
MEMORANDUM OF ADVICE

Public Release: 14 July 2023

The Hon Jeremy Rockliff, Premier of Tasmania

The Hon Elise Archer, Attorney-General

Felix Ellis, Minister for Police, Fire and Emergency Management

The Hon Roger Jaensch, Minister for Education, Children and Youth

THE AGE OF CRIMINAL RESPONSIBILITY IN TASMANIA



“A 10-year-old is literally a child. I’ve seen a 10-year-old in the remand centre once and I was just thinking to myself, well that’s a 10-year-old. Like it’s weird how a 10-year-old can get charged with crimes and a 10-year-old is capable of getting into detention. Where[as] you see other 10-year-olds in the community and they’re just normal children going to primary school. They have caring parents.”

Young person, 15 years old
Voices of Young People in the Youth Justice System Project

“The Tasmanian Government’s vision is for a Tasmania, that no matter where you live, your background or your circumstances, opportunities will be there and if you want to grasp those opportunities, a better life will be within your reach.”

Tasmania’s Child and Youth Wellbeing Strategy (August, 2021)

“With reference to its general comment No. 24 (2019) on children’s rights in the child justice system, the Committee urges [Australia] to bring its child justice system fully into line with the Convention and:

(a) To raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which doli incapax applies...”

United Nations Committee on the Rights of the Child



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1. Introduction

This Advice is intended to assist the Tasmanian Government to better promote and protect the wellbeing and best interests of children and young people exhibiting harmful behaviour, and to improve community safety through raising the age of criminal responsibility. It includes advice on legislative, policy and service system changes required to deliver a non-criminalising, needs-based response to harmful behaviour.

I hope this Advice will enable the Tasmanian Government to respond to the now very well-established case for change, and uphold its obligations under the United Nations Convention on the Rights of the Child (the Convention).

Many countries, as well as every Australian state and territory, have legislation in place which determines the age at which a child can be held criminally responsible for their behaviour. This responds to the requirement under the Convention for countries to establish a minimum age below which children are presumed not to have the capacity to breach the criminal law (article 40(3)). While the Convention doesn't specify a minimum age of criminal responsibility, the position of the United Nations Committee on the Rights of the Child is that it should be at least 14 years.

Tasmania's age of criminal responsibility is 10. This means that children as young as 10 years old can be arrested, searched, questioned, detained in a police watch-house or reception prison, charged with a criminal offence, prosecuted in a court, remanded in custody, convicted, and sentenced to detention. While the law presumes that children aged less than 14 are incapable of crime (known as the doctrine of *doli incapax*), this presumption is not a barrier to children aged 10 – 13 entering the criminal justice system in the first place. And although children are generally dealt with under the *Youth Justice Act 1997*, their entry to that system is via the adult criminal justice system.

To its credit, the Tasmanian Government has acknowledged that the current approach to youth justice for children as young as 10 is not fit for purpose and has committed to implementing a whole-of-government Blueprint for a multi-systemic response to youth justice, including a new model of therapeutic detention. It has also committed to raising the minimum age of detention to 14 years. Supporting children and young people at risk is also a priority action under Tasmania's *Child and Youth Wellbeing Strategy – It Takes a Tasmanian Village*.

While I warmly welcome the Government's commitments to reform, they do not yet provide the fundamental underpinning required to fully realise its commitment to a nation-leading, best practice approach to children and young people in conflict with the law. To achieve this requires an increased age of criminal responsibility with complementary legislative and policy reforms, as well as greater understanding of, and investment in, the service system.

It is reassuring to note that the Department of Justice has been tasked with progressing work on how Tasmania could develop a reform framework as a priority.

This Advice should be read in conjunction with my previous advocacy on youth justice, including my advice to inform the Working Group on the Age of Criminal Responsibility and the feedback and advice I have given to the Tasmanian Government to inform the development of its youth justice Blueprint. Also relevant are the recommendations made by the Expert Panel on the essential



therapeutic elements required for an improved service system response for children and young people with highly complex needs.

Building on previous work, this Advice includes additional child-centred guidance on how the Tasmanian Government can commit to raising our state's age of criminal responsibility and adopt an entirely new and non-criminalising approach to children whose behaviour brings them to the attention of police.

It is important to emphasise that in calling for an increased age of criminal responsibility, I am advocating for a response to the harmful behaviour of children that is, above all, *effective* in reducing the likelihood that that such behaviour will occur or continue to occur. I am not advocating for a response that has no consequences. I am advocating for a response that delivers *effective* consequences for behaviour. This requires us to leave behind the punitive narrative that behaviour change and accountability can only be achieved through a criminalising response. The evidence is clear - when children's rights are upheld and their individual needs are met and responded to therapeutically - harmful behaviour decreases. However, effective responses take commitment and effort by everyone involved, including children and young people, their families, the community, and governments.

We are fortunate that as a state, we have recognised the value of the wellbeing of children to our community and our collective future. We have committed to realising a Tasmania in which all children have what they need to grow and thrive.

Raising the age of criminal responsibility will improve the lives of children and young people by preventing or reducing contact with the criminal justice system. It will also ensure that responses to children exhibiting harmful behaviour align with international human rights standards and contemporary best practice without compromising, and in fact improving, community safety.



2. Acknowledgements

Acknowledgement of Country

I acknowledge and pay my respects to the palawa people of lutruwita/Tasmania as the original and ongoing custodians of this land and for the more than 40,000 years they have cared for their country and their children. I recognise that Aboriginal people are best placed to determine and deliver services to meet the needs of their children.

Other Acknowledgements

I wish to thank the young Tasmanians with experience of our criminal justice system who have shared their stories and ideas for change with me and staff in my office. Your unique insights and views help inform my advocacy on behalf of all children and young people in the state. I also acknowledge the tireless work of those individuals and organisations who have long advocated locally and nationally for non-criminalising, evidence-based responses to the needs of children exhibiting harmful behaviour in our communities.

My thanks also to Dr Nina Hudson for her work on early drafts.

Finally, my appreciation to the dedicated staff in my office, both past and present, who have contributed to this Advice.



3. Summary of Recommendations

In this Advice, I recommend the Tasmanian Government:

1. Commits, without delay, to raising the age of criminal responsibility to at least 14 years, with no exceptions.
2. Implements the raised age of criminal responsibility within two years as a part of the Tasmanian Government's Final Youth Justice Blueprint.
3. Ensures that any legislative, policy, procedural and service system reforms associated with a raised age of criminal responsibility are designed and implemented according to three key principles:
 - I. being child-centered;
 - II. the right of Aboriginal people to determine and lead the appropriate response for their children;
 - III. the ecological model of child development which recognises the influence of families, communities and society on the wellbeing of children.
4. Amends existing legislation to create new, non-criminalising pathways to respond to children's harmful behavior based on the comprehensive independent public advice and recommendations of the Tasmania Law Reform Institute (TLRI) in its 2022 report on *Raising the Minimum Age of Criminal Responsibility – Law Reform Considerations*. This includes:
 - I. amending s18 of the *Criminal Code Act 1924* to give effect to the raised age of criminal responsibility;
 - II. making appropriate amendments to the *Youth Justice Act 1997*, including to ensure that the effect of the legislative reform does not derogate any existing rights of children aged below the age of criminal responsibility;
 - III. ensuring police have precise and well-defined *ad hoc* powers as first responders to incidents involving children aged below the raised age of criminal responsibility, including to take a child to a safe place and make appropriate referrals;
 - IV. amending the definition of 'at risk' under the *Children, Young Persons and Their Families Act 1997*;
 - V. seeks further advice from the TLRI on any subsequential amendments necessary to ensure the rights and wellbeing of children aged below the raised age are upheld (eg the impacts for children aged below the raised age who are in detention or under community based supervision at the time the amendments take effect).



5. Commits to enhance, and appropriately resource, the service system to support the needs of children engaging in harmful behaviour. This includes commissioning a comprehensive independent review of the current service system to enable a contemporary service system map and gap analysis upon which service system enhancements can be based.
6. Through a child-centered service system redesign, builds capacity across the service system to enable appropriate non-criminalising responses for children exhibiting harmful behaviours. This would include:
 - I. equipping police, and other first responders, with the training, skills and expertise necessary to respond effectively to the needs of the child;
 - II. adopting an embedded youth worker crisis response and outreach model for de-escalation, immediate assessment of safety and needs, and referral to appropriate services;
 - III. establishing 'safe places' for children and young people to ensure their immediate safety if unable to return to family or carers;
 - IV. provision of independent individual advocacy, including specialist legal advocacy for children for whom statutory interventions are proposed.
7. Designs and implements a new, individualised, needs assessment and response co-ordination service, inclusive of intensive case management where necessary, for children aged below the increased age of criminal responsibility. This should be a multi-disciplinary service with centralised co-ordination and leadership by a single agency.
8. Ensures whole-of-government accountability through a new, multi-agency governance committee including, at a minimum, the Secretaries of the Department for Education, Children and Young People, Department of Health, Department of Premier and Cabinet, and the Commissioner of Police. The terms of reference of the Committee should include providing oversight and provision of care and supports for children aged below the new age of criminal responsibility who are exhibiting extremely concerning harmful behaviour.



4. Role of the Commissioner for Children and Young People

An important part of my role as Tasmania's Commissioner for Children and Young People is to advise and make recommendations to Ministers, state authorities and others in relation to the rights and wellbeing of children in Tasmania. In doing so, I pay particular attention to children who are vulnerable or disadvantaged for any reason, including those with experience of or at risk of entering the youth justice system.

The independent statutory office of the Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). As Commissioner, my functions include:

- advocating for all Tasmanian children and young people;
- acting as advocate for children and young people detained under the *Youth Justice Act 1997*;
- researching, investigating and influencing policy development in areas relating to children and young people;
- promoting, monitoring and reviewing the wellbeing of children and young people;
- promoting and empowering children and young people to participate in the making of decisions, and to express opinions about matters that may affect their lives;
- helping ensure Tasmania meets its national and international obligations in respect of children and young people; and
- encouraging organisations to establish child friendly mechanisms to assist children and young people to participate in matters that affect them.¹

In performing these functions, I am required to have regard to the principle that the wellbeing and best interests of children and young people are paramount and must observe any relevant provisions of the United Nations Convention on the Rights of the Child (the Convention).² Further, I carry out my role according to the child-centred principles that:

- (a) children are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation;
- (b) the interests and needs of children and young people who are disadvantaged for any reason or vulnerable³ should be given special regard and serious consideration;
- (c) the contributions made by children to the community should be recognised for their value and merit;
- (d) the views of children on all matters affecting them should be given serious consideration and taken into account;

¹ See *Commissioner for Children and Young People Act 2016* (Tas) s 8(1).

² See *Commissioner for Children and Young People Act 2016* (Tas) s 3(1)(a) and (b).

³ Note, under section 3(2) of the *Commissioner for Children and Young People Act 2016* (Tas) the definition of 'vulnerable' includes a child or young person who is the subject of proceedings under the *Youth Justice Act 1997* (Tas).



- (e) parents, families and communities have the primary role in safeguarding and promoting the wellbeing of children and should be supported in carrying out their role.⁴

As Commissioner, the CCYP Act vests in me the power to do all things necessary or convenient to perform my functions, to exercise my powers and to administer the Act. In addition, the CCYP Act provides:

- a general power to advise and make recommendations to Ministers, state authorities and other organisations in relation to the rights and wellbeing of children and young people;⁵ and,
- a general power to investigate, and make recommendations in respect of, the effects of any legislation, proposed legislation, documents, government policies, or practices or procedures, or other matters relating to the wellbeing of children and young people.⁶

⁴ See *Commissioner for Children and Young People Act 2016* (Tas) s 3.

⁵ See *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(e).

⁶ See *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(d).



5. Terminology

Aboriginal: any reference to Aboriginal people, children, or young people in this Advice also encompasses Torres Strait Islander people.

Age of criminal responsibility: the minimum age below which children are presumed not to have the capacity to breach the criminal law.

Age of Criminal Responsibility Working Group (Working Group): an inter-jurisdictional working group of officials from each state, territory and the Commonwealth established in 2019 to review the age of criminal responsibility and make recommendations to the then Council of Attorneys-General.

Minimum age of detention: the minimum age from which a child can be remanded in custody or sentenced to a period of detention.

CCYP: Commissioner for Children and Young People (Tas).

Child and young person: these terms are used in the *Commissioner for Children and Young People Act 2016* (CCYP Act) and refer to a person who has not yet attained the age of 18 years. Generally, this Advice uses the term ‘child’ when referring to children aged below the age of criminal responsibility and those persons who would be aged below an increased age of criminal responsibility.

Commissioner for Children and Young People Act 2016 (Tas) (CCYP Act): the legislation that establishes the office, functions and powers of the Commissioner for Children and Young People (Tas).

Criminalisation: the process by which behaviours and individuals are transformed into crime and criminals. The age of criminal responsibility is a barrier to the criminalisation of children and their entry to the criminal justice system.

Harmful behaviour: harmful behaviour engaged in by a child means behaviour that will or is likely to seriously harm the child or another person.

MACR: minimum age of criminal responsibility.

Offending behaviour: behaviour that is defined as a criminal offence under current law.



Standing Council of Attorneys-General (SCAG): a forum that convenes quarterly and comprises Attorneys-General from the Australian Government, all states and territories, and the New Zealand Minister for Justice.

United Nations Convention on the Rights of the Child (the Convention): the international human rights treaty that sets out the civil, political, social and cultural rights that all children are entitled to. Australia and all other countries that are members of the United Nations (except the United States) have ratified the Convention, meaning that they have agreed to be bound by it.

United Nations Committee on the Rights of the Child (the Committee): a body of independent experts that monitors the implementation of the United Nations Convention on the Rights of the Child by signatories to the Convention, including Australia.



6. What prompted this Advice?

As Commissioner, my statutory functions require me to help ensure that Tasmania meets its national and international obligations, including those recommended by the United Nations Committee on the Rights of the Child. For some time, the Committee has urged Australia to take action regarding its age of criminal responsibility:

With reference to its general comment No. 24 (2019) on children's rights in the child justice system, the Committee urges [Australia] to bring its child justice system fully into line with the Convention and:

(a) To raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which doli incapax applies...⁷

As noted above, I have an independent advocacy function for individual children and young people detained under the *Youth Justice Act 1997*. This means that I regularly hear the views of young people about the criminal justice system, including their interactions with police and correctional officers, judicial officers, lawyers, and their experiences of custodial environments. In many cases, they describe interactions which cause them harm, rather than support them to understand the impact of their behaviour, accept accountability, and adjust their behaviour.

This Advice is informed by an extensive body of national and international research and child-rights materials examining the age of criminal responsibility and evidence-based non-criminalising approaches to preventing and responding to children's harmful behaviour. These include:

1. The repeated calls by the United Nations Committee on the Rights of the Child on Australia to raise its age of responsibility '*to an internationally accepted level and make it conform with the upper age of 14 years, at which doli incapax applies*';
2. The Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory;⁸
3. My advocacy, and that of former Commissioners, for the development of an integrated therapeutic youth justice model across the full continuum of services;⁹
4. *The Age of Innocence: Children and Criminal Responsibility Forum* presented as part of the University of Tasmania's *Island of Ideas* program (February 2021). During this forum, I joined an expert panel of Tasmanian practitioners and academics drawn from law, police, health, and community services engaged in discussion on ways to address children's problematic behaviour, meet their underlying needs and promote community safety;¹⁰

⁷ United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia CRC/C/AUS/CO/5-6** (1 November 2019) [47].

⁸ *Report of the Royal Commissioner and Board of Inquiry into the Protection and Detention of children in the Northern Territory*, (Final Report, 17 November 2017).

⁹ For further details, see the 'Our Publications' section on my website: www.childcomm.tas.gov.au.

¹⁰ *Island of Ideas Forum, Age of innocence: Children and criminal responsibility* (Forum, 25 February 2021) <<https://www.youtube.com/watch?v=3nwyKtHBfG4>>.



5. Responses to the Age of Innocence: Children and Criminal Responsibility Survey (March–April 2021). Following the forum mentioned above, I facilitated a survey to elicit the views of individuals and organisations with relevant expertise, knowledge, experience and/or interest in Tasmania’s age of criminal responsibility;
6. The Victorian Commission for Children and Young People’s report, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*.¹¹ This Inquiry explores the lived experiences of Aboriginal children and young people in Victoria and the factors contributing to their over-representation in the youth justice system. It calls for a re-imagined system to protect the rights of Aboriginal children to support them to thrive.
7. The *Children First: Children in the Child Safety and Youth Justice System* paper published by Tasmania Legal Aid.¹² This paper includes previously unpublished data which demonstrates the over-representation of ‘crossover children’ in Tasmania’s youth justice system.
8. Expert Panel advice and recommendations to the (then) Minister for Children and Youth on the essential therapeutic elements required for an improved service system response for Tasmanian children and young people with highly complex needs.¹³
9. My submissions to the Government’s *Reforming Tasmania’s Youth Justice System Discussion Paper* (Youth Justice Blueprint) and subsequent drafts.¹⁴
10. The Research Paper by the Tasmania Law Reform Institute (TLRI) entitled *Raising the Minimum Age of Criminal Responsibility – Law Reform Considerations*.¹⁵ I sought advice from TLRI on the legal implications of raising the age of criminal responsibility in Tasmania, and in particular any necessary law reform. The TLRI’s Research Paper drew on the submissions I received from peak agencies, service providers and others through the *Age of Innocence: Children and Criminal Responsibility Survey* (see above).
11. Case studies provided by the Department for Education, Children and Young People (DECYP), and the Tasmanian Aboriginal Legal Service (TALS). Non-identifying case studies, some of which are included in this Advice in Appendix A, demonstrate how the underlying causes of children’s harmful behaviour can be appropriately addressed and community safety promoted through a co-ordinated non-criminalising response.
12. Relevant data, including administrative data provided by Tasmania Police relating to children and young people’s contact with Tasmania’s criminal justice system. A snapshot from this analysis, presented below, provides important context for my Advice and recommendations.

¹¹ Victorian Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (Report, June 2021).

¹² Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Paper, July 2021).

¹³ Expert Panel, *Expert Panel advice and recommendations to the Minister for Children and Youth on the essential therapeutic elements required for an improved service system response for Tasmanian children and young people with highly complex needs* (Report, July 2021).

¹⁴ For further details, see the ‘Our Publications’ section on my website: www.childcomm.tas.gov.au.

¹⁵ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022).



13. The confronting evidence given by victim-survivors during the hearings of the Commission of Inquiry (COI) into the *Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings*, including experiences of Tasmania's criminal justice system.
14. The *Draft Final Report 2020 of the Council of Attorneys-General Age of Criminal Responsibility Working Group* (Working Group).¹⁶ I further note my February 2020 submission to the Working Group, which is available on my website.¹⁷

This Advice is also prompted by the many conversations I have with children and young people through my individual advocacy role, and also the broader work undertaken by my office. This includes the work of the Advocate for Young People in Detention, a role which has existed within my office since February 2022, and has significantly enhanced my ability to hear and learn from the experiences of children detained within the criminal justice system. This Advice draws on a substantial project currently being undertaken by my office which explores the views of young people in conflict with law in Tasmania. This project is called the *Voices of Young People in the Youth Justice System Project* (Voices Project) (November 2022 – current).

Through the *Voices Project*, I have heard the views of children and young people with lived experience of the Tasmanian youth justice system, including their insights into the reasons why children begin exhibiting harmful behaviours and the types of risk factors children experience, and how these risk factors can multiply. I also heard views about the factors that make it less likely that a child will engage in harmful behaviour including the importance of family and community, housing, and therapeutic interventions (e.g., drug and alcohol treatment). Young people had a lot to say about the criminal justice system itself, including interactions with police, and the detention environment.

For example, two young people described the following:

If a 10-year-old's committing a crime, obviously there's something wrong at home. They're going to rebel against their parents, and then they're eventually going to rebel against the police. That's the way it works. There's no, he was 'such and such'. At the end of the day.... people who commit crime have always got something wrong with them..... Maybe he's watching his Dad hitting his Mum, or..... he's getting hit by his Dad, or something like that. He would have that inner rage and just wants to take it out on the world. You know what I mean? It's not as simple as, oh he went in there.... stole a chocolate, charge him.

Young person, Voices of Young People in the Youth Justice System Project

¹⁶ Council of Attorney-General Age of Criminal Responsibility Working Group, *DRAFT Final Report 2020* (Report, 2020). Note, the draft report was prepared by the Working Group for the then Council of Attorneys-General (CAG) but was never agreed by all jurisdictions at officer level nor provided to CAG for consideration. The draft report notes that, while the report, findings and recommendations were not endorsed by the Commonwealth, the majority of the Working Group was 'satisfied that that the report comprehensively reflects the evidence reviewed and the consultation undertaken...' 6.

¹⁷ See the 'Our Publications' section on my website: www.childcomm.tas.gov.au.



It's usually a young person who's broken and they're going through family issues and they're depressed [that becomes involved in the criminal justice system]. Using a lot of drugs and they don't know what to do with their life.... That's how I felt the first time when I did [crime].... I didn't feel like I had family or a home to go to, so I just went out and used drugs as another way of coping and going smoking ice and that. Thought that was better than going home because I didn't want to argue with my family....

Young person, Voices of Young People in the Youth Justice System Project

In the coming months, what I heard from young Tasmanians will form the basis of specific outputs that present children and young people's views on key aspects of the current youth justice system, and what children and young people need – in their own words – to grow and thrive.

I acknowledge that I am delivering this Advice in a broader context. This includes paradigm shifting reform opportunities. The first of these is the forthcoming release of the findings and recommendations of the *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings*. The second is the commencement of a new regulatory framework for child and youth safe organisations under the *Child and Youth Safe Organisations Act 2023* (Tas).

However, the child-centred guidance contained in this Advice on how the Tasmanian Government can commit to an entirely new and non-criminalising approach to children whose behaviour brings them to the attention of police should be considered immediately to guide change. It is my view that maintaining the status quo of a criminalising system for children as young as 10 years old, is increasingly unsustainable.



7. Guiding principles for reform

In my March 2022 response to the Tasmanian Government's *Reforming Tasmania's Youth Justice System Discussion Paper*,¹⁸ I identified three principles that I believe should guide any reform to Tasmania's youth justice system.

1. Reforms are child-centred;
2. Reforms acknowledge the right of Aboriginal people to self-determine and lead the appropriate response for their children; and
3. Reforms acknowledge the ecological model of child development, which recognises the influence of families, communities and broader society on the wellbeing of children.

I have adopted these principles in framing this Advice and my recommendations.

Principle 1: Being child centred

Being 'child centred' means giving paramount consideration to the best interests of the child in matters of law, policy and service delivery.¹⁹ It is about raising the status of children's rights and interests and considering the impact of decisions and processes on children. It also involves promoting and upholding the right of children and young people to participate by seeking and taking account of their views in decision-making on all matters that affect them.²⁰ Children and young people are the 'experts in their own lives',²¹ and listening to their views, especially of those with lived experience, has the potential to improve decision-making and lead to more effective policy, program and service development and implementation.

Principle 2: The right of Aboriginal people to determine and lead the appropriate response for their children

The United Nations Declaration on the Rights of Indigenous People defines self-determination as the right of 'indigenous peoples' to

*freely determine their political status and freely pursue their economic, social and cultural development.*²²

¹⁸ Available on the 'Our Publications' section on my website: www.childcomm.tas.gov.au.

¹⁹ United Nations, Convention on the Rights of the Child, GA Res 44/25 (2 September 1990, 17 December 1990) Article 3.

²⁰ United Nations, Convention on the Rights of the Child, GA Res 44/25 (2 September 1990, 17 December 1990) Article 12.

²¹ Australian Childhood Trauma Group, 'Why have an approach to children's participation?' (Webpage, 2021) <<https://theactgroup.com.au/childrens-participation-and-voice/>>.

²² United Nations Declaration on the Rights of Indigenous Peoples, (13 September 2007) Article 3. For further discussion, see Larissa Behrendt, Miriam Jorgensen and Alison Vivian, *Self-Determination: Background Concepts* (Scoping Paper, 2017).



Aboriginal self-determination in the youth justice context must be premised on an understanding of what ‘self-determination’ means for Aboriginal children.²³ Realising self-determination involves genuine partnerships between Tasmanian Aboriginal people and the Tasmanian Government to ensure that services to Aboriginal children and their families are Aboriginal led, and culturally safe.

Cultural safety is defined in the National Agreement on Closing the Gap as being about,

*overcoming the power imbalances of places, people and policies that occur between the majority non-Indigenous position and the minority Aboriginal and Torres Strait Islander person so that there is no assault, challenge or denial of the Aboriginal and Torres Strait Islander person's identity, of who they are and what they need. Cultural safety is met through actions from the majority position which recognise, respect, and nurture the unique cultural identity of Aboriginal and Torres Strait Islander people. Only the Aboriginal and Torres Strait Islander person who is recipient of a service or interaction can determine whether it is culturally safe.*²⁴

The Tasmanian Government notes that the right of Aboriginal and Torres Strait Islander children and young people to cultural safety is an important part of implementation of the *Child and Youth Safe Organisations Framework*. It has also been recognised in the draft Blueprint, consistent with the principles and targets of the National Agreement on Closing the Gap, that Aboriginal people are best placed to ensure the appropriate responses for their children.

Principle 3: The ecological model of child development which recognises the influence of families, communities and society on the wellbeing of children

The ecological model of child development recognises that a child's development is the ‘product of a complex set of interacting factors, at the individual, family, and community levels’.²⁵ From this perspective, a child engaging in harmful behaviour is not seen as ‘the problem’ in isolation, but as part of a large and complex eco-system with various factors and processes influencing their actions, interactions and identities.²⁶

²³ Chris Cunneen, *Self-Determination and the Aboriginal Youth Justice Strategy* (Research Paper, 2019) 6.

²⁴ National Agreement on Closing the Gap (Agreement, July 2020).

²⁵ Gordon Jack, ‘Ecological Influences on Parenting and Child Development’ (2000) 30(6) *British Journal of Social Work* 703. See also, Urie Bronfenbrenner, *The ecology of human development* (Harvard University Press, 1979); Jill F. Kilanowski, ‘Breadth of the Socio-Ecological Model’ (2017) 22(4) *Journal of Agromedicine*, 295.

²⁶ Diana Johns, ‘A Social Ecological Approach to ‘Child Friendly’ Youth Justice’ (Conference Paper, National Association for Youth Justice: Justice for Children in Trouble, University of Cambridge, September 2017).



Spotlight on the ecological model of child development

The ecological model of child development is articulated by the Tasmanian Government in its whole-of-government *Child and Youth Wellbeing Strategy – It Takes a Tasmanian Village*:

The ecological model of human development places the child at the centre and recognises the influence of relationships within the settings of the family, the community, wider society and the environment. Children and young people’s wellbeing is heavily shaped by their relationships with their family and also the wider community. These relationships are critical to the development of wellbeing; and secure, predictable and loving attachments from early life with parents are of particular importance.

The ecological model recognises that child and youth wellbeing takes the contribution of all Tasmanians ... ‘It Takes a Tasmanian Village’.²⁷

²⁷ Tasmanian Government, *It takes a Tasmanian Village: Child and Youth Wellbeing Strategy* (Report, 2021) 6.



8. The case for change is already well established in government policy

The rights and wellbeing of Tasmanian children became central to Government policy with the development of Tasmania's first long-term and whole-of-government strategy to improve the wellbeing of Tasmanian children and young people.

The Tasmanian Government, in *It takes a Tasmanian Village: Child and Youth Wellbeing Strategy* makes it abundantly clear that we aspire to a Tasmania where –

*no matter where you live, your background or your circumstances, opportunities will be there and if you want to grasp those opportunities, a better life will be within your reach.*²⁸

To realise this, the Government articulates its vision as follows:

*Children and young people in Tasmanian have what they need to grow and thrive.*²⁹

Overwhelmingly, evidence, including the work prompting this Advice, demonstrates that children come into conflict with the law because of factors including disadvantage, disability and trauma. In other words, children's contact with the law is often a direct result of **not** having what they need to grow and thrive. In making this point, I acknowledge that the responsibility for this is not, nor can it ever be, entirely the responsibility of government. However, it is the responsibility of government to ensure that the laws which frame and guide the context within which children and young people exist, and the service systems that interact with them, do indeed support children to grow and thrive.

It is from this perspective that I welcomed the Government's recent commitment to raise the minimum age of detention for children in Tasmania to 14 years old, as a part of their development of a new Youth Justice Blueprint. Its aim is to *build a nation-leading, best practice approach to young people in conflict with the law.*³⁰ However, simply taking detention off the table as a remand or sentencing option for children under 14 years old does not go nearly far enough towards achieving the Government's stated aim to build a nation-leading, best practice approach or to ensure that children and young people in Tasmania have what they need to grow and thrive.

In my view, achieving these aims requires a paradigm shift in how we, as a community, value and support children, including those exhibiting harmful behaviours. If we continue to default to a criminalising response for children as young as 10, we accept that some children are somehow less deserving of support, care, and attention. Every child deserves to have what they need to grow and thrive.

As a 15-year-old female participant in the Voices Project described:

[T]hat's what most kids go through before they get locked up. They're either homeless or going through poverty. That's why they need to do shit, to survive..... [and] there is nothing [to help them]. Because child safety aren't going to do anything to help them properly.....

²⁸ Tasmanian Government, *It takes a Tasmanian Village: Child and Youth Wellbeing Strategy* (Report, 2021) 4.

²⁹ Tasmanian Government, *It takes a Tasmanian Village: Child and Youth Wellbeing Strategy* (Report, 2021) 8.

³⁰ Roger Jaensch, Minister for Education, Children and Youth, 'Raising the minimum age of detention' (Media Release, 8 June 2022).



The government doesn't care about these kids that are sleeping in alleyways or sleeping in parks, you know ... where do they go at the end of the night? They sleep in a park. They sleep on the street. It just keeps happening If they did care they wouldn't be on the street.

An increase in the age of criminal responsibility to at least 14 years old accompanied by a substantially enhanced service system will go much further to achieving the Government's stated aims, upholding the rights, and improving the wellbeing of all Tasmanian children.



9. Tasmania's current approach

The age of criminal responsibility in Tasmania is set at just 10 years of age. Currently, for children below the age of criminal responsibility, the interaction with law is very limited. For example, the TLRI advises that the power of police to respond to unsafe and/or harmful behaviour of children aged less than 10 is limited in Tasmania to provisions under the *Mental Health Act 2013* (*Mental Health Act*) and the *Children, Young Persons and Their Families Act 1997* (*CYPTF Act*) in specific circumstances.

The *Mental Health Act* provides police with a limited *ad hoc* power to take a child into protective custody in situations where the officer doing so has a 'reasonable belief that the child has a mental illness'.³¹ While some children who engage in harmful behaviour may have a mental illness, as the TLRI notes, offence-like behaviour 'cannot, of itself, be taken as evidence of a mental illness', and to do otherwise would present several risks.³² Under the *CYPTF Act*, police have a power to deal with children who are being assessed as 'at risk'.³³ This means that police can take reasonable steps to prevent the occurrence, or further occurrence, of the 'abuse or neglect' of a child at the request of the Secretary of DECYP, subject to an assessment authorised by a Magistrate. The TLRI says this means that at present police do not have an *ad hoc* power to respond to the harmful behaviour of a child aged below the age of criminal responsibility except under the *Mental Health Act*, as described above.

It appears, in theory at least, that police may have other *ad hoc* powers in relation to children aged below the age of criminal responsibility. For example, police have the power to take into protective custody a person who is intoxicated in a public place. Under s. 4A of the *Police Offences Act 1935*, where a police officer believes on reasonable grounds that a person in a public place is intoxicated and is behaving in a manner likely to cause injury to themselves or another or damage to property, or is incapable of protecting themselves from physical harm, the police officer may take the person into custody. In these circumstances, police may release the person to a 'place of safety' or into the care of a person responsible. I have not to date found any reason to believe that this power does not apply to a child aged below the age of criminal responsibility.

For children aged above the current age of criminal responsibility but less than 14 years, the principle of *doli incapax* applies. This principle means that children aged between 10 and 14 inclusive are presumed to be 'criminally incapable' unless proved otherwise by the prosecution. The inherent subjectivity in the *doli incapax* principle is generally recognised as a factor in its inconsistent application within and between jurisdictions. It is also not a barrier to entry into the criminal justice system in the first place and I have been made aware, through consultation and discussion, of significant reservations about its effectiveness.

³¹ For further, see Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 50.

³² Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 50.

³³ Of further note, under s. 19 the Secretary can obtain the assistance of the Commissioner of Police in carrying out the assessment of the circumstances of a child.



In Tasmania, the age of criminal responsibility aligns with the current age of detention and so children as young as 10 can be detained, usually at the Ashley Youth Detention Centre. However, as mentioned in the introduction to this Advice, as a part of a suite of proposed youth justice reforms, in June 2022, the Tasmanian Government made a commitment that the age of youth detention will be raised to 14. The Government has described its intention to raise the minimum age of detention as a key element in its larger plan to build a nation-leading, best practice approach to young people in conflict with the law. Further, the Government has agreed that detention does not support rehabilitation or reduce the likelihood of re-offending for younger children and that early exposure to a detention environment can also further traumatisate young people, expose them to problem behaviours of older detainees and increase criminal networks. This policy commitment is intended to apply to children on remand as well as in sentenced detention.³⁴

There has, however, been no commitment to raise the age of criminal responsibility in Tasmania, despite this having previously been identified as an issue where change is warranted.

In October 2021 a motion in the Legislative Council to raise the age of criminal responsibility in Tasmania from 10 to 14 years was agreed to. However, Tasmania's Attorney-General has stated the Government's preference is to work towards a nationally consistent approach through continued participation in the Age of Criminal Responsibility Working Group established by the Standing Council of Attorneys-General discussed below.

More recently, the Attorney-General has said she has asked the Department of Justice to progress work on how the state could develop a reform framework 'as a priority'.³⁵

³⁴ Roger Jaensch, Tasmanian Government, 'Raising the Minimum Age of Detention' (Media Release, 8 June 2022).

³⁵ Rob Inglis, Tasmanian Aboriginal Legal Service: State must urgently raise the age of criminal responsibility, *Mercury* (online, 13 December 2022).



10. Progress around Australia- a new national benchmark

Several jurisdictions including Tasmania, New South Wales and South Australia have decided to reserve their stance on the age of criminal responsibility until the Working Group has finalised its advice to the SCAG, citing preference for a nationally consistent approach. Yet, other jurisdictions are responding to the growing call for change, with commitments made by the Northern Territory (NT), the Australian Capital Territory (ACT), and more recently Victoria to raise the age of criminal responsibility. It is my view that following the commitments of the ACT and Victoria, the new national benchmark for the age of criminal responsibility is 14 years.

- Australian Capital Territory (ACT): a motion to raise the age of criminal responsibility to 14 was passed by the ACT Legislative Assembly in August 2020. The ACT Justice and Community Safety Directorate subsequently commissioned an independent review of the service system to ‘identify service gaps, implementation issues and alternative models to meet the needs of 10 to 13-year-olds likely to be affected by the proposed reform’.³⁶ The ACT Government subsequently published a Position Paper confirming its intention to develop legislation to raise the age of criminal responsibility to 12 years, and then to 14 years within a 2-year period.³⁷ A Bill was introduced on 9 May 2023, and is currently being considered by the Standing Committee on Justice and Community Safety.³⁸
- Northern Territory (NT): the NT government has committed to raising the age of criminal responsibility from 10 years to 12 years of age and only allowing children under 14 years to be detained for serious crimes. These reforms are informed by the *Royal Commission into the Protection and Detention of Children in the Northern Territory* and are intended to reflect a ‘preventative approach, focusing on early intervention and diversion to address concerning behaviours in children’.³⁹ In October 2022, a Bill was tabled in the NT Parliament proposing legislative changes to give effect to raising the age of criminal responsibility and detention.⁴⁰ The Bill also proposes to make changes to simplify the *doli incapax* rule in determining whether a child under 14 years has the mental capacity to commit an offence. The Bill has passed and will commence on or before 7 October 2024.
- Victoria: Victoria’s Legislative Council Legal and Social Issues Committee in its Inquiry into Victoria’s Criminal Justice System observed that ‘the SCAG’s commitment to developing a proposal to raise the minimum age of criminal responsibility across Australia to 12 years old is out of step with the views and evidence presented by stakeholders who contributed to its

³⁶ Morag McArthur, Aino Suomi and Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, August 2021).

³⁷ Australian Capital Territory Government, *Raising the age of criminal responsibility* (Position Paper, November 2022).

³⁸ Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT); see also Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT).

³⁹ *Report of the Royal Commissioner and Board of Inquiry into the Protection and Detention of children in the Northern Territory*, (Final Report, 17 November 2017).

⁴⁰ Criminal Code Amendment (Age of Criminal Responsibility) Bill 2022 (NT). Of further note, the Bill also makes changes relating to charges and convictions that are alleged to have been committed when the person was a child under the age of 12 years, including removal from a person’s public criminal history, prohibiting any new proceedings and discharging from any ongoing orders or obligations.



Inquiry’ and ‘overwhelming support to raise the minimum age of criminal responsibility in Victoria to at least 14 years old to reduce the early engagement of children with the criminal justice system’.⁴¹ In April 2023, the Victorian Government became the first Australian state to announce it would raise the age of criminal responsibility from 10 years to 12 years as a first step, and to 14 years by 2027.⁴² Legislation is expected to be introduced into Parliament later this year and the change to 12 years of age expected to be phased in in late 2024. The second stage of the reform will be subject to the design and implementation of an alternate service model for 12- and 13-year-olds in consultation with an Independent Review Panel. Peak bodies and organisations in Victoria (including the Victorian Commission for Children and Young People and Victoria Legal Aid) and nationally (e.g., the Human Rights Law Centre) have welcomed the action to raise the age from 10 years but have expressed strong criticism and concern about the decision to delay to 2027 raising the age to 14 years.

- Western Australia (WA): the WA Labor Party passed a motion to raise the age of criminal responsibility from 10 years to 14 years during a state party conference in October 2021. The WA Government is yet to act on this motion.

⁴¹ Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into Victoria’s criminal justice system* (Report, 2022) 125.

⁴² Daniel Andrews, Premier of Victoria, ‘Keeping Young People Out of The Criminal Justice System’ (Media Release, 26 April 2023).



11. Children's contact with the criminal justice system

Fewer than 2 per cent of Tasmania's children and young people (aged 10 to 17) encounter the criminal justice system in connection with their own behaviour. According to the most recent ABS Recorded Crime Statistics for 2021-2022, of the 53,860⁴³ children and young people aged 10 to 17 in Tasmania, 888 were proceeded against by police⁴⁴ (1.65 per cent).

The number of youth offenders aged 10 to 17 years has been steadily declining since 2008-09 in Tasmania. However, in 2021-22, there was a 5 per cent increase in the number of children and young people aged 10 to 17 proceeded against by police in contrast to a 7 per cent overall decrease in total offenders in Tasmania.⁴⁵ This 'uptick' is supported by anecdotal evidence from police and youth justice services, however it is unclear whether it has also been seen in the 10 to 13 year old age cohort in particular.

In 2021-2022, there were 27,031 children between the ages of 10 and 13 (inclusive) in Tasmania. In the same period, only 7 children aged 10 to 13 were under community-based supervision and only 5 were in detention. As a result, in 2021-22, less than 0.1 per cent of Tasmanian children aged between 10 and 13 were under youth justice supervision.⁴⁶

However, as the data indicate in Table 1, Table 2 and Diagram 1, the small number of younger children who are under court-ordered youth justice supervision in the community or in detention masks a larger number of 10 to 13 year olds who come into contact with the police. In the same period (2021-22) police opened files for 203 unique children between the ages of 10 and 13 (inclusive) (ie around 0.75 per cent of the total population). Nearly half of these 'juvenile files' were prosecuted (45 per cent), one third were informal cautions (34 per cent), and the remainder resulted in either formal cautions (16 per cent) or referrals to community conference (5 per cent).

⁴³ Australian Bureau of Statistics, *National, state and territory population: Estimated resident population, by age and sex – at 30 June 2022* (Catalogue No. 3101.0, December 2022).

⁴⁴ Australian Bureau of Statistics, *Recorded Crime – Offenders* (2021-2022).

⁴⁵ Australian Bureau of Statistics, *Recorded Crime – Offenders* (2021-2022).

⁴⁶ Australia Institute of Health and Welfare, *Youth Justice Australia 2021-2022* (Report, 2023) 2. Note, 'community-based supervision' includes sentenced supervision (eg probation, suspended detention, or supervised release) and unsentenced supervision (e.g., conditional bail). Detention can include unsentenced remand or sentenced detention.



Table 1: Children aged 10 to 13 having contact with police or justice in Tasmania, 2018-22

Category	2018-19	2019-20	2020-21	2021-22
Total population of children, Tasmania (10–13-year-olds) ⁴⁷	27,049	27,340	27,371	27,031
Outcomes ⁴⁸	2018-19 ⁴⁹	2019-20 ⁵⁰	2020-21 ⁵¹	2021-22 ⁵²
Police juvenile file offenders (10–13-year-olds)	197	187	207	203
Informal cautions	97	108	141	134
Formal cautions	79	61	60	65
Community conference referrals	48	20	32	21
Prosecution files	168	39	124	180
Community-based supervision	22 ⁵³	np ⁵⁴	8 ⁵⁵	7 ⁵⁶
Detention	6 ⁵⁷	np ⁵⁸	np ⁵⁹	5 ⁶⁰

⁴⁷ Australian Bureau of Statistics, *National, state and territory population: Estimated resident population by single year of age, Tasmania – at 30 June 2022* (Catalogue No. 3101.0).

⁴⁸ Note: Tasmania Police has provided me with further context to how police deal with children who offend. Tasmania Police is required to take action against any offending behaviour that is detected/reported to police. The *Youth Justice Act 1997* requires that youth may only be proceeded against via a diversionary action rather than a court/prosecution action if they will first admit guilt. Tasmania Police's ability to divert youth away from the criminal justice system is thus dependent on the cooperation of the juvenile offenders in question.

⁴⁹ All Outcome data for the period 2018-19 sourced from information provided by Tasmania Police from Tasmania Police Prosecution and Information Bureau Systems. Extracted 27 Feb 2020.

⁵⁰ All Outcome data for the period 2019-20 sourced from information provided by Tasmania Police from Tasmania Police Prosecution and Information Bureau Systems. Extracted 27 Nov 2020.

⁵¹ All Outcome data for the period 2020-21 sourced from information provided by Tasmania Police from Tasmania Police Prosecution and Information Bureau Systems. Extracted 13 Sep 2022.

⁵² All Outcome data for the period 2021-22 sourced from information provided by Tasmania Police from Tasmania Police Prosecution and Information Bureau Systems. Extracted 13 Sep 2022.

⁵³ Australia Institute of Health and Welfare, *Youth Justice in Australia 2018-19 supplementary tables – Characteristics of young people under community-based supervision* (Catalogue No. JUV 132, 2020).

⁵⁴ Australia Institute of Health and Welfare, *Youth Justice in Australia 2019-20 supplementary tables – Characteristics of young people under community-based supervision* (Catalogue No. JUV 134, 2021).

⁵⁵ Australia Institute of Health and Welfare, 2021, *Youth Justice in Australia 2020-21 supplementary tables – Characteristics of young people under community-based supervision* (Catalogue No. JUV 138, 2022).

⁵⁶ Australia Institute of Health and Welfare, 2022, *Youth Justice in Australia 2021-22 supplementary tables – Characteristics of young people under community-based supervision* (Catalogue No. JUV 140, 2023).

⁵⁷ Australia Institute of Health and Welfare, *Youth Justice in Australia 2019-20 supplementary tables – Detention* (Catalogue No. JUV 134, 2021).

⁵⁸ Australia Institute of Health and Welfare, *Youth Justice in Australia 2019-20 supplementary tables – Detention* (Catalogue No. JUV 134, 2021).

⁵⁹ Australia Institute of Health and Welfare, *Youth Justice in Australia 2020-21 supplementary tables – Detention* (Catalogue No. JUV 138, 2022).

⁶⁰ Australia Institute of Health and Welfare, *Youth Justice in Australia 2021-22 supplementary tables – Detention* (Catalogue No. JUV 140, 2023).



Diagram 1: Snapshot of children aged 10 to 13 having contact with police or justice in Tasmania, 2021-22⁶¹

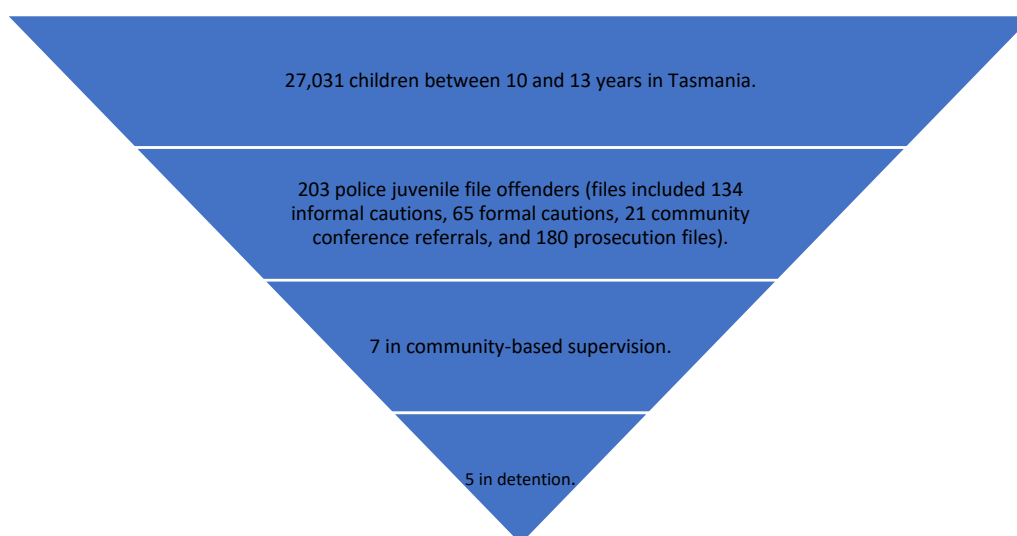


Table 2: Juvenile files by outcome, age and number of files in 2021-22, Tasmania⁶²

Offender Age	Community Conferences	Formal cautions	Informal Cautions	Prosecution files	Unknown type
10	0	3	14	13	
11	4	4	16	36	
12	6	15	46	49	
13	11	43	58	82	
Other ages	86	235	381	1,016	1
TOTAL	107	300	515	1,196	1

⁶¹ For data sources, see Table 1.

⁶² Tasmania Police, *Tasmania Police Prosecution and Information Bureau Systems*. Extracted 13 Sep 2022. Notes: Juvenile Files statistics report the number of files with police proceedings against youth offenders, counting one unique offender per file. A person's age is calculated as their minimum age on juvenile files, based on offence date. **This data may be subject to additional caveats which will be updated prior to any public release.**



11.1 Types of Offending

The research shows that children and young people tend to engage in certain types of offending usually against property (i.e. theft, vandalism) and only rarely in very serious offences such as homicide or sexual offences.⁶³ ABS data for all youth offenders for Tasmania (10 to 17 years) show that for 2022, acts to cause injury (i.e. assault) were the most common principal offence proceeded against by police in relation to youth offenders (29.3 per cent), followed by theft (20.4 per cent), property damage and environmental pollution (12.6 per cent), and illicit drug offences (10.8 per cent).⁶⁴ This ABS age-specific data is not available for Tasmania, however national data for 10 to 13 year olds reinforces that young offenders in this age range do not generally engage in the most serious of criminal offending. Nationally, very few children between the ages of 10 and 13 had principal offences for homicide (0.1 per cent) and sexual offences (4.7 per cent). Acts intended to cause injury were the most common principal offence proceeded against by police in relation to young offenders aged 10 to 13 (24 per cent), followed by unlawful entry with intent (18.4 per cent), property damage and environmental pollution (14.1 per cent), and theft (13.9 per cent).

11.2 A criminogenic system

Criminal justice systems can be criminogenic, with early contact being one of the key predictors for future offending. Research has found overwhelmingly that the younger children are when they first encounter the system, the more likely they are to re-offend.⁶⁵ Youth offenders tend to have higher rates of re-offending than adults. Nationally between 2000-01 and 2019-20, 9 out of 10 children who were first sentenced to youth justice supervision between ages 10 and 12 re-offended and were returned to youth justice supervision before reaching 18.⁶⁶ The return rate declined with each successive age group.⁶⁷ It therefore stands to reason that community-based responses to the harmful behaviour of younger children may be a more effective way of reducing the likelihood of future contact with the criminal justice system.

Research has also found that most young people who engage in criminal behaviour do not progress to serious crime, and in fact appear to desist spontaneously without intervention or after one or two encounters with police.⁶⁸ However, there is a small core group of young people who do have repeated contact with the criminal justice system who are responsible for a disproportionate amount of crime.⁶⁹ In 2022, in Tasmania, '40 youths made up 50 per cent of the total youth crime

⁶³ Sentencing Advisory Council, *Sentencing Young Offenders* (Research Paper, October 2021), 7.

⁶⁴ Australian Bureau of Statistics, *Recorded Crime – Offenders, Table 20, Youth Offenders, Principal Offence 2021–22* (Catalogue No. 4519.0).

⁶⁵ Jesuit Social Services, *Too much too young: Raise the age of criminal responsibility to 12* (Report, October 2015) 4.

⁶⁶ Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision, 2019–20*. (Juvenile Justice Series No. 25, Catalogue No. JUV 137).

⁶⁷ Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision, 2019–20*. (Juvenile Justice Series No. 25, Catalogue No. JUV 137).

⁶⁸ Tamara Walsh, Robin Fitzgerald, Lucy Cornwell and Cara Scarpato, 'Raise the age – and then what? Exploring alternatives to criminalising children under 14 years of age' (2021) 27 *James Cook University Law Review* 37, 41.

⁶⁹ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 *Trends and Issues in Criminal Justice*.



charges'.⁷⁰ This concentration of offending behaviour mirrors trends examined elsewhere in this Advice. Young people in this cohort tend also to be those who come to the attention of police at an early age, a matter discussed further below.

11.3 Characteristics of children in contact with the criminal justice system

It is important to acknowledge that most Tasmanian children never come into contact with the criminal justice system. However, particular risk factors increase the likelihood that a child may become involved in the justice system, and children who do enter the system, particularly in the 10 to 13 age range, have often already been flagged as being at risk by other areas of government service delivery.

The evidence indicates that the current system tends to criminalise disadvantage, disability and trauma. While these factors are by no means causal, children involved in the criminal justice system are more likely to come from lower socio-economic areas, to be disengaged from education, and to be known to child safety services. Multi-system involvement is in and of itself a risk for ongoing contact with the criminal justice system.⁷¹ The reality is that the small number of children who exhibit violent or harmful behaviour will generally have been exposed to family violence, abuse, and neglect.⁷²

Concerningly, Tasmanian Aboriginal children and young people continue to be over-represented in the youth justice system, compared to non-Aboriginal children and young people. In 2021-22, 33 per cent of the children and young people under youth justice supervision in Tasmania aged 10 to 17 were Aboriginal.⁷³ There were 10 young people under youth justice supervision aged 10 to 13, however as the numbers were so small, Aboriginal status was not reported. Thirty-six per cent of all young people aged 10 to 17 in detention in 2021-22 in Tasmania were Aboriginal.⁷⁴ As a comparison, around 1 in 10 of Tasmania's population of children and young people aged 0 to 19 (or 11.2 per cent) identify as Aboriginal.

Children involved in the child safety system also continue to be over-represented in the youth justice system in Tasmania. A review of Tasmania Legal Aid (TLA) files between 2007 to 2020 revealed that of the 3,600 individual child safety clients helped during the period, around 10 per cent also had a youth justice file.⁷⁵ Two thirds (65.7 per cent) of these 'crossover children' first had involvement with

⁷⁰ Felix Ellis, Minister for Police, Fire and Emergency Management, House of Assembly Estimates Committee A, Estimates (Thursday, 8 June 2023).

⁷¹ Tamara Walsh, Robin Fitzgerald, Lucy Cornwell and Cara Scarpato, 'Raise the age – and then what? Exploring alternatives to criminalising children under 14 years of age' (2021) 27 *James Cook University Law Review* 37, 42.

⁷² Tamara Walsh, Robin Fitzgerald, Lucy Cornwell and Cara Scarpato, 'Raise the age – and then what? Exploring alternatives to criminalising children under 14 years of age' (2021) 27 *James Cook University Law Review* 37, 42.

⁷³ Australian Institute of Health and Welfare, *Youth Justice in Australia 2021-22, supplementary tables – Characteristics of young people under supervision* (Catalogue No. JUV 140).

⁷⁴ Australian Institute of Health and Welfare, *Youth Justice in Australia 2021-22, supplementary tables – Detention* (Catalogue No. JUV 140).

⁷⁵ Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Paper, July 2021) 9-10.



child safety and then with youth justice.⁷⁶ For children first charged with a crime before turning 14 years, crossover children made up 41 per cent of this group and accounted for 46 per cent of files.⁷⁷ The report also found that stealing, followed by assault and damage to property were the three most serious charges in a first file for crossover children under 14 years.⁷⁸ For two children, their first file was for breach of bail.⁷⁹ Around 25 per cent of all TLA youth justice clients were female, however 37 per cent of crossover children were female.

A total of 40 children and young people who were under youth justice supervision during 2020-21 in Tasmania, experienced their first youth justice supervision between the ages of 10 and 13, and had an interaction with the child safety system in the last five years.⁸⁰ Of those 40 young people, 35 per cent were Aboriginal.⁸¹

Children who offend are more likely to have risk factors like disability, mental illness, alcohol and other drug disorders, exposure to crime and violence, homelessness and child abuse and neglect.⁸² The research suggests that these multiple factors, when not addressed early in life, compound and interlock to create more complex support needs.⁸³ There is clear evidence of an association between trauma, drug use and offending among young people who commit criminal offences.⁸⁴

11.4 Physical environments

It has been said that youth justice detention is not an environment in which children can flourish, grow up strong and healthy, and reach their potential. Instead, it is a place which compounds existing issues children face or creates new mental health, social, emotional and wellbeing problems.⁸⁵

For example, children have described the detention environment to me as follows:

[It's] lonely and scary and traumatising [being in detention]. You've got nothing but your lonely thoughts in a cell at night.

Voices Project participant, 17-year-old male

...[T]he rooms up at Ashley's, they're just fucking terrible. It's like you're at a maximum [prison].... [Y]ou get metal fucking toilets up there. So like every time I go to the toilet.... I'd have to put toilet paper on it. It was cold as - you know what I mean?

Voices Project participant, 18-year-old male

[I]t's a detention centre, you're here to get punished.... It's a jail for kids. So, you know, what is it going to do? Nothing.

Voices Project participant, 17-year-old male

⁷⁶ Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Paper, July 2021) 9-10.

⁷⁷ Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Paper, July 2021) 9-10.

⁷⁸ Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Paper, July 2021) 13.

⁷⁹ Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Paper, July 2021) 13.

⁸⁰ Australian Institute of Health and Welfare, *Young people under youth justice supervision and their interaction with the child protection system 2020-21* (Catalogue No. CSI 29).

⁸¹ Australian Institute of Health and Welfare, *Young people under youth justice supervision and their interaction with the child protection system 2020-21* (Catalogue No. CSI 29).

⁸² Jesuit Social Services, *Thinking Outside: Alternatives to remand for children* (Research Report, 2013).

⁸³ Chris Cunneen, *Arguments for raising the minimum age of criminal responsibility* (Research Report, 2017) 9.

⁸⁴ Tamara Walsh, Robin Fitzgerald, Lucy Cornwell and Cara Scarpato, 'Raise the age – and then what? Exploring alternatives to criminalising children under 14 years of age' (2021) 27 *James Cook University Law Review* 37, 43.

⁸⁵ Amnesty International, *The sky is the limit: Keeping young children out of prison by raising the age of criminal responsibility* (Report, 2018) 6.



Image 1: Admissions height chart, Ashley Youth Detention Centre.
Supplied by Department for Education, Children and Young People.



Image 2: *Entry to holding room, Ashley Youth Detention Centre.
Supplied by Department for Education, Children and Young People.*



Image 3: *External entry to holding area, Ashley Youth Detention Centre.
Supplied by Department for Education, Children and Young People.*



Image 4: Programs room, Ashley Youth Detention Centre.
Supplied by Department for Education, Children and Young People.



Ashley Youth Detention Centre is not the only custodial environment encountered by a larger cohort of children in contact with the criminal justice system. Other environments include reception prisons, police stations, police transport and courts. These places have been designed for adults. Generally, they are not developmentally appropriate spaces for any child, let alone those with the types of complex needs discussed above.

For example, one young person has reflected on the reception prison environment as follows:

Well, if it's your first time [in a reception prison] it can be terrifying. Because you're in a remand centre which is a prison and you're a kid but there's also adults in there and the guards are really shit in there.

...

You're sitting in a room with a gym mat and there's urine all over the walls. It's a really dirty cell. All their cells are really dirty.

Voices Project participant, 15-year-old female



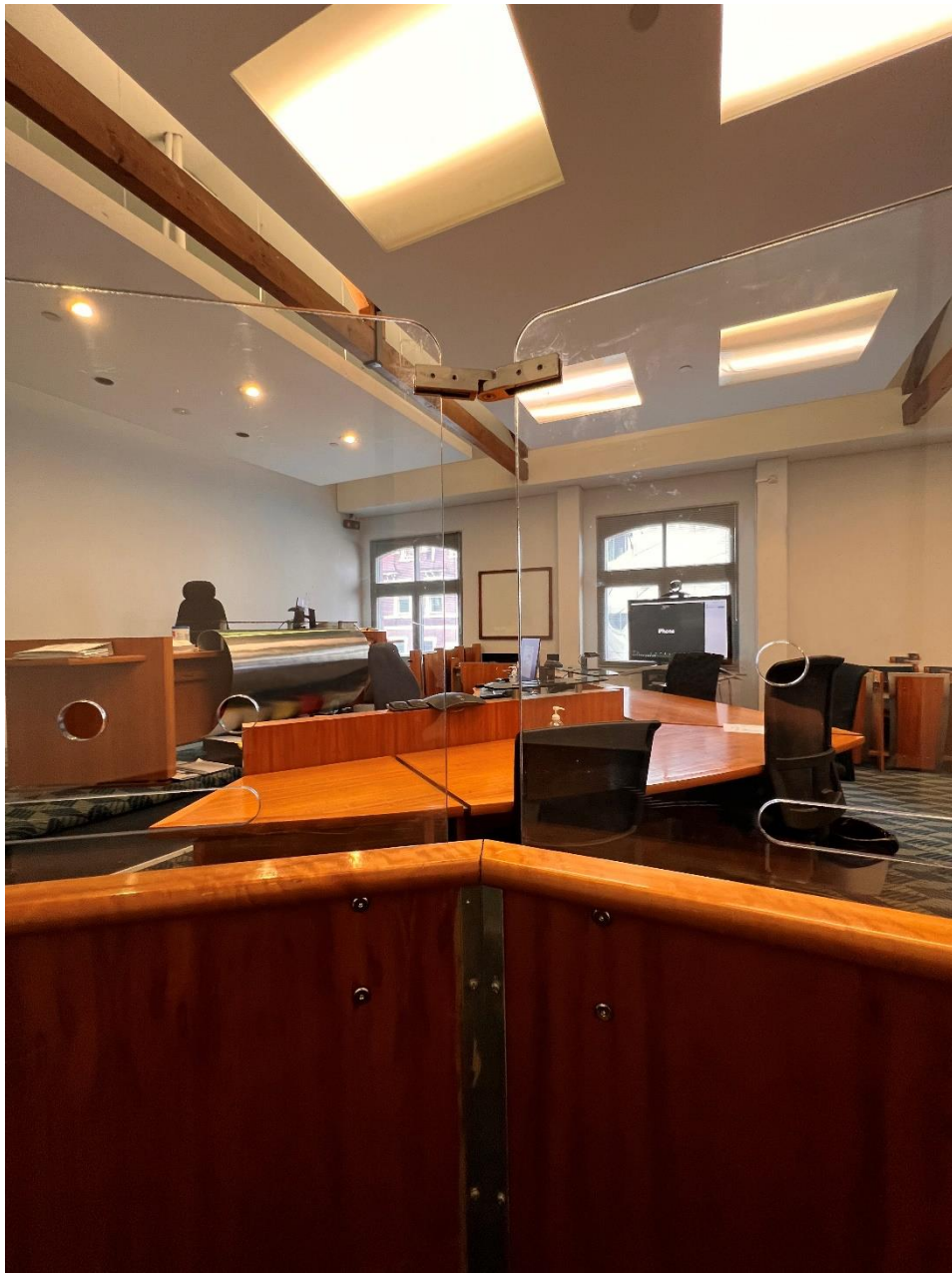
Image 5: External image depicting the façade of the Launceston Reception Prison.
Provided by Department of Justice.



Image 6: Image depicting a reception prison watch-house cell in which a child or young person may be detained.
Provided by Department of Justice.



***Image 7:** External image depicting the façade of the Hobart Reception Prison.
Provided by Department of Justice.*



***Image 8:** Hobart Youth Court from the dock, Magistrates Court of Tasmania.
Published with consent of the Chief Magistrate.*



Image 9: *Hobart Youth Court dock, Magistrates Court of Tasmania.
Published with consent of the Chief Magistrate.*



12. Realising change

In this section, I consider the law and policy changes required to raise the age of criminal responsibility in Tasmania to at least 14 years.

I have had the benefit of comprehensive independent advice from the Tasmania Law Reform Institute (TLRI) on the technical legal requirements to raise the age of criminal responsibility in Tasmania. I note in doing so, the TLRI also answered the question:

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

I acknowledge that in providing that advice the TLRI noted that the question of raising the age cannot be considered in ‘isolation’ but must be considered in the context of the service system reforms needed to respond appropriately to children’s harmful behaviour across the full public health continuum.

There is an urgent need for an independent review of the current service system, that is made publicly available (see Recommendation 5). This will ensure the comprehensive and contemporary service system map and gap analysis required to support non-criminalising approaches to the harmful behaviour of children can be designed and implemented in time to respond to a higher age.

This review of Tasmania’s service system should take account of and leverage existing work including the ongoing development of a whole-of-government Blueprint for a multi-systemic response to youth justice, the review of the Targeted Youth Support System, the Child and Adolescent Mental Health Service system reforms, and the work to implement the recommendations of the Expert Panel on the essential therapeutic elements required for an improved service system response for children with highly complex needs.

The relatively recent (2021) independent review of the ACT service system emphasised the need for enhancements across the entire public health continuum. As McArthur explained,

*Consistent with the public health approach, service systems that ensure children’s needs and rights are met include universal services such as education, health care, support services, targeted or secondary services such as mental health, substance misuse programs and other targeted programs, and tertiary systems such as child protection and youth justice. Secondary and tertiary service networks specifically target and respond to at-risk children and families ...*⁸⁶

I have outlined my views across the public health continuum on the current service system in Tasmania in my submissions to the Tasmanian Government’s development of a *Youth Justice Blueprint* and the *Child and Youth Wellbeing Strategy*.⁸⁷ See also my comments in response to the

⁸⁶ Morag McArthur, Aino Suomi and Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, August 2021) 23.

⁸⁷ For further details, see the ‘Our Publications’ section on my website: www.childcomm.tas.gov.au.



Working Group which include the compelling evidence for primary prevention and early intervention initiatives, with a large focus on the first 1000 days of children's lives.⁸⁸

However, a further, more comprehensive and contemporary review of the service system is required to understand and to fill known service gaps affecting children and young people. This action will achieve a Tasmania that truly reflects the aspiration that –

*no matter where you live, your background or your circumstances, opportunities will be there and if you want to grasp those opportunities, a better life will be within your reach.*⁸⁹

12.1 Reforming the law

The TLRI has advised that raising the age of criminal responsibility does not require a significant level of reform.⁹⁰ It has not recommended a new legislative framework for responding to the behaviour of children below the raised age of criminal responsibility. Instead, its advice is that the rights and interests of those affected by the change to the law, including those affected by the behaviour of children, can be adequately addressed through 'some amendment and re-calibration' of existing laws.⁹¹ I agree with this approach (see Recommendation 4).

Section 18 of the *Tasmanian Criminal Code Act 1924* provides that –

18. Immature age

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

...

To be clear, it is my view that the *Criminal Code Act* should be amended so that the minimum age at which a child can be held criminally responsible is at least 14 years, and that this should be implemented within 2 years (see Recommendation 1 and Recommendation 2).

To raise the current age of criminal responsibility the TLRI recommends that this section be amended to

*clarify that an act or omission by a person who is under the MACR is characterised as an offence under Tasmanian law, but the child under the relevant age is 'not responsible for' that offence, or alternatively 'is excused from' that offence.*⁹²

⁸⁸ For further details, see the 'Our Publications' section on my website: www.childcomm.tas.gov.au.

⁸⁹ Tasmanian Government, *It takes a Tasmanian Village: Child and Youth Wellbeing Strategy* (Report, 2021) 4.

⁹⁰ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 5.

⁹¹ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 5.

⁹² See further, Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 49.



This would bring the Tasmanian provision into alignment with other Australian jurisdictions which do not deprive the act of its legal character as an offence based on the age of the person. The TLRI recommends that -

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

I further note that should the law be reformed in this way, where the conduct remains an offence but that a child under the age of criminal responsibility is either 'not responsible' or 'is excused from' that offence, amendment to the *Youth Justice Act* would also be necessary to replace reference to the age of 10 years old with the new age of criminal responsibility (including the current definition of 'youth'), and redefine prescribed offences to apply only to those aged 14 years and older.⁹³

Consistent with the recommendations of the Committee on the Rights of the Child, it is my strong view that there should be no exceptions to the increased age of criminal responsibility (see Recommendation 1). While I understand that some in the community would find this challenging, it would be illogical if the rationale for raising the age was not applied to serious crimes like murder or rape. For further discussion and exploration of this issue, see section 8.2 in the Final Report of the *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory*.

*Any exceptions weaken the arguments for raising the age of criminal responsibility. They are not aligned with the evidence that responding with a criminal justice response is neither appropriate nor effective.*⁹⁴

In implementing the reform, it is important that the rights of victims are maintained. As the TLRI identifies, in most instances, the existing statutory system that compensates victims of crime under the *Victims of Crime Assistance Act 1976* is 'sufficient to deal with injuries by children' under a raised age of criminal responsibility.⁹⁵ However, the TLRI does identify a 'gap' in the availability of compensation for victims in relation to property damage caused by children aged less than the age of criminal responsibility.⁹⁶ Pointing to the impracticalities, in most instances, of a victim instituting a civil claim for damages against a child under the age of criminal responsibility, the TLRI recommends expanding the scope of victims of crime compensation to include instances of property damage caused by children under the age of criminal responsibility, in circumstances where the loss is not covered by an insurance or other liability scheme.⁹⁷

⁹³ See further, Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 49.

⁹⁴ Morag McArthur, Aino Suomi and Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory: Final Report* (August 2021) 23 < [Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory \(apo.org.au\)](https://apo.org.au/publication/review-of-the-service-system-and-implementation-requirements-for-raising-the-minimum-age-of-criminal-responsibility-in-the-australian-capital-territory) >.

⁹⁵ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 62.

⁹⁶ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 61.

⁹⁷ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 62.



For children adversely affected by the harmful behaviour of other children, there is value in considering including affected children within the jurisdiction of the response co-ordination service that is explained in detail in section 12.3.

The implications for young people aged below the raised age of criminal responsibility already involved with the criminal justice system will also need to be considered in the context of the above law changes. I recommend that further advice is sought from the TLRI on any subsequential amendments necessary to ensure the rights and wellbeing of children aged below the raised minimum age are upheld (e.g., the impacts for children aged below the raised minimum age who are in detention or under community-based supervision at the time the amendments take effect).

12.2 First responders to the harmful behaviour of children under a raised age of criminal responsibility

Where there are incidents that cannot be resolved safely within families or communities, it is my strong view that under a raised age of criminal responsibility, the primary role of police will remain as first responders using a child-centred approach. Police as first responders (supported by an embedded youth worker outreach model) can become a gateway to an enhanced service system rather than gatekeepers of the youth justice system⁹⁸ (see Recommendation 6).

Spotlight on child-centred policing

There is a rapidly growing body of work that articulates and demonstrates the strengths of police responses to children and young people's behaviour through non-criminalising frameworks.

'Child First' Justice is the guiding principle for the United Kingdom's youth justice system, with the National Police Chiefs Council (NPCC) noting, in its Child Centred Policing national strategy, that:

It is crucial that in all encounters with the police those below the age of 18 should be treated as children first.⁹⁹

*The implications of this are further outlined in the United Kingdom's [Child Centred Policing Best Practice Framework](#) which outlines how policing policy can meaningfully reflect and uphold the rights of children and young people.*¹⁰⁰

*Currently, there is no publicly available overarching policy or protocol articulating the approach of Tasmania Police to interacting with children and young people either generally, or with respect to vulnerable groups (e.g., children with a mental illness or disability, or those with a care experience, or Aboriginal children).*¹⁰¹

⁹⁸ Note, this includes the current Mandatory Reporting Requirements. For further, see Tasmanian Police, *Tasmanian Police Manual* (Manual, 15 May 2023) 9.2.2.

⁹⁹ National Police Chiefs' Council, *National Strategy for the Policing of Children and Young People* (Report, 2015) 9.

¹⁰⁰ National Police Chiefs' Council, *Child Centred Policing* (Framework, 2015). See further, National Police Chiefs' Council, *Voice of the Child* (Briefing, 2022).

¹⁰¹ Note, while the Tasmania Police Manual includes a section titled 'Youths and Children', the guidance that it provides is limited to the areas of youth justice, as set out under the *Youth Justice Act 1997* and child protection, under the *Children, Young Persons and Their Families Act 1997* as discussed earlier in this Advice.



In Australia, and internationally, police interactions with children and young people have been an area of intense scrutiny. I have previously called for further discussion about how to ensure that, going forward, all interactions between police and children and young people are child centred, culturally safe and developmentally appropriate.¹⁰² To achieve this, careful consideration of policing policies, processes and interactions with children and young people, including those under the age of criminal responsibility, is needed.¹⁰³

I acknowledge that much of this work will need to be undertaken to ensure Tasmania Police complies with the Child and Youth Safe Organisation Act 2023. I strongly encourage Tasmanian Police to think beyond the regulatory framework and commit to and embed a way of working that is, at all times and in all places, child centred, developmentally appropriate and culturally safe for children in Tasmania.

In its recent work to understand the legislative implications of a raised age of criminal responsibility, the TLRI notes that the current Tasmanian approach to police powers to respond to the harmful behaviour of children aged below the age of criminal responsibility is limited. They note that current provisions are not sufficient to ensure that police, as first responders, can respond *ad hoc* (self-initiated) to the range of harmful behaviour by the larger group of children who will fall under a raised minimum age of criminal responsibility.¹⁰⁴

For children under a raised age of criminal responsibility, the TLRI suggests consideration should be given to including *ad hoc* police powers in the *Children, Young Person and Their Families Act 1997* (CYPTF Act) as currently, this legislation ‘lacks a degree of breadth and clarity’.¹⁰⁵ To remedy this, the TLRI recommends articulating the role of police as first responders under the CYPTF Act by adopting a ‘dualist approach’. This would direct police to respond to the behaviour of a child under the raised age of criminal responsibility where that behaviour amounts to (a) a serious or persistent offence, or (b) the behaviour generally indicates that the child is at risk and requires care and protection.¹⁰⁶ This would require the broadening of the definition of ‘at risk’ under the CYPTF Act to include children who are a risk to themselves and/or others. Police would require clearly defined *ad hoc* powers to act as first responders for children deemed to be ‘at risk’ under this expanded definition. The provisions establishing protective custody powers for police mentioned above in section 9 may be instructive in formulating any new provision under the CYPTF Act.

The TLRI identifies that while the primary role of police in relation to children under a raised age of criminal responsibility should be as first responders, there could be a ‘secondary role and duty’ on police to take the child to a ‘child safe place’ and report any relevant conduct (ie conduct that reaches the above threshold) by the child and the police action (eg that they took them home or to another

¹⁰² See, for example, for my submission to the Government *Reforming Tasmania’s Youth Justice System Discussion Paper*. See the ‘Our Publications’ section on my website: www.childcomm.tas.gov.au.

¹⁰³ Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 68.

¹⁰⁴ See further, Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 50.

¹⁰⁵ See further, Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 51.

¹⁰⁶ See further, Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 53.



‘safe place’) to the appropriate contact within DECYP, as the department responsible for the *CYPTF Act*.¹⁰⁷ This could include referral to the Advice and Referral Line. This secondary role and duty is concerned with facilitating an assessment of the immediate safety and needs of a child. I acknowledge that police are not best placed, nor do they have the necessary training and expertise to perform this assessment. Therefore, I strongly urge that consideration be given to embedding a specialist youth outreach service within Tasmanian Police to perform this function. Consistent with the view of the Committee on the Rights of the Child, this would ensure that a child is provided with ‘assistance and services according to their needs, by the appropriate authorities’.¹⁰⁸

Spotlight on embedded youth outreach models

Other jurisdictions have considered the value of an embedded youth outreach response for children exhibiting harmful behaviours. Similar to the multi-agency Police, Ambulance and Clinician Early Response (PACER) model being piloted in Tasmania,¹⁰⁹ an embedded worker response is a collaborative, inter-disciplinary, mobile response model between police and a specialist youth service. Key features of Victoria’s Embedded Youth Outreach Program Evaluation (EYOP) include:

An after-hours, in the field, support and referral service

Assessment of need, vulnerabilities and protective factors

Brief solution-focused interventions, and supported referrals for children

Advocacy for children ‘in the moment’.

Capacity building and skill transition between police and youth workers

Positive treatment effect compared to matched control group.¹¹⁰

According to Distinguished Professor James R. P. Ogloff AM, Director of the Centre for Forensic Behavioural Studies and evaluation lead for the evaluation of the EYOP,

‘Evaluation findings are very encouraging, showing that the EYOP has been able to successfully identify at-risk youth and intervene in a manner that has interrupted the offending pathway for many young people. This helps both meet the needs of young people and furthers the goal of increasing community safety.’¹¹¹

For further detail, see: [Embedded Youth Outreach Program \(police.vic.gov.au\)](https://police.vic.gov.au)

¹⁰⁷ See further, Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 55.

¹⁰⁸ United Nations Committee on the Right of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system*

¹⁰⁹ See further, Canberra Health Service, *PACER* (Explainer, 2021); Tasmanian Department of Police, Fire and Emergency Management, *Annual Report 2021-22* (Report, 2023) 6.

¹¹⁰ Stefan Luebbbers, Anne Pichler, Rachael Fullam and James Ogloff, *Embedded Youth Outreach Program Evaluation* (Final Report, 2019).

¹¹¹ Stefan Luebbbers, Anne Pichler, Rachael Fullam and James Ogloff, *Embedded Youth Outreach Program Evaluation* (Final Report, 2019).



I do, however, note that any change to police powers requires thorough consideration of the statutory limits on those powers in circumstances where police come into contact with a child under the age of criminal responsibility. There are several matters that will require clarification by law including, for example, the use of coercion or restraint used by police in taking a child to a 'child-safe place', or whether and how any questioning of a child should take place.¹¹²

A critical gap in the current Tasmanian service system is a lack of safe, child-centred spaces in the community for children to access.¹¹³ This is particularly true for children who engage in harmful behaviours, who in my experience are often excluded from crisis accommodation and other community-based support services due to the complexity of their needs and behaviours.

When I speak with children and young people in detention about their life experiences prior to being taken into custody, many recall feeling like they had nowhere safe to go. For a range of reasons, 'home' may not exist or be a place where a child or young person feels welcome, safe, or cared for. Often it is the lack of a suitable alternative option that leads to children and young people finding themselves in unsafe situations – sleeping rough, associating with unsafe adults, and engaging in harmful behaviours, sometimes to survive.

As James (16), a participant in the Voices project explained:

"When you don't got a home or nowhere to go and you're sitting on the doorstep crying to come home, it's pretty sad and it makes you depressed, so you just go out and you've got to go steal food to eat...[U]sually I just slept out in the cold me and my mates and that's why we got in trouble. We're out walking in the middle of the night but we probably go steal a car or something just to go sleep in and go drive because we've got to walk everywhere. We've got no home to go to...."

Creating child safe and trauma-informed spaces for children and young people like James is critical to responding to the needs and circumstances of children and young people involved in the youth justice system.

Currently, children aged 10-13 who engage in harmful behaviours, and for whom 'home' is not a suitable option, can end up in police watchhouses, adult prison facilities, and Ashley Youth Detention Centre. What is needed are child-safe and supportive alternatives to prison and detention facilities for police to take these children to – safe spaces with trained health and/or other professionals onsite to provide immediate crisis support to children, to assess their needs and respond in an individualised, trauma-informed manner.

¹¹² Tasmanian Law Reform Institute, *Raising the Minimum Age of Criminal Responsibility: Law Reform Considerations* (Research Paper, April 2022) 67.

¹¹³ Note, the need for each government to establish and expand 'places of safety' for children is a key recommendation made in the Council of Attorney-General Age of Criminal Responsibility Working Group, *DRAFT Final Report 2020* (Report, 2020) Recommendation 2.4 'Places of safety' be established or ensured. Each government review, develop and expand safe accommodation for children that is culturally appropriate and takes into account the need for connection with family and community.'



Spotlight on child safe spaces

All children and young people in Tasmania have the right to be safe and to feel safe.

Moore and McArthur have reported to Tasmania's Commission of Inquiry that children are more likely to feel safe in environments that are clean and tidy, not damaged, and free from hazards.¹¹⁴ Research also suggests that, while it is important for children to be adequately supervised, they also require access to privacy and freedom of movement in order to feel safe.¹¹⁵ These findings support the notion that the design of a physical environment is important to a child's sense of safety. Key features of child-centred and trauma-informed design include small, home-like environments, with soft surfaces to absorb sound, rather than institutional environments.¹¹⁶

However, while the physical environment of a space is of undoubted importance, a truly child-safe space encompasses so much more than just 'bricks and mortar'. Children and young people with experience of the youth justice system tell me that to feel safe, they need adults to truly listen to them, to understand how they are feeling, and to respect and value them and their rights. This echoes the research which demonstrates that to feel safe, children and young people need to be listened to and be involved in the decisions that affect them.¹¹⁷ A 15-year-old participant in the Voices Project, puts it like this:

There needs to be more people listening like you [the Advocate for Young People in Detention] Not a lot of people sit down and listen like you. They just sit there and oh yeah, right, this and that and this, you know? They don't listen.

A common theme that is also raised during my interactions with children and young people in detention is the need for stability and predictability. Children and young people tell me that they feel safest when they know what to expect from their environment. To achieve this, children and young people need clear, accessible information regarding their rights and responsibilities. They need to be involved in decisions affecting their care, and to be provided with sufficient information to make informed choices.

¹¹⁴ Tim Moore and Morag McArthur, *Take notice, believe us and act! Exploring the safety of children and young people in government run organisations* (Report, 2022).

¹¹⁵ Tim Moore and Morag McArthur, *Take notice, believe us and act! Exploring the safety of children and young people in government run organisations* (Report, 2022).

¹¹⁶ Rohan Lulham, 'Does Design Matter? An Environmental Psychology Study in Youth Detention' in Ben Crewe, Yvonne Jewkes and Thomas Ugelvik (eds), *The Palgrave Handbook of Prison Design* (Springer, 2022) 443-479; Sanne Oostermeijer and Matthew Dwyer, *Local Time. Design Guide for Small-scale Local Facilities* (Report, 2019).

¹¹⁷ Tim Moore and Morag McArthur, *Take notice, believe us and act! Exploring the safety of children and young people in government run organisations* (Report, 2022).



12.3. Reforming the service system

There is a rapidly growing body of work exploring the types of reforms needed to ensure that service systems meet the needs of all children, including those children aged less than the age of criminal responsibility, their families, and their communities. Service systems that ensure children's needs and rights are met include:

*... universal services such as education, health care, support services, targeted or secondary services such as mental health, substance misuse programs and other targeted programs, and tertiary systems such as child protection and youth justice. Secondary and tertiary service networks specifically target and respond to at-risk children and families.*¹¹⁸

As the Committee on the Rights of the Child has said,

*"[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."*¹¹⁹

As described above, reform to the *Children Young Person and their Families Act*, in relation to the powers of first responders, together with the implementation of an embedded youth worker outreach model would provide, in my view, an appropriate immediate response framework. Yet, there remains a larger question about how to ensure the delivery of an effective response to the harmful behaviour of children, including the potentially larger cohort of children under a raised age of criminal responsibility. As the Centre for Crime, Law and Justice observes,

*The international knowledge base suggests that 'offending behaviours' by young children – including the large majority of instances that do not involve direct harm to others, and the very small proportion of instances that do – are more accurately and constructively characterised as indicators of need. Such behaviours do require a response. They require an effective response that prioritises the best interests of the child and the best interests of the wider public.*¹²⁰

To this, I would add that any effective response must be child-centred, and informed by the views and wishes of the child and their family and be culturally appropriate, consistent with the principles informing the framing of this Advice.

It is my strong view that delivering and ensuring an effective response to children under a raised age of criminal responsibility requires the design and implementation of a new response co-ordination service (referred to here as Response Co-ordination Service (RCS)) for children aged below the increased age of criminal responsibility who exhibit harmful behaviour. The RCS should consist of a multi-disciplinary team with centralised leadership by a single agency and be strongly connected to, if not completely integrated with, the embedded youth worker outreach model operating alongside

¹¹⁸ Morag McArthur, Aino Suomi and Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, August 2021) 23.

¹¹⁹ United Nations Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*

¹²⁰ University of New South Wales, Centre for Crime, Law and Justice, *Replacing the Youth Justice System for Children Aged 10-13 years in NSW: A 'Best Interests' Response* (Report, September 2021) 18.



Tasmania Police. The RCS will coordinate and oversee the assessment and response to children and families that is flexible and proportionate to need, as further described below (see Recommendation 7).

For most children aged between 10 to 13 years, an effective response will include the returning of a child to their family, or carer, and then proactively ensuring the child and their family is supported, as needed, by the RCS to access an enhanced service system should they need to. By way of example, this may include proactive support for the child and their family to engage in education, receive specialist services for mental health, alcohol, or other drugs, or specific types of harmful behaviour, by making warm referrals and supporting attendance through transport assistance. Restorative approaches such as conferencing may also be offered, if appropriate.

For the small proportion of children who engage in persistent and or more serious harmful behaviour, or where the child's family is unable to provide the support that the child needs, an effective response may require the RCS to work more intensively with the child and/or the family. For example, the RCS may provide intensive case management to ensure that the needs of the child are proactively identified and responded to, and that intensive supports and training are provided to the family. Evidence based therapeutic programs including parenting programs and other specialised programs (eg Functional Family Therapy (FFT), Multisystemic Therapy (MST)) could be co-ordinated and or referred through the RCS.¹²¹

In the most extreme cases, where a child exhibits highly complex and persistent behaviour, further oversight, and the shared accountability for the delivery of therapeutic intervention for the child and/or their family, may be required. In some cases, the amended (see 12.1) statutory provisions within the CYPTF Act (eg a care and protection order) may also be required to support the child. This is discussed further in section 12.4.

12.3 Positive momentum towards a needs-based approach

The type of approach described above is not entirely new and many of the themes regarding the co-ordination of services and therapeutic care options have already been outlined by the Expert Panel in its recommendations to the Tasmanian Government on the essential therapeutic elements required to improve the service system response for children in Tasmania with highly complex needs.¹²² The implementation of the Expert Panel's recommendations are, in my view, pivotal to the success of a reform model to support a raised age of criminal responsibility.

I note that the Government issued a request for proposal in October 2022 for delivery of a Wellbeing, Care and Recovery Placement Program (WCRPP) to implement recommendations of the Expert

¹²¹ Morag McArthur, Aino Suomi and Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, August 2021) 47.

¹²² Expert Panel, *Expert Panel advice and recommendations to the Minister for Children and Youth on the essential therapeutic elements required for an improved service system response for Tasmanian children and young people with highly complex needs* (Report, July 2021).



Panel for an improved system response for Tasmanian children and young people with highly complex needs¹²³. The outcome of this process is not yet known.

There are also further examples, within the existing service system, where a needs-based, therapeutic response is preferred to a criminalising response. For example, under the Prevention, Assessment, Support and Treatment (PAST) program, children displaying harmful sexual behaviour receive a comprehensive, evidence based, trauma-informed assessment, to develop an intervention that is tailored to the child/young person's needs.¹²⁴

Additional examples of the use of innovative and needs-based approaches in Tasmania are included in *Appendix A: Case Studies*. These case studies describe how the underlying causes of children's harmful behaviour can be effectively responded to, and community safety promoted, through a co-ordinated and non-criminalising response. In some of these case studies, the children involved have had contact with the criminal justice system. However, in my view, the involvement of the justice system was unnecessary to respond effectively to the needs of the child.

I strongly urge the government to learn from these approaches and programs and to further commit to legislative and service system reform to support them as the preferred, universal approach for children aged below a raised age of criminal responsibility.

12.4 Governance and oversight

In their advice and recommendations to Government on the essential therapeutic elements required to improve the service system response for children in Tasmania with highly complex needs, the Expert Panel stated that:

*A whole-of-system approach is needed to ensure the safety and wellbeing of children and young people in Tasmania. It is essential that the needs of children and young people are prioritised and that there is sustained investment in addressing the service needs of this vulnerable cohort.*¹²⁵

It went on to recommend a cross sectoral oversight group to monitor the implementation of its recommendations. Drawing on the same concept of whole-of-government accountability and a whole-of-system approach, I recommend a new, multi-agency governance committee be accountable for oversight and provision of care and supports for children aged under the raised age of criminal responsibility who are exhibiting extremely concerning harmful behaviours. This committee should include, at a minimum, the Secretaries of the Department for Education Children and Young People, Department of Health, Department of Premier and Cabinet and the Commissioner of Police. The terms of reference of the Committee should include providing

¹²³ Roger Jaensch, Minister for Education, Children and Youth, 'Next step in delivering programs for young people with complex needs' (Media Release, 8 October 2022).

¹²⁴ Sexual Assault Support Service (Tasmania), 'PAST Program - therapeutic intervention for Harmful Sexual Behaviours' (Webpage, 30 June 2023) < PAST Program - therapeutic intervention for Harmful Sexual Behaviours | Sexual Assault Support Service (sass.org.au)>.

¹²⁵ Expert Panel, *Expert Panel advice and recommendations to the Minister for Children and Youth on the essential therapeutic elements required for an improved service system response for Tasmanian children and young people with highly complex needs* (Report, July 2021).



oversight, and authorisation of care and supports for this highly vulnerable cohort, including through statutory interventions where necessary.

In my evidence to the Tasmanian Commission of Inquiry, I included my strong support for independent, individual advocacy for children experiencing statutory interventions through the Tasmanian out-of-home care and youth justice systems.¹²⁶ Under a raised age of criminal responsibility, children within the cohort described above, overseen by the governance committee should be afforded access to individual advocacy, including legal advocacy where necessary (for example where statutory interventions are considered, or imposed).

Implementation of individual advocacy arrangements for children within this cohort will of course need to take account of any findings and recommendations of the Commission of Inquiry. Existing services funded to provide legal advocacy for children currently involved in the criminal justice system should, in my view, continue to be funded to provide specialist legal advocacy for children below a raised age of criminal responsibility where statutory interventions are proposed and/or where they have legal problems requiring assistance.

¹²⁶ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Witness Statement of Leanne McLean* (Statement, 12 April 2022).



Appendices

Appendix A - Innovative practice case studies

The Tasmanian Aboriginal Legal Service (TALS) has provided three non-identifying case studies illustrating the underlying needs of children aged less than 14. While each of the children in these case studies had some contact with the criminal justice system in connection with their behaviour, the underlying causes of this behaviour was able to be addressed through a co-ordinated non-criminalising response.

Case Study - Max

Max came to the attention of police for prohibited behavior – exposing his penis and masturbating in public. Max had an intellectual disability. TALS was able to avoid Max having extended involvement in the criminal justice system by providing support and education. TALS arranged for Max to complete an assessment with a psychologist. They then engaged with Max's NDIS Co-Ordinator to provide referrals to a sexual assault support service and to educate Max about appropriate sexual behaviors. By obtaining a forensic mental health assessment for Max, TALS was able to provide accurate and up to date information about Max's diagnosis and capacity to police, his family and support services. Max was therefore able to obtain appropriate education and support to ensure his behavior did not escalate and he did not have to engage with the criminal justice system. Without access to a lawyer and [Community] Youth Justice, Max may have pleaded guilty when appearing before the Court and continued to have interactions with police because his capacity was not properly understood and appropriate support and education would not have been provided.

Case Study - Sophie

Sophie was 13 years old and in the care of Child Safety Services when she began hanging out with the wrong people and came to the attention of police. Sophie had trouble controlling her emotions and assaulted several people in a very short period of time. She also started some small fires and stole from shops. She was smoking cannabis and did not have any permanent place to live. With the support of Youth Justice, Sophie was able to explain what she wanted and what she needed to feel safe. Submissions were made to Housing on behalf of Sophie's mother and she was transferred to a two bedroom property (from a one bedroom), so Sophie could move in and have her own room. A referral was made to 54 Reasons and they helped Sophie join a gym and boxing club. Sophie was supported to engage in alternate education, and she began attending five days a week. By listening to Sophie and helping her engage in activities she enjoyed, Sophie was given a safe place to live and supported to engage in education and prosocial activities. By addressing Sophie's social issues, her criminal behavior was addressed and she has not had any further involvement in the criminal justice system. ¹³¹

Case Study - Bob

Bob is a 13-year-old male who has been charged with burglary, stealing, destroy property and trespass committed when he was 12 and 13. Since coming to the attention of the youth justice system, he has engaged with doctors and been diagnosed with ADHD and has been appropriately medicated. This has changed his behavior dramatically and his attendance at school in 2022 increased from five classes per week to 20. He will commence school full time this year (grade 8). He also attended youth camps which has been very positive. It is motivating for him and he enjoys the outdoors activities and learning new skills. The matter will be dealt with by way of Community Conference.



The Department for Education, Children and Young People provided two non-identifying case studies. One is included below, as a further demonstration of innovative practice to respond to the underlying need of the child through a care team approach.

Case Study:

- The Advice and Referral Line (ARL) was contacted about concerns for a young person who was engaging in risk taking including drug use, and offending behaviours in the community. They had a Youth Justice order which they were breaching. They were involved in a risky relationship with an older person which would constitute exploitation. They were disengaged from school and learning.
- The young person's father had previously used violence against them, and they had been exposed to family violence perpetrated by their father toward their mother.
- The young person's mother had and continued to experience difficulties with her own drug use which was impacting her ability to provide care and having a negative influence on the young person's drug use issues.
- The ARL convened a Care Team around the young person involving the young person, their family, their Youth Justice Worker, a Family Violence professional and school representatives.
- The Care Team worked together over a series of meetings to identify goals and next steps for the young person and their family.
- The young person was protected from further exposure to family violence by a non-contact Police Family Violence Order being made against the father. The parents engaged in the process separately.
- The father accepted referral to a family violence program.
- The father participated in care teams, provided care to the young person and supported the steps that were taken to respond to issues for the young person.
- The mother accepted information from ARL on services which could help her recover from and be safe from family violence. She engaged with Anglicare's RAIN program and progressed plans to move interstate.
- The young person ended the exploitative relationship.
- The young person was supported to engage with their lawyer, and the Youth Justice Worker prepared a pre-sentence report which recommended mandating engagement with education and other services.
- The Youth Justice worker was persistent in continuing to identify services that could help the young person and encouraging them and making adjustments until they landed the best options.
- Education representatives persevered in encouraging the young person to re-engage with learning. A conciliation conference resulted in a part-time enrolment.
- The ARL provided ongoing co-ordination and their supportive contact with each party to progress next steps was well received and helped everyone to make progress.



Appendix B - Survey responses and/or submissions:

The development of this Advice has been informed by feedback received through the Age of Innocence: Children and Criminal Responsibility Survey (March–April 2021).

Public responses were provided by following organisations and individuals:

- Change the Record
- Human Rights Law Centre and Tasmanian Aboriginal Legal Service
- Key Assets
- Hub4Health
- Civil Liberties Australia
- Save the Children
- Youth Law Australia
- The Salvation Army
- Children in Care Collective
- YourTown
- Sally McGushin
- Maree-Rose Jones
- Jafar Clark
- Liz Connor
- Lea Lawson
- Mary Knowles OAM
- TasCOSS