



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

Submission from Office of the Public Guardian

November 2021

Table of contents

Introduction	1
About the Office of the Public Guardian.....	1
OPG's role in the youth justice system	2
Position of the Office of the Public Guardian	3
Age of criminal responsibility.....	3
Removal of <i>doli incapax</i>	4
Changes to <i>doli incapax</i>	6
An alternative model	7
Conclusion.....	8

Introduction

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity and children and young people in out-of-home care or staying at a visitable site.

OPG provides individual advocacy services to children and young people through the following functions:

- child advocacy, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them; and
- child community visiting, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities).

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes structured (supported and substitute) decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigation function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to participate and make decisions where possible and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision-makers under an advance health directive or an enduring power of attorney.

OPG's role in the youth justice system

While there are several levels of oversight of the youth justice system in Queensland, OPG's purpose is to protect the rights and interests of children staying at visitable locations, which includes youth detention. OPG advocates on behalf of relevant children and young people by listening to, giving a voice to, and facilitating the resolution of their concerns and grievances.

As outlined above, OPG operationalises its child advocacy functions through its Child Advocates and a Community Visitor program. OPG's Child Advocates, advocate for children subject to a range of child protection interventions. In relation to youth justice, they assist youth justice lawyers by advocating for child safety placement and service support options to assist children in relation to bail applications and following release from youth detention. Since mid-2018, OPG's Child Advocates have provided targeted advocacy to ensure issues regarding the child's capacity for criminal responsibility (*doli incapax*) are appropriately explored in court proceedings. This involves supporting instructed legal representatives to canvass submissions in court proceedings to ensure Police Prosecutions is put to proof on the issue, and to bring the court's attention to considerations that may be relevant to the question of capacity for criminal responsibility including those factors considered above.

Community Visitors visit children in detention, independently inquire into their physical and emotional wellbeing and advocate for appropriate accommodation and delivery of services. Community Visitors have powers to enter youth detention centres without notice, inspect the site, and require staff members to answer questions and produce documents.

.

Position of the Office of the Public Guardian

OPG welcomes the opportunity to provide a submission to the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill). The views of OPG contained in this submission do not represent the views of the Queensland Government.

This submission and its recommendations address the aspects of the Bill where they relate to the experiences of OPG and the people we serve. A summary of OPG's recommendations appears below.

Office of the Public Guardian recommends:

1. The minimum age of criminal responsibility should be increased to 14 years of age for all offences.
2. If the age of criminal responsibility is increased to an age less than 14 years, or increased only in certain circumstances, the presumption of *doli incapax* should be retained.
3. Should the presumption of *doli incapax* be retained, it could be applied more effectively in practice through:
 - Considering a child's daily functioning, historical and current circumstances and vulnerabilities were considered more closely rather than their actions in isolation;
 - a more functional and timely case management process; and
 - implementation of targeted training and accreditation processes and clear practice direction for stakeholders regarding procedural requirements for court proceedings.
4. As a priority, and to accompany an increase to the age of criminal responsibility to 14 years, that the Queensland Government commit to an alternative model for young people with investment in intervention programs and frameworks for children exhibiting anti-social or criminal behaviours who are no longer able to access youth justice services.
5. That any early intervention strategies under an alternative model include:
 - youth diversion programs in remote communities developed and operated by, or in partnership with, Aboriginal and Torres Strait Islander communities and/or Aboriginal and Torres Strait Islander controlled organisations; and
 - targeted, culturally appropriate strategies to address the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system.

Age of criminal responsibility

OPG has consistently advocated for an increase to the age of criminal responsibility from 10 to 14 years, which would align with the United Nations Convention on the Rights of the Child *General Comment No.24 (2019) on children's rights in the child justice system*. As detailed in the explanatory notes to the Bill, serious consequences can flow from children as young as 10 years being deemed criminally responsible for anti-social behaviour and receiving a court-imposed penalty. Early contact with the criminal justice system can result in lasting effects on a child's development and increase the chances of re-incarceration, leading to an almost inevitable progression to the adult corrections system.

Children with cognitive or intellectual disability are a particularly vulnerable cohort whose behaviour can lead to early exposure to the criminal justice system. These children may exhibit behaviours of concern for several reasons, particularly if their care and support needs are not being met by the people or the service systems on which they rely. This creates a risk of these behaviours being attributed with criminal intent results in prosecution of the child by the criminal justice system when appropriate service system support may have a preventative effect.

Similarly, children in the child protection system are often disadvantaged by traumatic environmental factors related to their upbringing that can lead to criminal behaviour, such as child abuse or neglect, homelessness, mental health issues or drug and alcohol use. Research published the *Australian Institute of Criminology – Trends and Issues in Crime and Criminal Justice*¹, found that children who came to the attention of statutory child protection services are at least nine times more likely than other children to offend and come under the supervision of youth justice services. The research also found that generally more than half of the children detained in youth justice centres are known to child protection services. Criminalising the trauma and behavioural manifestations of these children creates a vicious cycle of disadvantage and only further isolates and victimises the children most in need of the community's support and protection.

Beyond offending itself, it is the experience of OPG that young children lack the capacity to properly engage with the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions, fail to keep track of court proceedings, or to properly comprehend criminal proceedings.

OPG strongly supports the Bill as a means to protect children under the age of 14 years from early exposure to the criminal justice system. OPG also submits that the age of criminal responsibility should be raised for all types of offences. This is consistent with the findings of the Royal Commission into the Protection and Detention of Children in the Northern Territory.² Based on OPG's observations, a child's lack of ability to reason, predict consequences, control impulses, and comprehend criminal proceedings impacts on all behaviours they exhibit, be that of a minor or more serious criminal nature.

Recommendation 1

The minimum age of criminal responsibility should be increased to 14 years of age for all offences.

Removal of *doli incapax*

OPG notes the removal of the presumption of *doli incapax* in the Bill and recognises the problems associated with this principle. As part of our role in advocating for children, we have observed that it is not the most appropriate means for protecting the rights and interests of children in the youth justice system, especially those residing in out-of-home care.

However, OPG urges the Committee to thoroughly consider the implications of completely removing the *doli incapax* principle. Should amendments to the Bill see the age of criminal responsibility increased to

¹ Susan Baidawi and Rosemary Sheehan, 'Crossover kids: Offending by child protection-involved youth' (2019) Australian Institute of Criminology - Trends and Issues in Crime and Criminal Justice.

² Royal Commission into the Protection and Detention of Children in the Northern Territory Final Report, 2017, www.royalcommission.gov.au/child-detention/final-report.

an age less than 14 years, or increased only for specific offences, OPG recommends that the presumption of *doli incapax* be retained. If the presumption is removed and children under the age of 14 years are deemed to be criminally responsible, there may be a disproportionate negative impact on the rights and interests of children in out-of-home care.

The *doli incapax* principle can protect children from disadvantaged backgrounds, including those living in out-of-home care, by directing attention to the child's education and the environment in which the child has been raised, as opposed to their biological age acting as the sole determinant of capacity. A meaningful assessment of a child's capacity must consider any relevant trauma and disadvantage during their childhood and the physical, intellectual and psychological consequences they may have suffered.

This has added significance in the context of children charged with criminal offences who have also been placed in the child protection system. At a minimum, the position of such children highlights their vulnerability through current or previous exposure to abuse or harm or through the absence of protective factors. Their current living circumstances and the reality of conditions in the out-of-home care system are also relevant factors, which may include placement instability, disrupted attachments with parents and caregivers and poor educational attendance and outcomes. A child's capacity, by virtue of any previous experience of trauma, maltreatment or other harm, may also be compounded by their everyday reality in the out-of-home care system which may exacerbate a child's psychological and emotional vulnerabilities caused by previous maltreatment.

In this context, a child exhibiting aggressive or challenging behaviours should be seen for what it is: the expression of distress or maladapted responses to adversity as a function of a lack of capacity, rather than criminal conduct. By reason of their significant trauma experiences and heightened vulnerabilities, children in the out-of-home care system should be entitled to the protection of legal principles that recognise their behaviours as a function of impaired cognitive capacity rather than criminal conduct, including the *doli incapax* principle. This will ensure they are diverted away from the criminal justice system to more appropriate functional supports.

Case example

OPG provided complementary legal advocacy for Tim*, a 10-year-old boy who was charged with several criminal offences related to his behaviour in a residential care setting, including property damage. OPG held concerns that Tim's background of significant trauma and circumstances as a child in care significantly impaired his adaptive and coping skills and cognitive functioning. OPG was also concerned that Tim's expression of distress or maladapted responses to adversity in these circumstances should be understood as a function of impaired capacity, rather than criminal conduct. OPG supported the instructed legal representative to provide submissions to the court and put Police Prosecutions to proof on the issue of capacity for criminal responsibility (s29(2) *Criminal Code*), which ultimately resulted in Police Prosecutions withdrawing all charges.

As a result of OPG advocacy, other supports were also put in place to address the underlying factors that had contributed to Tim's behaviours.

**Name has been changed.*

Recommendation 2

If the age of criminal responsibility is increased to an age less than 14 years, or increased only in certain circumstances, the presumption of *doli incapax* should be retained.

Changes to *doli incapax*

While the application of *doli incapax* is outside the scope of the Bill, it is important to recognise the potential value of the presumption should the age of criminal responsibility be raised to an age less than 14 years. It is the experience of OPG that *doli incapax* could be more effective in practice if a child's functionality in day-to-day life, historical and current circumstances and vulnerabilities were considered more closely rather than simply considering their actions in isolation. This should also include an examination of further prejudicial factors and other compromising factors (such as neuropsychological issues, experiences in the child protection system and any mental health conditions).

Another significant issue hindering the effectiveness of *doli incapax* is the timeliness of decision-making and the need for a more functional and timely case management process. From OPG's experience, to address issues regarding capacity for criminal responsibility the court will require a brief of evidence from Police Prosecutions canvassing evidence to be relied on to rebut the presumption, which then must be tested in court proceedings. The delay may result in bail issues for some children, being held on remand for an extended period pending determination of issues regarding criminal responsibility. As a result, a child may instruct a lawyer to be "pleaded out" to finalise matters promptly, meaning the issue of capacity for criminal responsibility is left untested.

Further, the principle of *doli incapax* may be applied more successfully in practice if stakeholders are better informed about the relevant principles (including evidentiary requirements) and court processes, which may be facilitated by targeted training and accreditation processes and clear practice direction regarding procedural requirements for court proceedings. Streamlining prosecution procedures, including the timely provision of briefs of evidence regarding capacity for criminal responsibility, may also assist, provided prosecutions are adequately funded and resourced to do so.

Ultimately, the *doli incapax* principle is not the most appropriate means for protecting the rights and interests of children in the youth justice system, especially those also in out-of-home care. Instead, the age of criminal responsibility should be raised. However, if it is not raised to the age of 14 years, the *doli incapax* principle should be retained to ensure there is an avenue to protect the rights and interests of children, particularly those in out-of-home care, where there is a question about capacity for criminal responsibility.

Recommendation 3

Should the presumption of *doli incapax* be retained, it could be applied more effectively in practice through:

- Considering a child's daily functioning, historical and current circumstances and vulnerabilities were considered more closely rather than their actions in isolation;
- a more functional and timely case management process; and

- implementation of targeted training and accreditation processes and clear practice direction for stakeholders regarding procedural requirements for court proceedings.

An alternative model

As articulated in the explanatory notes for the Bill, an increase to the age of criminal responsibility must be accompanied by an alternative model of intervention for young people aged 10-13 years who display anti-social and criminal behaviour. As the explanatory notes to the Bill also note, prioritising early intervention would support the Government to deliver a youth justice strategy consistent with the four pillars detailed in the Atkinson Report³. Intervention strategies could incorporate parenting programs, access to targeted social services, mental health and disability assessment and services, drug and alcohol services and educational supports that focus on both physiological and brain-based behaviour regulation. This would require government investment in such programs outside of the youth justice system. However, such could ultimately reduce the need for such programs if children were provided with the tools, resources and support necessary to not engage in criminal activity in the first place. The flow on effects to the child, their family and the community as a whole would be significant. In considering diversion and preventative strategies for children who fall under the age of responsibility, the overrepresentation of Aboriginal and Torres Strait Islander children must be addressed. Targeted strategies are urgently required, including cultural competency training across the sector to ensure that service delivery is culturally appropriate. In this regard, it is recommended that youth diversion programs in remote communities are developed and operated by, or in partnership with, Aboriginal and Torres Strait Islander communities and/or Aboriginal and Torres Strait Islander controlled organisations.

The achievement of genuine public safety requires government recognition of the value of investment in early interventions that promote children and young people's education, health and wellbeing and the prevention of anti-social behaviours that can lead to offending. Considering the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system, such investments for these children are particularly critical.

Recommendation 4

As a priority, and to accompany an increase to the age of criminal responsibility to 14 years, that the Queensland Government commit to an alternative model for young people with investment in intervention programs and frameworks for children exhibiting anti-social or criminal behaviours who are no longer able to access youth justice services.

Recommendation 5

That any early intervention strategies under an alternative model include:

- youth diversion programs in remote communities developed and operated by, or in partnership with, Aboriginal and Torres Strait Islander communities and/or Aboriginal and Torres Strait Islander controlled organisations; and
- targeted, culturally appropriate strategies to address the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system.

³ Atkinson. B, *Report on Youth Justice*, 2018

Conclusion

OPG is optimistic that the Bill will have the intended effect of creating a shift from criminalisation to rehabilitation of children under the age of 14 years who may be at risk of entering the criminal justice system.