



**FEDERATION**  
OF COMMUNITY LEGAL CENTRES VIC

# RAISE THE AGE

SUBMISSION TO COUNCIL OF ATTORNEYS-GENERAL

February 2020

## ABOUT THE FEDERATION

The Federation is the peak body for Victoria's Community Legal Centres (CLCs). Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For over 40 years CLCs have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy.

We pursue our vision of a fair, inclusive, thriving community through challenging injustice, defending rights and building the power of our members and communities.

**WE WANT A COMMUNITY THAT IS FAIR, INCLUSIVE AND THRIVING: WHERE EVERY PERSON BELONGS AND CAN LEARN, GROW, HEAL, PARTICIPATE AND BE HEARD.**

The Federation:

- ▼ Enables a strong collective voice for justice and equality;
- ▼ Mobilises and leads CLCs in strategic, well-coordinated advocacy and campaigns;
- ▼ Works with members to continuously improve the impact of community legal services;
- ▼ Drives creativity and excellence in the delivery of legal services to communities;
- ▼ Helps make justice more accessible.

Read our strategic plan online  
[fclc.org.au/about](https://fclc.org.au/about)



THE FEDERATION ACKNOWLEDGES THE TRADITIONAL ABORIGINAL OWNERS OF COUNTRY AND WE PAY OUR RESPECTS TO ELDERS PAST, PRESENT AND EMERGING. WE RECOGNISE THEIR CONTINUING CONNECTION TO LAND, WATER AND COMMUNITY. SOVEREIGNTY WAS NEVER CEDED.

# RAISE THE AGE

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## RAISE THE AGE

The Federation of Community Legal Centres (the Federation) welcomes the opportunity to make a submission to the Council of Attorneys-General's Review of the Age of Criminal Responsibility. This submission primarily seeks to address questions 1, 2, 3, 5 and 6 of the Review, but we recommend that the Council read it in conjunction with the submissions of Smart Justice for Young People and Federation members such as Human Rights Law Centre, the Victorian Aboriginal Legal Service (VALS) and Youthlaw.

The age of criminal responsibility has significant implications for our community, and we call on the Council of Attorneys-General to recommend that the minimum age of criminal responsibility be raised to 14 years old in all cases. There must be no carve outs to this position, even for serious offences. This would bring Australia into line with human rights standards around the world. It is both the right thing to do and the best long-term decision given the detrimental effects of prisons on children and downstream costs.

We know that the rates of reoffending are significantly reduced for every year that children are kept out of prison. Raising the age will not only reduce the direct costs of putting children in prison, but will also reduce the significant consequential costs associated with recidivism and dealing with the lifelong consequences of being behind bars. Instead of funding more prison beds for children, governments should invest in prevention, early intervention, diversion and rehabilitation programs that are linked to culturally-safe and trauma-responsive services. Governments should support children and young people to stay out of prison by making a significant investment in housing, health, education and community services.

### The Harmful Effect of Prisons on Children

Prison is no place for a child, especially one who is too young to open a Facebook account. The current age of criminal responsibility is 10 years old, which means that grade 4 children who are still learning how to spell, tell the time and remember their times tables are being put behind bars. This exposes children to a damaging prison environment instead of giving them the support they need to break out of the cycle of poverty and disadvantage that causes crime. Putting children in prisons significantly increases their chance of experiencing depression and the risk of suicide<sup>1</sup>, and is often linked to a lifetime of poverty and intergenerational disadvantage. While the consequences of this are personally devastating to children whose brains are still developing, the downstream and intergenerational effects can lead to significant costs for government, social services and taxpayers.

The evidence shows that raising the age of criminal responsibility will reduce crime. It would also bring Victoria into line with most countries around the world, including most of Europe, Russia, China, Argentina and Vietnam.<sup>2</sup> Evidence shows that focusing on rehabilitation results in lower rates of recidivism<sup>3</sup>, and that for every year a child stays out of prison, the risk of reoffending decreases by 18 per cent.<sup>4</sup> We also know that the vast majority of children do not reoffend when they are dealt with outside the formal criminal legal system<sup>5</sup>, and when alternative approaches such as a health-based or education response are adopted instead.

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<sup>1</sup> Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (2017).

<sup>2</sup> See Child rights international network at: [www.crin.org/en/home/ages](http://www.crin.org/en/home/ages) Accessed on: 13 April 2018.

<sup>3</sup> Don Cipriani, Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective (2010) Volume 50, Issue 5, 104; Torbjørn Skardhamar and Kjetil Telle, 'Post-release Employment and Recidivism in Norway' *Journal of Quantitative Criminology* (2012) 28(4) 629.

<sup>4</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (December 2016) 26.

<sup>5</sup> Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 27, p. 413; Human Rights Law Centre, 'Explainer: Raising the age' (2018) <<https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age>>.

Young people belong in school and with their families, not in prison. can be tricky to navigate, and young people can face unique challenges and vulnerabilities, particularly in relation to mental health. Prison has a profoundly negative impact on children and the younger a child is when they enter the prison system, the higher chance they have of reoffending.<sup>6</sup> Routine prison practices such as strip searches, isolation and restraint are damaging to children who have most often already been subjected to trauma and abuse before entering. Research has shown that one third of children in prison developed mental health issues after being behind bars.<sup>7</sup>

## Make 'Doli Incapax' Redundant When Assessing Capability of Crime

Learning to tell right from wrong is a part of growing up, but we cannot expect children with developing brains to have the same level of judgment as adults. Children under 10 years old in Australia are deemed incapable of understanding that they have done something illegal. For children aged between 10 and 14, the legal rule of 'doli incapax' means that these children are presumed to be 'incapable of crime' or incapable of understanding that their behaviour is seriously wrong rather than merely naughty. It is up to the prosecution to rebut this assumption, however the child's defence often bears the practical burden of collecting evidence to establish that a child did not understand the severity of what they did.<sup>8</sup> In practice, this rule is often viewed by legal practitioners as challenging, impractical and convoluted and inconsistently applied.<sup>9</sup> It also requires children to give instructions to their lawyers about complex matters that they do not fully understand, such as whether or not to obtain expert evidence reports.<sup>10</sup>

We know that children who come into contact with the justice system often come from disadvantage and have experienced trauma. They should not be further disadvantaged by being criminalised and put before the courts. We know that children living in state care are often charged with offences such as putting a hole in the wall or acting out in a residential care home, and then face a pipeline from state care to prison. Courts in rural and regional areas are often under resourced and it can be difficult for a young person's capacity to be properly assessed, even if the argument is raised. This 'postcode justice' means that children in the country are not getting the same opportunities in the criminal legal system as children in the city.

Doli incapax does not protect children. We cannot keep relying on a rule that is applied so inconsistently and often discriminates against children. When the age of criminal responsibility is raised to 14 years, this doctrine will become redundant and the law will cease to be relevant.

## Support Children to Stay in School

When kids are doing it tough, they need guidance and support in a safe and trusted environment. It is easy to expel a child from school or exclude them from their community when we think they are acting out. Prison is the absolute wrong place for a child to receive the help and care they need to build a stable and positive future.

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<sup>6</sup> Andrew Becroft, 'From Little Things, Big Things Grow: Emerging Youth Justice Themes in the South Pacific' (Paper presented at the Australasian Youth Justice Conference on Changing Trajectories of Offending and Reoffending, New Zealand, 21-22 May 2013) 5 referring to Science Advisory Committee Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence (May 2011) at 24. See also Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 Trends & issues in crime and criminal justice, 4; Laurence Steinberg 'Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science' (2007) 16 Current Directions in Psychological Science 55, 56.

<sup>7</sup> Barry Holman and Jason Ziedenberg, The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities (28 November 2006) Justice Policy Institute.

<sup>8</sup> Fitz-Gibbon, K & O'Brien, W, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)', *International Journal for Crime, Justice and Social Democracy* (2019) 8(1): 18-33, p. 22.

<sup>9</sup> Fitz-Gibbon, K & O'Brien, W, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)', *International Journal for Crime, Justice and Social Democracy* (2019) 8(1): 18-33, p. 22.

<sup>10</sup> Fitz-Gibbon, K & O'Brien, W, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)', *International Journal for Crime, Justice and Social Democracy* (2019) 8(1): 18-33, p. 23.

It is often the most vulnerable and disadvantaged children who interact with the legal system at a young age.<sup>11</sup> Of the young offenders behind bars in Parkville and Malmsbury, 67 per cent were victims of abuse, trauma or neglect, 48 per cent presented with mental health issues, 38 per cent had cognitive difficulties that affected their daily functioning and 27 per cent had a history of self-harm or suicidal ideation.<sup>12</sup>

All young people need support to become happy, healthy adults.<sup>13</sup> Children and young people interacting with the legal system have often experienced significant disadvantage, and addressing the underlying causes of offending, such as disengagement with school, unstable housing environments, out-of-home care and mental health and wellbeing will provide a better long-term outcome for all Victorians.

We know that children who become disengaged at school are more likely to offend, so they need to be intensively supported when this happens to avoid falling into the quicksand of the court system. By engaging with communities and talking to them about what they need to support young people, we can work out the best way to manage social, structural and mental health issues. We also know that change works better when young people are meaningfully involved, so the government should work with them to co-design the strategies they and their communities need. Young people have innovative ideas and ways of thinking and we need to empower and listen to them. The Victorian Government needs a plan to close children's prisons and ensure the education system is able to support a diverse range of young people's needs so that they can thrive.

## Support Education Justice Partnerships

We know how difficult it can be for young people to stand up for their rights or to feel like they have any power over their own lives. Young people interacting with the criminal system need access to culturally safe legal advice as well as knowledge about how to avoid problems with the law. School lawyer programs embed a lawyer within a public school community and create an inclusive relationship with students, parents, guardians and teachers.

School lawyers help students and parents deal with a wide range of legal issues including family law and family violence matters, fines, employment, consumer law problems and homelessness. Importantly, they also provide community legal education to staff, students and families on high impact issues such as bullying, interacting with police and online safety. We need to move beyond short-term or one-off programs and provide ongoing community-designed and led solutions that support young people and prevent them from becoming unwell or entering the criminal system, regardless of where they live.

The government needs to develop a plan to close children's prisons and instead fund legal assistance and community services programs that support children to thrive and avoid becoming trapped in the criminal system.

### The School Lawyer Program Empowering students to escape violence at home

In 2016, a school participating in the School Lawyer Program introduced the Respectful Relationships curriculum which was delivered by the school's health teachers.

After one of the sessions, a year 12 student approached the teacher and disclosed that she was experiencing family violence at home which included being hit by her father. She didn't feel safe at home and wasn't sure what she should do. The student was 17 years old which meant that she was over the age to receive support from child protection services.

<sup>11</sup> Australian Institute of Health and Welfare 2016. Young people in child protection and under youth justice supervision 2014–15. Data linkage series no. 22. Cat. no. CSI 24. Canberra: AIHW, 17; See further Jesuit Social Services, Too much too Young: Raise the age of criminal responsibility to 12, October 2015, 3.

<sup>12</sup> Youth Parole Board, 'Annual Report 2018-19', p. 29.

<sup>13</sup> Koorie Youth Council, 'Ngaga-Dji (Hear Me) – Young Voices Creating Change for Justice', p. 46.

The teacher referred the student to the School Lawyer who provided practical family violence advice. The School Lawyer helped her complete an application for an interim intervention order and represented her at court on the day of her hearing. The School Lawyer also helped her obtain Centrelink payments so that she could live independently. Importantly, the School Lawyer worked with the school's well-being team and teachers to organise practical changes to make sure the student's schooling wasn't impacted, such as deferring SACS and exams, and organising access to a laptop and uniforms.

Having the School Lawyer meant that the school could properly support the young person as part of the Respectful Relationships program. It also meant the health teacher and school did not have to navigate the legal system and provide support to the student that they were not confident to provide.

## Community-led Responses in Aboriginal and Torres Strait Islander Communities

Although Aboriginal and Torres Strait Islander children do not commit more crimes than other children in our community, they are policed more<sup>14</sup> and are more likely to be held on remand without conviction.<sup>15</sup> Because of this, Aboriginal and Torres Strait Islander children are 25 times more likely to be behind bars than other children.<sup>16</sup> Placing Aboriginal and Torres Strait Islander children in the youth justice system results in convictions and criminal records for behaviour that many parents would consider normal among teenagers. Children are frequently taken from their families and communities and placed in out-of-home care, where they are often criminalised. Breaking a cup is permanently recorded as property damage<sup>17</sup> and yelling at a carer is labelled as disturbing the peace. Fifty-seven per cent of young people in residential care face criminal charges within one year and 23 per cent of young people who face criminal charges are under 14 years old.<sup>18</sup> This criminalisation of children creates a vicious cycle of disadvantage and traps them in the criminal legal system.<sup>19</sup> The solution is not to take children away from their families and communities, but to support them to remain at home and address structural inequality by funding education, health and housing services.

By focusing on prevention, early intervention and diversionary responses, we can stop prison from being a rite of passage for Aboriginal and Torres Strait Islander children and young people and support them to thrive. It is essential that the planning, design and implementation of these responses must always be community-led.

**“Legislation and official procedures already acknowledge that children and young people should be isolated only as a last resort and for the minimum time necessary. But we found the procedures do not translate into practice. The direct impact is that many of the practices in both our youth justice and prison systems**

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<sup>14</sup> Police Stop Data Working Group, Monitoring Racial Profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police report on racial (2017) 14.

<sup>15</sup> Amnesty International Australia, A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia (2015) 31.

<sup>16</sup> ABS, Report on Corrective Services (2017).

<sup>17</sup> 47 per cent are charged for criminal damage to property. See: Victoria Legal Aid, 'Care not Custody: A new approach to keep kids in residential care out of the criminal justice system' (2016).

<sup>18</sup> See: Victoria Legal Aid, 'Care not Custody: A new approach to keep kids in residential care out of the criminal justice system' (2016). < <http://www.legalaid.vic.gov.au/about-us/research-and-evaluation/evaluation-projects/care-not-custody-report> >

<sup>19</sup> Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra: AIHW: The younger a person was at the start of their first supervised sentence, the more likely they were to return to sentenced supervision. For those whose first supervised sentence was community-based, 90% of those aged 10-12 at the start of this sentence returned to sentenced supervision, compared with 23% of those aged 16 and just 3% of those aged 17. More staggering were those sentenced to detention as their first supervised sentence, all (100%) those aged 10-12 at the start of his sentence returned to some type of sentenced supervision before they turned 18. This rate of return decreased with age, to around 80% of those 14 and 15, 56% of those 16 and 17% of those 17.

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are likely to be contrary to law, incompatible with Victoria's human rights legislation, unjust, oppressive, discriminatory or simply, wrong." - DEBORAH GLASS, VICTORIAN OMBUDSMAN.<sup>20</sup>

## Conclusion

No child benefits from going to prison. Prison is an extremely harmful environment and can damage a child for the rest of their life. We must give children and young people the support they need to thrive and fulfil their potential. Raising the age will reduce reoffending while also avoiding the often lifelong consequences associated with putting children behind bars, including mental illness, homelessness and poverty

The United Nations Committee on the Rights of the Child has called for countries to have a minimum age of criminal responsibility set at 14 or higher and recommends that children under 16 should not be deprived of their liberty. We simply cannot justify locking up children as young as 10 years old and must raise the age to at least 14 years old. This will bring Australia into line with the world's human rights standards and prevent intergenerational harm to families and communities.

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<sup>20</sup> Victorian Ombudsman, 'OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people', (2019). <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22411>