

Age of Innocence: Children and Criminal Responsibility

A background paper to inform community discussion

February 2021



“[A]lthough the setting of a minimum age of criminal responsibility at a reasonably high level is important, an effective approach also depends on how each State deals with children above and below that age...Children below the minimum age of criminal responsibility are to be provided with assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences.”

UN Committee on the Rights of the Child (2019)

Introduction

Currently in Tasmania, as in all other Australian jurisdictions, the minimum age of criminal responsibility is set at 10 years. This means that children as young as 10 can be arrested, searched, charged with a criminal offence, remanded in custody, and sentenced to detention.

There is evidence to suggest that a criminal justice response for younger children is inappropriate and largely ineffective. The UN Committee on the Rights of the Child has recommended countries raise the minimum age of criminal responsibility to what is described as an internationally acceptable minimum of at least 14.

There is now a groundswell of support for raising the age in Australia, with Aboriginal and Torres Strait Islander organisations, the Australian and New Zealand Children’s Commissioners and Guardians, and many peak or representative organisations amongst those calling for change. These calls are based on fundamental human rights standards, an improved understanding of the developing brain, the complex needs of young children in conflict with the law, and a growing

body of research demonstrating that incarcerating children, especially younger children, increases their likelihood of reoffending.

Considering the significant over-representation of Aboriginal and Torres Strait Islander children in detention nationally, particularly between ages 10 and 13, and government commitments to improving outcomes for Aboriginal and Torres Strait Islander children, calls to raise the minimum age have become even more profound.

Given the groundswell of support, it is timely to ask — what would ‘raising the age’ mean in practice for Tasmania? This paper aims to provide background information to frame a panel discussion on this topic to take place on 25 February 2021 as part of the University of Tasmania’s *Island of Ideas* public lecture series and help inform broader community debate. The panel discussion will consider what ‘raising the age’ would mean in practice for Tasmania and any alternative interventions or supports required to effectively address the underlying needs of young children who would otherwise have been dealt with in the criminal justice system because of their behaviour.

Background

The law

Tasmania’s criminal justice system already treats children differently from adults. Children aged between 10 and 17 years at the time of an offence are generally dealt with under the *Youth Justice Act 1997* (the Act), which includes a focus on diversion and rehabilitation, and is based on a restorative justice model, with detention used only as a measure of last resort. This approach recognises the developmental stage of the adolescent brain — adolescents are more prone to risk-taking behaviour, peer pressure, and impulsivity¹, and it also recognises the inherent capacity of children to change.

Neurological development is even less advanced for children aged between 10 and 13. In all Australian states, this difference in maturity is acknowledged by a legal presumption that a child aged less than 14 years is incapable of committing crime (‘doli incapax’). Where a child under 14 is accused of an offence, the prosecution must prove that the

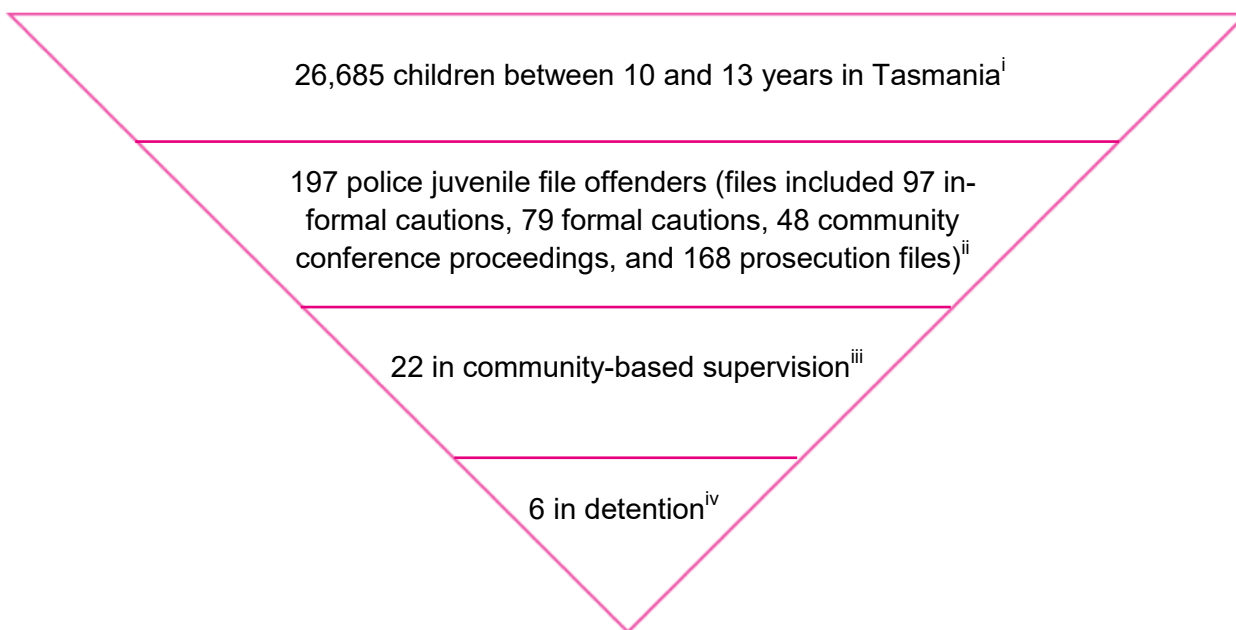
child knew their behaviour was seriously wrong as opposed to merely naughty or mischievous. However, doli incapax does not address the underlying reasons for a child’s problematic behaviour, nor does it prevent a child from entering the criminal justice system in the first place, which can be a stressful and stigmatising experience for young children.

In Tasmania, children who commit ‘prescribed offences’, which are very serious crimes such as murder or manslaughter, are tried as adults. But these cases are very rare, and children are much more likely to commit property and deception offences than crimes against the person.² In fact, since the Act came into effect over 20 years ago, no child has been sentenced for committing a prescribed offence when they were less than 14 years.³

The data

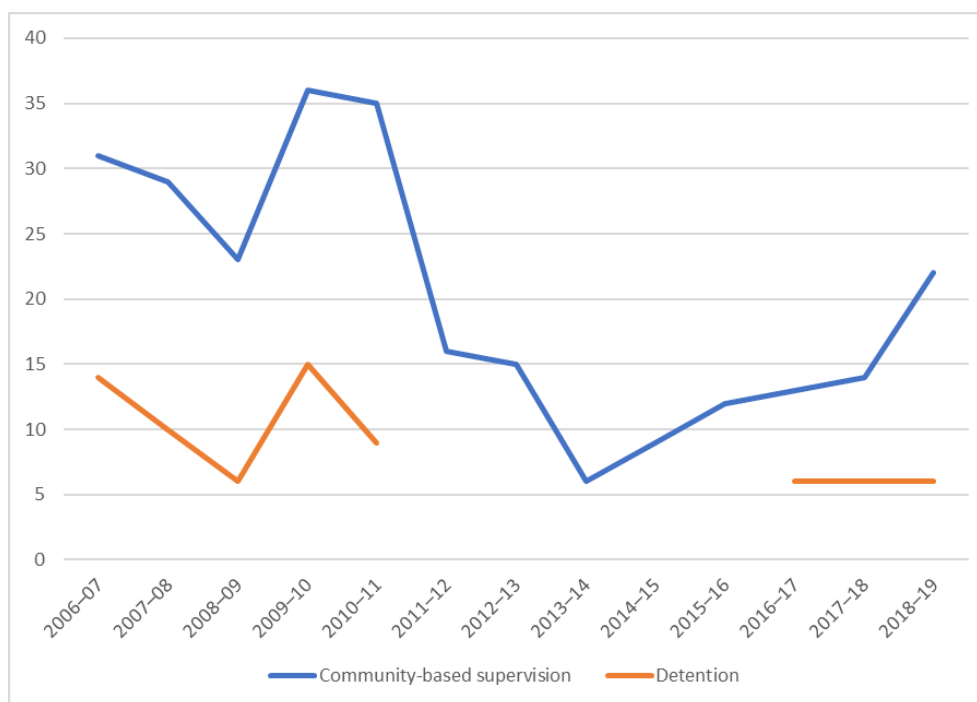
In 2018-19, there were 26,685 children in Tasmania between the ages of 10 and 13 (inclusive).⁴ During this time, police opened files on 197 children in the same age range. These files resulted in 97 informal cautions,

Diagram 1: Snapshot of youth offenders aged 10 to 13 in Tasmania, 2018-19



Sources: i ABS, 2019, TABLE 56. Estimated Resident Population By Single Year Of Age, Tasmania, [Australian Demographic Statistics](#), (accessed 21/12/20) ; ii Tasmania Police Prosecution and Information Bureau Systems, (extracted 27/2/2020). Note person’s age is calculated as their minimum age on juvenile files, based on offence date, and that one offender can have multiple outcomes; iii AIHW, 2019, Youth Justice in Australia supplementary tables — Characteristics of young people under community-based supervision: S36b, [Youth Justice in Australia 2018 -19](#), (accessed 21/12/2020); iv AIHW, 2019, Youth Justice in Australia supplementary tables — Detention: S74b, [Youth Justice in Australia 2018 -19](#), (accessed 21/12/2020).

Figure 1: Number of young people aged 10 to 13 under community-based supervision and in detention in Tasmania, per year



Source: Australian Institute of Health and Welfare, Youth Justice National Minimum Dataset (YJ NMDS) 2006-07 to 2018-19 (unpublished data request). Note that observations of value less than 5 have been suppressed and that data is not available for Tasmania prior to 2006-07.

79 formal cautions, 48 community conference proceedings, and 168 prosecution files.⁵ In 2018-19, only 22 children aged between 10 and 13 were under community-based supervision, and only 6 were in detention.⁶ As a result, in 2018-19 less than 0.1 per cent of Tasmanian children aged between 10 and 13 were under youth justice supervision. However, as the data indicate, the small number of young children under youth justice supervision masks a larger number in contact with police.

In Tasmania, the number of 10 to 13 year olds in the youth justice system is relatively small, but these children reoffend at a higher rate.

Additionally, children who first offend at a younger age are more likely to re-offend as a youth, and to be further involved in the criminal justice system as an adult.⁷ In fact, Australia-wide between 2000-01 and 2018-19, 9 out of 10 children who were first sentenced to youth justice supervision between ages 10 and 12 reoffended and were returned to youth justice supervision before reaching 18.⁸ It therefore

stands to reason that community based responses to the risky behaviour of children aged less than 14 may be a more effective way of reducing the likelihood of future contact with the criminal justice system.

Children involved in the youth justice system have generally faced childhood hardship and adversity

It is important to acknowledge that the vast majority of Tasmanian children never come into contact with the justice system. However, particular risk factors increase the likelihood that a child may become involved in the youth justice system, and young children who do enter the system have often already been flagged as being at risk by other areas of government service delivery.

While these factors are by no means causal, children involved in the youth justice system are more likely to come from lower socioeconomic areas, to be disengaged from education, and to be known to child protection services.^{9, 10}

In fact, a NSW survey found that 88 per cent of young people in custody had been suspended from school at least once.¹¹ Possibly as a result of their adverse childhood experiences, many children involved in the youth justice system have longstanding and complex health and behavioural problems, substance abuse problems, or cognitive deficits.^{12, 13, 14}

A de-identified case study of “Sam” on page 5 provided by the Tasmanian Aboriginal Legal Service reflects the experience of a young child’s contact with the youth justice system. The case study begs the question: Is a criminal justice response the best way to support Sam and respond to the underlying reasons for her behaviour?

In 2016, in a report commissioned by the Tasmanian Government, Noetic Solutions emphasised the importance of investment in prevention, early intervention and diversionary services to address the risk factors that lead to offending behaviour, which is a far more cost-effective approach to rehabilitating young people than detention. However, Noetic found that Tasmania does not have the breadth or depth of prevention, early intervention and diversionary services required to address the needs of children who offend.¹⁵

Aboriginal children are over-represented in the youth justice system

In Tasmania in 2018-19, Aboriginal and Torres Strait Islander children were 4 times more likely than their non-indigenous peers to be in detention or under community-based supervision on a given day. Nationally, Aboriginal and Torres Strait Islander children are especially over-represented in younger age groups; for Australia, 65 per cent of children aged between 10-13 who were under youth justice supervision were Aboriginal and Torres Strait Islander on an average day in 2018-19.¹⁶

The financial costs of a lifetime of interaction with the justice system are large

Youth justice detention requires a large outlay from the Tasmanian Government’s annual budget, costing the state over \$1 million per year per child in detention, which is around 10 times more expensive per detainee than adult detention.¹⁷ And the costs of incarcerating children don’t stop there — the criminogenic effects of detention can lead to a child’s repeated involvement in the youth justice system, and later involvement in the adult criminal justice system.

The Commissioner for Children and Young People has conducted a simple cost-benefit analysis where the life-time costs of interaction with the justice system are calculated for a child first entering youth justice detention aged 10 to 13, accounting for the probability of re-offending as a child, and again as an adult. Even though the likely cost of a child’s first sentenced detention is large at \$180,576, the overall lifetime cost of their likely further interaction with the justice system is almost 5 times higher, at close to one million dollars — the figure is \$995,435.¹⁸

Moreover, the youth justice system is only one of a number of government services which may be accessed by children in conflict with the criminal law. Such services represent a large cost to Australian governments, with estimates suggesting that \$15.2bn was spent in 2019 on ‘crisis services’ (including specialist homelessness, child protection, and youth justice services) for children and young people.¹⁹ Further, interaction with the justice system as an adult can lead to job instability, likely reducing lifetime taxes paid and increasing reliance on government benefits.

The Commissioner for Children and Young People takes responsibility for any errors or discrepancies between the data sources and the data presented in this paper. Should you have any concerns regarding the data presented, please contact the Commissioner .

Case Study: Sam

Sam is 11 years old and is before the Court for Aggravated Armed Robbery. She lives with her mum, Jess, who has an intellectual disability. Jess drank alcohol during her pregnancy with Sam. Sam's father was around in the early years, but he committed both verbal and physical family violence in the home and left the family unit when Sam was 3. Sam's mum has always tried her best to care for Sam. She doesn't have a lot of control over her and she doesn't engage with services because she is afraid of Child Safety Services taking Sam from her.

There have been some meetings at the school, because Sam has been socially withdrawn, she has had difficulty concentrating and is impulsive. Jess has attended the school meetings and has engaged. She puts Sam's issues down to parenting on her own and the violence that occurred in the home when Sam was growing up. Sam attends school without lunch sometimes and has dirty clothes. When Sam was 11, she started hanging out with a man in his 20's who lived in the same street as her. He asked her to come to the pizza shop down the road with him and handed her a spanner (which she didn't ask any questions about). Sam walked to the pizza shop with him. Once they arrived, he yelled at her to pass him the hammer in an aggressive tone. Sam handed it over to him and he demanded money from the register and hit the shop attendant on the head. Sam was charged with aiding and abetting the robbery with the older male and was bailed to be at Court.

Sam presented to her lawyer as very young for her age with symptoms of FASD. There were questions about whether Sam knew what she did was wrong. A report was ordered from a Forensic Psychiatrist through the Court. It was determined that Sam presented with FASD symptoms, had an IQ of 47 and a mental age comparable to a 7-year-old. The report indicated that it would be likely Sam would be eligible for NDIS and recommended that a referral be made. Sam attended Court on four occasions whilst the report was being prepared. Ultimately, given what was in the report, the Prosecution did not proceed with the charge.

This case study was provided by the Tasmanian Aboriginal Legal Service. To ensure anonymity, this case study is a composite based on cases involving several different children.

Examples of state, national and international commitments relevant to children in conflict with the law

Tasmania: The Tasmanian Government has committed to delivering a long-term, whole of government Child and Youth Wellbeing Strategy²⁰, after developing the *Tasmanian Child and Youth Wellbeing Framework* in 2018.²¹ The Tasmanian Government has also committed to implementing a modern, integrated state-wide therapeutic youth justice model.²²

National: New targets recently agreed to in the *National Agreement on Closing the Gap* include reducing the number of Aboriginal and Torres Strait Islander young people (10 – 17 years) in detention by at least 30 per cent by 2031.²³ The Tasmanian Government is a signatory to this agreement, along with the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all other Australian Governments.²⁴ In addition, the Council of Attorneys-General has committed to reviewing the minimum age of criminal responsibility through a working group. This work is ongoing.

International: Australia is a signatory to the *UN Convention on the Rights of the Child*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the Optional Protocol under the latter Convention (known as OPCAT), as well as other international instruments specific to youth justice.²⁵

References and notes

- ¹ Institute of Medicine, 2001, *Juvenile Justice*, Washington, DC, The National Academies Press.
- ² Jesuit Social Services, 2019, [Raising the Age of Criminal Responsibility](#), (accessed 21/12/2020).
- ³ Supreme Court of Tasmania's Criminal Case Management System (confirmed 4/2/2021)
- ⁴ ABS, June 2019, Table 56, Estimated Resident Population by Single Year of Age, Tasmania, [Australian Demographic Statistics](#), (accessed 30/9/2020).
- ⁵ Tasmania Police, 2019, *Annual 2018-19 Corporate Performance Report*, Department of Police, Fire, and Emergency Management.
- ⁶ AIHW, 2019, Youth Justice in Australia supplementary tables — Characteristics of young people under community-based supervision: S36, [Youth Justice in Australia 2018-19](#), (accessed 21/12/2020); AIHW, 2019, Youth Justice in Australia supplementary tables — Detention: S74, [Youth Justice in Australia 2018-19](#), (accessed 21/12/2020).
- ⁷ These trends are depicted in a number of studies, including one from Victoria which found that 86 per cent of offenders first sentenced at age 10-12 reoffended, which compares to 33 per cent for those first sentenced at age 19-20. This study also finds that 75 per cent of children first sentenced at age 10-12 were sentenced again as an adult by age 22, which compares to 49 per cent of those first sentenced at age 17. The study examined 5,385 children and young people sentenced in the Children's Court Victoria in the 11 years post 2008-09. Sentencing Advisory Council, 2016, [Reoffending by Children and Young People in Victoria](#), Victorian State Government, (accessed 14/10/2020).
- ⁸ AIHW, 2020, [Young people returning to sentenced youth justice supervision, 2018-19](#), Juvenile justice series no. 24. Cat. No. JUV 133. Canberra:AIHW, (accessed 8/1/2021).
- ⁹ AIHW, 2020, [Youth Justice in Australia 2018-19](#), Cat. No. JUV 132. Canberra: AIHW
- ¹⁰ AIHW, 2019, [Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018](#). Data linkage series no. 25. Cat. no. CSI 27. Canberra: AIHW. (statistics exclude NSW).
- ¹¹ Indig, D. et. al., 2011, *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.
- ¹² A NSW survey of youth in detention found that participants had on average 2.5 psychological disorders with over half of participants meeting the criteria for an attention/behavioural disorder. This same NSW study showed that 13.5 per cent of participants met the criteria for a PTSD diagnosis, whilst the majority demonstrated some symptoms consistent with trauma. Indig, D. et. al., 2011, *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.
- ¹³ A 2003 Australian study suggested that around 70 per cent of youth in detention were intoxicated at the time of their offence, and 67 per cent of this group reported using one or more substances daily. Prichard, J. et. al., 2005, *Alcohol, Drugs and Crime: A Study of Juveniles in Detention*, AIC.
- ¹⁴ A 2015 NSW survey of youth in detention found that on average participants scored on the borderline range of ability, with 1 in 6 scoring low enough to be classed as intellectually disabled. See Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, 2017, [2015 Young People in Custody Health Survey: Full Report](#), NSW state government.
- ¹⁵ Noetic Solutions Pty Ltd, 2016, [Custodial Youth Justice Options Paper](#), Report for the Tasmania, State Government Department of Health and Human Services, (accessed 14/10/2020).
- ¹⁶ AIHW, 2020, Youth Justice in Australia 2018-19 supplementary tables — Characteristics of young people under supervision: S5, [Youth Justice in Australia 2018-19](#), accessed 8 January 2021. Such data for Tasmania is not available.
- ¹⁷ The quoted figures underestimate the total cost as they do not include, for example, expenditure on education in detention, and police and court costs.
- ¹⁸ Details on the cost benefit analysis are available from the Commissioner for Children and Young People on request.
- ¹⁹ William Teager, Stacey Fox and Neil Stafford, 2019, [How Australia can invest early in children and return more: A new look at the \\$15b cost of late intervention](#), Early Intervention Foundation, The Front Project and CoLab at the Telathon Kids Institute, Australia.
- ²⁰ Gutwein, P., 2020, [Building Tasmania's future for the next generation](#), media release Tasmanian Government, (accessed 23/7/2020).
- ²¹ Department of Health and Human Services, 2018, *The Tasmanian Child and Wellbeing Framework*, Tasmanian Government.
- ²² Gutwein, P., 2020, [Building Tasmania's future for the next generation](#), media release Tasmanian Government, (accessed 23/7/2020). Department of Health and Human Services, 2018, *The Tasmanian Child and Wellbeing Framework*, Tasmanian Government.
- ²³ [National Agreement on Closing the Gap](#): July 2020, (accessed 13/01/2021)
- ²⁴ Jaensch, R., 25th July 2020, [Closing the Gap](#), Tasmanian Government media release, (accessed 21/12/2020).
- ²⁵ Standard Minimum Rules for the Administration of Juvenile Justice 1985 (also known as the Beijing Rules), Guidelines for the Prevention of Juvenile Delinquency 1990 (also known as the Riyadh Guidelines) and Rules for the Protection of Juveniles Deprived of their Liberty 1990 (also known as the Havana Rules).

Contact us:

Level 1, 119 Macquarie Street, Hobart,
Tas., 7000
GPO Box 708, Hobart, Tas., 7001
Telephone: (03) 6166 1366
childcomm@childcomm.tas.gov.au
<https://www.childcomm.tas.gov.au/>

