

POLICY POSITION

Raising the Age of Criminal Responsibility to 14 in NSW

Just Reinvest NSW (JR NSW) strongly supports the raising of the age of criminal responsibility to 14 years in New South Wales (NSW). The reasons for this support are detailed in the below policy paper but can be summarised as follows:

- Criminalising young people causes long term harm to them and their families through ongoing interaction with the criminal justice system that continues into adulthood and as such, does not make communities safer
- The financial cost of criminalising young people through its impact on the administration of the justice system does not make economic sense when reinvesting in community based programs that address the underlying causes of offending would be a much more better expenditure of public money
- It is at odds with the medical evidence that a young person's brain has not developed to the level that it is acceptable to make them criminally responsible within this age range (10-14 years)
- Criminalising young people between these ages is contrary to many developed countries throughout the world; our international human rights obligations and even some other states in Australia who have already recognised this evidence and introduced legislation to raise the age of criminal responsibility

This is the basis for the JR NSW policy position and our participation in the campaign to raise the age of criminal responsibility from 10 to 14 years and is further detailed below.

It should also be understood that JR NSW sees the raising of the age of criminal responsibility as just one component to reforms that need to be instituted across both child protection and criminal justice systems. In parallel to this change, the underlying causes of young people's offending behaviour need to be simultaneously addressed through culturally safe, wrap around services for both the young person and their families. These services need to be driven by, and held accountable to, the local Aboriginal communities they serve, and where possible be owned by those communities who are best placed to address their own issues through place based, community led services.

Why the Current Age of Criminal Responsibility is not Appropriate

It has long been established that Aboriginal people are vastly overrepresented throughout all stages of the criminal justice system. This includes for both men and women as well as juveniles. Participation in the criminal justice system commences at an early age for many and continues from childhood to adulthood.

In NSW as with most of Australia (except for the Northern Territory and more recently the Australian Capital Territory) the age whereby somebody can be held criminally responsible and start their interactions with the criminal justice system is 10 years old. This means a child as young as 10 years old can be charged by police and proceed to court to face sentences that can go all the way to incarceration.

This is in stark contrast to many international examples, most notably throughout Europe, where the age of criminal responsibility ranges from 12 yrs all the way to 18 yrs as can be seen below:

Belgium	18
Portugal	16
Norway	15
Denmark	15
Sweden	15
Hungary	14
Germany	14
Austria	14
Spain	14
France	13
Ireland	12

The Medical Evidence

There is a range of reasons why this reform is important, including the well documented evidence of the ‘neurobiological impacts of early childhood and trauma, and knowledge from developmental psychology about the risk and protective factors for child wellbeing’¹. These developmental arguments include the recognition of the marked differences between the cognitive functioning (e.g., impulsivity, reasoning) in children and adults and the different capacities of individual children to regulate their behaviour, assess risks and implications, demonstrate empathy and self-efficacy – ‘requiring that we challenge the assumption that capacity adheres uniformly to chronological age’².

Children who interact with the youth justice system come with a range of complex health, mental health and cognitive disabilities that are often exacerbated by those interactions. Raising the minimum age of criminal responsibility will not solve all the problems associated with the criminalisation of children with mental health disorders and/or cognitive impairments³. However, it does provide an opportunity to avoid criminalising young children with complex needs and entrenching them in the youth justice system at an early age. It also provides an opportunity to consider more effective responses to meeting children’s needs in the community. Cunneen and others argue that raising the minimum age will set a higher barrier and force the consideration of more appropriate responses to this particularly vulnerable group of children⁴.

A further element of the argument for raising the age of criminal responsibility is that it offers an opportunity to address the unacceptably high levels of Aboriginal and Torres Strait Islander children in the justice system. There is evidence that responding to Aboriginal and Torres Strait Islander children with youth justice responses leads to ‘generationally incarcerated’ cohorts of children who make up a substantial proportion of the crime statistics⁵. Raising the age of criminal responsibility provides the impetus for breaking the cycle of Aboriginal children’s early entry into the criminal system⁶. It also provides a real opportunity to build the capacity of the formal and informal systems (of family and community) to focus on ‘promoting secure, safe, and stable human relations, education, and housing, as well as offering appropriate and timely individual,

¹ (Cunneen, 2017)

² (Newton & Bussey, 2012)

³ (Cunneen, 2017; Dowse et al., 2014; McCausland & Baldry, 2017)

⁴ (Baldry et al., 2018; Cunneen, 2017)

⁵ (Westerman, 2021)

⁶ (Crofts, 2019)

family, and systemic support across an integrated policy and service framework⁷. Intervening early can not only change the trajectories away from the criminal justice system but can improve the a child's life, leading to individual and community benefits. The ultimate outcome of raising the age of criminal responsibility is to identify and respond to the individual context of children with complex needs, to reduce and avoid harmful behaviour and to support them on positive pathways.

Quite obviously the current situation needs to change. A system needs to be put in place that diverts young people under the age of 14 out of the criminal justice system and into therapeutic, community-based support services that address the underlying causes of their behaviour.

Current Situation in NSW

Currently in NSW, as with most jurisdictions in Australia, there are two sets of minimum age for criminal responsibility.

The first establishes the age of criminal responsibility at 10 years⁸, meaning that a child under 10 years of age cannot commit a criminal offence because they do not yet have the mental capacity to form the necessary intent or understanding that what they did was a criminal offence.

From the age of 10 to 14 there is an onus on the prosecution to prove that the young person knew that their actions were wrong under what is known as the doctrine of *Doli Incapax* (latin for 'incapable of deceit'). In NSW this is a common law doctrine only and is not reflected in legislation. Under this doctrine 'the common law presumes that a child between the age of 10 and 14 years does not possess the necessary knowledge to have criminal intention, that is, the child is incapable of committing a crime due to a lack of understanding of the difference between right and wrong'⁹. The presumption of *doli incapax* is a presumption that can be rebutted by the prosecution calling evidence. In addition to proving the elements of the offence, the onus is on the prosecution to prove beyond reasonable doubt that the child knew that what they did was seriously wrong, as distinct from mere mischief.

On the face of it while the doctrine of *Doli Incapax* offers considerable protection to young people interacting with the criminal justice system, this protection is not afforded until a magistrate is considering the rule within the court environment. This means that the young person has already been subject to the potential harm/trauma of interaction with the criminal justice system through contact with police, being charged and potentially held on remand before eventually being found 'not guilty' of the offence/s. This process clearly has implications for Aboriginal young people who are already vastly overrepresented in all stages of the criminal justice system.

Also, the application of the doctrine in favour of the young person is inconsistent. This is particularly so for Aboriginal young people with "the system of two minimum ages is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices"¹⁰.

Around Australia

⁷ (Dowse et al., 2014, p. 182)

⁸ Section five, Children (Criminal Proceedings) Act 1987

⁹ Judicial Commission of NSW, [Doli incapax - the criminal responsibility of children \(nsw.gov.au\)](https://www.jcs.nsw.gov.au/doli-incapax-the-criminal-responsibility-of-children)

¹⁰ Cunneen, C. (2020) Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report, Comparative Youth Penalty Project, Jumbunna Institute for Indigenous Education and Research, University of Technology, Sydney.

The current policy in NSW is also the same in South Australia, Tasmania, Queensland¹¹ and Western Australia¹². As with NSW the doctrine of *Doli Incapax* applies to children between the ages of 10-14. The notable exceptions are the Northern Territory where the age was raised to 12 years and in the Australian Capital Territory where legislation has been introduced to raise the age to 14 by 2025.

Northern Territory

The Northern Territory legislation commenced in August 2023 to raise the age of criminal responsibility to 12 with the *Criminal Code Amendment (Age of Criminal Responsibility Act) 2022* which was a key recommendation of the *Royal Commission into the Protection and Detention of Children in the Northern Territory*. The criminal code now considers a child aged 10 or 11 who engages in behaviour that would normally constitute an offence, will no longer be dealt with through the criminal justice system. Instead, NT Police and Territory Families will refer the child and their family to the *On the Right Track* (ORT) program which aims to help children and their families address the root causes of their behaviour. This is also what currently occurs with children under 10. With the ORT families of offending children may be subject to parenting programs; family meetings and [family responsibility agreements](#) while the young person can be referred to mental health services; alcohol and drug abuse and youth engagement and diversion activities including [youth camps](#); [youth outreach re-engagement officers](#) and [restorative youth justice conferencing](#).

Importantly if a family does not ensure participation of their child in ORT, then a determination may be made by the Department that the child's safety and wellbeing is at risk and start statutory child protection responses.

The developments in the Northern Territory and the process of referral highlight the fact that the mere raising of the age of criminal responsibility is no panacea to Aboriginal children's contact with police as well as the justice and child safety systems ([NT Government must work with Aboriginal communities after raising age of criminal responsibility to 12 | Human Rights Law Centre \(hrlc.org.au\)](#)). Issues around access to the services proposed as well as their cultural appropriateness remain an ongoing concern for justice reinvestment advocates such as the Human Rights Law Centre. As suggested in the above article, JR NSW recommends that the below actions be taken parallel to raising the age of criminal responsibility in NSW:

1. **Establish referral pathways and information sharing:** Work with service providers on the ground to create referral pathways and enhance information sharing in ways that deliver positive benefits to children and their families. By doing so, children and their families can access the necessary support and services when and where they need.
2. **Empower Aboriginal service providers:** Resource local Aboriginal service providers to deliver culturally appropriate and holistic responses, specifically tailored to the needs of Aboriginal children and their families following the principals of justice reinvestment for place based, data-driven, community led solutions. JR NSW's supporting body and backbone teams can provide guidance into how funding services outside of the criminal justice system could have an impact on young people without them having to be drawn into the ongoing trauma associated with their participation in that system.

¹¹ Although the doctrine of *Doli Incapax* is reflected in legislation in Queensland *Criminal Code Act (1899)* (QLD)

¹² Also incorporates *Doli Incapax* into legislation *Criminal Code Act Compilation Act 1913* (WA)

3. **Implement transparent monitoring and evaluation:** Commit to rigorous and transparent monitoring and evaluating the outcomes of referral pathways and diversionary efforts. This will help ensure that the initiatives are effective and can be continuously improved upon.
4. **Do not follow the example of raising the age to 12:** NSW needs to demonstrate a commitment to raising the age of criminal responsibility to 14 immediately, and not have an interim step of raising the age to 12. The anecdotal, judicial and medical evidence on child brain development does not support this.
5. **Increase early intervention and prevention services for Aboriginal children:** Guided by the Generational Strategy, increase diagnostic and treatment services delivered to Aboriginal and Torres Strait Islander children by Aboriginal Community Controlled Health Organisations (ACCHOS). Young people in detention have high levels of neurodisability and complex health issues which worsen in detention, which is a non-therapeutic environment.

Australian Capital Territory (ACT)

With the introduction of the *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023* the ACT will initially raise the age of criminal responsibility to 12 years and will increase it to 14 in 2025. The ACT Government has stated that, “These reforms will ensure a child or young person who engages in harmful behaviour is diverted from the criminal justice system and provided with services to identify and support their therapeutic needs, to protect the safety of themselves, improve their overall wellbeing and keep the Canberra community safe.”

Victoria

In Victoria, the age of criminal responsibility is being raised to 12 years old by the end of [2024](#) with a commitment to raising the age to 14 by 2027.

[April 2023 press release](#)

Queensland

Queensland is providing [‘in-principle’ support](#) for working towards raising the minimum age of criminal responsibility from 10 years to 12 years, as part of a national approach, at the next Meeting of Attorneys-General.

South Australia

There is currently no commitment to raise the age from 10 years old.

Western Australia

There is currently no commitment to raise the age from 10 years old.

Tasmania

In Tasmania the age of criminal responsibility remains at 10 years old. However the age of minimum detention is rising to [14](#) years old.

Conclusion

The NSW Government now can join the Australian Capital Territory to provide real leadership in raising the age of criminal responsibility to 14. The medical evidence supports this. The detrimental impact of introducing young people to a system of harm and trauma supports this. The opportunity to address the underlying causes of offending through therapeutic, community-based interventions outside of the criminal justice system supports this. In turn it will contribute to building safer communities that will benefit all of society.