

Submission
to
the QLD Parliamentary Committee Inquiry
on
Raising the Minimum Age of Criminal Responsibility

November 2021



AUSTRALIAN
CHILD RIGHTS
TASKFORCE

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The Australian Child Rights Taskforce

CONVENOR

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EXECUTIVE SUMMARY

This submission shares the insights of the **Australian Child Rights Taskforce** concerning this important development in justice and wellbeing for children and young people in Australia today.

Childhood and adolescence are 'critical times for building capabilities for life'¹. Learning experiences don't come in neat packages for all children and young people. Sometimes these experiences are guided by mistakes or misguided by the less than perfect circumstances around them. The criminal justice system offers a fundamentally flawed approach for supporting and learning for children. The surrounding service systems are not child-centred and respectful of children's rights and health and wellbeing.

The Taskforce welcomes the opportunity to provide this submission to the Queensland Parliament Community Support and Services Committee Inquiry on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill). This Inquiry follows on the recent commitment by the Australian Capital Territory Government (ACT Government) to raise the age of criminal responsibility in its jurisdiction. This submission draws on the work undertaken by the Taskforce to consider the issues arising from this commitment and is based on our previous submission to the ACT Government's own investigation of the steps necessary to appropriately implement the commitment.

For this submission, the Taskforce has consulted with its Queensland members and other relevant community stakeholders. Accordingly, we offer these views in consideration of the local Queensland context. We believe that this Inquiry offers an important opportunity to review the limitations of existing policy and practice in the service system for children and to consider future direction and developments that will improve justice, health and wellbeing and respect for rights for children and young people in Queensland and Australia more generally.

In 1997 the Australian Law Reform Commission & Australian Human Rights Commission handed down a joint report called "Seen and Heard: priority for children in the legal process". Today, this landmark report remains the most comprehensive examination of children and the legal system in Australia.

Disturbingly, many of the failures of legal processes for children identified in this report remain today:

- discrimination against children;
- a failure to consult with and listen to children in matters affecting them;
- a lack of co-ordination in the delivery of services to children;
- an overly punitive approach to children in criminal justice systems;
- the over-representation of Aboriginal and Torres Strait Islander children in the justice and protection systems;
- court processes which are bewildering and intimidating for children; and
- school exclusion processes without fairness and natural justice.

This Inquiry provides an opportunity to revisit and address some of the findings of that report in the context of Queensland in 2021.

¹ McLachlan, R., Gilfillan, G. and Gordon, J. 2013, *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra at page 14.

Our Key Recommendations

The minimum age of criminal responsibility should be raised to 14 years with no exceptions.

Child rights should guide the implementation of the reform.

The effective implementation of the reform requires a comprehensive review of the existing service system for children. Such a review should seek to identify gaps and weaknesses in the existing service system and ensure that these are addressed alongside the raising of the age of criminal responsibility.

The focus should be to create and maintain safe, stable, and supportive environments for children, families, and the wider community.

The reforms must address the ongoing and overwhelming impact of both intergenerational trauma and failure of the current service systems to respect and protect Aboriginal and Torres Strait Islander children in Queensland.

The views of children should be heard in design, implementation and decision making.

The reforms should address coordination and integration of services and systems.

The reforms should produce systems that address need and are voluntary and accountable.

Services to victims of crime should not be affected.

Our Key Partners

For this submission, the Taskforce has consulted with its Queensland members and Queensland community stakeholders. We offer these views in consideration of the local Queensland context. We believe that this Inquiry offers an important opportunity to review the limitations of existing policy and practice in the service system for children and to consider future direction and developments that will improve justice, health and wellbeing and respect for rights for children and young people in Queensland and Australia more generally.

In particular, we endorse the submissions of our Queensland partners, yourtown and Queensland Aboriginal & Torres Strait Islander Child Protection Peak (QATSICPP) and of Taskforce members, Child Wise and Save the Children Australia.

We note the work already undertaken in the ACT and commend the Review Report commissioned by the ACT Government².

² "Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory" August 2021, Canberra, Australia

Background

The Issues

The Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill) has been introduced into the Queensland Parliament. The Bill proposes raising the minimum age of criminal responsibility as a key strategic reform. The Bill has been referred to the Queensland Parliament Community Support and Services Committee. This Committee is conducting an Inquiry and this submission is made to the Inquiry.

The Australian Child Rights Taskforce supports the reform and wishes to assist in the pathway to the implementation of the reform by sharing its views and experience.

The Taskforce welcomes the opportunity to provide this submission to the Inquiry. This Inquiry follows on the recent commitment by the Australian Capital Territory Government (ACT Government) to raise the age of criminal responsibility in its jurisdiction. This submission draws on the work undertaken by the Taskforce to consider the issues arising from this commitment. It is based on our previous submission to the ACT Government's own investigation of the steps necessary to appropriately implement the commitment.

As undertaken in the ACT, the Queensland reform requires a comprehensive review of the existing service system for children. Such a review should identify gaps and weaknesses in the existing service system and ensure that these are addressed alongside the raising of the age of criminal responsibility. In particular, the review would map existing service pathways and systems and services that address the needs for children and young people that may engage in risky or harmful behaviours. It would need to identify gaps and provide recommendations around options for mechanisms to replace the current youth justice system.

We note with support the following quote from the ACT Government's Discussion Paper:

"A key component of this reform is the decriminalisation of harmful behaviour for a larger cohort of children and young people. To support this, a continuum of community and Government-based services will be needed. An alternative response must address the needs of children, young people, their families, and their communities. It must also improve access to early supports, provide options for therapeutic care and accommodation, embed restorative approaches, contain alternatives or other changes to court processes and consider how to support victims when traditional justice mechanisms are no longer available."

It is also imperative that we acknowledge and address the ongoing and overwhelming impact of both intergenerational trauma and failure to respect and protect on the part of the current service systems (including youth justice responses) on Aboriginal and Torres Strait Islander children in Queensland. Addressing this impact must sit at the heart of reform and rebuilt responses.

The Child Rights Framework

The Convention reflects a fundamental shift that occurred during the 20th Century in the way that children were viewed. Previously children were largely viewed as the property of adults. This shift to an understanding of children as rights holders themselves has begun to be reflected in domestic legal systems as well as international law.

The Convention sets out this understanding in a range of ways including through its requirement that processes in law, government policy and judicial review will act to guarantee the effective implementation of the rights set out in the Convention for each Australian child (Article 2.1) and to require that all appropriate legislative, administrative and other measures are taken in order to implement the rights set out in the Convention: (Article 4).

The Australian Child Rights Taskforce and its work

The Australian Child Rights Taskforce³ is a coalition of over 100 organisations, networks and individuals who are committed to the protection and development of the rights of children and young people in Australia. UNICEF Australia convenes the Taskforce, and its work is guided by a Steering Committee.

One of the key roles of the Taskforce is to hold Australian Governments to account on the implementation of the *United Nations Convention on the Rights of the Child* (the Convention). When Australia ratified the Convention in 1990, this represented a commitment that every child in Australia should enjoy the rights set out in the Convention.

The Child Rights Taskforce has published a series of reports (most recently 'The Children's Report')⁴, that have examined the implementation of the Convention in order to assist the United Nations Committee on the Rights of the Child⁵ in its review of Australia's performance. These reports acknowledge that while Australia is a wonderful place for most of its children, there remains significant structural and material disadvantage for many children.

These reports have informed the recommendations of the Committee⁶ which have covered a broad range of policy areas where improvements were considered necessary, including the raising of the age of criminal responsibility.

The Committee has also noted that despite Australia's ratification of the Convention in 1990, it has yet to effectively incorporate rights into policy and legislative frameworks to benefit children and there are unacceptable gaps in the legal protection of children's rights.

³ <http://www.childrights.org.au/welcome>

⁴ <https://apo.org.au/node/200771>

⁵ <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

⁶ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/5-6&Lang=En

The Australian Child Rights Taskforce's Contribution

Raising the minimum age of criminal responsibility to 14 years is a far-reaching reform and a powerful enabler for children's rights. If implemented well, it will have a systemic effect in interrupting intergenerational cycles of disadvantage, changing life trajectories for many children, and creating safer and fairer communities across Queensland.

The Australian Child Rights Taskforce supports a decision to raise the age that it is in accordance with the scientific and medical evidence about appropriate support for children's development. It acknowledges the ineffectiveness of detention and other punitive responses in addressing the underlying issues in the challenging behaviours of children currently dealt with by the justice system. It addresses the breach of international human rights standards which has seen Australia receive sustained criticism from the United Nations and a number of other nations globally. It seeks to address the stark reality that the current low minimum age (of 10 years) reinforces intergenerational disadvantage and disproportionately affects Aboriginal and Torres Strait Islander children.

Today there must also be acknowledgement and meaningful engagement with the rights of Aboriginal and Torres Strait Islander children and in particular their right to live in culture and community and to be supported by culturally safe and responsive systems. The child rights framework incorporates and complements the recognition and implementation of the Implications of the United Nations Declaration on the Rights of Indigenous Peoples.

The Taskforce recognises that its work must also ensure that Aboriginal and Torres Strait Islander peoples and communities must be self-determining and able to take responsibility for the care and support of their children.

The Australian Child Rights Taskforce calls for a decision on this issue that is guided by these child rights principles as it implements a raised minimum age of criminal responsibility.

We acknowledge that the community expects that where appropriate, children are held responsible for their actions and given the opportunity to learn from their mistakes. We support coordinated and strategic action to support community safety and prevent and address harmful behaviours, including by children.

We note that the decision to raise the age of criminal responsibility puts a spotlight on the services and strategies available and required to build community safety and prevent harmful behaviours, both immediately and in the longer term. We acknowledge that this will identify gaps and weaknesses in the existing service system and structures including some that already existed without the challenge of implementing this reform.

We acknowledge and endorse the work of other Taskforce members which has informed and guided our work on this submission.

Building A Universal System

The Taskforce's view is that the minimum age of criminal responsibility should be raised to 14 years for all offences, with no exceptions. There is no principled basis for distinguishing between different types of offence for this purpose. The criminal justice system is an inappropriate and ineffective way of dealing with children at this stage of development, physical, neurological, and moral. As the United Nations Committee on the Rights of the Child has said, exceptions to the minimum age 'are usually created to respond to public pressure and are not based on a rational understanding of children's development'.⁷ The creation of exceptions to the application of the minimum age may undermine the effectiveness and aims of the reform.

We acknowledge the importance of addressing the issue of appropriate service system responses to children engaging in serious harmful behaviours. The key intent of this reform should be that those responses are not based in the criminal justice system.

We also acknowledge that community expectations of justice and safety remain key considerations in building responses. However, there remain effective opportunities to address these concerns with strategies and responses that engage with and empower children, families, and communities.

Doli Incapax

The legal practice principle, *doli incapax* has offered a theoretical method for ensuring that a child aged under 14 cannot be held criminally responsible for an offence unless it can be proven that they knew what they were doing was seriously wrong. However, the practical problems with how *doli incapax* currently operates, and its failure to safeguard children's rights and best interests in practice, have been well documented.⁸

Further the principle is designed to operate within a criminal justice system and in the context of criminal justice response. Raising the age of criminal responsibility offers the opportunity to reframe both the system and the response within a broader and more comprehensive service system setting. In those circumstances the principle should no longer be required.

⁷ Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, United Nations, 18 September 2019, [25].

⁸ See, e.g., Aboriginal Legal Service (NSW/ACT), *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, 3 March 2020, available at <https://www.raisetheage.org.au/cag-submissions>.

The Middle Years

Raising the age will require significant reform and expansion to the services and interventions available to support children and young people aged 10 to 13 years. Whilst the current context focuses on those currently identified with therapeutic needs, we would argue that the universal and strategic service system responses for children between the ages of 8 and 12 (often described as “the middle years”)⁹ require better attention.

We repeat our view that it is important to examine and identify gaps in service system responses in implementing this reform and developing an alternative model. Addressing the broader needs of this wider age group more generally will be of significant value, will avoid the risk of stigmatising particular groups and build responses to the needs for this age group more comprehensively.

An Alternative Model

The Australian Child Rights Taskforce endorses the notion that this reform provides the opportunity to redesign the approach to understanding and responding to harmful behaviours; shifting the focus to creating and maintaining safe, stable, and supportive environments; and to address the underlying causes of harmful behaviour.

Child rights principles support an approach that recognises that all children have a right to live in a safe, stable, and supportive environment. Shifting the focus away from the criminal justice system to the rights of all children to have their development needs met (rather than to solely the prevention of harmful behaviours) offers a more comprehensive and less potentially stigmatising approach.

We endorse the view expressed in the ACT Government Discussion Paper which states:
“Evidence demonstrates that early support, family-led decision making, and robust, consistent, and reliable service systems are critical for preventing children from entering a cycle of harmful behaviour”

This should not permit shifting of responsibility from governments as the key coordinating agency for service systems that support the development of children (and responsibility for human rights entitlements more generally). Given the causes of serious and ongoing harmful behaviours in children are often found in broader social conditions, addressing expectations of accountability should not replace a focus on strong and coordinated service system responses and a principled child rights framework.

⁹ <https://pursuit.unimelb.edu.au/articles/the-importance-of-your-child-s-middle-years>

Child Rights as Design Principles for an Alternative Model

Using a child rights framework will offer the opportunity to build in the necessary safeguards and mechanisms to address issues of personal and community safety and accountability.

Policy and practice should be driven by what is in the best interests of the child.

Strong and resilient families will provide safe, stable, and supportive environments.

Children should be involved in the design and implementation of any solutions. We endorse the views expressed by Save the Children in its submission to the ACT Government which remains applicable in a Queensland context.

"First, any alternative model should prioritise hearing and taking seriously the views of children and young people in all decisions relevant to them, including in responding to harmful behaviour. Children have a right to be heard and taken seriously in such decisions, as reflected in Article 12 of the Convention on the Rights of the Child. Among other benefits, this assists in ensuring that children's best interests are being met. Moreover, when children are meaningfully involved in decisions about them, they are more likely to ... support those decisions and the decisions themselves are more likely to achieve their desired purpose."

"Second, any alternative model should focus on identifying and addressing underlying causes and risk factors for harmful behaviour, including child and family poverty, child and family contact with the child protection system, and disengagement from education. This would include building strong links at all levels of policy making, budgetary investment and services across all relevant portfolios, programs and actors across levels of government and within communities."¹⁰

We endorse the comments of Save the Children in its previous submission that "the alternative that replaces the criminal justice system needs a more holistic approach in how it pursues its goals, including addressing the underlying causes – at a social and individual level – of harmful behaviours"; that the model should be based on child rights and child-centred; and addressing the social determinants of harmful behaviour (but not just for the sake of addressing harmful behaviours).

We endorse Save the Children's observation that community safety is best served in preventing harmful behaviours by strategic and early interventions that support behaviour change. Early intervention models can be built on risk and need but must still be wary of the stigmatising impact of interventions that are not based on supporting family and involving willing participation by children, families, and communities.

¹⁰ Save the Children Submission, August 2021

Key Considerations for an Alternative Model

There will be a challenge to ensure that the gate keepers to an alternative model (whether police or other services) do not indirectly widen the net and stigmatising impact of referral into what otherwise would have been the criminal justice system. There will still need to be a process of initial assessment before referral. Just as the existing system should operate with discretionary warnings and cautions before the referral into the more formal justice system, there will need to be assessments of whether any referral to further service is required beyond addressing risk and meeting need.

The integration into existing (and where possible extension of) service models (including education, disability, and health services both universal and targeted) should be built on the provision of required support services that focus on risk and need.

The Role of Community

We note that the ACT Government Review proposes the use of a multidisciplinary assessment and referral panel. We also support this suggestion and believe that a similar model could be built that is based on the skills and experience embedded in Queensland communities. Mechanisms such as community-based panels can offer improved accountability and transparency if supported and led by strong independent community expertise that is not beholden to any particular sectoral or government stakeholder. An independent statutory authority can offer support for ensuring consistency in performance and outcomes.

The use of community expertise can improve processes for shared decision making and ensure the interests of children, families and communities can be heard during assessment, referral, and service delivery. This could provide opportunities for the involvement of key leaders and contributions from local Aboriginal and Torres Strait Islander families and communities.

Addressing Needs

We anticipate that a review of the existing service systems will identify gaps and limitations. In reframing the system on the basis of assessment of need, there are opportunities to achieve improvements in the coordination and delivery of each system.

Pathways of referral and eligibility should be reviewed. Community engagement and independent assessment offer new opportunities for overcoming existing barriers. We defer to the knowledge of local communities and providers in identifying and meeting existing gaps. But in principle, we would expect that all universal and secondary services currently providing services to children and families (health; education; housing; welfare; family violence; disability; mental health and child-care and development) should be involved in the shift in focus and opportunity.

Coordinated and collaborative community-led and independent assessment and referral can lead and guide these mechanisms.

Voluntary and Accountable

Critically the Taskforce believes that, as a fundamental principle, referral to services should be voluntary and that efforts for involvement should be focused on addressing barriers rather than mandating compulsory involvement. Any exceptions to this principle must be statutory and subject to accessible review.

The ACT Government's work offers useful initial guidance. It has identified three areas likely to create referral opportunities: (when a crisis occurs; after a crisis; and when a crisis continues to occur). These suggest the involvement of responding agencies (police; mental health; intensive education supports; emergency services). Reporting and responding guidelines will be required and there may be the need for immediate family support or accommodation services. Otherwise, beyond initial assessment and if appropriate and required, referral to full assessment will be the next step.

Victims and Communities

There will also be the opportunity for assessment for accountability mechanisms where there has been an impact on other community members. Mechanisms can still be included to address the rights and interests of victims and communities. We support the notion that an alternative model should still provide access to community members to supports that would be available to victims of crime: access to restorative justice mechanisms and assistance with recovery.

There will need to be mechanisms that protect against stigmatisation of the children involved. There may be mechanisms within victim offender mediation that can provide proxies for an offender. But these should not diminish recognition and respect for the rights of victims and those affected to safety, privacy, dignity, and participation.

Police Powers and Information Management

We would anticipate that police will continue to play a key role in detecting and protecting community safety in dealing with children affected by the reforms. Adjustments may be necessary to police powers and relevant offences. There may be additional statutory measures to ensure the involvement of other agencies and invested assessment bodies or persons.

In principle, we would support as far as possible the transition of children dealt with by the criminal law for offences committed between the ages of 10 and 13 to the alternative model and to have their criminal records adjusted to reflect the changed status of their offending.

Particular attention will be required to manage the personal information of children. It may be that the review of services that will provide an opportunity to review the principles, policies, and practices in relation to information sharing and the improved coordination of services. We note that these practices, particularly as they relate to child protection and child safety have already been the subject of recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse.