

VALS Policy Brief

Raising the Age of Criminal Responsibility





Every child should be free to go to school, have a safe home to live in and be supported to learn from their mistakes. But right now, politicians are sending children as young as 10 years old to be locked away in prison. Governments must address this by raising the minimum age of criminal responsibility to at least 14 years, and the minimum age for detention to 16 years.

Recommendations

1. The Victorian Government must raise the minimum age of criminal responsibility to at least 14 years. To do this, it should:
 - (a) Commit to raising the age of criminal responsibility to 14 years, with no exceptions or 'carve outs' for any type of behaviour or conduct.
 - (b) Initiate a process to map out the family and service system response to ensure that children under 14 years who exhibit behaviours previously considered offending (and their families) get the necessary familial, therapeutic, restorative and rehabilitative assistance.
 - (c) Properly fund existing support services for children and their families, to ensure coverage of all of Victoria, as well as ongoing, sustainable funding.
 - (d) Pass legislation for children under 14 years as a matter of urgency, and no later than in the first 100 days of a new term of government.
2. The Victorian Government should raise the minimum age for detention to at least 16 years.
3. The Victorian Government should extend the presumption of doli incapax to children aged 14-17 years, and ensure that it is understood and applied effectively by:
 - (a) Creating a legislative requirement for prosecutors to rebut the presumption;
 - (b) Restricting the kinds of evidence that can be produced to rebut the presumption;
 - (c) Increasing funding to the Children's Court to improve the quality of clinical reports;
 - (d) Requiring all police, Crown prosecutors and criminal defence lawyers to undergo mandatory training on doli incapax.



What is the age of criminal responsibility?

The age of criminal responsibility is the age at which someone can be charged, convicted and sentenced for a criminal offence. In all States and Territories in Australia, the age of criminal responsibility is 10 years. This means that children who are still losing their baby teeth and are not old enough to sign up to Facebook, can be removed from their family and locked up in a prison.

How does the low age of criminal responsibility impact Aboriginal people?

Aboriginal children are disproportionately impacted by the low age of criminal responsibility, as they are more likely than non-Aboriginal children to have contact with the youth justice system at an early age, less likely than non-Aboriginal children to receive a caution from police, and more likely to be charged with a criminal offence.

In 2019-2020, 47% of children aged 10-13 years who were in contact with Youth Justice (in custody and in the community) on an average day in Victoria, were Aboriginal.

Throughout 2019-2020:

- 13% of children aged 10-13 years who had contact with police were Aboriginal;
- 46.6% of Aboriginal children aged 10-13 years who had contact with police were charged, compared to 38.6% of non-Aboriginal children aged 10-13 years;
- 32.5% of children aged 10-13 years who were under supervision by Youth Justice (either in custody or in the community) were Aboriginal. This included, 27% of 10-13 year olds who were on remand, and 44% of 10-13 year olds who were on statutory youth justice supervision in the community.

Why should the Victorian Government raise the age of criminal responsibility?


Raising the age of criminal responsibility to at least 14 years will have a significant impact on Aboriginal children, who are disproportionately impacted by the low age of criminal responsibility. By 2031, the Victorian Government has committed to Close the Gap in the rate of Aboriginal and non-Aboriginal people under youth justice supervision. This is an unambitious target and



could be significantly improved. However, even to achieve this target, raising the age to at least 14 years is a critical step.

There is a substantial body of medical, sociological and criminological evidence in favour of raising the age, including:

- **Lack of culpability:** Medical science shows that children below the age of 14 years lack the maturity to fully comprehend the impact of their actions and meet legal standards of culpability.
- **International law:** According to the United Nations Committee on the Rights of the Child (**UNCRC**), the minimum age of criminal responsibility should be at least 14 years, with no exceptions for any offences. In many other countries around the world, the age is 14 years, and in some countries, the minimum age of criminal responsibility is 16 years. Australia has binding legal obligations under the Convention on the Rights of the Child and has been repeatedly criticised by the UNCRC, the UN Special Rapporteur on the Rights of Indigenous Peoples, and the UN Human Rights Council for failing to comply with international standards. In 2021, when Australia appeared before the Human Rights Council, it was condemned by over 30 other countries for its low age of criminal responsibility.
- **Addressing complex needs:** Children in the youth justice system often have complex needs, including mental health concerns, cognitive and/or physical disabilities, lack of secure housing, behavioural difficulties, drug or alcohol use, involvement with Child Protection, experiences of trauma and/or violence and social isolation. They may also come from families that need additional support and/or have family members who also have complex needs. Criminalising these children will not address their needs and is more likely to lead to further offending.
- **Reducing recidivism:** Early involvement with the youth justice system significantly increases the likelihood of reoffending, including reoffending as an adult; the younger someone is when they are first sentenced, the higher their chance of reoffending.
- **Existing protections are ineffective:** Current Victorian practice tries to protect children through a rebuttable presumption of *doli incapax*, but this presumption is frequently overlooked or incorrectly applied in practice.
- **Punitive bail laws:** Due to the punitive bail system in Victoria, children aged 10-13 years are detained on remand, even when they are unlikely to receive a custodial sentence for the offence. In 2019, 107 remand orders were made in respect of children aged 10 to 13 years, but no custodial sentencing orders were made in respect of this age group.
- **Community safety:** It is often argued that criminal justice responses to youth offending are necessary to keep the community safe. This is simply not true. The best way to create safer communities is keep young people out of the youth justice system, including by supporting them, and their families and communities, to address their needs.

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- **Detention is harmful:** Conditions in youth detention re-traumatise children, compound mental illness, further disrupt their development and make reoffending more likely. For Aboriginal children, detention also removes them from their families, communities, Country and culture. Detention is harmful for all children, but particularly children as young as 10 years old.

Should there be any exceptions for serious offending?

There should be no exceptions to the minimum age of criminal responsibility. In rare cases that a child commits a serious offence, the focus should be rehabilitation, community safety and supporting the victims of the offending. This should include:

- Supporting victims through restorative justice processes (which have the added benefit of supporting the child to take responsibility for their actions) if the victim consents, and providing proper support for victims.
- A focus on rehabilitation, as no child should be categorised as being beyond rehabilitation or community support, no matter what their harmful behaviour is. We should be dedicating more resources to the children most at risk of further offending and serious offending, not less.
- Tailored and intensive supports for the child and their family, while the child is in the community, not a facility. The focus should be on providing a wrap-around service, addressing the underlying causes of offending, assisting the family and child to navigate systems from which they have been excluded or unable to navigate on their own (e.g. housing support, Centrelink, education), building a solid, extensive support network in the community (where the child will ultimately always return) to ensure that the chances of reoffending are reduced.

There are existing services and models that should be provided greater funding and increased capacity to more effectively work together (rather than in silos), to achieve this intensive, tailored, community-based, ongoing support.

What should be done instead of criminalising our children?

Children in the youth justice system often have complex needs, and have invariably been let down by the adults and systems in their lives. We should not be punishing our children for the failures of others. Children must be given a chance to learn from their mistakes and grow up to



be healthy, safe, contributing members of our communities.

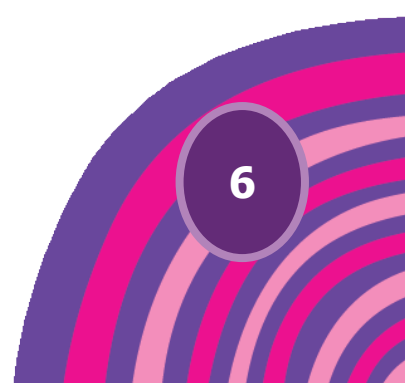
Rather than criminalising children and reinforcing inequalities, governments should be providing wrap around support and care at the earliest possible stage, to prevent contact with the youth justice system in the first place. This means that risk factors must be identified and addressed as early as possible, including early diagnosis of health issues and/or disabilities, providing safe and secure housing, ensuring that children remain engaged with school, and reducing the risk of child protection intervention by supporting families to take care of their children.

It is also critical to ensure that children below the age of 14 years who are exhibiting behaviours currently considered to be offending, are connected to wrap around support and services, where needed. This will require a fundamental shift in police culture, supported by clear processes to ensure that police connect children to relevant supports and services where needed. In addition, we will need strong oversight mechanisms – including an [independent police complaints body](#) – to ensure that Victoria Police are accountable and support the implementation of this reform.

The Government must recognise that the Aboriginal community and Aboriginal Community Controlled Organisations (**ACCOs**) are experts in how to best support Aboriginal children and families. They are best placed to ensure that protective factors – such as connection to culture, Country, family and community – are nurtured and that children have the opportunity to thrive. Respecting [Aboriginal self-determination](#) would lead to improved outcomes for not only Aboriginal children, but more broadly for community safety.

Who supports raising the age of criminal responsibility?

This critical reform has widespread support in Victoria and across Australia, including from medical and legal experts, such as the Victorian [Commission for Children and Young People \(CCYP\)](#), the [National Aboriginal and Torres Strait Islander Legal Services \(NATSILS\)](#), the [Law Council of Australia](#), the [Australian Medical Association](#), [National Legal Aid](#), [Public Health Association Australia](#), the [Royal Australasian College of Physicians \(RACP\)](#), [Human Rights Law Centre \(HRLC\)](#), [Amnesty International](#) and the [Victorian Smart Justice for Young People Coalition \(SJ4YP\)](#).





What is the Victorian Government's position on raising the age of criminal responsibility?

The Victorian Government has persistently maintained that it will work with other States and Territories in Australia to develop a national approach to this issue.

In November 2018, governments across Australia established a national Working Group on the Age of Criminal Responsibility. In November 2021, the Meeting of Attorneys-General – comprised of the Federal Attorney-General and Attorneys-General from each State and Territory in Australia – “supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12 years.” After 3 years, the group has not still made any concrete commitments. At the [August 2022 Meeting of Attorneys-General](#), “[p]articipants agreed the Age of Criminal Responsibility Working Group would continue to develop a proposal to increase the minimum age of criminal responsibility, paying particular attention to eliminating the overrepresentation of First Nations’ children in the criminal justice system.” VALS strongly condemns the lack of action and leadership by Governments across the country on this issue.

In June 2021, the CCYP completed its [Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system](#) and recommended that the minimum age of criminal responsibility should be increased to 14 years, with no exceptions. The Government has formally [responded to this report](#), but failed to respond to this recommendation.

In 2022, the Government launched [Wirikara Kulpa](#), Victoria’s first Aboriginal Youth Justice Strategy. The Strategy was developed jointly with the [Aboriginal Justice Caucus \(AJC\)](#), who have advocated fiercely for the Victorian Government to raise the age of criminal responsibility to at least 14 years. While the [AJC](#), the [Koorie Youth Council](#) and the [Commissioner for Aboriginal Children and Young People](#) have all recommended raising the age of criminal responsibility to 14 years, the new Aboriginal Youth Justice Strategy fails to include this critical reform.

What does the path to raising the age look like in Victoria?

The Victorian Government must raise the minimum age of criminal responsibility to at least 14 years. To do this, it should:

- Commit to raising the age of criminal responsibility to 14 years, with no exceptions or ‘carve outs’ for any type of behaviour or conduct.



- Initiate a process to map out the family and service system response to ensure that children under 14 years who exhibit behaviours previously considered offending (and their families) get the necessary familial, therapeutic, restorative and rehabilitative assistance.
- Properly fund existing support services for children and their families, to ensure coverage of all of Victoria, as well as ongoing, sustainable funding.
- Pass legislation for children under 14 years as a matter of urgency, and no later than in the first 100 days of a new term of government.

Why should the Victorian Government prohibit detention of children and young people below the age of 16 years?

In addition to raising the age of criminal responsibility to at least 14 years, the Victorian Government must prohibit detention of children and young people below the age of 16 years. While harm arises from any contact with police and the criminal legal system, detention is invariably and acutely harmful, and the Government must progress towards having no children in detention. Key reasons for this reform include:

- **Detention is harmful:** As discussed above, conditions in youth detention re-traumatise children, compound mental illnesses (including triggering incidents of [self-harm and suicide](#)), further disrupt their development, education and employment opportunities, and make reoffending more likely. [67%](#) of children and young people in Victoria's youth detention centres are victims of abuse, trauma or neglect. Instead of receiving support and care, they are subjected to widespread [lockdowns](#), strip searching and violence, including [use of force by staff](#) against children and young people.
- **International Law:** The UN Committee on the Rights of the Child recommends that "no child be deprived of liberty, unless there are genuine public safety or public health concerns, and encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as [16 years](#) of age." Many countries comply with these standards, including [Scotland and Slovenia](#).
- **Aboriginal children are disproportionality affected:** As noted above, Aboriginal children and young people are over-represented in youth justice detention centres and are disproportionality impacted by the harmful effects of detention in Victoria.
- **Experts agree:** In 2021, [CCYP](#) recommended that detention of children under the age of 16 years (either on remand or sentence) should be prohibited by law.



Why should the Victorian Government retain and strengthen the presumption of *doli incapax*?

Although the minimum age of criminal responsibility is 10 years, there is a rebuttable presumption in the law that 10-13 year olds do not have the capacity to understand the implications of their actions. This means that 10-13 years olds are presumed not to have committed a criminal offence, unless it is proven otherwise.

In practice, this presumption is inconsistently applied and routinely fails to protect our children. It is not well understood and there are often delays, meaning that a child and their family can be forced to attend court multiple times over several months, only to have the charges withdrawn. This not only disruptive to the child's education, family and cultural life, it also increases the child's exposure to the youth justice system.

If the age of criminal responsibility is raised to at least 14 years, *doli incapax* will no longer be relevant for children aged 10-13 years. However, evidence shows that child and adolescent brains are not fully mature until their early twenties, and that children develop at different ages. Moreover, the high rates of cognitive and intellectual disabilities amongst young people involved with the youth justice system means that many young people aged 14-17 years may also lack the emotional, mental and intellectual maturity to fully understand the impact of their actions.

The presumption of *doli incapax* should be strengthened and retained for children and young people aged 14-17 years. In particular, the Government should:

- Create a legislative requirement for prosecutors to rebut the presumption;
- Restrict the kinds of evidence that can be produced to rebut the presumption;
- Increase funding to the Children's Court to improve the quality of clinical reports;
- Require all police, Crown prosecutors and criminal defence lawyers to undergo mandatory training on *doli incapax*.



Where can I learn more?

- [VALS Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group](#)
- [VALS Submission to the Victorian Parliamentary Inquiry on Victoria's Criminal Justice System](#)
- The national [Raise the Age Campaign](#) website, including the national [petition](#)



Appendix A: The age of criminal responsibility in other countries around the world

In many other countries around the world, the minimum age of criminal responsibility is between 14 and 16 years. The following table is based on research by the [Child Rights International Network \(CRIN\)](#), and shows countries where the minimum age of criminal responsibility is 14, 15 and 16 years.

14 years	15 years	16 years
Spain	Norway	Argentina
Paraguay	Sweden	Angola
Peru	Finland	Mozambique
Chile	Iceland	
Colombia	Denmark	
Democratic Republic of Congo	Czech Republic	
China	Poland	
Romania	The Philippines	
Bulgaria	Laos	
Vietnam		
Cambodia		
Kazakhstan		
Turkmenistan		
Ukraine		
Serbia		
Albania		
Macedonia		
Mongolia		
Georgia		
Armenia		
Azerbaijan		



Acknowledgement of Traditional Owners

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Sovereignty was never ceded. Always was, always will be, Aboriginal land.

Artwork

The artwork used in this document was originally designed by Gary Saunders for the Victorian Aboriginal Legal Service.

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