# Getting youth justice right
## Supporting our children to thrive
## Sector briefing on the Youth Justice Bill

## Summary

We welcome the introduction of the *Youth Justice Bill* (the Bill) to Victorian Parliament as a critical opportunity to deliver long overdue transformation of the state's youth justice system. The Bill comes after years of consultation and it includes several reforms that we should be collectively proud of as a sector. This improved provisions around sentencing, cautions and diversions, and a statement of guiding youth justice principles. These inclusions will have a positive impact on diverting young people away from the criminal legal system. Amongst other positive provisions in the Bill, these reforms are long overdue, and we are confident they will lead to meaningful change for children who are in contact with the criminal legal system, and the wellbeing of our community more broadly.

The Bill is an opportunity to create a safer Victoria for everyone – where every child is free to go to school, have a safe home to live in and be supported to learn from their mistakes. Children belong in playgrounds and schools, never in prison cells. The Victorian Parliament has a once in a generation opportunity to pass the Bill with amendments that would ensure that children and young people have the best possible chance at a safe and healthy life.

This briefing, supported by a range of organisations who work in the legal and non-legal community sector, outlines the key amendments required to strengthen the Bill and ensure that it is the strongest it can be, and one that will elevate the impact from meaningful to transformational. We will continue to work collaboratively with the Victorian Parliament to support the Bill and ensure the Bill that is passed into law encompasses amendments that will achieve an outcome that best protects children and helps them to thrive.

## 1. Minimum age of criminal responsibility

The Bill raises the minimum age of criminal responsibility to 12, with the Government indicating an intention to further raise the age to 14 years old by 2027. Consistent with the recommendation of the Yoorrook Justice Commission, we strongly recommend that the Bill raise the minimum age of criminal responsibility to 14 immediately, without exception. Failing to do so immediately will see many more 12 and 13-year-olds criminalised and dragged through the system in the coming years.

The evidence is clear that contact with the criminal legal system, in any form, harms children. Consistent with international human rights standards, medical science and criminological evidence, raising the age to 14-years-old is the absolute bare minimum reform required to achieve the goal of supporting children to thrive in the community, rather than being locked away in police and prison cells.

Medical experts, psychologists and criminologists agree that children under the age of 14 years have not developed the social, emotional and intellectual maturity necessary for criminal responsibility. The rationale for raising the age is true for all children, not in relation to any specific types of behaviour.

A government that is genuinely committed to this reform would solidify its intention to raise the age to 14 in legislation and ensure that both stages of raising the age are completed prior to entering caretaker mode in the lead up to the 2026 election.

Victoria should look to the approach in the ACT, where a transition from raising the age to 12 now, and then raising it again to 14 in 2025, has been enshrined in law. Such an approach would show that Parliament is listening to the calls of the Aboriginal and Torres Strait Islander, health, legal and human rights organisations for change, and create a level of accountability for the Government to deliver on its commitment.

The Government's commitment to raising the age to 14 is said to be subject to the implementation of an Alternative Service Model, which the Independent Review Panel is advising them on. We urge the Government to not wait and codify its commitment to raising the age to 14 by 2027. Alternative Aboriginal led and mainstream child and family services already exist, they just need to be better resourced to be implemented across the state and supported to address the unmet needs underlying children's contact with the criminal legal system. Given the small number of children concerned – with only 15 children aged 10-13 in youth detention for 2022–23 – such an alternative response is highly achievable.

| Relevant clause | Amendment required |
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| **Clause 10**<br>Minimum age of criminal responsibility | Raise the minimum age of criminal responsibility immediately to at least 14, without exceptions. Alternatively, include timetabled raise to 14 by the end of 2026 in the Bill. |

## 2. Make youth bail laws fairer

In 2023, the government postponed changes to youth bail laws which would have removed almost all reverse onus provisions for children, despite securing bipartisan support for the amendments. This year, the Victorian government backflipped on this

reform, instead announcing a trial of electronic monitoring devices, together with curfews and exclusion zones, on children. The government has committed a shocking $34 million to the trial.

Expensive and ineffective, we strongly oppose the inclusion of the electronic monitoring trial in the Bill. Far from an alternative to imprisonment, electronic monitoring is another form of criminalisation, deep stigmatisation and punishment. Concerningly, the Bill includes further provision to lock children up in pre-trial detention while the suitability of electronic monitoring is explored.

We instead call on the Government to act consistently with their previous commitment to ensure that children are not subject to reverse onus bail provisions. Consistent with the recommendation of the Commission for Children and Young People, children must be excluded from the presumption against bail. Youth bail tests should reflect Poccum's Law: all presumptions against bail and reverse onus provisions that apply to children should be repealed in favour of a presumption for bail unless the prosecution that there is a specific and immediate risk to the safety of another person; a serious risk of interfering with a witness; or a demonstrable flight risk.

Increasing access to bail and suitable bail support programs will prevent further criminalisation, give children the best opportunity to rehabilitate and increase community safety. There is no evidence that harsher bail laws reduce youth crime, yet presumptions against bail mean more children are behind bars for behaviour that a court has not even found them guilty of. In Victoria, the changes to the bail laws in 2017 and 2018 - that were intended to target adult men - triggered an increase in the number of children on remand. Aboriginal and Torres Strait Islander children are remanded at unacceptably high rates, placing them at particular risk of harm.

| Relevant clause | Amendment required |
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| **Part 23.2**<br>Youth bail | Remove all reverse onus provisions and establish a presumption of bail. This could be substantively achieved by reflecting the original youth bail provisions in Division 4 of the *Bail Amendment Bill 2023* as it was upon introduction to parliament. |
| **Clause 903**<br>Electronic monitoring | Remove electronic monitoring trial provisions.<br>Alternatively, remove provision in section 17H (2) (c) of clause 903 which allows for remand of children pending a suitability assessment for electronic monitoring as part of their bail hearing. |

## 3. Prohibit harmful detention practices

As identified by the Commission for Children and Young People last year, children in Victorian prisons are increasingly subjected to 'lockdowns' and remain at risk of being strip searched, spit hooded and locked away in adult prisons. Subjecting children to harmful prison practices undermines any rehabilitative purpose that prison might serve.

The Bill's prohibition on the use of solitary confinement on children in prison is a welcomed step towards stamping out the use of cruel and degrading practices in child prisons, but it must also expressly prohibit the use of all harmful prison practices, including isolation, strip searching, spit hooding and the detention of children in adult prisons.

Alarmingly, the Bill allows for the transfer of children aged 16 and over to adult prisons inconsistent with protections afforded to children by the Convention on the Rights of the Child for every child deprived of their liberty to be separated from adults, children must be treated as such and should never be locked away in adult prisons.

The Bill raises the minimum age of detention to 14 years old, with significant exceptions. Prisons are not safe places for children – and consistent with the recommendation of the Yoorrook Justice Commission and international human rights standards – the minimum age of detention should also be raised to at least 16 years old, without exception. Increasing the minimum age of detention to 16 would drastically decrease the number of Aboriginal children in custody and support progress towards achieving the youth detention goals in the National Agreement on Closing the Gap and the Victorian Aboriginal Justice Agreement.

| Relevant clause | Amendment required |
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| **Clause 480**<br>Use of isolation in youth detention facilities | Prohibit the use of isolation in youth detention facilities. |
| **Clause 481 and 482**<br>Authorisation for placing a child or a group or class of children in isolation | Omit any subclauses that give the Commissioner of Youth Justice power to authorise isolation if they consider – without having to have regard for a genuine risk of safety – that "the use of isolation is appropriate in the circumstances".<br>Alternatively, insert prohibition on the authorisation of isolation where there is no immediate or serious risk or threat. That is, prohibition on the use of isolation on the basis of 'staffing shortages' or other similar administrative concerns should not give rise to episodes of isolation. Determination of isolation should only ever be made on an individualised |

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| | assessment of particular child in relation to a particular risk, and not a broad carveout for the order and security of the prison.<br>Establish a power for the Commissioner for Children and Young People to inspect, review and remove a child or group or class of children from isolation in certain circumstances. |
| **Clause 487**<br>Meaningful human contact during isolation | Establish requirements for meaningful human contact within the Bill to ensure standards are not easily amended without proper parliamentary scrutiny.<br>Minimum requirements of meaningful human contact should include: human contact that is face to face and without physical barriers, contact that is more than fleeting or incidental, and contact that is empathetic interpersonal communication. Things that should not constitute meaningful human contact include: contact that occurs in the context of prison routines, in the course of investigations or legal processes, or that that occurs out of a medical necessity. |
| **Clause 491**<br>Actions required after placing a child in isolation | Include requirement to facilitate contact with a legal practitioner for the purpose of legal advice immediately, or as soon as possible, after being placed in isolation.<br>Include a requirement to notify the Commission for Children and Young People, Victoria Legal Aid and the Victorian Aboriginal Legal Service (if the child is Aboriginal and or Torres Strait Islander) when the isolation of a child is authorised under clause 480. |
| **Clause 448 (1) (d)**<br>Custodial rights | Amend to reflect Royal Children's Hospital and Australian Government Guidelines for physical activity of young people: a minimum of three hours exercise per day with one hour of vigorous physical activity and two hours of light physical activity. |
| **Clause 524**<br>Use of isolation register | Insert additional factor that must be recorded that notes the impact of the isolation episode on the child's engagement with education, health and family visit access.<br>Insert requirement that the child's legal representative be notified about the use of isolation and subsequently require the report made on the isolation register to be available to the child's lawyer without limitation on the way in which that |

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| | record may be used by the child and their representative. |
| **Clauses 497 – 503, and 581 - 587**<br>Unclothed searches of children in youth detention facilities and police goals | Prohibit unclothed searches of children. |
| **Clause 3**<br>Define prohibited instruments of restraint | Insert a definition for prohibited instruments of restraint and include spit hoods within this definition. |
| **Clause 476, 477 and 579**<br>Prohibited physical restraint techniques | Prohibit the use of spit hoods as a physical restraint technique. |
| **Clause 324 and 1129**<br>Sentences of detention | Establish a minimum age of detention of at least 16, and without exception.<br>Prohibit a sentence of detention for children under 14 regardless of the type of offending or 'serious risk to community safety'. |
| **Clause 667 and 669**<br>Transfer of children to adult prisons | Prohibit the transfer of children aged 16 or older to an adult prison. |

## 4. No new police powers

We strongly oppose new powers in the Bill that enable police to transport children aged 10 and 11 in a police vehicle; detain them, including at police stations, without any express time limits; use force on them; and subject them to searches.

Granting police additional powers to intervene in the lives of children as young as 10 – children who are still in primary school – in a manner that replicates criminal responses undermines the entire purpose of raising the age. Any engagement with the criminal legal system, including first contact with police, is harmful for children and risks entrenchment in the system. In particular, these powers will have a disproportionate impact on First Nations children, multicultural children and children in residential care.

The new powers are also unnecessary. Where a child aged 10 or 11 is at serious risk to themself or others, police already have sufficient powers under the *Victoria Police Act*, *Mental Health and Wellbeing Act,* the *Children Youth and Families Act* and under common law. In addition, police could simply adopt the approach currently used in relation to children under 9, there is no material difference.

This point is acknowledged in the Bill's Statement of Compatibility, where these new powers are described as "an additional tool for police to use alongside existing

operational strategies... or existing common law and statutory powers that may be available depending on the circumstances". The Statement of Compatibility also notes that offending in this age group is rare – especially serious offending – with no children in Victoria aged 10 or 11 under youth justice supervision and none remanded into custody in 2022-23.

By creating various approaches to engaging with children aged 10 and 11, over 12 but under 14, and over 14, the Bill runs the risk of becoming too complex for police to operationalise. This has proved deadly and dangerous in the past; during the coronial inquest into the death of Veronia Nelson, members of Victoria Police admitted to being unable to understand the *Bail Act*, and therefore they established an 'unwritten policy' that contravened their obligations under the *Bail Act*. Veronica passed away in custody only a few days after being remanded on minor offending by police officers who did not understand or properly apply the state's bail laws.

Police should not be first responders to situations involving marginalised people who governments have systemically failed. The Standing Council of Attorneys-General Age of Criminal Responsibility Working Group Report noted the importance of alternative community- and welfare-based responses when responding to children exhibiting risk, and subsequently recommended restricting police intervention wherever possible.

Similarly, the recent decriminalisation of public intoxication saw a shift towards dealing with public intoxication through a health lens with polices involvement in these circumstances being strictly limited. Reflecting on the decriminalisation of public intoxication during her evidence at Yoorrook, Attorney General Symes noted that other states which had retained residual powers for police while attempting to execute the reform had not achieved the intended change. Learnings from the recent decriminalisation of public intoxication can be considered in formulating alternative, child-centred responses to children aged 10 and 11 that do not deploy police – loaded with additional, unnecessary powers – as first responders.

| Relevant clause | Amendment required |
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| **Chapter 3**<br>Police powers | Remove all new police powers in relation to children aged 10 and 11.<br>Alternatively, remove all excessive powers, including search, use of force and detention of children at a police station. |
| **Clause 68**<br>Children taken into care and control | Include requirement that Body Worn Camera must be activated during any encounter with children under the minimum age of criminal responsibility. |
| **Clause 74**<br>Requirements after use of force | Require use of force report to be completed after any use of force, and establish consequences for failure to record a use of force report. |

| Relevant clause | Amendment required |
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| **Clause 77**<br>Record keeping | Include a requirement for public reporting on the use of police powers under Chapter 3. |

## 5. Divert children from the criminal legal system

Contact with police and prisons harms children and increases the chance that they will be criminalised in the future. The evidence is clear that diverting children away from the legal system has a positive impact in reducing their risk of recriminalisation. Avoiding the use of full judicial proceedings for children is also part of Australia's obligations under the Convention of the Rights of the Child.

Pathways that divert children away from the criminal legal system need to be strengthened. This requires a legislative presumption in favour of diversion and alternative pre-charge measures, as well as removing barriers to diversion such as exclusions for certain conduct and the requirement for prosecution consent.

In circumstances where the use of alternative pre-charge measures is not possible, the statutory diversion scheme should be amended to maximise opportunities for children, and the Bill should allow for courts to issue youth cautions and warnings.

Children should be able to access legal advice before agreeing to any diversion measures pre charge as well as post charge to ensure they receive the best outcome.

There are particular cohorts of children that are chronically over-represented in the youth justice system due to structural and systemic factors beyond their control. Although over-representation of particular cohorts of children is recognised in some areas of the Bill, there are ways in which the Bill can strengthen this recognition to ensure that children who are overrepresented are protected and the diversion of these cohorts is prioritised at every stage of the process.

| Relevant clause | Amendment required |
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| **Clause 19**<br>Prevention, diversion and minimum intervention | Strengthen provision by including legislated presumption in favour of youth warnings, cautions, youth justice conferencing and diversion. |
| **Clause 15**<br>Guiding youth justice principles | Omit subsection (b) to ensure 'context' is not applied too broadly when applying guiding principles in considering diversion. |
| **Clause 92** | Remove police discretion and establish a presumption in favour of the minimum intervention |

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| Determining responses to offending behaviour | necessary and appropriate in line with the guiding principles of diversion set out in clause 19.<br>Remove requirement to consider previous or relevant conduct, and whether the child has acknowledged responsibility or shown remorse for the alleged behaviour.<br>Remove requirement to consider the number, frequency and nature of findings of guilt or convictions. |
| **Part 6.3**<br>Diversion | Insert provision that establishes a right to and requirement for legal advice for the child prior to consenting to diversion.<br>Remove any requirements that a child does not deny or alternatively acknowledges responsibility of the alleged offending. |
| **Clause 191**<br>Exclusions for diversion | Remove exclusions on offence types that are eligible for diversion. |
| **Clause 193 (5) (a)**<br>Adjournment to undertake diversion | Remove prosecution consent as a barrier to adjournment for diversion. |
| **Clause 194**<br>Adjournment for diversion and acknowledgement of responsibility | Ensure that adjournment for diversion does not require non-denial or acknowledgement of responsibility for the alleged offence. |
| **Clauses 117 and 118**<br>Eligibility for early diversion group conferencing | Establish a presumption in favour of diversion for all offending without exception. Must also remove discretion for police to refer a child for early diversion group conferencing.<br>Remove barrier for referral on the basis of non-denial of the alleged offending by the child. |
| **Clauses 161 and 162**<br>Referral for early diversion group conferencing | Establish that the referral to participate in early diversion group conferencing should be possible at any stage of the proceedings, and without exclusions for certain offence types.<br>Referral by the Court must not require the decision maker to consider submissions made by prosecution or the alleged victim. |
| **Clause 148 – 153**<br>Time limits on commencing a proceeding against a child | Omit any clauses that extend the time limit on commencing a proceeding against a child beyond six months after the date of the alleged offence, without exception. |
| **Clauses 13, 93, 101, 115 and 147**<br>Reporting obligations | Establish a requirement that Victoria Police, prosecuting agencies, Youth Justice, the Commission for Children and Young People, and the Courts collect and publish data on the number |

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| Data recorded should be made publicly available. | of warnings, cautions, summons, and prosecutions that proceeded against children.<br>Data recorded about should include information about the child's: age, gender identity, cultural identity, whether the child is Aboriginal and/or Torres Strait Islander, and whether the child has experienced child protection involvement. |
| **Clause 1** | Insert reference to the guiding youth justice principles of Clause 18. |