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Centre.

# Raising the age in Tasmania

Responses to the Tasmanian Commissioner  
for Children and Young People's survey on  
raising the minimum age of criminal  
responsibility

**30 April 2021**

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## **Human Rights Law Centre**

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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## **Tasmanian Aboriginal Legal Service**

The Tasmanian Aboriginal Legal Service (**TALS**) is an independent, locally controlled organisation under the governance of the Aboriginal Corporation of Tasmanian Legal Services.

TALS specialises in criminal, civil and family law matters for Aboriginal people in Tasmania and provides culturally safe, holistic and appropriate services that are inclusive and open to all Aboriginal Tasmanians.

Increasingly TALS are an advocate for justice, equality and human rights for all First Peoples in Tasmania and aims to halve Aboriginal Tasmanians' rate of negative contact with the justice system in a decade.

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# Contents

<b>1.</b>	<b>Summary .....</b>	<b>4</b>
<b>2.</b>	<b>Early intervention and alternatives .....</b>	<b>4</b>
<b>2.1</b>	<b>Alternative programs already exist.....</b>	<b>4</b>
<b>2.2</b>	<b>Early intervention is key .....</b>	<b>4</b>
	<b>Education .....</b>	<b>5</b>
	<b>Child Protection.....</b>	<b>5</b>
<b>3.</b>	<b>Stop locking up children.....</b>	<b>6</b>
<b>4.</b>	<b>End the over-imprisonment of Aboriginal and Torres Strait Islander children .....</b>	<b>6</b>
<b>5.</b>	<b>Prevent harm and promote wellbeing .....</b>	<b>7</b>
<b>6.</b>	<b>Accountability can, and must be, age appropriate .....</b>	<b>8</b>
<b>7.</b>	<b>Raise the age without exception .....</b>	<b>8</b>
<b>8.</b>	<b>The failed safeguard of doli incapax .....</b>	<b>8</b>
<b>9.</b>	<b>Nothing to lose, and so much to gain .....</b>	<b>9</b>

# 1. Summary

The minimum age of criminal responsibility in Tasmania is just 10 years old. This means that children as young as 10 can be arrested, charged with an offence, hauled before a court, locked away in detention and deprived of their liberty and ultimately their wellbeing.

**The Human Rights Law Centre and the Tasmanian Aboriginal Legal Service recommend that the minimum age of criminal responsibility should be raised to at least 14 years of age, with no carve outs.**

The Tasmanian Commissioner for Children and Young People sought consultation from interested and experienced individuals and organisations by way of online survey to help inform an advice they will provide to the Tasmanian Government on the minimum age of criminal responsibility.

This document is a compilation of the Human Rights Law Centre's responses to that online survey, with contributions from the Tasmanian Aboriginal Legal Service.

# 2. Early intervention and alternatives

*Question 1a: If the minimum age of criminal responsibility is raised in Tasmania (e.g. to 14), what evidence-based alternative programs, interventions or supports would be required to effectively address the underlying needs of children aged below the minimum age who would otherwise be dealt with in the criminal justice system because of their behaviour?*

We recommend that the minimum age of criminal responsibility be raised in Tasmania to at least 14 years of age, with no carve outs. The current age of criminal responsibility is just 10 years old. This includes children who could still only be in grade four at primary school. This means that, in Tasmania, children as young as 10 can be arrested, charged with an offence, hauled before a court, locked away in detention and deprived of their liberty and ultimately their wellbeing.

By investing in alternative programs, health and education services and support for children, we can build stronger and safer communities for us all. Aboriginal-led alternatives to detention work because they connect children with culture, country and community.

## 2.1 Alternative programs already exist

We understand, per the Noetic Solutions 2016 report regarding custodial youth justice options (**Noetic Solutions Report**), that the Department of Health and Human Services in Tasmania has undertaken a project to map all the services funded to support children at risk in Tasmania.<sup>1</sup>

Raising the age of criminal responsibility presents an opportunity for the Tasmanian Government to leverage this research and mapping to identify what services already exist, evaluate their effectiveness and work to identify and remedy any gaps in service delivery.

Departments and agencies involved in health, child protection and education, in partnership and collaboration with families, communities, the Commissioner for Children and Young People and other key organisations, should be involved in this process and the development of early intervention initiatives.

## 2.2 Early intervention is key

The Commissioner for Children and Young People in its 2021 background paper to inform community discussion on the age of criminal responsibility, referred to a 2016 report which emphasised the importance of investment in prevention, early intervention and diversionary services, but acknowledged that Tasmania currently does not have the breadth or depth of prevention, early intervention and diversionary services required.<sup>2</sup>

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<sup>1</sup> Noetic Solutions Pty Ltd, *Custodial Youth Justice Options Paper: Report for the Tasmanian Government Department of Health and Human Services* (2016), Tasmanian Government, p 39, accessible: [https://www.dhhs.tas.gov.au/\\_\\_\\_data/assets/pdf\\_file/0018/268020/99010\\_Custodial\\_Youth\\_Justice\\_Options\\_Paper\\_October\\_2016\\_-\\_Report\\_for\\_the\\_Tasmanian\\_Government.pdf](https://www.dhhs.tas.gov.au/___data/assets/pdf_file/0018/268020/99010_Custodial_Youth_Justice_Options_Paper_October_2016_-_Report_for_the_Tasmanian_Government.pdf).

<sup>2</sup> Commissioner for Children and Young People in Tasmania, *Age of Innocence: Children and Criminal Responsibility; A Background paper to inform community discussion* (2021), accessible: <https://www.childcomm.tas.gov.au/wp-content/uploads/Age-of-Innocence-Children-and-criminal-responsibility-Background-Paper-FINAL.pdf>.

The service mapping project, referred to above, will be useful for the Tasmanian Government in further understanding this gap in service delivery. The Tasmanian Government then needs to rectify and address gaps in service delivery of early intervention programs.

In terms of developing prevention and early intervention initiatives, these should be the least intensive required in the circumstances and be developmentally appropriate, human rights compliant and evidenced based. The most effective initiatives are those that build or enhance protective factors and positive skills development rather than risk mitigation. For example, family or parental training programs, structured pre-school education programs, centre-based developmental day care, home visitation services, and family support services.

It is important to recognise that many of the interventions that reduce the likelihood of a child's later involvement in the criminal justice system are the same as those identified to protect children from harm and promote their wellbeing in the child and family domain.

It must be acknowledged that there is likely to be some diversity amongst communities and regions in relation to the factors that contribute to or protect against anti-social or potentially criminal behaviour by children and the types of services and levels of social capital, resources and funding.

Two key early intervention points are education and child protection.

## Education

There is a clear link between disengagement from school and a child's entry into the youth justice system. School environments therefore present an ideal opportunity to identify children who are at risk of entering the criminal justice system and provide targeted support.

In this regard education agencies should move away from opaque behavioural management practices that can lead to the suspension and expulsion of children exhibiting challenging behaviours from school towards providing an inclusive school environment with policies and practices that are supportive of all children, particularly responsive to the unique experiences and needs of children with health, disability and learning issues.

## Child Protection

The failure to identify health needs and understand the link between challenging behaviours and the traumatic impact of abuse and neglect on children can lead to children known to child protection and welfare services being pipe-lined into the criminal justice system.

There is a clear link between a child's contact with the child protection system, including out of home care, and their engagement with the youth justice system. The Tasmanian Government's 2017 Youth at Risk Strategy found that almost half of young people in detention were also in the child protection system in the same year.<sup>3</sup> The Commissioner for Children and Young People has also found that "too many young people in out of home care have poor outcomes across the developmental spectrum as a result of less than ideal support from the State... [t]his includes... entry into the youth justice system."<sup>4</sup>

This is consistent with more recent reporting in other jurisdictions. For example, the Sentencing Council of Victoria in its 'Crossover Kids' report found that, in its study group, 94% of cross over children were involved with child protection services *before* they became involved in the youth justice system.<sup>5</sup>

In light of this, child protection agencies are uniquely placed to identify and respond to children at risk of contact with the youth justice system through appropriate assessments and referrals to supports that could ensure individualized and culturally responsive interventions.

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<sup>3</sup> Jacquie Petrusma MP, Minister for Human Services, *Youth at Risk Strategy* (2017), Tasmanian Government, p 19, accessible: [https://www.communities.tas.gov.au/\\_\\_data/assets/pdf\\_file/0022/36373/CYS\\_Youth\\_at\\_Risk\\_Strategy\\_48pp\\_v8\\_LR.pdf](https://www.communities.tas.gov.au/__data/assets/pdf_file/0022/36373/CYS_Youth_at_Risk_Strategy_48pp_v8_LR.pdf).

<sup>4</sup> Commissioner for Children and Young People in Tasmania, *Children and Young People in Out of Home Care in Tasmania* (2017), p 7, accessible: <https://www.childcomm.tas.gov.au/wp-content/uploads/2017/01/Children-and-Young-People-in-Out-of-Home-Care-in-Tasmania-Report-WEB.pdf>.

<sup>5</sup> Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 2: Children at the Intersection of Child Protection and youth Justice across Victoria* (2020), Victorian Government, p xvi, accessible: [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover\\_Kids\\_Report\\_2.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover_Kids_Report_2.pdf).

### 3. Stop locking up children

*Question 1b: Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (e.g. to 14), should a higher minimum age of detention be introduced (e.g. 16)? If this was to occur, what evidence-based alternative programs, interventions or supports would be required for those children aged below the minimum age of detention?*

The United Nations Child Rights Committee has stated that 14 is the minimum age at which children should be held legally responsible and that laws should be changed to ensure that children under the age of 16 years “may not be legally deprived of their liberty.”<sup>6</sup> This is in recognition of the fact that locking children up in detention creates a vicious cycle of disadvantage and traps children in the quicksand of the criminal justice system.

When a child is incarcerated, they are removed from their home, family and other social supports. According to the Royal Australian and New Zealand College of Psychiatrists submission to the Royal Commission, the loss of liberty, personal identity and protective factors that may have been available in the community can place great stress on a child, impair adolescent development and compound mental illness and trauma.<sup>7</sup> In these circumstances, children in detention are particularly susceptible to victimisation (by adults and other children), stigmatisation by the criminal justice system and negative peer contagion.<sup>8</sup>

Similar to that set out above, to support children those children aged below the minimum age of detention of 16 years old, the Tasmanian Government needs to build up and create programs, interventions or supports that focus on supporting rather than punishing children.

### 4. End the over-imprisonment of Aboriginal and Torres Strait Islander children

*Question 2: How should the overrepresentation of Aboriginal and Torres Strait Islander children in our criminal justice system inform options for the reform of Tasmania’s laws on the minimum age of criminal responsibility?*

By raising the age, the Tasmanian Government can have an immediate - and generational - impact on ending the over-imprisonment of Aboriginal and Torres Strait Islander children.

Aboriginal and Torres Strait Islander children are overrepresented in the Tasmanian youth justice system being 4 times more likely than their non-Indigenous peers to be in detention or under community-based supervision on any given day.<sup>9</sup> On an average day in 2018 – 2019, 65% of children aged between 10-13 under youth justice supervision in Tasmania were Aboriginal and Torres Strait Islander children in circumstances where only 8.4% of children identified as Aboriginal and/or Torres Strait Islander children.<sup>10</sup>

Aboriginal and Torres Strait Islander children are over-represented in the child protection system.<sup>11</sup> There is a clear link between children in the child protection system and those children who end up in detention, with the Australian Law Reform Commission finding that Aboriginal and Torres Strait Islander children in the child protection system were almost three times as likely to be subject to youth justice supervision than

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<sup>6</sup> Committee on the Rights of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system* (2019), United Nations, available here:

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?Lang=en&symbolno=CRC%2FC%2FGC%2F24](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?Lang=en&symbolno=CRC%2FC%2FGC%2F24).

<sup>7</sup> Royal Australian and New Zealand College of Psychiatrists submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017). Victorian Government, Justice and Community Safety, Peggy Armytage and Professor James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending*, (July 2017), 51.

<sup>8</sup> Kelly Richards, Australian Institute of Criminology, *Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders?* (2011), 7.

<sup>9</sup> Commissioner for Children and Young People in Tasmania, *Age of Innocence: Children and Criminal Responsibility; A Background paper to inform community discussion* (2021), accessible: <https://www.childcomm.tas.gov.au/wp-content/uploads/Age-of-Innocence-Children-and-criminal-responsibility-Background-Paper-FINAL.pdf>.

<sup>10</sup> Commissioner for Children and Young People in Tasmania, *The Health and Wellbeing of Tasmania’s Children and Young People Report 2018* (2018), accessible: <https://www.childcomm.tas.gov.au/wp-content/uploads/2018/08/The-Health-and-Wellbeing-of-Tasmanias-Children-and-Young-People-Report-2018.pdf>.

<sup>11</sup> Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018), Australian Government, p 74, accessible: <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

non-Indigenous young people.<sup>12</sup>

For Aboriginal and Torres Strait Islander children in particular, imprisonment and the associated social isolation and alienation from family, community and country can be more intense, especially for children from regional areas. The flow on effect is also felt through family and community disharmony, impaired connection to positive family members including Elders and reduced opportunities to fulfil and engage in important cultural obligations including ceremonies and initiation.

The removal of a child from their community can serve to reinforce negative behaviours and increase the influence of peers in the detention facility. It is accepted that youth detention centres are, as the Australian Institute of Criminology in 2011 put it, ‘universities of crime’ that enable offenders to build and maintain criminal networks, learn and improve offending techniques and strategies.<sup>13</sup> So rather than assisting a child to develop in socially responsible ways and address their needs and risk factors, incarceration itself can increase the likelihood of reoffending.

The staggeringly high rates of overrepresentation of Aboriginal and Torres Strait Islander children demonstrates the need to invest in Aboriginal-led alternatives to imprisonment. We endorse the Commissioner for Children in Tasmania’s call for a shift towards justice reinvestment as an alternative to secure youth detention in Tasmania.<sup>14</sup>

## 5. Prevent harm and promote wellbeing

*Question 3a: What might be the best approach for protecting the community from the rare cases of serious anti-social or harmful behaviours committed by children aged below the minimum age of criminal responsibility?*

When people commit serious crimes, they should be held responsible, but children must be given a chance to learn and grow safely. Much of the offending by children is impulsive, opportunistic, attention-seeking and transient, rather than planned and habitual. Unlike adult offending, offences by children tend to be committed in small groups in public areas, and close to where they live.

On the very rare occasion that a child does do something seriously wrong, it means that something has gone seriously wrong for that child. The Tasmanian Government should be focussed on addressing the things that have gone wrong for that child, and help children learn from their mistakes, develop responsibility and engage in school. This is an approach that will lead to lower rates of future offending.

The answer is not, and never will be, sending children to detention.

Where children continue to have ongoing contact with the legal system, this is largely linked to environmental and social factors that are largely the same as those that can lead them into child protection<sup>15</sup> – family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage. Children who are aged 14 years or younger at the time of their first youth justice order are more likely to come from disadvantaged communities and have higher rates of missed maternal and child health appointments and developmental vulnerability on two or more domains of the Australian Early Development Index.<sup>16</sup>

In relation to anti-social or problematic behaviours by particularly young children, there should be a range of responses that are proportionate to the behaviour and identified risk or need, as well as the age of the child, taking into consideration their development. In terms of prevention and early intervention initiatives, these should be the least intensive required in the circumstances and be developmentally appropriate, human rights compliant and evidenced based. The most effective initiatives are those that build or enhance protective factors and positive skills development. For example, family or parental training programs, structured pre-school education programs, centre-based developmental day care, home visitation services, and family support services.

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<sup>12</sup> Ibid.

<sup>13</sup> Kelly Richards, Australian Institute of Criminology, Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders? (2011), 6-7.

<sup>14</sup> Commissioner for Children Tasmania, *Factsheet: Alternatives to Secure Youth Detention in Tasmania Inquiry*, (2013), accessible: <https://www.childcomm.tas.gov.au/wp-content/uploads/2015/07/CfC-Alternative-Detention-Fact-Sheet-0913-DRAFT-FINAL-1.pdf>

<sup>15</sup> Joint Australian Children’s Commissioners and Guardians submission to the Australian House of Representatives Inquiry into the over representation of Aboriginal and Torres Strait Islander young people in the justice system (2010), 6.

<sup>16</sup> Jesuit Social Services, Thinking Outside, Alternatives to Remand for Children (Research Report) (2013), 38- 41.

## 6. Accountability can, and must be, age appropriate

*Question 3b: If the minimum age of criminal responsibility is raised (e.g. to 14 years), what alternative legal frameworks may be required to ensure children aged below the minimum age who exhibit serious anti-social or harmful behaviour receive appropriate reparative interventions and supports directed at addressing the risk factors for their behaviour? (What sort of competent legal authority should make the decision about the appropriate pathway for the child to take? What criteria or factors should inform that decision?)*

There is no need for the creation of any new legal frameworks to ensure that children aged below the minimum age receive appropriate interventions.

Children should be held accountable for their actions in a way that is age-appropriate and focuses on supporting them and addressing the underlying causes of the child's behaviour. This can be done by building up and creating the programs, interventions or supports discussed above that focus on supporting rather than punishing children.

Tasmania already has frameworks in place that respond to children under the age of 10 years. As part of the process of raising the age, the Tasmanian Government can build on and expand frameworks to support children aged 10-13 years old.

## 7. Raise the age without exception

*Question 3c: If the minimum age of criminal responsibility is raised (e.g. to 14 years), but not for all offences, in what contexts or for what offences should it not be raised – should there be carve outs for serious offences like murder or sexual assault?*

The age of criminal responsibility should be increased from 10 years to at least 14 years old. There should be no carve outs or exceptions for any offences.

## 8. The failed safeguard of doli incapax

*Question 3(d): If the minimum age of criminal responsibility remains less than 14 years, or is raised to 14 for some offences only, the presumption of doli incapax would continue to have application in any criminal proceedings against children aged less than 14. Could the test for doli incapax be clarified, refined, or expressed differently in legislation to ensure that it produces more consistent results and operates as intended – in particular that it is a presumption for the prosecution to rebut, rather than a defence that must be raised by the defence?*

The age of criminal responsibility should be raised to at least 14 and there should be no carve outs or exceptions for certain offences.

The old, common law presumption doli incapax - that provides that a child aged 10-13 lacks the capacity to be criminally responsible for their actions - does not work and routinely fails to safeguard children aged 10 to 13 years old. Once the age is raised to at least 14 years, doli incapax would have no role to play and would become redundant.

The presumption of doli incapax simply does not reflect contemporary medical knowledge of childhood brain development, social science, long term health effects or human rights law.<sup>17</sup>

It is applied inconsistently, and children can often be exposed to the harms of the criminal justice system through the process of trying to prove doli incapax. This is because, in order to determine conclusively whether a child aged 10-13 years was doli capax at the time of the offence, a trial or summary hearing must be held. The trial can take months or longer depending on court lists, case management processes and the availability of experts relevant to proof of knowledge and maturity. In the meantime, the child awaiting trial will have already experienced and been exposed to certain aspects of the criminal legal process that can itself be criminogenic and reinforce the very behaviours and attitudes sought to be prevented. For example, a child suspected of committing an offence could be arrested and taken into custody by police, handcuffed,

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<sup>17</sup> See, eg, Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [44]; Committee on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia, UN Doc CERD/C/AUS/CO/18-20 (29 December 2017) [25]-[26].

strip searched, subjected to forensic examinations, interrogated, remanded in custody or subject to conditional bail, multiple court appearances and labelled as a criminal through media or social media reporting.

There is no role for *doli incapax* to play in the youth justice system.

## 9. Nothing to lose, and so much to gain

### 9.1 Tasmania has nothing to lose

*Question 4: What legal, federal, or other implications might arise from Tasmania raising the minimum age of criminal responsibility if other Australian jurisdictions do not?*

The Tasmanian Government has nothing to lose by raising the age. The Australian Capital Territory has already committed to raising the age of criminal responsibility to 14 years of age. There are no federal, legal or other implications of Tasmania also doing so, even if other Australian jurisdictions do not.

Throughout history, the states and territories of Australia have often had different ages of criminal responsibility. In fact, in 1999 when Tasmania raised the age of criminal responsibility from 7 to 10 years, Tasmania was the only jurisdiction in Australia that had 7 years as the age of criminal responsibility.

### 9.2 In fact, Tasmania has a lot to gain

*Question 5: Are there are any unforeseen consequences of raising the minimum age?*

One unforeseen consequence of raising the age is that keeping children out of detention will save the Tasmanian Government money. The Commissioner for Children and Young People in Tasmania, in the background paper regarding Age of Innocence, found that the financial costs of youth detention are huge and can last a lifetime.<sup>18</sup>

The Commissioner found that youth detention alone involves an outlay of \$1 million per child in detention every year.<sup>19</sup> The Commissioner also recognised that children who are locked up at a young age are more likely to reoffend and become trapped in the criminal justice system.<sup>20</sup> This is an expensive cycle, and the costs go well beyond the logistics of incarceration. Incarceration and repeated interactions with the justice system, according to the Commissioner, can lead to job instability which reduces lifetime taxes paid and increases reliance on government benefits.<sup>21</sup>

Investing in alternative programs to incarceration will not only make life changing differences to children who need support, but it also has the potential to save the Tasmanian Government money.

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<sup>18</sup> Commissioner for Children and Young People in Tasmania, *Age of Innocence: Children and Criminal Responsibility; A Background paper to inform community discussion* (2021), accessible: <https://www.childcomm.tas.gov.au/wp-content/uploads/Age-of-Innocence-Children-and-criminal-responsibility-Background-Paper-FINAL.pdf>.

<sup>19</sup> *Ibid.*

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

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