

15 November 2021

Dear Community Support and Services Committee,

Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

Thank you for the opportunity to provide feedback on the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (The Bill).

YFS Legal is a community legal centre in Logan, representing children and young people in Court in the criminal justice system. YFS Legal delivers the Children's Court Duty Lawyer service with Youth Legal Aid at the Beenleigh Children's Court.

YFS Legal supports all the proposed amendments in the Bill and the evidence which is relied upon in the explanatory notes to the Bill.¹

We believe that incarceration of young children is counter-productive, that it is not in the best interests of children, and that more should be done to support our most vulnerable children who are at-risk of offending.

Further reasons for our support are identified below.

Supporting the most vulnerable children in our community

Youth offending is clearly distinguished from adult offending. It is undisputed that children's brains are still developing, giving cause to the need to conduct 'sentencing' through a different approach.² A child's brain has a much lower capacity for 'reflection before action,' when compared to an adult.³ Rather than supporting young people's brain development, introduction to the legal justice system can often 'traumatise them, increase the vulnerability and likelihood of reoffending'.⁴ A child who has been in contact with the youth justice system is less likely to finish and or commence education or training or obtain employment.⁵ In addition, a recent study in Academic Paediatrics found the incarceration of children has a more detrimental effect on adult physical and mental health outcomes as opposed to general incarceration.⁶

¹ Explanatory Notes: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021.

² R Arthur, 'Rethinking the criminal responsibility of young people in England and Wales, (2012), 20(1) *European Journal of Crime Criminal Law and Criminal Justice* 13, 13-29; E Farmer, 'The age of criminal responsibility: Developmental science and human rights perspectives,' (2011), 6(2) *Journal of Children's Services* 86, 86-90.

³ Royal Commission into the Protection and Detention of children in the Northern Territory, Vol I, 28.

⁴ J Edwards, 'A Just System? Punitive Youth Justice Systems Increase the Risk of Crime,' (2017), 42(2) *Children Australia* 233, 233.

⁵ J Bernberg and M Krohn, 'Labeling, Life Chances and Adult crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime I Early Adulthood' (2003) 41 *Criminology* 1287; Queensland Family & Child Commission, Queensland Government, 'The Age of Criminal Responsibility in Queensland' (2017), 37.

⁶ E Barnert, L Abrams, R Dudovitz, T Coker, E Bath, L Tesema, B Nelson, C Biely, P Chung, 'What Is the Relationship Between Incarceration of Children and Adult Health Outcomes?' (2019) 19(2) *Academic Paediatrics*, 342. 342-345.

There is consensus that children below 14 years of age suffer more harm from intervention by the legal system and criminalisation than benefit.⁷ Offending by children is most often connected to their environment, primarily relating to social and economic disadvantages and this is a globally present issue.⁸ Research has shown children without parental support exhibit more complex needs than children and young people with supportive families.⁹ Further evidence shows youth suffering from mental health disorders who have previously been dealt with by the justice system have a higher risk of recidivism. This evidence reinforces the need to provide holistic support to our most vulnerable children who are at risk of committing offences, rather than entrapping them in a system which fails to achieve its goals.

On average, 17 children aged 10-13 years were held in watch houses in Queensland each day between 2019-20,¹⁰ and children aged 10-13 make up 9% of the detention centre population.¹¹ Further, a First Nations child is 24 times more likely to be imprisoned than any other child,¹² and First Nations children made up more than 90% of children aged 10-13 held in watchhouses for more than 3 nights between 2019-2020.¹³ For perspective, in the Northern Territory, First Nations children in custody are twice as likely to have a 'developmental vulnerability' such as a disability, cognitive impairment, alienation or poor emotional regulation.¹⁴

YFS agrees that national action should be taken on this issue,¹⁵ which exposes children, and in particular First Nations children, to serious harm through cruel treatment and the like.¹⁶

Reducing the risk of further offending

YFS supports that all children aged between 10 to 14 in youth detention should be released and that children under 14 years of age should not spend any time in watchhouses. There is a lack of evidence that detention is an effective deterrence tool,¹⁷ and further research suggests juvenile detention creates 'hardened and institutionalised' young people.¹⁸

⁷ B Goldson 'Child incarceration: institutional abuse, the violent state and the politics of impunity' (2009), referred in P Scraton and J McCulloch (Eds), *The Violence of Incarceration*, London: Routledge.

⁸ J Edwards, above n 4, 233; B Goldson, 'Counterblast: Difficult to Understand or Defend?: A Reasoned Case for Raising the Age of Criminal Responsibility' (2017), 48(5) *The Howard Journal* 514, 519.

⁹ D Kenny and P Nelson, 'Young offenders on community orders: Health, welfare and criminogenic needs,' (2008) Sydney, Sydney University Press.

¹⁰ Explanatory Notes: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, 4.

¹¹ Youth Justice Annual Summary Statistics: 2015-16 to 2019-2020, Detention Centre Data.

¹² Amnesty International Australia, 'Indigenous kids by raising the age' (2020), <[CAG should seize the opportunity to transform the lives of Indigenous kids by raising the age - Amnesty International Australia](#)>; Australian Institute of Health and Welfare, 'Youth Justice in Australia 2016-17' (Report, 25 May 2018).

¹³ Qld Department of Youth Justice 2020, 'Answer to Estimates Pre-hearings, Questions on Notice No 16.'

¹⁴ Royal Commission into the Protection and Detention of Children in the Northern Territory, Vol I, 135.

¹⁵ Explanatory Notes: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, 3.

¹⁶ Amnesty International, 'Kids in watch-houses: exposing the truth' (2020) <[KIDS IN WATCH HOUSES: EXPOSING THE TRUTH - Amnesty International Australia](#)>; Australian Broadcasting Corporation, 'Australia's Shame,' Four Corners, 26 July 2016 <<https://www.abc.net.au/4corner/Australia-shame-promo/7649462>>.

¹⁷ M Bagaric and T Alexander, 'The capacity of criminal sanctions to shape the behavior of offenders: Specific deterrence doesn't work, rehabilitation might and the implications for sentencing' (2012) 36(3) *Criminal Law Journal* 159, 163; I Lambie and I Randel, 'The impact of incarceration on juvenile offenders' (2013), 33 *Clinical Psychology Review* 448, 448; A Trotter and H Hobbs, 'A historical perspective on juvenile justice reform in Queensland,' (2014) 38 *Criminal Law Journal* 77; Australian Bureau of Statistics, 'An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007 (2010)' <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031_aug%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf)>; D Brown, 'The Limited Benefit of Prison in Controlling Crime,' (2010) 22 *Current Issues in Criminal Justice* 137, 140-142.

¹⁸ T Bernard, 'The Cycle of Juvenile Justice' (2010) 2nd ed. Oxford University Press, 3-4.

Australian courts themselves have indicated that the use of incarceration can in circumstances be ‘unproductive, or counter-productive, for the offender and hence the community.’¹⁹ In addition, studies have also shown that if a young person is exposed to other young people who commit offences, recidivism is increased.²⁰

Younger children who first connect with the youth justice system are at a greater risk of reoffending.²¹ A study of 4100 children examined the impact of their experience with the legal system and found the more exposure to the legal system a child experiences, the more likely they are to reoffend demonstrating the need for ‘minimal intervention and maximum diversion’ approaches, especially for younger children.²² YFS believes that increasing the age of criminal responsibility will help achieve this.

Negative impact of the *doli incapax* presumption

There is no evidence to support the argument that the *doli incapax* presumption provides a sufficient barrier to children aged 10-14 years. In fact, it can cause greater disadvantage to children when ‘highly prejudicial evidence’ which would ordinarily be inadmissible is relied on to rebut the presumption.²³ YFS agrees with the findings in the Atkinson ‘Report on Youth Justice’ that *doli incapax* is ‘rarely a barrier to prosecution’.²⁴ In YFS’ role as duty lawyer in children’s criminal matters, we see first-hand how easily the presumption of *doli incapax* is rebutted and young children are subjected to youth justice proceedings.

Upholding human rights

YFS supports the need to legislate in line with human rights and on the recommendations of the UN Committee stating the minimum age for criminal responsibility be 12 years.²⁵ Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC) provides ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.²⁶ The reasoning in the explanatory notes of the bill along with this submission provides clear evidence as to why raising the age of criminal responsibility is in children’s best interests. Further, Article 40 states children ‘alleged as, accused of, or recognised as having infringed the penal law’ should be dealt with in an age-appropriate manner with intent to reintegrate the child into society and urges governments to adopt ‘measures for dealing with such children without resorting to judicial proceedings’.²⁷ Again, the underlying principle of a child’s best interests should be the key focus in dealing

¹⁹ *Boulton v The Queen* [2014] VSCA 342, [112]

²⁰ A Petitclerc, U Gatti, F Vitaro and R Tremblay, ‘Effects of juvenile court exposure on crime in young adulthood’ (2013) 54(3) *The Journal of Child Psychology and Psychiatry* 291.

²¹ Australian Institute of Health and Welfare, ‘Young people returning to sentenced youth justice supervision 2015-16,’ (2017), Juvenile Justice Series no. 21.

²² B Goldson, ‘Counterblast: Difficult to Understand or Defend?: A Reasoned Case for Raising the Age of Criminal Responsibility’ (2017), 48(5) *The Howard Journal* 514, 519; L McAra and S McVie ‘Youth justice? The impact of system contact on patterns of desistance from offending’ (2007), 4(3) *European Journal of Criminology* 315, 336.

²³ T Crofts, ‘Contemporary Comment: A Brighter Tomorrow: Raise the Age of Criminal Responsibility’ (2018), 27(1) *Current Issues in Criminal Justice* 123, 125-127 and reference to Australian Law Reform Commission Report, ‘Seen and Heard: Priority for Children in the Legal Process’ (1997), Report No. 84.

²⁴ Bob Atkinson, ‘Report on Youth Justice’ (2018).

²⁵ Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [32].

²⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force in Australia 16 January 1991).

²⁷ *Ibid.*

with children who are alleged to have ‘infringed’ upon the law, that is, through community supports and programs.

Implementing further supports to encourage positive development

In addition to agreeing with the proposed amendments, YFS also agrees that *‘all efforts should be taken to encourage and support the ongoing provision of therapeutic programs and care such as substance misuse treatment, education and training and restorative justice outside of the criminal legal system for children’*,²⁸ particularly to those under 14 years. In addition, homelessness is often a significant factor which causes children to commit offences and additional resources to support children in these situations should be implemented to encourage positive development and basic safety.

In response to the mass overrepresentation of First Nations children, the need for additional resources to support First Nations children to have accommodation, comprehensive health screening and increased funding for substance abuse programs is fundamental.²⁹

There is a well-defined evidence-based need to provide additional support to socially and financially disadvantaged children who are at risk of offending.³⁰ The Queensland Government, ‘Working Together Changing the Story: Youth Justice Strategy 2019-2023’ asserts that prevention programs are the most effective approach to addressing youth offending and are also the most cost effective.³¹

Other countries which have a minimum age of criminal responsibility of 14 years have implemented supports and programs for youth who commit offences. Denmark for example has a social services system to deal with these children.³² Many of these countries use alternatives such as informal warnings given by police, referrals to services which can provide support and diversion through conferencing.³³ Specialist training for people who provide these supports to children has been recognised as an important aspect in the success of these programs and YFS supports the need to facilitate adequate training to support our most vulnerable people in the community.

We ask that the committee accepts the Bill and employs therapeutic supports for children at-risk of offending.

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²⁸ Explanatory Notes: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, 16.

²⁹ House of Representatives, ‘Time to act on youth custody shame: national disgrace says report,’ (2011), 42 *About the House* 15.

³⁰ L Bartels, ‘The interaction for disadvantage and the criminal justice system in Australia – and six ways to address this,’ (2020).

³¹ Queensland Government, ‘Working Together Changing the Story: Youth Justice Strategy 2019-2023’ (2019), 8.

³² B Kyvsgaard, ‘Youth Justice in Denmark,’ (2004) 31 *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* 349.

³³ Australian Institute of Health and Welfare, ‘Comparisons between Australian an international youth justice systems: 2014-14’ (2015) Youth Justice Fact Sheet no. 74.