sanction may be imposed for an offence that a person committed before attaining fifteen years of age').

<sup>819</sup> *Ibid* ch 30 s 5.

<sup>820</sup> *Jugendstrafgesetz* [Juvenile Criminal Law Act] (Switzerland) 20 June 2003, art 3(1) ('This Act applies to persons who have committed a punishable offence between the age of 10 and 18'). *Strafgesetzbuch* [Criminal Code] (Switzerland) 1937, art 9(2) provides that the provisions of the *Juvenile Criminal Law Act* apply to persons who are not yet 18 at the time of the offence.

<sup>821</sup> *Jugendstrafgesetz* [Juvenile Criminal Law Act] (Switzerland) 20 June 2003, art 25.

<sup>822</sup> *Ibid* art 11(2).

<sup>823</sup> *Ibid* arts 10–11.

						<p>placement in an educational or treatment facility, which may be of a closed nature.<sup>824</sup></p> <p>As regards the penalty of imprisonment, the maximum term of imprisonment for young persons aged 15–16 at the time of the act is one year.<sup>825</sup> This may be carried out in the form of semi-detention per art 77b of the <i>Criminal Code</i>, meaning the inmate spends only rest and leisure time in the institution, and can work, train, or be otherwise occupied outside of it.<sup>826</sup> For those who have reached 16 years old, they may be punished with imprisonment for up to four years if the conditions regarding the severity of the crime are met.<sup>827</sup></p>
<b>Turkey</b>	12 <sup>828</sup>		Possible under MACR.		12–15	<p>Children between 12–15 will <i>not</i> be held criminally liable where, at the time of the offence, they were incapable of appreciating the legal meaning and consequences of their act; or had an underdeveloped capability to control their behaviour.<sup>829</sup></p> <p>However, while children under 12 years of age cannot be held criminally liable or prosecuted, ‘security measures’ may be imposed on them, including deprivation of liberty in educational, governmental and private care institutions. There is no lower age limit for these measures.<sup>830</sup></p> <p>The same applies for children aged 12–15 who lacked the requisite mental capacity to appreciate wrongfulness and consequences.<sup>831</sup> The types of security measures applicable to minors are specifically provided for in the 2005 <i>Juvenile Protection Law</i>.<sup>832</sup></p>

<sup>824</sup> Ibid art 15.

<sup>825</sup> Ibid art 25(1).

<sup>826</sup> Ibid art 27(1).

<sup>827</sup> Ibid art 25(2).

<sup>828</sup> *Ceza Kanunu* [Criminal Code] (Turkey) 26 September 2004, art 31(1) (‘Minors under the age of twelve are exempt from criminal liability’).

<sup>829</sup> Ibid art 31(2).

<sup>830</sup> Cipriani (n 760) 106 n 45.

<sup>831</sup> *Ceza Kanunu* [Criminal Code] (Turkey) 26 September 2004, art 31(2).

<sup>832</sup> *Ceza Kanunu* [Criminal Code] (Turkey) 26 September 2004, art 56. The legislation providing for the inter alia the security measures is the [Law on the Execution of Penalties and Security Measures] (Turkey) 2004. While not solely regulating juvenile justice, the law has special provisions for minors: see, eg, art 11.

<b>United Kingdom (England, Wales, Northern Ireland)</b>	10 <sup>833</sup>	(NI) 14				In Northern Ireland, one measure available is a custody care order, ordering that the child be placed in secure accommodation. There is no express age limit for this measure. However, detention in a juvenile justice centre is only available where the child is at least 14 years old. <sup>834</sup>
<b>United Kingdom (Scotland)</b>	12 <sup>835</sup>					Generally, children under 16 cannot be detained. <sup>836</sup> However, there are exceptions where the child commits murder <sup>837</sup> or a serious terrorism offence. <sup>838</sup>
<b>United States</b>	Varies from 0–12 Average =3.5years.				Varies <sup>839</sup>	32 states have no set MACR. <sup>840</sup> Of the 22 states that have set a MACR, it ranges from 12 years (Massachusetts <sup>841</sup> and California, though there is no minimum age in California for certain serious offences <sup>842</sup> ) to 6 years (North Carolina <sup>843</sup> ). The most common is 10 years. <sup>844</sup>
<b>Average</b>	MACR = 12	MACD = 14	12		<b>Rebuttable threshold 12-16.5</b>	

<sup>833</sup> England and Wales: *Children and Young Persons Act 1933* (UK) s 50 ('It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence'). This Act does not extend to Scotland or Northern Ireland unless expressly provided so: at s 109(3). Northern Ireland: *Criminal Justice (Children) (Northern Ireland) Order 1998* (UK) s 3 ('It shall be conclusively presumed that no child under the age of 10 can be guilty of an offence').

<sup>834</sup> *Criminal Justice (Children) (Northern Ireland) Order 1998* (UK) ss 44A(8), 44C(1). See also Leenknecht, Put and Veeckmans (n 686) 16.

<sup>835</sup> *Criminal Procedure (Scotland) Act 1995* (UK) s 41 ('A child under the age of 12 years cannot commit an offence').

<sup>836</sup> *Ibid* ss 205, 207(1)–(2).

<sup>837</sup> *Ibid* s 205(2)–(3).

<sup>838</sup> *Ibid* ss 205ZA(6), 205ZC(4).

<sup>839</sup> See Cipriani (n 760) 221–2 n 164.

<sup>840</sup> 'Minimum Ages of Criminal Responsibility in the Americas' *Child Rights International Network* (Web Page) <<https://archive.crin.org/en/home/ages/Americas.html>>.

<sup>841</sup> Mass Gen Laws Ann ch 119 § 52.

<sup>842</sup> Cal Welf & Inst Code § 602. The serious offences are murder, rape by force, sodomy by force, oral copulation by force, and sexual penetration by force — there is no MACR for these offences and children will be within the jurisdiction of the juvenile court.

<sup>843</sup> NC Gen Stat Ann § 7B-1501(7).

<sup>844</sup> 'Minimum Age for Delinquency Adjudication—Multi-Jurisdiction Survey', *National Juvenile Defender Centre* (Web Page, 2020) <<https://njdc.info/practice-policy-resources/state-profiles/multi-jurisdiction-data/minimum-age-for-delinquency-adjudication-multi-jurisdiction-survey/>>.



## Appendix B : Commonwealth offences likely to apply to children

### Criminal Code Act 1995

Section	Offence	Penalty
80.2C	Advocating terrorism	Imprisonment for 5 years
80.2D	Advocating genocide	Imprisonment for 7 years
82.8	Introducing vulnerability reckless as to national security	Imprisonment for 10 years
92.10	Recklessly being funded by foreign intelligence agency	Imprisonment for 10 years
101.1	Engaging in a terrorist act	Imprisonment for life
101.2	Receiving training connected with terrorist acts	Imprisonment for 25 years (knows of connection) Imprisonment for 15 years (reckless as to connection)
101.4	Possessing things connected with terrorist acts	Imprisonment for 15 years (knows of connection) Imprisonment for 10 years (reckless as to connection)
101.6	Doing any act in preparation for, or planning, a terrorist act	Imprisonment for life
102.3	Intentionally being a member of a terrorist organisation	Imprisonment for 10 years
102.5	Intentionally receiving training or participating in training with a terrorist organisation	Imprisonment for 25 years
102.6	Intentionally receiving funds from a terrorist organisation	Imprisonment for 25 years (knows it is a terrorist organisation) Imprisonment for 15 years (reckless as to whether organisation is a terrorist organisation)
102.7	Intentionally providing support to a terrorist organisation	Imprisonment for 25 years (knows it is a terrorist organisation) Imprisonment for 15 years (reckless as to whether organisation is a terrorist organisation)
102.8	Intentionally associating with terrorist organisations	Imprisonment for 3 years
131.1	Theft of property belonging to a Commonwealth entity	Imprisonment for 10 years

<b>Section</b>	<b>Offence</b>	<b>Penalty</b>
132.1	Receiving stolen property belonging to a Commonwealth entity	Imprisonment for 10 years
132.2	Robbery involving property belonging to a Commonwealth entity	Imprisonment for 15 years
132.3	Aggravated robbery involving property belonging to a Commonwealth entity	Imprisonment for 20 years
132.4	Burglary involving property belonging to a Commonwealth entity	Imprisonment for 13 years
132.5	Aggravated burglary involving property belonging to a Commonwealth entity	Imprisonment for 17 years
132.6	Making off without payment involving a Commonwealth entity	Imprisonment for 2 years
132.7	Going equipped for theft or a property offence involving property belonging to a Commonwealth entity	Imprisonment for 3 years
132.8(1)	Dishonestly taking property belonging to a Commonwealth entity	Imprisonment for 2 years
132.8(2)	Dishonestly taking and retaining property belonging to a Commonwealth entity	Imprisonment for 2 years
132.8A	Damaging property belonging to a Commonwealth entity	Imprisonment for 10 years
134.1	Obtaining by deception property belonging to a Commonwealth entity	Imprisonment for 10 years
134.2	Obtaining by deception a financial advantage from a Commonwealth entity	Imprisonment for 10 years
135.1	General acts of dishonesty against a Commonwealth entity (obtaining a gain / causing a loss / influencing a Commonwealth public official)	Imprisonment for 10 years
135.2(1)	Obtaining a financial advantage for himself/herself from a Commonwealth entity knowing or believing that he or she is ineligible to receive that financial advantage	Imprisonment for 12 months
135.2(2)	Obtaining a financial advantage for another person from a Commonwealth entity knowing or believing that the other person is ineligible to receive that financial advantage	Imprisonment for 12 months
135.4	Conspiring to defraud a Commonwealth entity	Imprisonment for 10 years
137.1	Giving false or misleading information to a Commonwealth entity, a person exercising or performing functions under, or in connection with, a law of the Commonwealth, or in compliance or purported compliance with a law of the Commonwealth	Imprisonment for 12 months

<b>Section</b>	<b>Offence</b>	<b>Penalty</b>
144.1	Forgery for dishonest use involving a Commonwealth public official or in connection with the operations of a Commonwealth entity, or forgery of a Commonwealth document	Imprisonment for 10 years
145.2	Possessing a forged document for dishonest use involving a Commonwealth public official or in connection with the operations of a Commonwealth entity, or possessing a forged Commonwealth document	Imprisonment for 10 years
147.1	Causing harm to a Commonwealth public official	Imprisonment for 13 years (if official is Commonwealth judicial officer or a Commonwealth law enforcement officer) Imprisonment for 10 years (in any other case)
149.1	Obstructing a Commonwealth public official	Imprisonment for 2 years
302.3	Trafficking marketable quantities of controlled drugs	Imprisonment for 25 years or a fine of 5,000 penalty units, or both
302.4	Trafficking controlled drugs	Imprisonment for 10 years or a fine of 2,000 penalty units, or both
303.6	Cultivating controlled plants	Imprisonment for 10 years or a fine of 2,000 penalty units, or both
304.2	Selling marketable quantities of controlled plants	Imprisonment for 25 years or a fine of 5,000 penalty units, or both
304.3	Selling controlled plants	Imprisonment for 10 years or a fine of 2,000 penalty units, or both
305.5	Manufacturing controlled drugs	Imprisonment for 10 years or a fine of 2,000 penalty units, or both
306.3	Pre-trafficking marketable quantities of controlled precursors	Imprisonment for 15 years or a fine of 3,000 penalty units, or both
306.4	Pre-trafficking controlled precursors	Imprisonment for 7 years or a fine of 1,400 penalty units, or both
307.2	Importing and exporting marketable quantities of border controlled drugs or border controlled plants	Imprisonment for 25 years or a fine of 5,000 penalty units, or both
307.3	Importing and exporting border controlled drugs or border controlled plants	Imprisonment for 10 years or a fine of 2,000 penalty units, or both
307.12	Importing and exporting marketable quantities of border controlled precursors	Imprisonment for 15 years or a fine of 3,000 penalty units, or both
307.13	Importing and exporting border controlled precursors	Imprisonment for 7 years or a fine of 1,400 penalty units, or both
308.1	Possessing controlled drugs	Imprisonment for 2 years or a fine of 400 penalty units, or both
308.2	Possessing controlled precursors	Imprisonment for 2 years or a fine of 400 penalty units, or both

<b>Section</b>	<b>Offence</b>	<b>Penalty</b>
320.2	Importing psychoactive substances	Imprisonment for 5 years, or a fine of 300 penalty units, or both
320.3	Importing substances represented to be serious drug alternatives	Imprisonment for 2 years, or a fine of 120 penalty units, or both
361.2	Trafficking prohibited firearms or firearm parts into Australia	Imprisonment for 10 years or a fine of 2,500 penalty units, or both
361.3	Trafficking prohibited firearms or firearm parts out of Australia	Imprisonment for 10 years or a fine of 2,500 penalty units, or both
372.1	Dealing in identification information	Imprisonment for 5 years
372.1A	Dealing in identification information that involves use of a carriage service	Imprisonment for 5 years
372.2	Possessing identification information	Imprisonment for 3 years
376.2	Using false identification information at a constitutional airport	Imprisonment for 12 months
376.3(1)	Using false identification information to obtain air passenger tickets using a carriage service	Imprisonment for 12 months
376.3(2)	Taking a flight using air passenger ticket obtained with false identification information using a carriage service	Imprisonment for 12 months
390.5	Committing an offence for the benefit of, or at the direction of, a criminal organisation	Imprisonment for 7 years
400.4	Laundering proceeds of crime etc. (money or property) worth \$100,000 or more	Tier 1 offences - Imprisonment for 20 years, or a fine of 1,200 penalty units, or both Tier 2 offences – Imprisonment for 10 years, or a fine of 600 penalty units, or both Tier 3 offence – imprisonment for 4 years, or a fine of 240 penalty units, or both
400.5	Laundering proceeds of crime etc. (money or property) worth \$50,000 or more	Imprisonment for 15 years, or a fine of 900 penalty units, or both (with intent) Imprisonment for 7 years, or a fine of 420 penalty units, or both (reckless) Imprisonment for 3 years, or a fine of 180 penalty units, or both (negligent)
400.6	Laundering proceeds of crime etc. (money or property) worth \$10,000 or more	Imprisonment for 10 years, or a fine of 600 penalty units, or both (with intent)

<b>Section</b>	<b>Offence</b>	<b>Penalty</b>
		Imprisonment for 5 years, or a fine of 300 penalty units, or both (reckless) Imprisonment for 2 years, or a fine of 120 penalty units, or both (negligent)
400.7	Laundering proceeds of crime etc. (money or property) worth \$1,000 or more	Imprisonment for 5 years, or a fine of 300 penalty units, or both (with intent) Imprisonment for 2 years, or a fine of 120 penalty units, or both (reckless) Imprisonment for 12 months, or a fine of 60 penalty units, or both (negligent)
400.8	Laundering proceedings of crime etc. (money or property) of any value	Imprisonment for 12 months, or a fine of 60 penalty units, or both (with intent) Imprisonment for 6 months, or a fine of 30 penalty units, or both (reckless) A fine of 10 penalty units (negligent)
400.9	Dealing with property reasonably suspected of being proceeds of crime etc.	Imprisonment for 3 years, or a fine of 180 penalty units, or both (\$100,000 or more) Imprisonment for 2 years, or a fine of 120 penalty units, or both (less than \$100,000)
471.1	Theft of mail-receptacles, articles or postal messages	Imprisonment for 10 years
471.2	Receiving stolen mail-receptacles, articles or postal messages	Imprisonment for 10 years
471.3	Taking or concealing mail-receptacles, articles or postal messages	Imprisonment for 5 years
471.4	Dishonest removal of postage stamps or postmarks	Imprisonment for 12 months
471.5	Dishonest use of previously used, defaced or obliterated stamps	Imprisonment for 12 months
471.6	Damaging or destroying mail-receptacles, articles or postal messages	Imprisonment for 10 years
471.7	Tampering with mail-receptacles	Imprisonment for 5 years
471.8	Dishonestly obtaining delivery of articles	Imprisonment for 5 years

<b>Section</b>	<b>Offence</b>	<b>Penalty</b>
471.10	Hoaxing by posting an article pretending to be explosives and dangerous substances	Imprisonment for 10 years
471.11	Using a postal or similar service to make a threat	Imprisonment for 10 years (threat to kill) Imprisonment for 7 years (threat to seriously harm)
471.12	Using a postal or similar service to menace, harass or cause offence	Imprisonment for 2 years
471.13	Causing a dangerous article to be carried by a postal or similar service	Imprisonment for 10 years
471.15	Causing an explosive, or a dangerous or harmful substance, to be carried by post	Imprisonment for 10 years
474.4	Manufacturing, advertising, displaying, offering for sale, selling or possessing an interception device (telecommunications offences)	Imprisonment for 5 years
474.5	Causing a communication in the course of telecommunication carriage to be received by a person or carriage service other than the person or service to whom it is directed	Imprisonment for 1 year
474.6(1)	Tampering or interfering with a telecommunication facility	Imprisonment for 1 year
474.6(5)	Using or operating any apparatus or device resulting in hindering of the normal operation of a carriage service supplied by a carriage service provider	Imprisonment for 2 years
474.14	Using a telecommunications network with intent to commit a serious offence (punishable by imprisonment for life or a period of 5 or more years)	A penalty not exceeding the penalty applicable to the serious offence
474.15	Using a carriage service to make a threat	Imprisonment for 10 years (threat to kill) Imprisonment for 7 years (threat to seriously harm)
474.16	Using a carriage service for a hoax threat	Imprisonment for 10 years
474.17	Using a carriage service to menace, harass or cause offence	Imprisonment for 3 years
474.18	Improper use of emergency call service	Imprisonment for 3 years
477.1	Accessing to or modifying data held in a computer, or impairing the electronic communication to or from a computer, without authorisation, with intent to commit a serious offence (punishable by imprisonment for life or a period of 5 or more years)	Penalty not exceeding the penalty applicable to the serious offence
477.2	Causing unauthorised modification of data held in a computer impairing access to or the reliability, security or operation of such data	Imprisonment for 10 years
477.3	Causing unauthorised impairment of electronic communication to or from a computer	Imprisonment for 10 years

<b>Section</b>	<b>Offence</b>	<b>Penalty</b>
478.1	Accessing or modifying restricted data without authorisation	Imprisonment for 2 years
478.2	Causing unauthorised impairment of data held on a computer disk, a credit card, or another device used to store data by electronic means	Imprisonment for 2 years
478.4	Producing, supplying or obtaining data with intent to commit a computer offence	Imprisonment for 3 years
480.4	Dishonestly obtaining or dealing in personal financial information	Imprisonment for 5 years
480.5	Possessing or controlling any thing with intent to dishonestly obtain or deal in personal financial information	Imprisonment for 3 years
480.6	Importing a thing into Australia with intent to dishonestly obtain or deal in personal financial information	Imprisonment for 3 years