



SUBMISSION | NEW SOUTH WALES
BAR ASSOCIATION

2021-22 Pre-Budget Submission to Treasury

17 February 2021

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practise in NSW.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's members who practise in the NSW registries of the Commonwealth Courts. If you would like any further information regarding this submission, please contact the Association's Department of Policy and Public Affairs on 02 9232 4055 or via epearson@nswbar.asn.au.

Contents

- A Executive summary
- B Recommendations
- C The business case for further federal funding for the legal assistance sector
- D The case for properly resourcing the family law system and a specialist, stand-alone Family Court
- E The case for implementing the Australian Law Reform Commission's *Pathways to Justice* Report
- F Closing the Gap
- G The cost of not raising the minimum age of criminal responsibility to 14
- H Conclusion

A. Executive summary

1. The New South Wales Bar Association (**the Association**) thanks the Federal Government for the opportunity to make submissions to Treasury on priorities for the 2021-22 Budget.
2. A well-resourced and properly funded justice system has a direct correlation to the quality of justice that the system administers as well as public confidence in that system and the Rule of Law. When the system is undermined by the lack of Judges, staff, funding or support to properly meet demand, the community suffers, as the system is unable to live up to its full potential.
3. The Association acknowledges the continuing effect of the COVID-19 pandemic on Australians and the pressure this places on government to respond to the needs of the community.
4. However, the Association urges the Government to maintain a commitment to resourcing the justice system as outlined in this submission, so the system can fully carry out its functions and serve the Australian public through this difficult time.
5. As outlined in the Association's [Supplementary 2020-21 Pre-Budget submission](#) in August 2020, the COVID-19 pandemic has reinforced the importance of properly funding and resourcing legal assistance providers, family violence service providers, the courts and family law system to ensure they possess the resilience and agility to respond to increased need in times of crisis.
6. Many justice services, courts and legal assistance providers were already struggling with limited resources and in desperate need of funding relief before the pandemic. This strain has been compounded by the increased legal need during the pandemic and the further pressures placed on the system.
7. The justice system is an essential service at all times and should be funded accordingly.

B. Recommendations

8. The Association recommends that, as an immediate priority and over the forward estimates, the 2021-22 Budget:
 - a. Increase funding for specialist legal assistance providers and Legal Aid Commissions (together, the **Legal Assistance Sector**);
 - b. Increase funding and resourcing of the family law system;
 - c. Maintain and adequately fund a specialist, stand-alone and properly resourced Family Court in Australia to best assist children, families and survivors of family violence;
 - d. Fund the appointment of additional judicial officers, including specialist family law judges, to meet the workload of the Family Court and Federal Circuit Court;
 - e. Commit to implementing and properly fund the recommendations of the Australian Law Reform Commission's 2018 *Pathways to Justice* inquiry;
 - f. Invest in the Closing the Gap initiative;
 - g. Commit to raising the minimum age of criminal responsibility from 10 to 14.

C. The case for further funding legal assistance

Why does legal assistance matter?

9. Equal and fair access to the law is undermined by the reality that, without legal assistance, many people are not able to afford legal representation and appear by necessity themselves in criminal, civil or family law matters.¹ Underfunding the Legal Assistance Sector adversely impacts clients, victim-survivors and witnesses, and places pressure on already overstretched court systems.
10. Chronic underfunding of the Legal Assistance Sector continues to impact on access to justice for many members of the community, and may result in them not pursuing otherwise legitimate claims to defend their rights or interests because they cannot afford legal representation.
11. While some people choose to represent themselves, there is a clear link between lack of access to the Legal Assistance Sector and the number of self-represented litigants. In 2019-20 one or both parties did not have representation at some point during proceedings in one in four cases in the Federal Circuit Court,² and one in five cases in the Family Court.³ Self-represented litigants commenced 587 actions in the Federal Court in 2019-20.⁴
12. Unrepresented litigants require more assistance from the courts, including: information about support services and court procedures; advice on form filling, court etiquette, preparing court documents and the rules of evidence; and emotional and practical support.⁵ This means cases involving one or more parties without legal representation take significantly longer to conduct properly, fairly and justly. One Family Court Judge told a research study in 2000, after a very full duty list, that the time taken for nine matters involving self-represented litigants would have been halved had they been represented.⁶

Why is more funding needed?

13. The COVID-19 pandemic exacerbated the pre-existing shortfall in secure funding for the Legal Assistance Sector.
14. There has been a significant trend over two decades of the Australian Government's funding contribution to Legal Aid Commission's reducing on a real per capita basis.
15. Even before the pandemic, specialist legal assistance providers were struggling with chronic under-resourcing. For example, in September 2020 Women's Legal Services Queensland told the Senate's COVID-19 Committee that before the pandemic, they were having to turn away 40

¹ John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

² Federal Circuit Court *Annual Report 2019-20* (2020) 31, figure 3.8

³ Family Court, *Annual Report 2019-20* (2020) 26, figure 3.16.

⁴ Federal Court, *Annual Report 2019-20* (2020) 31, table 3.6.

⁵ Dewar, Smith and Banks (n 1) 1.

⁶ *Ibid* 51.

percent of calls – 6,600 vulnerable women seeking their assistance. During the pandemic, that has risen to more than half of those seeking help.⁷

16. At any given time, Family Violence Prevention Legal Services have to turn away 30 to 40% of people contacting them for support because they do not have the resources to meet demand.⁸
17. Despite indications that the impacts of COVID-19 will continue to be felt by the court system for years to come, the 2020-21 Budget made no additional provision to the Legal Assistance Sector.⁹
18. The Legal Assistance Sector must be proactively funded on an ongoing basis to ensure the justice system and legal assistance providers are best equipped to respond to community need all times, including during crises. This must include adequate, sustained funding for specialised legal assistance providers, such as Women’s Legal Services Australia, National Aboriginal and Torres Strait Islander Legal Services and Family Violence Protection Legal Services.

How much funding is needed?

19. At least an additional \$390 million per annum is still required to invest further resources into the Legal Assistance Sector to address critical civil and criminal assistance service gaps, according to the Law Council of Australia, comprising:¹⁰
 - (a) at least \$120 million per annum for civil legal assistance services; and
 - (b) at least \$270 million per annum for other services provided by Legal Aid Commissions, restoring the share of Commonwealth funding of such services to 50 per cent.
20. In 2020 Women’s Legal Services Australia estimated that an extra \$25 million was needed to ensure the current volume of requests received by its members can be addressed.¹¹

⁷ Katina Curtis, ‘Incredible pressure: Thousands of women turned away from domestic violence legal services’, *Sydney Morning Herald* (online) 22 September 2020 <<https://www.smh.com.au/pofederaitics/federal/incredible-pressure-thousands-of-women-turned-away-from-domestic-violence-legal-services-20200922-p55y22.html>>.

⁸ Australian Women Against Violence Alliance, ‘Women’s lives will be at risk because of decision not to act today – domestic violence experts’ (Media Release, March 2020) <https://awava.org.au/2020/03/13/media-release/womens-lives-will-be-at-risk-because-of-decision-not-to-act-today-domestic-violence-experts?doing_wp_cron=1589642604.5754508972167968750000>.

⁹ Commonwealth, *Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, Canberra, 21 October 2020, 24 (Mr Anderson) (‘*October Estimates*’).

¹⁰ Law Council of Australia, *2020-21 Deferred Pre-Budget Submission* (August 2020) 8 <<https://www.lawcouncil.asn.au/publicassets/13bfe261-dfec-ea11-9434-005056be13b5/3868%20-%202020-21%20Deferred%20Pre-Budget.pdf>>.

¹¹ Women’s Legal Services Australia, ‘Federal Budget fails to respond to call for urgent funding for specialist women’s legal services’ (Media Statement, 7 October 2020) <http://www.wlsa.org.au/media_releases/federal_budget_fails_to_respond_to_call_for_urgent_funding_for_specialist_womens_legal_services>.

D. The case for resourcing the family law system and maintaining a stand-alone Family Court

Why is a properly-resourced family law system important, including a specialist, stand-alone Family Court?

21. The family law system is one of the most used but under-resourced areas of the justice system.
22. Maintaining a properly resourced stand-alone, specialist family court as a keystone of that system is important to ensure specialist knowledge and training for judicial officers, registrars and court staff to equip them to identify and manage risk, and protect children and victims of family violence in need of the courts' assistance. A specialist court consists of more than just its Judges. It includes structural and institutional specialisation, in the form of its support services, resources and processes. This specialised court infrastructure is important to support children and families, and to coordinate and locate legal and non-legal support services.
23. When properly resourced, the Family Court has excelled at the provision and application of specialist conciliation and assessment services. Registrars and family consultants, when properly resourced and deployed, are an integral part of case management. They provide an invaluable service in the early identification, narrowing and resolution of issues. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.¹² The Association supports former Chief Justice Elizabeth Evatt AC's statement that:¹³

The increasing number of cases in which issues of family violence and child abuse are raised has led to an even greater need today for family law jurisdiction to be vested exclusively in specialised judges who can give their full attention to the needs of family law clients without being diverted to exercise other unrelated jurisdictions.

24. There is currently a Government proposal before the Senate to abolish the Family Court by merging it into the lower-level, overburdened and under-resourced Federal Circuit Court. The Association, along with more than 155 stakeholders,¹⁴ opposes the merger because this would abolish the stand-alone Family Court as we know it. The Association does not accept that the merger would realise any cost savings, it will only exacerbate delay, confusion and cost for families.

Why is more funding needed?

25. There is a direct causal link between resourcing and the timeliness and quality of justice delivered by the courts. Under-resourcing and a failure to promptly replace retiring judicial officers has produced delays and costs that impact on the accessibility and quality of justice for children, families and victim-survivors of family violence. Before the COVID-19 pandemic, the Family Court and Federal Circuit Court were each already facing backlogs of more than a year's worth of

¹² Women's Legal Services Australia, *Safety first in family law* (2019); see also House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence* (Report, 2017) [1.6] ('2017 House of Representatives Inquiry').

¹³ 'Family Court merger 'undesirable' for families, former Family Court Chief Justices say' (Joint Media Statement, 29 November 2020) <<https://www.lawcouncil.asn.au/media/media-releases/family-court-merger-undesirable-for-families-former-family-court-chief-justices-say>>.

¹⁴ See *Open Letter – Concerns about proposed Family Court merger* (2019) <http://www.wlsa.org.au/submissions/open_letter_-_concerns_about_proposed_family_court_merger>, updated in February 2021.

cases.¹⁵ The backlog of all pending non-appeal applications in the Family Court has grown from 4,997 to 6,720 (34%) from 2012-13 to 2018-19, while the backlog of all pending applications in the Federal Circuit Court has grown from 31,067 to 53,320 (72%).¹⁶ Those backlogs continued to rise in 2019-20 in each court.

26. As at November 2020, five Federal Circuit Court Judges in the Sydney registry had between 300 to 400 cases each in their dockets.¹⁷ Another Sydney-based Federal Circuit Court Judge and three Federal Circuit Court Judges at the Parramatta Registry had between 400-500 cases in their dockets.¹⁸ One further Judge in the Parramatta Registry is currently not sitting. The single Federal Circuit Court Judge in the Wollongong registry had more than 600 cases in their docket and has not been replaced since being elevated to the Family Court.¹⁹ The Chief Judge of the Federal Circuit Court has indicated that the ideal manageable number should be around 100 cases each.²⁰
27. More than 10 Judges across the Family Court and Federal Circuit Court nationally will be retiring in 2021-22. It is critical that these appointments are promptly replaced to avoid contributing to further delays for parties.
28. The Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court said in 2019 “There is no doubt that there are unacceptable delays in both courts and an unacceptable backlog... there’s no doubt there is a need for further resources”.²¹ This need is now more acute.
29. Funding provided in the 2020-21 Budget was insufficient to address the unmet need in the system and the Courts, and address the significant backlog of cases, for four reasons. First, the Budget announced \$35.7 million over four years for “additional resources and judges for the Federal Circuit Court (FCC) to assist with the timely resolution of migration and family law matters”.²² The Attorney-General’s Department confirmed in Senate Estimates in October that only a third of this funding - \$12.8 million – would support family law, through the appointment of one judge and five registrars.²³ This falls well short of the Chief Justice’s statement in 2019 that adding “an extra judge in every major registry would make a massive difference” to backlogs.²⁴
30. Second, the Government announced it was providing “the Family and Federal Circuit Courts with an additional \$10.2 million to manage the impacts of COVID-19”.²⁵ However, the Attorney-General’s Department has confirmed that the \$10.2 million figure was arrived at by adding the \$2.5 million allocated to maintain the COVID-19 list to money earmarked for improvements to the Launceston and Rockhampton registries.²⁶ The legal profession had been campaigning for the

¹⁵ Nicola Berkovic, ‘Courts reject questions over delays and judges’, *The Australian* (online) 23 October 2019, citing Family Court and Federal Circuit Court *Annual Reports 2018-19* (2019).

¹⁶ Productivity Commission, ‘Part C – Justice’, *Report on Government Services 2021* (2021) table 7A.21.

¹⁷ Family Court of Australia and Federal Circuit Court of Australia, [Responses to written questions on notice](#), 16 November 2020 (received 18 November 2020).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ See 2017 House of Representatives Inquiry (n 12) 153 [4.250].

²¹ Quoted in Nicola Berkovic, ‘Family law reform: Priority for next Australian government’, *The Australian* (online) 23 April 2019.

²² *Budget Paper No 2* (2020) 56.

²³ October Estimates (n 9) 46 (Mr Gifford).

²⁴ Quoted in Tony Keim, ‘A family (court) affair’, *Proctor* (November 2019) 32.

²⁵ Treasurer of the Commonwealth of Australia, ‘Guaranteeing essential services’ (Media Release, 6 October 2020).

²⁶ October Estimates (n 9) 50 (Mr Gifford).

Launceston and Rockhampton work to be undertaken for some time before COVID-19. These can hardly be described as COVID-19-related initiatives and will not address the growing backlogs and delays experienced as a result of the pandemic and shadow pandemic of family violence.

31. Third, \$4.1 million previously earmarked for expenditure in the Family Court was removed from budgeted expenses for the Family Court under program 2.1 over the next three years in the Attorney-General's Budget Statement, without explanation.²⁷ Fourth, despite funding being set aside in 2019 for the appointment of a judge to the appeal division, this appointment still has not occurred to date despite significant workload and backlogs facing the Family Court.
32. The Government subsequently announced in December 2020 that the Federal Circuit Court's small claims jurisdiction would be expanded. \$2 million over three years was provided, without funding for additional judges.²⁸ This is despite the crippling workloads already facing the Court.

How much additional funding and resourcing is required?

33. A substantial injection of funding is required to address successive years of under-resourcing by successive governments. If nothing else, to ensure that the system is able to function in a meaningful way, the following investment should occur urgently. The \$4.1 million removed in the 2020-21 Budget should be reinstated to the Family Court.
34. As mentioned above, in November 2019 the Chief Justice advised that adding "an extra judge in every major registry would make a massive difference" to backlogs.²⁹ This has not yet occurred. As a conservative estimate, adding an extra judge in each of the Family Court and Federal Circuit Court state capital registries³⁰ would total 14 judges.
35. The Mid-Year Economic and Fiscal Outlook in 2018-19 put the cost of an additional judge and support staff at \$3.7 million over four years, or \$1.1 million per full financial year.³¹ Based on this, a minimum \$15.4 million would be required per year.
36. More than ten retiring Judges in the Family Court and Federal Circuit Court must be promptly replaced with new appointments to avoid further delays.
37. In addition, there are a number of instances in NSW and nationally where retiring judges have not been promptly replaced. Further Judges may be required to work through COVID-19 backlogs, in view of the Courts' reliance on AVL hearings since March 2020. Justice Perram of the Federal Court has noted that AVL hearings are 20 to 40 percent slower.³²

²⁷ Ibid; *Attorney-General's Portfolio Budget Statement 2020-21* (October 2020) 242, table 2.2.1 Cf *Attorney-General's Portfolio Additional Estimates Statement 2019-20* (February 2020) 87, table 2.2.1.

²⁸ Commonwealth of Australia, *Mid-Year Economic and Fiscal Outlook 2020-21* (2020) 147.

²⁹ Quoted in Keim (n 24) 32.

³⁰ Adelaide, Brisbane, Canberra, Darwin, Sydney, Melbourne, Hobart.

³¹ Commonwealth of Australia, *Mid-Year Economic and Fiscal Outlook 2018-19* (2019) 155.

³² Justice Perram, 'Video Justice: Ten Years of Progress for Courts in Eight Weeks', *Australian Financial Review* (online) 14 May 2020).

E. Funding the implementation of the 2018 *Pathways to Justice* recommendations

Why is this important?

38. Aboriginal people and Torres Strait Islanders make up 2.8% of the Australian population but constitute 27.6% of the prison population. The Indigenous imprisonment rate in Australia rose 63% from the time the Royal Commission into Aboriginal Deaths in Custody reported in 1993 to 2016. These disproportionate statistics highlight how First Nations peoples continue to experience disadvantage and discrimination in Australia's justice system.
39. Not only is this a shameful reflection on modern Australia, the flow-on costs to the community in areas such as the cost of imprisonment, unchecked drug and alcohol abuse, ongoing domestic violence and out-of-home care are enormous. There has been a series of substantial reports and inquiries concerning First Nations peoples in custody, a number of which contain recommendations which are yet to be implemented, including the Australian Law Reform Commission's (ALRC's) 2018 *Pathways to Justice Report*.
40. Implementing the *Pathways to Justice Report* recommendations would significantly contribute to reducing the incarceration rate of First Nations peoples and would be an important step in correcting the unjust treatment that these communities have faced for many years.
41. The Association calls on the Commonwealth and State Governments to respond to, fund and implement the *Pathways to Justice Report*, including the following 10 urgent priorities:
 - a. the establishment of an independent justice reinvestment body, overseen by a Board with Aboriginal and Torres Strait Islander leadership, and the initiation of justice reinvestment trials to promote engagement in the criminal justice system;
 - b. the establishment of properly resourced specialist Aboriginal and Torres Strait Islander sentencing courts to be designed and implemented in consultation with Aboriginal organisations, including the Walama Court in the NSW District Court;
 - c. repeal of mandatory or presumptive sentencing regimes which have a disproportionate effect on Aboriginal offenders;
 - d. the expansion of culturally appropriate community-based sentencing options, resourced and supported by the State Government;
 - e. the diversion of resources from the criminal justice system to community-based initiatives that aim to address the causes of Indigenous incarceration;
 - f. the revision of bail laws to require bail authorities to consider cultural issues that arise due to a person's Aboriginality;
 - g. raising the minimum age of criminal responsibility and the minimum age of children in detention to 14, as outlined below in this submission;
 - h. the abolition or restriction of offences relating to offensive language to genuinely threatening language;

- i. fine default should not result in imprisonment in lieu of or as a result of unpaid fines; and
- j. the introduction of specific sentencing legislation to allow courts to take account of unique systemic and background factors affecting First Nations People.

Why is more funding needed?

42. Implementing many of the *Pathways to Justice Report* recommendations requires funding to ensure their success in contributing to reducing the incarceration rate of First Nations peoples.
43. For example, the Walama Court proposal in NSW which was referred to by the ALRC Report is supported by a sound business case, prepared by the Walama Working Group led by Her Honour Judge Dina Yehia SC of the District Court. NSW Department of Communities and Justice Secretary Coutts-Trotter told an estimates hearing in September 2019 that the Walama Court was “an excellent proposal” being considered alongside “a range of other proposals, in the 2020-21 budget cycle” and “the issue is simply one of funding”.³³

How much additional funding and resourcing is required?

44. The Association recommends that the Federal Government commit to implementing the *Pathways to Justice Report* recommendations as a priority in the 2021-22 Budget and work with First Nations-led groups, the states and territories to ensure appropriate funding.
45. Some of the costs of these initiatives may vary on a state by state basis and must be the subject of ongoing consultation to ensure appropriate funding is secured and shared, where appropriate, across Commonwealth and state/territory governments.
46. Importantly, many initiatives, including the Walama Court, will realise longer term societal and monetary benefits for Australian taxpayers, through their contribution to reducing recidivism and therefore the costs associated with incarceration. Nationally during 2019-20, expenditure on corrective services was \$3.88 billion for prisons and \$0.76 billion for community corrections.³⁴ Expenditure plus depreciation was \$5.09 billion, which represented a real increase of 5.1% from 2018-19.³⁵
47. Implementing the *Pathways to Justice Report* recommendations would realise savings as fewer First Nations peoples will be imprisoned and the reduced recidivism rates would mean generations of people will no longer continue to cycle through the criminal justice system.

³³ See New South Wales Bar Association, “Disappointing” NSW Budget holds back on funding for Walama Court, First Nations’ (Media Statement, 18 November 2020).

³⁴ Productivity Commission (n 16) Part C Section 8 ‘Corrective Services’, table 8A.1.

³⁵ Ibid.

F. Closing the Gap

Why is this important?

49. The National Agreement on Closing the Gap is an important step in sharing decision making and responsibility with First Nations peoples and the Government.
50. Closing the Gap initiatives, which include four priority reforms and 16 socio-economic targets, are aimed at committing federal, state and territory governments to work with First Nations organisations in relation to housing, healthcare, justice targets, and education.
51. The Closing the Gap targets, however, are not set up to succeed if First Nations voices are not included in decision-making processes around setting and implementing the targets, or if proper resourcing and funding is not allocated to support implementation.
52. For the first time, the Closing the Gap targets announced in July 2020 included a justice target aiming to reduce adult incarceration by 15% by 2031. Those targets have attracted widespread criticism as being inadequate from a number of organisations, including the Aboriginal Legal Services NSW/ACT and the Association, as well as being inadequately funded.
53. The Association has consistently said that higher targets to reduce the over-representation of First Nations peoples in the criminal justice system could be achieved more quickly and effectively. For example, figures released by the NSW Bureau of Crime Statistics and Research in August indicated that the State's prison population had been reduced in eight weeks by 11% and the youth detention population by 27% from February to June in response to the threat of COVID-19. The fact that such a substantial reduction in the prison population can be achieved in the short term in the context of the COVID-19 pandemic indicates that the Indigenous over-representation in Australian corrections system can be addressed much faster than the Closing the Gap target, and without putting the community at risk. As outlined above, reducing the over-representation of First Nations peoples in custody has the potential to realise cost savings in the longer term, in addition to significant other benefits.

Why is more funding needed and how much is required?

54. While the Commonwealth Government announced an initial contribution of \$46.5 million over four years, that equates to just \$11.63 million a year. When divided across each of the 16 Closing the Gap targets, these amounts are nowhere near enough to reasonably meet the targets or fund the initiatives necessary to meet the targets and Close the Gap. Funding must be invested in initiatives including healthcare and justice infrastructure, the building and funding of schools, the creation of job opportunities for First Nations peoples, the creation of housing initiatives and proper mental health resources. Further, First Nations organisations must be properly resourced and funded to participate in these processes.
55. The Association urges the Federal Government to consult with First Nations-led groups and stakeholders to develop and implement a more appropriate, sustained budget to meet the Closing the Gap targets.

G. The cost of not raising the minimum age of criminal responsibility to 14

Why should the minimum age of criminal responsibility be raised?

56. The Association strongly supports raising the age of criminal responsibility from 10 to 14 years of age across all state, territory and Commonwealth jurisdictions for six reasons:³⁶
- a. First, there is a concerning nexus between early contact with the criminal justice system and subsequent juvenile and adult re-offending;
 - b. Second, a minimum age of 10 is inconsistent with consensus amongst the medical community regarding research on child brain development;
 - c. Third, Aboriginal and Torres Strait Islander children are significantly overrepresented in Australia's child protection systems and disproportionately affected by the current minimum age, which perpetuates the cycle of disadvantage;
 - d. Fourth, children with intellectual and psychosocial disabilities are also over-represented in the juvenile justice system in NSW;
 - e. Fifth, the operation of the *doli incapax* presumption in NSW is leading to the adverse involvement of children in the criminal justice system where the child is found not to have capacity; and
 - f. Sixth, the current law is inconsistent with international standards and the recommendations of peak legal and medical bodies.
57. The Association is not asserting that there should be no response or consequences for behaviour of concern committed by children under the age of 14. Rather, the Association urges the Government to adopt a response of culturally competent treatment, education and rehabilitation to address this behaviour, as an alternative to criminalising children aged between 10 and 14.
58. Raising the minimum age is consistent with the views and concerns of many stakeholders. In June 2019 the Law Council's board of directors voted unanimously to change its policy position to advocate for the minimum age of criminal responsibility to be raised to 14.³⁷ This position has been endorsed by the Bar Council of the Association. The Independent Expert leading the United Nations Global Study on Children Deprived of Liberty recommended to the United Nations in July 2019 that "States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age".³⁸
59. Similarly, the United Nations Committee on the Rights of the Child³⁹ has called on Australia to "raise the minimum age of criminal responsibility to an internationally accepted level and make it

³⁶ These are outlined in detail in the Association's submission to COAG, which is available at https://nswbar.asn.au/uploads/pdf-documents/submissions/NSW_Bar_Association_-_submission_to_COAG_-_minimum_age_of_criminal_responsibility.pdf.

³⁷ Law Council of Australia, 'Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove *doli incapax*' (Media Statement, 26 June 2019).

³⁸ M Nowak, *Report of the Independent Expert leading the global study on children deprived of liberty*, GA Report, UNGA, 74th Sess, Item 68(a), UN Doc A/74/136, [109].

³⁹ Established under the UN Convention on the Rights of the Child which Australia has ratified.

conform with the upper age of 14 at which *doli incapax* applies”.⁴⁰ This is in line with the Committee’s General Comment No. 24 (2019) which called for the minimum age of criminal responsibility to be raised to 14. Most recently, the issue was raised in January 2021 by 31 countries meeting at the United Nations Universal Periodic Review, which recommended that Australia raise the minimum age of criminal responsibility.

How much will it cost?

60. Maintaining the current minimum age of criminal responsibility is not advantageous from either a societal, justice or budgetary perspective.
61. Nationally, the average cost per day of a young person being subject to detention based supervision has increased from \$1455 in 2017-18,⁴¹ to \$1579 in 2018-19,⁴² to \$1901 in 2019-20.⁴³ There will be opportunities for transferring current funding from the criminal prosecution and detention of children to the treatment, education and rehabilitation model suggested by the Association. That may produce considerable savings across a number of portfolios including police, the courts and children’s detention centres. The Association encourages the relocation and reinvestment of such resources to diversionary programs, for supported accommodation and supervision, and particularly for the support of First Nations organisations and other culturally appropriate resources to undertake that work.
62. Proper assessment must occur to determine appropriate levels of funding to ensure children under 14 are appropriately supported and supervised in the way intended. Such a structural shift would significantly counter any cost outlay and may prove to be revenue neutral in the medium to long term. The experience of countries where the age of criminal responsibility is 14 or higher has been that “there are no negative consequences in terms of crime rates”.⁴⁴

H. Conclusion

63. Thank you again for the opportunity for the Association to make a submission on Pre-Budget priorities. The Association appreciates the significant budgetary pressures facing the Government at this time. However, failing to invest in the justice system or specialist legal assistance and family violence support services is a false economy and only creates additional, unacceptable pressures on the courts and community. If you would like any further information, or to discuss this submission, please contact the Association’s Director of Policy and Public Affairs, Elizabeth Pearson, via epearson@nswbar.asn.au.

⁴⁰ United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019).

⁴¹ Productivity Commission, *Report on Government Services 2020* (2020), vol F, ch 17, table 17.25.

⁴² *Ibid* table 17.24.

⁴³ Productivity Commission (n 16) vol F, ch 17, table 17A.20.

⁴⁴ F Dunkel (1996) ‘Current Directions in Criminal Policy’, 38, quoted in Chris Cunneen, ‘Arguments for Raising the Minimum Age of Criminal Responsibility’ (Research Report - Comparative Youth Penalty Project, University of New South Wales, 2017).