

National Justice Project

Submission to the Queensland Parliament Community
Support and Services Committee - Criminal Law (Raising
the Age of Responsibility) Amendment Bill 2021

November 2021



ABOUT THE AUTHORS

The National Justice Project is a not-for-profit human rights legal service that works to eradicate institutional discrimination. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination.

Our key areas of activity include health justice, specifically for persons with disability and First Nations communities; challenging misconduct in police, prisons and youth services; and seeking justice for asylum seekers and refugees. We receive no government funding and intentionally remain independent in order to do our work. We therefore rely on grassroots community, philanthropic and business support.

We create positive change through our key strategic areas:

- **Undertaking strategic legal action** including representing clients in public interest litigation, which leads to law reform, policy change, attitudinal change, improved services and accountability for people who have been harmed by injustice.
- **Delivering world class, practice-inspired and catalytic social justice education** for the community, and for current and future legal professionals and advocates, thus growing the next generation of social justice lawyers in Australia and the Pacific.
- **Supporting grassroots advocacy** built on ethical, rigorous and fact-based research that amplifies the voices of communities harmed by injustice, and leads to law reform and policy change driven by the experience of community.

This submission has been co-authored by staff at the National Justice Project, together with Legal Clerk, Rosaleen Jeffries and students of the National Justice Project legal clinic operating at Monash University.

The National Justice Project is a proud supporter of the Raise the Age campaign driven by Change the Record.

ACKNOWLEDGEMENT OF FIRST NATIONS PEOPLES' CUSTODIANSHIP

The National Justice Project pays its respects to First Nations Elders, past and present, and extends that respect to all First Nations peoples across the country. We acknowledge the diversity of First Nations cultures and communities and recognises First Nations Peoples as the traditional owners and ongoing custodians of the lands and waters on which we work and live.

We acknowledge and celebrate the unique lore, knowledges, cultures, histories, perspectives and languages that Australia's First Nations Peoples hold. The National Justice Project recognises that throughout history the Australian health and legal systems have been used as an instrument of oppression against First Nations Peoples. The National Justice Project seeks to strengthen and promote dialogue between the Australian legal system and First Nations laws, governance structures and protocols. We are committed to achieving social justice and to bring change to systemic problems of abuse and discrimination.

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TERMS OF REFERENCE

The National Justice Project welcomes the opportunity to support the introduction of the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 into the Queensland Parliament to ensure children under 14 years of age are not incarcerated or otherwise punished under the criminal legal system, consistent with current medical understanding of child development and contemporary human rights standards.

Extensive evidence has already been produced to support raising the minimum age of criminal responsibility to at least 14 years by numerous Aboriginal and Torres Strait Islander organisations, medical and legal experts, service providers, and human rights organisations in response to a call for submissions from the Council of Attorneys-General's Age of Criminal Responsibility Working Group (CAG Working Group) in December 2019. It is not our intention here to repeat in detail the evidence already presented to the CAG Working Group, however we refer to various submissions within this paper and implore the Committee to refer to this established body of evidence to support increasing the age of criminal responsibility to 14.¹ The purpose of this submission is to affirm the National Justice Project's ongoing support for raising the minimum age of criminal responsibility to at least 14 years in Queensland and across all Australian States and Territories without exception and in line with our international human rights obligations.

RECOMMENDATIONS

The National Justice Project recommends that all Australian Governments action the following:

1. The minimum age of criminal responsibility should be raised to at least 14 years for all offences consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment, and in line with international standards.
2. Once the minimum age of criminal responsibility is raised to at least 14 years, *doli incapax* will be redundant and should therefore be abolished.
3. For children aged 14-17 years, detention should only occur as a measure of last resort and for the shortest possible time.
4. Enhanced funding and supports are urgently needed for diversionary programs and restorative strategies as alternatives to criminalisation. Aboriginal and Torres Strait Islander organisations must lead the program design and delivery for First Nations children and their families.
5. Enhanced funding and supports are urgently needed for Aboriginal and Torres Strait Islander-controlled services in the delivery of culturally safe and trauma informed health, family and disability support, education, cultural connection, healing and other support services.

¹ See <https://www.raisetheage.org.au/cag-submissions>.

EXECUTIVE SUMMARY

In the submission, the National Justice Project examines Australia's minimum age of criminal responsibility. We focus on the current legal standards which act to entrench criminality in young people and lead to a cycle of reoffending.² We believe that in light of the damaging effects of detention on the vast majority of children coming into the youth justice system, detention between the ages of 10-13 is not the appropriate response.

Incarceration disproportionately impacts First Nations young people and young people living with disability. Moreover, where race and disability intersect, young people face a double disadvantage. Raising the minimum age of criminal responsibility can reduce the over-representation of First Nations children and young people and those living with disability in the criminal justice system.³

We believe that children are entitled to special protection due to their age. Children under 14 do not have sufficient maturity to exercise judgement and control to justify imposing criminally liability. Moreover, the current presumption of *doli incapax* is ineffective and applied inconsistently between jurisdictions. As such, children in Australia are vulnerable to the criminal justice system despite extensive evidence that children's brains are still developing and during their formative years have limited capacity for understanding the criminal nature of their actions.⁴

The government is responsible for providing policy frameworks and services directed at assisting children and families. At present, Australian Governments are failing to safeguard our children and young people by maintaining, under state law, the age of criminal responsibility at 10 years of age. Criminalising children from 10 years of age is in breach of international human rights standards and puts Australia out of step with the rest of the world, where the median age is 14 years.⁵ Governments across all jurisdictions should uniformly raise the age of criminal responsibility to 14 years, without limitations or exceptions.

² Law Council of Australia, Submission to Council of Attorney General, *Age of Criminal Responsibility Working Group Review* (2 March 2020), 9.

³ National Aboriginal and Torres Strait Islander Legal Services, Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group* (28 February 2020) 26.

⁴ Danila Dilba Health Service, Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group Review* (28 February 2020) 7.

⁵ Australian Human Rights Commission, *Children's Rights Report* (2016), 187.

SUBMISSIONS

a) *Limitations with the presumption of doli incapax*

Across Australia the age of criminal responsibility is set at 10 years. In 2019-202 alone, this statutory minimum age criminalised and detained approximately 499 children between the ages of 10-13. Of the 499 children in detention, only 43 are under the age of 12.⁶

This criminalisation of children can create a cycle of disadvantage and criminogenic behaviour, entrenching young people in the criminal justice system and isolating them from family, community and much needed access to culturally appropriate support services designed to meet their needs. Children who have early contact with the criminal system and those who are detained often face complex health issues, including increased risk of suicide.⁷ The impacts of criminalisation can also compound mental illness and trauma for young people.⁸

In addition to a statutory minimum age of criminal responsibility, there is a legal presumption concerning criminal responsibility operating in all Australian jurisdictions known as the principle of *doli incapax*.⁹ The rationale for the presumption of *doli incapax* is that a child under 14 years of age is “not sufficiently intellectually and morally developed to appreciate the difference between right and wrong”.¹⁰ However, the presumption is rarely a barrier to prosecution due to the low threshold required to rebut the presumption and the reliance on subjective adjudication by the judge.¹¹

Doli incapax is purportedly a legal safeguard for children under 14, however in operation the presumption is highly problematic. Courts have been found to apply the presumption inconsistently, leading to discriminatory practices.¹² To rebut the presumption at trial, the prosecution has been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. Protracted legal proceedings, in particular where there is an appeal, can also keep children languishing in the justice system for lengthy periods.¹³

The UN Committee on the Rights of the Child found that Australia’s current system “devised as a protective system...has not proved so in practice”.¹⁴ The legal practices are inadequate and lead to poorer outcomes for Australia’s youth, such as further offending and potential life-long involvement with the justice system. The current framework sustains punitive-

⁶ Australian Institute of Health and Welfare (Cth), *Youth Justice in Australia 2019-20*, Media Release 134 (2021), 6.

⁷ Human Rights Law Centre, Submission to the Council of Attorneys-General, *Process to Raise the Age of Criminal Responsibility* (28 February 2020), 10.

⁸ Aboriginal Justice Caucus, Submission to Council of Attorney-Generals, *Age of Criminal Responsibility Working Group* (February 2020), 5.

⁹ Australian Law Reform Commission, *Seen and Heard: Priority for Children in The Legal Process*, Report No 84 (2010) [18.17]

¹⁰ *RP v The Queen* [2016] HCA 53, [8]

¹¹ Law Council of Australia (n 2) 25.

¹² Human Rights Law Centre (n 7) 7.

¹³ Danila Dilba Health Service (n 4) 9-10; The Law Society of NSW, Submission to the Council of Attorney-General, *Age of Criminal Responsibility Working Group Review* (14 February 2020), 2.

¹⁴ Human Rights Law Centre (n 7) 8.

based standards which force children into contact with the justice system. The age of criminal responsibility should be increased to no less than 14 years of age with a focus on prevention, diversion and support rather than punishment.

The minimum age of criminal responsibility should be raised to at least 14 years for all offences consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment, and in line with international standards

Once the minimum age of criminal responsibility is raised to at least 14 years, *doli incapax* will be redundant and should therefore be abolished

b) Developmental and cognitive considerations

Within Australia, children should not be held criminally responsible for their actions until they have reached a certain age. This age should not pre-date their capacity to assess risk, predict consequences, control their impulses or understand the nature of their behaviour. It is clear, following the premise of *doli incapax* that the justice system recognises that children under the age of 14 years may not have the required capacity to form the *mens rea* necessary for conviction.¹⁵ However, neurobiological research shows that development in children is not reflected in nor consistent with the current laws on childhood capacity.

Young people have increased impulsivity and sensation seeking behaviour.¹⁶ Neurobiological research has shown that the adolescent brain does not fully mature until a person is at least in their early 20s,¹⁷ and that the prefrontal lobe, which accounts for criminal behaviour and offending, is the last area of the brain to mature.¹⁸ Children under the age of 14 are still undergoing significant development and as a result possess limited impulse control and empathy, are vulnerable to peer pressure, are attracted to risk and the immediate gratification that usually follows risky behaviour, are limited in their ability to apply consequential thinking prior to decision making, and are not at a cognitive level of development where they are able to fully appreciate the criminal culpability of their behaviour and appropriately regulate their behaviour accordingly in the moment.¹⁹

There are also significant social costs attached to the incarceration of Australia's young people. Criminalising the behaviour of young and vulnerable children often involves separating children from their families and communities, disrupting their lives and routine (including education, social development and health care), exposing them to the harmful environment of detention and

¹⁵ ACT Human Rights Commission, Submission to the Council of Attorney General, *Review of the Age of Criminal Responsibility* (28 February 2020), 7.

¹⁶ The Royal Australian and New Zealand College of Psychiatrists, Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group Review* (28 February 2020) 2.

¹⁷ Aboriginal Legal Service of Western Australia, Submission to the Council of Attorneys-General, *Review of the Age of Criminal Responsibility* (28 February 2020) 9.

¹⁸ Law Council of Australia (n 2), 12.

¹⁹ Royal Australasian College of Physicians, 'Submission to the Council of Attorneys General Age of Criminal Responsibility Working Group Reviewing', February 2020, 2; Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility', Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney (2017) <https://www.cypw.unsw.edu.au/sites/ypp.unsw.edu.au/files/Cunneen_%282017%29_Arguments_for_raising_the_minimum_age_of_criminal_responsibility.pdf>.

increasing their chance of future contact with the criminal justice system.²⁰ Children should have the chance to learn from their mistakes in a manner that is safe, age-appropriate and supportive. Reforming the current minimum age of criminal responsibility is key to providing an appropriate and meaningful way to avoid criminalisation and its harmful effects whilst considering the emotional, mental and cognitive capacity of children and young people.

The minimum age of criminal responsibility should be raised to at least 14 years for all offences consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment, and in line with international standards

For children aged 14-17 years, detention should only occur as a measure of last resort and for the shortest possible time

c) The overcriminalisation of First Nations children and children living with disability

The age of criminal responsibility disproportionately impacts First Nations children and young people. This is due to systemic racism and a legacy of dispossession, marginalisation, and intergenerational trauma.²¹ In 2019-2020 alone, 499 children aged between 10 and 13 were imprisoned, 65 percent of whom are First Nations children.²²

There is a strong link between the disproportionate rates of juvenile detention and the disproportionate rates of adult imprisonment.²³ Raising of the minimum age of criminal responsibility may act to intervene in the early cycle of contact with the criminal justice system, and potentially reduce the over-representation of First Nations children and adults in the criminal justice system.²⁴

The current minimum age for criminal responsibility does not reflect the multiple and complex needs of children and young people who come into contact with the justice system.²⁵ Many young people in the justice system have complicated and multifaceted needs, including mental health and disability. Nationally, over 75 per cent of imprisoned children and young people are living with one or more mental illness. Incarceration in childhood is associated with increased risks of suicidality, depression, substance use, mental illness and cognitive and psychosocial disability.²⁶

²⁰ Aboriginal Legal Service (NSW/ACT), Submission to Council of Attorney-General, *Age of Criminal Responsibility Working Group* (3 March 2020), 21.

²¹ RMIT University: Centre for Innovative Justice, Submission to the Council of Attorney-General, *Review of Age of Criminal Responsibility* (February 2020), 3.

²² Human Rights Law Centre, 'Children Continue To Be Jailed In Year Since Attorneys-General Failed To Raise The Age' (Webpage, 2021) <<https://www.hrlc.org.au/news/2021/7/26/children-continue-to-be-jailed-in-year-since-attorneys-general-failed-to-raise-the-age>>.

²³ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system* (2011), 247.

²⁴ National Aboriginal and Torres Strait Islander Legal Services, Submission to the Council of Attorneys-General, *Age of Criminal Responsibility Working Group* (28 February 2020) 26.

²⁵ RMIT University: Centre for Innovative Justice (n 21), 4.

²⁶ Royal Australasian College of Physicians, 'Submission to the Council of Attorneys General Age of Criminal Responsibility Working Group Reviewing', February 2020, 3.

The causal link between incarceration and poor mental health is well established, with some studies showing one third of incarcerated youth diagnosed with depression experienced its onset following incarceration.²⁷ Exposure to trauma and separation from home and community resulting from detention has been found to further exacerbate these risks.²⁸

Young people with cognitive and psychological disability are overrepresented across Australia's juvenile justice system.²⁹ Behaviours associated with cognitive and psychosocial disabilities such as attention-deficit/hyperactivity disorder (ADHD) and fetal alcohol spectrum disorder (FASD) are often misinterpreted as non-compliance or defiance³⁰ and met with punitive measures including excessive force, the use of physical restraints and prolonged solitary confinement.³¹

First Nations children and young people living with cognitive and psychosocial disability are more likely to be criminalised,³² have substantially higher rates of contact with police and face higher rates of violence and abuse by prison staff and police compared to their non-indigenous counterparts.³³ This is a direct result of the systemic racism imbedded in our criminal justice system.

First Nations children and young people and young people living with disability should be supported through culturally appropriate community-based responses, with a focus on prevention, diversion and support rather than punishment.

For children aged 14-17 years, detention should only occur as a measure of last resort and for the shortest possible time

Enhanced funding and supports are urgently needed for diversionary programs and restorative strategies as alternatives to criminalisation. Aboriginal and Torres Strait Islander organisations must lead the program design and delivery for First Nations children and their families

Enhanced funding and supports are urgently needed for Aboriginal and Torres Strait Islander-controlled services in the delivery of culturally safe and trauma informed health, family and disability support, education, cultural connection, healing and other support services

d) International human rights standards

The United Nations Committee on the Rights of the Child has, in successive concluding observations on Australia's periodic reports under the *Convention on the Rights of the Child*, repeatedly called for Australia to increase its "very low" minimum age of criminal responsibility in

²⁷ Human Rights Law Centre (n 7), 6.

²⁸ Royal Australasian College of Physicians (n 26), 3.

²⁹ New South Wales Bar Association, Submission to Council of Attorney-General, Age of Criminal Responsibility Working Group Review (4 March 2020) 4.

³⁰ Law Council of Australia (n 2), 16.

³¹ Leanne Dowse, Simone Rowe, Eileen Baldry and Michael Baker, 'Police Responses to People with Disability', Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2021) 100, 108.

³² Aboriginal Legal Service of Western Australia (n 17) 9.

³³ Aboriginal Legal Service of Western Australia (n 17) 11.

line with international standards.³⁴ Fourteen is the minimum accepted age for criminal responsibility under international human rights law. As such, Australia's statutory minimum age of 10 is in clear breach of international human rights law and standards.

Overseas jurisdictions suggest that systems can be established to provide interventions and safeguard the community whilst providing for young people in an appropriate and meaningful way to avoid criminalisation and its harmful effects.³⁵ The United Nations Committee on the Rights of the Child has stated that "no child should be deprived of liberty, unless there are genuine public safety or public health concerns", which encompasses any form of detention, imprisonment or custodial setting.³⁶

Australia must come into line with international human rights standards, extending protection to those between the ages of 10-13 years. Furthermore, State and Territory Governments must consider making available less rights-restrictive options to address offending by children and young people in place of criminalisation and detention.³⁷

The minimum age of criminal responsibility should be raised to at least 14 years for all offences consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment, and in line with international standards

e) Alternatives to criminalisation

When young children are forced through a criminal legal process, their health, wellbeing and future are put at risk. Punitive approaches simply don't work.³⁸ Furthermore, the incarceration of children has significant economic costs.³⁹ However, alternative non-adversarial options are available to governments. Justice reinvestment, restorative justice and culturally appropriate diversionary programs have been found to be more cost-effective responses to young offenders.⁴⁰

The Aboriginal Justice Caucus submitted that community designed and led programs are best placed to support First Nations children and communities.⁴¹ Programs and services designed and facilitated by First nations communities help strengthen cultural connection and work to re-establish broken relationships.⁴² The Royal Australian and New Zealand College of Psychiatrists also supports funding and supporting programs and diversionary strategies to prevent

³⁴ ACT Human Rights Commission (n 15) 4.

³⁵ Danila Dibla Health Service (n 4) 9.

³⁶ North Australian Aboriginal Justice Agency, Submission to Council of Attorney-General, *Age of Criminal Responsibility Working Group Review* 7.

³⁷ ACT Human Rights Commission (n 15), 5.

³⁸ Amnesty International, 'Australia: Stop Locking Up 10 Years Olds In Prison', *Amnesty International Australia* (Webpage, 2021) <<https://action.amnesty.org.au/act-now/raise-the-age>>.

³⁹ Aboriginal Legal Service (NSW/ACT) (n 20), 21.

⁴⁰ RMIT University: Centre for Innovative Justice (n 21) 7; ACT Human Rights Commission (n 15) 3

⁴¹ Aboriginal Justice Caucus, Submission to Council of Attorney-Generals, *Age of Criminal Responsibility Working Group* (February 2020) 7.

⁴² Aboriginal Justice Caucus (n 41), 10.

disadvantage in early childhood years, through rehabilitation, reintegration, and mental health care.⁴³

The Australian Governments must consider funding holistic approaches that cater for children's needs and are tailored to their local context;⁴⁴ approaches that support rather than punish children and young people. Rather than continuing down the path of hyper-incarceration, all levels of Government must work to increase the availability of culturally safe alternatives to detention concurrent with raising the age of criminal responsibility to 14 years.

Enhanced funding and supports are urgently needed for diversionary programs and restorative strategies as alternatives to criminalisation. Aboriginal and Torres Strait Islander controlled organisations must be at the centre of program design and delivery for First Nations children and their families.

Enhanced funding and supports are urgently needed for Aboriginal and Torres Strait Islander controlled services in the delivery of culturally safe and trauma informed health, family support, education, disability, cultural connection, healing and other support services.

⁴³ The Royal Australian and New Zealand College of Psychiatrists (n 16), 4.

⁴⁴ Aboriginal Legal Service (NSW/ACT) (n 20), 31.