ANTaR
Justice, Rights and Respect for Australia's First Peoples

Sea of hands

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

November 2021

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With thanks:

This submission was authored by Mr Paul Wright, ANTaR National Director; and edited/reviewed by Ms Chandla Serret.

About ANTaR

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

Raise the age of criminal responsibility to a minimum 14 years

Thank you for the opportunity to provide some comments to inform the consideration of the proposed ***Criminal Law (Raising the Age of Responsibility) Amendment Bull 2021 (QLD)***. ANTaR notes that should this Amendment Bill pass, Queensland (QLD) would join the Australian Capital Territory in being the leading jurisdictions in Australia to pursue this important legislative change. We appreciate the need to consider and deliberate the best way to protect young children from adverse and damaging interaction with the justice system, particularly incarceration, and the need of the justice system to continue serving and protecting the wider community.

As a national advocacy organisation, solely focused on justice, rights and respect of First Nations People in Australia, we have seen a large public response to the calls for raising the age of criminal responsibility across Australia. ANTaR is a founding member of the Change the Record Campaign (which we also auspice) and an active member of the Raise the Age Campaign. We are also organisational members of Just Reinvest NSW and work closely with First Nations communities to achieve some fundamental reforms in the Justice systems in each jurisdiction across Australia.

This type of legislative reform is essential to reducing the alarmingly high rates of incarceration and recidivism rates among First Nations communities. It is our hope that every State and Territory government soon considers similar amendments to their current stand on child incarceration for adult crimes, and pursue true reform without delay. As the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) chair, Ms Priscilla Atkins said earlier in 2021:

> *"This is an unjust and dangerous matter of political will. Ongoing inaction means a horrifying number of our young people continue to be trapped in the quicksand of the so called justice system. Now is a critical opportunity for the Australian Government to reimagine the justice system and commit to ending the over-incarceration of our children by raising the age of criminal responsibility to at least 14."*

ANTaR's submission is informed by our work with the Campaigns and coalitions already mentioned. We are keen to continue engaging with the process the QLD Parliament is working through and we hope all QLD parliamentarians support this crucial change.

In making this submission, we note the recent Meeting of Attorneys-General (MAG) Communique from the meeting of 12 November 2021 stated:

> *"State Attorneys-General supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and*

> *discussion of implementation requirements. The Northern Territory has committed to raising the age to 12, and will continue to work on reforms including adequate and effective diversion programs and services. The Australian Capital Territory has also committed to raising the age, and is working on its own reforms."*

This is a very disappointing position for the State and Territory governments to take. The evidence is clear that locking up children does not work. An open-ended process to consider a proposal to lift the minimum age to only 12 years is unacceptable and appears to be a cynical approach to parking this issue from further public scrutiny. As we outline our position in this submission, we implore the QLD Government and every member of the QLD Parliament to get on with raising the age of criminal responsibility in your state to 14 years as soon as possible. As Change the Record Co-Chair, Cheryl Axleby has stated:

> *'Many 12 year olds are still in primary school. 13 year olds are starting their first year of high school. These children need our love and support to learn from their mistakes, grow and thrive. No child belongs behind prison bars…*
>
> *The United Nations, and over thirty other countries, have called on Australia to raise the age to at least 14 years old. If Covid has taught governments anything, it's that you can't pick and choose what medical advice you follow. The doctor's orders are clear: raise the age to at least 14 years old.'*

The current legislative framework disproportionately affects Aboriginal and Torres Strait Islander communities and is undermining the Government and community efforts to close the gaps in social health and wellbeing outcomes. We attach to this submission, our submission to the ACT Government in response to their process in considering raising the age, it covers several further points that should be considered alongside this amendment (see Appendix A). We also suggest the Queensland Parliament's Community Support and Services Committee consider the submissions made by the coalition of organisations from the Raise the Age Campaign to the (then) Council of Attorneys-General in December 2019 – which can be accessed here: https://www.raisetheage.org.au/cag-submissions.

Raising the Age to 14 in Queensland

As already stated, ANTaR is a member of the Change the Record and Raise the Age campaigns, and we commend and endorse the positions of these Aboriginal and Torres Strait Islander-led coalitions.

The case for raising the age of criminal responsibility in QLD is clear. According to the Australian Institute of Health and Welfare the rate of imprisonment of Aboriginal and Torres Strait Islander young people is approximately twenty three times the rate of non-Indigenous young people in QLD.

In 2019-20 there were at least 365 young people placed in detention or under supervision on community-based orders in QLD, and most of them were Aboriginal and Torres Strait Islander children.

We understand that if the QLD Government were to raise the age to only 12 (rather than at least 14) then 131 out of 145 children under 14 behind bars last year would remain locked up in prison, rather than get the support they need in community.

The evidence shows that placing young children in detention increases the chance that they will have future, negative engagement with the criminal justice system. It is not an effective way to make our communities safe or help the children in a time of great vulnerability and need. All young people and particularly Aboriginal and Torres Strait Islander children need support, not punishment, when they get into trouble to protect them and the community.

QLD's more recent proposed reforms on youth justice are largely counterproductive to closing the gap in incarceration rates and will only exacerbate the issues that the far too young age of criminal responsibility brings to light. Bail reforms that lead to longer periods in detention are cruel and unnecessary. There is no evidence that harsher bail laws reduce youth crime and they have an outsized impact on Aboriginal and Torres Strait Islander youth. These policies are inconsistent with QLD's commitment to Closing the Gap.

Raising the age will build on the evidence-based youth justice framework set out under the Queensland Government's *Working Together Changing the Story: Youth Justice Strategy 2019-23*, namely the four pillars of early intervention, keeping children out of court, keeping children out of custody, and reducing offending.

Raising the age of criminal responsibility to 14 years will also provide a strong foundation for measuring and demonstrating the QLD Government's progress towards these reforms. The *Changing the Sentence* report found that there was disproportionate investment in detention facilities as opposed to initiatives supporting the youth justice pillars, representing a missed opportunity.

Raising the age of criminal responsibility to 14 years will also be crucial to improving outcomes for Aboriginal and Torres Strait Islander children who come into contact with the QLD criminal justice system at far higher rates than their non-Indigenous peers.

This is particularly pressing on the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody, as it provides a pathway to reverse the acceleration of Aboriginal and Torres Strait Islander incarceration rates and to prevent First Nations deaths in custody in QLD

Finally, raising the age of criminal responsibility to 14 years will also support the Palaszczuk Government in achieving its commitments under the new National Agreement on Closing the Gap. The commitment to priority reform areas, including shared decision-making, building the community-controlled sector, and reducing 'Indigenous incarceration rates by 15%', will not be possible without fundamental reforms to

raising the age and promoting effective existing community-controlled services that support young Queenslanders.

Conclusion

Thank you again for the opportunity to provide a submission on this important consideration.

ANTaR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples in QLD and we would also welcome the opportunity to meet with the QLD Parliament's Community Support and Services Committee, to discuss any of the points raised in this submission.

Sincerely

Paul Wright
National Director, ANTaR

APPENDIX A

Submission: Raising the minimum age of criminal responsibility (ACT)

August 202

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With thanks:

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Introduction

Thank you for the opportunity to provide some comments to inform the consideration of the proposed ***raising the minimum age of criminal responsibility (MACR) in the ACT***. ANTaR also commends the ACT Government for being the leading jurisdiction in Australia to pursue this legislative change. We appreciate the need to weigh up the best way to protect young children from adverse and damaging interaction with the justice system, and particularly incarceration and the need to continue serving and protecting the wider community.

As a national advocacy organisation, solely focused on justice, rights and respect of First Nations People in Australia, we have seen a large public response to the calls for raising the age of criminal responsibility across Australia.

ANTaR is a founding member of the Change the Record Campaign (which we also auspice) and an active member of the Raise the Age Campaign. We are also organisational members of Just Reinvest NSW and work closely with First Nations communities to achieve some fundamental reforms in the Justice systems in each jurisdiction across Australia.

As the ACT Government has recognised in its decision to pursue a raising of the minimum age of criminal responsibility, this type of reform is essential to reducing the alarmingly high rates of incarceration, recidivism and damage to First Nations communities. It is our hope that the other State and Territory governments soon follow this example and pursue this reform without delay. As the NATSILs chair, Ms Priscilla Atkins said recently:

> *"This is an unjust and dangerous matter of political will. Ongoing inaction means a horrifying number of our young people continue to be trapped in the quicksand of the so called justice system. Now is a critical opportunity for the Australian Government to reimagine the justice system and commit to ending the over-incarceration of our children by raising the age of criminal responsibility to at least 14."*

ANTaR's submission is informed by our work with the Campaigns and coalitions already mentioned and the input of our ANTaR ACT colleagues. We are keen to continue engaging with the process the ACT Government has laid out.

We have attempted to respond to most of the questions posed in the ACT Government's Discussion Paper.

1. Section One: Threshold issues for raising the MACR

> *Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?*

Based on the evidence and expert advice, ANTaR firmly believes that there should be no exceptions to raising the MACR.

As many of our partner organisations have argued, on rare occasions that a child under the age of 14 does something seriously wrong, it speaks more to the failures and under-resourcing of support for them. As your Discussion Paper already outlines, the medical evidence shows that children under the age of 14 years are undergoing significant growth and development:

> "Research suggests that children under the age of 14 have not developed the maturity necessary to form the intent for full criminal responsibility. This developmental immaturity relates to multiple areas of cognitive functioning, including impulse control, reasoning and consequential thinking." It also refers to "a window of potential vulnerability in the early- to mid-adolescent period during which the likelihood of impulsivity, sensation-seeking and risk-taking behaviours is raised." (p12)

We know that interaction with the criminal justice system can cause life-long harm and trauma for children.

The ACT Government should rather redirect the monies spent on incarcerating children and invest in the programs that support children and their families, by providing safe housing, culturally safe and accessible health care and the wrap-round supports to help children thrive at school.

Should doli incapax have any role if the MACR is raised?

ANTaR National does not think 'doli incapax' should play a role, or be relevant for children under the age of 14 years.

Nothing dramatic changes in a child's development at 14 years old, and many countries have raised the age to *above* 14 years old. Rather,14 years is really the minimum age that you could expect a child to have sufficient neurological development to be held criminally responsible.

The recognition that children under 14 years old are *not sufficiently mature* to have this capacity is well established in Australian law - it is reflected in the *doli incapax* doctrine. This is the legal presumption that children under 14 years old do not have the cognitive capacity to form criminal intent. The problem is that the *doli incapax* presumption does not work in practice and does not protect the rights of children. Children are regularly remanded and held in prison cells while they wait for court hearings to debate matters of *doli incapax.*

2. Section two: An alternative model to the youth justice system

Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

ANTaR supports the principles. However, as our colleagues at the Change the Record Campaign have noted, the ACT Government policies, programs and funding arrangements will all need to be reviewed to make sure they live up to the principles.

What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

The ACT Government needs to engage with the Aboriginal community organisations in Canberra to identify what support they would need to enable them to support and rehabilitate young people under 14 who come into contact with the Law.

Aboriginal community organisations have indicated a need for greater funding for Functional Family Therapy, and a need for the Healing Farm to be fully operational as originally intended by the Ngunnawal Elders, to support families who need therapeutic healing.

Our Campaign colleagues have identified five key gaps in the service delivery landscape in the ACT:

- The lack of a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse
- The absence of Function Family Therapy - Youth Justice and/or other evidence-based programs targeted to this cohort of children
- The limited availability of psycho-social services for young people, particularly those with disabilities
- The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness
- A broad need for greater education across services to improve the identification of, and response to, disability support needs

These are key areas of need which should be addressed by the ACT Government in its development of an alternative system to the criminal justice system.

We understand that the ACT Government has committed to pursuing Justice Reinvestment as a concept priority, this needs to be followed through with a wholesale pursuit of reinvestment away from incarceration and the significant resources sucked up by building and maintaining prisons. The ACT has reportedly paid the most to lock up children in Australia with costs exceeding $500,000 per annum.[1]

[1]https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fnation%2Fdetention-costs-rise-as-fewer-youths-are-incarcerated%2Fnews-story%2F9391b6f1e28f1de1ba324da10456bd45&memtype=anonymous&mode=premium

Raising MACR and a comprehensive approach to Justice Reinvestment should be hand in hand policies with complementary strategies.

How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

As noted above.

Multidisciplinary Panels should be established to assist with early identification and response to the needs of vulnerable young people as a key preventative measure for more acute issues. Government needs to consider the social determinants of health as key building blocks.

How should children and young people under the MACR be supported after crisis points?

The services and systems that comprise the human services sector in the ACT (and that are likely to be called upon to facilitate access to the necessary supports) must be authorised to apply flexibility in respect of eligibility restrictions, and must be empowered to intervene early with adequately funded service responses that focus on both the child themselves as well as the environment within which the child is situated to best support children and young people to move through periods of crisis and have their needs met.

Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

Like our ANTaR ACT colleagues, we propose that the first option should always be voluntary participation in services or restorative programs, however, we accept that there may be cases or occasions when mandatory participation in therapeutic services/ programs could in the long term benefit a young person.

On the very rare occasion that a child does something seriously wrong, they will often need interventions and support. These can be delivered through a range of non-criminal avenues. In the most serious cases, there are civil law provisions that already exist in the ACT, Victoria and NSW (for example) which allow for a judge to compel a child to participate in a program, reside in a facility or undergo various forms of health, cognitive or psychological assessment.

3. Section three: Victims' rights and supports

In relation to this section, ANTaR believes that victims of acts which harm, made by a child under 14 should still have the rights of other victims as indicated in paragraph 63 of the Discussion Paper. The Government needs to lead community education about the importance of an appropriate MACR and help victims to understand that children under 14 years are not fully capable of having criminal intent, which is why they will not be charged.

However, as our ANTaR ACT colleagues have noted, there could be value in a voluntary process of restorative justice when no formal offence has occurred, but a victim has been harmed.

How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

The needs of children and protecting the rights of victims to safety and recovery are complementary. Reforms should recognise that community safety is predicated on the needs of community members being met. This includes children.

Additionally, getting the policy right on raising the MACR along with improving supports promotes community safety, prevents recidivism and ultimately protects the wellbeing of all members of the community. The earlier a child comes into contact with the criminal legal system, the more likely it is that they will have further engagements with the youth and adult justice systems.

4. Section four: Additional legal and technical considerations

Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

ANTaR believes that overall, the same police powers that apply now to children under 10 years old should apply to those under 14 years.

Any engagement with the criminal justice system can cause harm to a child - from police contact right through to the deprivation of liberty. Consideration should be given to minimise and make as safe as possible, any engagement with police.

What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?

As above.

Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

We reiterate what our colleagues at Change the Record have stated - crimes committed by children under the influence, coercion or aided and abetted by adults are already appropriately dealt with under the criminal law, with the responsibility correctly lying with the adult involved. 'Children should be provided with appropriate protection and the adults responsible prosecuted'.[2] Minor legislative amendments may need to be made to capture activities that are not criminal offences due to the age of the child but otherwise would be.

Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

Yes they should be transitioned to the new alternative model.

Priority should be given to assessing each individual child's needs, what supports are required for them and their families, ensuring they have adequate accommodation and supports in place to minimise disruption and promote continuity of services.

Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

All children should be transitioned to the new alternative model in line with a human rights approach.

Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

All convictions for children under 14 should be 'spent' automatically as some young people may not become aware that they can request this if an 'on request' system is instituted, and they may be disadvantaged in job applications etc. as a result.

Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

The process of an Independent Reviewer (Para 110 of Discussion Paper) as used in Scotland seems to be a sensible approach to this question.

[2] Penal Reform International, 'The minimum age of criminal responsibility' (Justice for Children Briefing no 4, 2013) 4 <https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf>; Queensland Family and Child Commission, *The age of criminal responsibility in Queensland* (2017) <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/policy/minimum-age-criminal-responsibility.pdf>.

Reflecting the principles that underpin raising the MACR, the privacy of a child under the age of 14 should be protected and information regarding their behaviour should not be used for the purposes of criminal prosecution at a later time. This includes for children who have already been sentenced prior to the MACR being raised.

> *Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?*

No.

The medical evidence is clear - a child under the age of 14 does not have the cognitive capacity to engage in criminal activity and therefore cannot be held criminally responsible for their actions. It therefore is inconsistent (and harmful) for the behaviour of a child who is insufficiently mature to commit a criminal act, to be used at a later date against them.

Conclusion

Thank you again for the opportunity to provide a submission on this important consideration.

ANTaR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples in the ACT and we would also welcome the opportunity to meet with the ACT Government, to discuss any of the points raised in this submission.

Sincerely

Paul Wright
National Director, ANTaR