



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

Queensland Parliament Community Support and Services Committee

November 2021

About Us

Change the Record is Australia's only national First Nations-led justice coalition. We have two objectives - to end the mass incarceration of Aboriginal and Torres Strait Islander peoples and to end the disproportionate burden of family violence experienced by Aboriginal and Torres Strait Islander peoples. We urge all governments to raise the minimum age of criminal responsibility to at least 14 years old, to keep our very young children with family and in community and out of the criminal legal system which so often traps them into their adult years.

We are a member of the national Raise the Age campaign steering committee.

Our submission

Change the Record thanks the committee for the opportunity to provide comment on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021.

We support the bill and we urge the Queensland parliament to legislate to raise the minimum age of criminal responsibility (MACR) to at least 14 years old, with no exemptions and no carve outs, as a matter of priority.

It is the responsibility of governments to ensure children are free to go to school, learn and play, have a safe home to live in, and are supported to grow and thrive with their families, friends and communities. However, in Queensland and all other Australian jurisdictions apart from the ACT, children as young as 10 years old are criminalised and incarcerated. Aboriginal and Torres Strait Islander children are vastly overrepresented in this cohort.

Locking children away in prison only leads to harm, increases their likelihood of future interaction with the criminal legal system, disrupts their education, compounds and worsens social and economic exclusion and disadvantage, traumatises and retraumatises children, families and communities and increases the risk of mental illness, poor health and ultimately premature death. These risks and harms are particularly acute for children and young people on the Autism spectrum, children with cognitive disabilities such as Foetal Alcohol Spectrum Disorders (FASD) and other developmental delays, and those who have already experienced complex trauma in their early years.

The medical and legal advice is clear: children do not have the neurological capacity or developmental maturity to form criminal intent, control their impulses or comprehend the consequences of their actions.¹ Sending a child to prison is always harmful, but medical experts have said 14 years old is the bare minimum age at which one could expect a child to have sufficient neurological development to be held criminally responsible.

Instead of responding to children and young people in trouble with punitive ‘tough on crime’ policies, governments should invest in supportive, strengths- and community-based early intervention and prevention services and holistic wraparound supports, including investing in Aboriginal Community-Controlled Organisations services to ensure First Nations children and families receive culturally safe support.

Closing the Gap on the mass incarceration of Aboriginal and Torres Strait Islander children and young people

Aboriginal and Torres Strait Islander children have the right to grow up strong and safe in their culture, on Country, with family and community. However, under the current legal framework Aboriginal and Torres Strait Islander children are disproportionately criminalised and incarcerated, more likely to be stopped and questioned by police, to be arrested rather than given a formal warning, be taken into custody and held instead of being summonsed to appear in court, and more likely to be remanded in custody instead of being bailed.² The low age of criminal responsibility is a key driver of Aboriginal and Torres Strait Islander children’s contact with the criminal legal system.

¹ See Trevitt, S. and Browne, B., ‘Raising the age of criminal responsibility’, 2020, Change the Record and The Australia Institute discussion paper, p10-11, available at <<https://www.changetherecord.org.au/RaiseTheAge>>.

² Commonwealth of Australia, ‘Doing Time - Time for Doing - Indigenous youth in the criminal justice system’, 2011, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, p200-205, <<https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf>>.

In Queensland in 2019-20, First Nations children and young people aged 10-17 were 20 times as likely as non-Indigenous children and young people to be under supervision orders, and 29 times as likely to be in detention.³ 365 children under the age of 14 were placed in detention or under supervision orders in Queensland in the same period. 32 were 10-11 years old, 117 were 12 years old, and 216 were 13 years old.⁴ Nearly 8 out of 10 of these children were First Nations.⁵

Aboriginal and Torres Strait Islander grandmothers, parents and families who have watched their children and grandchildren become trapped in the criminal legal system have driven the campaign to raise the age of criminal responsibility in Australia as a matter of justice, survival and sovereignty. The vast overrepresentation of Aboriginal and Torres Strait Islander children in the criminal legal system is the result of historic and ongoing colonisation, dispossession, displacement from Country, fracturing of families and communities through child removal, the failure of successive state and federal governments to address and redress persistent socio-economic disadvantage and adverse health outcomes, and systemic racist discrimination against First Nations peoples.⁶

Raising the MACR to at least 14 years old is an opportunity for the Queensland government to act to directly reduce the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal legal system, and to put in place community-controlled and culturally safe and appropriate services and supports for First Nations children and families who need it. This reform is crucial to improving health and wellbeing outcomes for First Nations peoples across the lifecourse, and will support the government in achieving its commitments and obligations under the National Agreement on Closing the Gap.

³ Australian Institute of Health and Welfare, Youth justice in Australia 2019-20, Queensland Fact Sheet, 28 May 2021, <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/contents/state-and-territory-fact-sheets/queensland>>.

⁴ Figures from 2019-20: AIHW, *Youth Justice National Minimum Data Set 2000-01 to 2019-20*, (Catalogue No JUV 134, 21 May 2021) Supplementary Tables S36b and S74b, accessed 30/11/2021 at <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/data>>.

⁵ *Ibid.*, Supplementary Tables 42b and 80b.

⁶ National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group: Raising the Age of Criminal Responsibility, 28 February 2020, p11, <<https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a393e2983c1c4bf7a1e766/1621332963750/NATSILS.pdf>>.

Community expectations and international comparisons

The current MACR in Queensland is out of step with both domestic community expectations and the international community, and is among the lowest ages of criminal responsibility in the world.

Polling by Change the Record and The Australia Institute in 2020 found that the vast majority of Australians had no idea that children as young as 10 could be arrested and imprisoned. When they found out they were appalled, and supported raising the age to at least 14 years old, in line with medical advice and evidence. According to our research, 66% of Queenslanders either support, strongly support or do not oppose raising the age to at least 14.⁷

The UN Convention on the Rights of the Child (CRC) holds that the best interests of the child shall be a primary consideration in all decision making (Art.3 (1)) and that the arrest, detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time (Art 37. (b)). As a signatory to the CRC, Australia has committed to upholding these rights. Australian jurisdictions' practice of criminalising and incarcerating children under 14 years old, often for property crimes and often being held in custody before conviction or sentencing, is inconsistent with our obligations under the CRC.

The median age of criminal responsibility worldwide is 14 years old, and the United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years of age or older, and that the law should ensure children under the age of 16 are not deprived of their liberty. In countries like Denmark, Finland, Norway, Sweden, Austria, Spain, Hungary, Italy, Germany, China and Russia children under 14 years old (and in some cases even older) cannot be put in handcuffs, arrested by police or sent to youth detention centres.⁸

For years, the international community has called on Australia to raise the MACR to at least 14. In 2017, both the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination (CERD) called on Australia to take active steps to raise the age. The CERD expressed specific concern about the disproportionate incarceration of Aboriginal and Torres Strait Islander children. In January 2021, 31 UN member states called on Australia to raise the age to 14 years old.⁹

⁷ Trevitt and Browne, op. cit p21.

⁸ Human Rights Commission, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group: Raising the Age of Criminal Responsibility, 26 February 2020, <https://humanrights.gov.au/sites/default/files/ahrc_20200226_submission_cag_working_group_macr.pdf>.

⁹ Australian Broadcasting Corporation, 'Australia urged by 31 countries at UN meeting to raise age of criminal responsibility', 21 Jan 2021, <<https://www.abc.net.au/news/2021-01-21/un-australia-raise-the-age-of-criminal-responsibility/13078380>>.

Carceral responses to kids in trouble cause more harm

According to the Law Council and Australian Medical Association, holding children criminally responsible is ‘out of step with medical consensus regarding brain development’, and that at 10 years old the brain has not sufficiently developed for a child to be criminally responsible for their actions.¹⁰ Medical experts have also found that sending children to prison can cause them lifelong harm, increase rates of mental illness, trauma, and even lead to early death.¹¹

Children in grades four, five and six do not have the cognitive development to be held criminally responsible for their actions.¹² The Royal Australasian College of Physicians explains that “adolescence is a critical time in a person’s development. Isolation and a lack of access to health services are damaging to the healthy development of a child.”

Children under the age of 14 years have not yet developed the social, emotional and intellectual maturity necessary for criminal responsibility. This rationale is why children and adults are treated differently by the legal system and afforded different legal rights and capacities at different stages of development (e.g. the right to drink, vote, marry etc.) The age of criminal responsibility of 10 years old is currently out of step with these other legal rights.

The Queensland government’s own Youth Justice Strategy is based on four pillars of early intervention, keeping children out of court, keeping children out of custody, and reducing offending, as detailed in the 2018 Atkinson Report on Youth Justice. The Strategy cites evidence of the intersecting and profound difficulties and vulnerabilities that children coming into contact with the criminal legal system face:

- 31% have a parent that has been held in adult custody;

¹⁰ Law Council and Australian Medical Association, ‘Minimum Age of Criminal Responsibility’, Joint Policy Statement, 2019, p2, <https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-ea11-9403-005056be13b5>.

¹¹ Australian Medical Association, ‘AMA calls for age of criminal responsibility to be raised to 14’, (Media release and Position Paper, 2019) <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>.

¹² Judge Andrew Becroft, ‘From Little Things, Big Things Grow’ Emerging Youth Justice Themes in the South Pacific, 5 referring to Sir Peter Gluckman Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence (Wellington, Office of the Prime Minister’s Science Advisory Committee, 2011), p 24. See also Kelly Richards, ‘What makes juvenile offenders different from adult offenders? Trends & Issues in crime and criminal justice’ (2011), 4. See further Laurence Steinberg ‘Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science’ (2007) 16 Current Directions in Psychological Science 55, 56.

- 58% had a diagnosed or suspected mental health or behavioural disorder;
- 52% were totally disengaged from education;
- Almost 20% were experiencing homelessness or had unsuitable accommodation;
- 51% had some involvement with child protection agencies and
- 17% had a diagnosed or suspected disability.¹³

Imprisoning children, particularly those with existing vulnerabilities and comorbidities, risks causing them enormous harm and can compound and worsen trauma and developmental delays. It increases children's risk of depression, suicidality and self harm and damages emotional development. Isolation and solitary confinement can have severe, long-term and irreversible impacts on a child's health and wellbeing.¹⁴

There has been extensive research in Australia and internationally into the impacts of incarcerating children on future offending. There is strong evidence that locking children up does not work to keep the community safer, or reduce future offending by the child. Instead, it is estimated that children arrested before the age of 14 are three times more likely to reoffend as adults than children who come into contact with the criminal legal system when they are over 14 years of age.¹⁵ As leading criminologist Professor Chris Cunneen explains:

"A small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age. For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending."¹⁶

Removing these children from their communities and placing them in youth prisons increases their risk of criminal offending and negative peer influence. "It is widely recognised that some criminal

¹³ Queensland Government, Youth Justice Strategy 2019–2023, accessible at <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategy.pdf>.

¹⁴ Baldry, E. and Cunneen, C., 'Locking up kids damages their mental health and leads to more disadvantage. Is this what we want?', 21 June 2019, The Conversation, <https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674>.

¹⁵ Queensland Family & Child Commission, 'The Age of criminal responsibility in Queensland', 2017, Report, p30, <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/policy/minimum-age-criminal-responsibility.pdf>.

¹⁶ Cunneen, C., 'Arguments for Raising the Minimum Age of Criminal Responsibility', 2017, Research Report, Comparative Youth Penalty Project, University of New South Wales, <https://www.cypp.unsw.edu.au/sites/ypp.unsw.edu.au/files/Cunneen%20%282017%29%20Arquments%20for%20raising%20the%20minimum%20age%20of%20criminal%20responsibility.pdf>.

justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are ‘universities of crime’ that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks.”¹⁷

Article 40 of the UN CRC states that “every child alleged as, accused of or recognized as having infringed criminal law should always be treated in a manner consistent with the promotion of the child’s sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.”

Unfortunately, and against all the evidence, earlier this year the Queensland government introduced retrograde and harmful changes to the Youth Justice Act 1992, including a presumption against bail for some children and young people.¹⁸ As predicted, these laws have caused the number of children in custody to skyrocket.¹⁹ Instead of persisting down a path of punishment and appeals to ‘tough on crime’ rhetoric, it’s our view that Queensland should follow the evidence and its own obligations under domestic and international agreements and human rights frameworks to support children and act to get them out of the criminal legal system.

The alternatives

In addition to raising the MACR to at least 14, without exceptions, the best evidence supports prioritising voluntary, preventative, family-based, community-driven responses, and investment in Aboriginal Community-Controlled Organisations (ACCOs) and services.

In developing and expanding alternatives to criminal legal responses to children, Change the Record recommends the inclusion of principles that reflect the overrepresentation of First Nations children within the criminal justice system, and the specific changes and interventions that are required to reverse this trend. These include:

¹⁷ Australian Institute of Criminology, ‘What makes juvenile offenders different from adult offenders?’, 2011, Trends and Issues in crime and criminal justice series, No. 409, p6-7, <<https://www.aic.gov.au/sites/default/files/2020-05/tandi409.pdf>>.

¹⁸ Department of Children, Youth Justice and Multicultural Affairs, ‘Changes to the Youth Justice Act 1992’, 2021, Queensland Government, website, <<https://www.cyjma.qld.gov.au/youth-justice/reform/changes-youth-justice-act-1992>>.

¹⁹ Australian Broadcasting Corporation, ‘Queensland’s crackdown on serious youth crime ‘working’, police say’, 27 August 2021, online article, <<https://www.abc.net.au/news/2021-08-27/queensland-youth-crime-reform-data-revealed/100412328>>.

- Investing in Aboriginal controlled community organisations, programs and early intervention initiatives
- Investing in wrap-around family supports and services *separate to* the child protection system
- Supporting First Nations families to reduce child removals and provide culturally-safe services and supports
- Recognising the systemic failures that lead to the overrepresentation of First Nations children in the criminal justice and child protection system and developing a whole-of-government response to chronic housing shortages, improving educational participation and holistic health outcomes.

Current systems for working with children and young people in trouble, including police, are overwhelmingly crisis-oriented. Investment in early intervention and prevention services and a refocusing on early referral to supportive services are needed to give children and young people the best chance of never having to interact with the criminal legal system. It should not be the case that a young person's first referral to a support service should come after they have come into contact with the criminal legal system.

Multidisciplinary Panels

It's our view that jurisdictions should explore establishing Multidisciplinary Panels where children can be referred if they come into contact with police or if their behaviour raises concerns within the home, community or school. Such panels bring together key service providers to support the needs of children and families, diverting children away from the criminal legal system and ensuring that appropriate assessments, identification of needs and further referrals to relevant services occur. Processes would be voluntary, confidential and limited to the service providers in the room unless consent is given for further referral or case coordination. To avoid the risk of alienating families and children who fear that participation in case coordination may result in forced child removal, processes would explicitly not involve referrals to the child protection system.

Invest in safe, supported accommodation options for at-risk children and young people

Communities, police, youth workers and social workers have repeatedly raised concerns about a lack of stable accommodation for children and young people with challenging behaviours. In its 2017 report on the Age of Criminal Responsibility in Queensland, the Queensland Family & Child Commission noted ‘the direct and indirect relationship between low income status and children’s offending: that it can be both a product of necessity and of environment. During consultations, children and social workers said that detention was not a deterrent for some offenders as they appreciated having secure and stable accommodation.’²⁰ It is unacceptable that any child should be placed in a position where they feel compelled to choose between homelessness and a prison cell. There is a clear unmet need for safe, supported crisis, short- and medium-term accommodation and housing options for children and young people experiencing or at risk of homelessness, and this need must be met as a matter of urgency.

Early intervention and prevention programmes

Speaking on best practice alternatives to incarcerating children, the UN Committee on the Rights of the Child has stated:

‘Prevention and early intervention programmes should be focused on support for families, in particular those in vulnerable situations or where violence occurs. Support should be provided to children at risk, particularly children who stop attending school, are excluded or otherwise do not complete their education. Peer group support and a strong involvement of parents are recommended. States parties should also develop community-based services and programmes that respond to the specific needs, problems, concerns and interests of children, and that provide appropriate counselling and guidance to their families.’²¹

²⁰ Queensland Family & Child Commission, op. cit, p18.

²¹ United Nations Committee on the Rights of the Child, General comment No. 24 (2019) on children’s rights in the child justice system, IV.A.9, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAIgpOwHQjsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>.

Examples of successful programmes already extant in Queensland include:

Healing Foundation

The Healing Foundation supports members of the Stolen Generations, Aboriginal and Torres Strait islander children and promotes community healing . Through strengths-based and trauma-informed programs, the Foundation addresses intergenerational trauma suffered by Aboriginal and Torres Strait Islander peoples, including from the forced removals of children.

One program is the Murri School, a P–12 Aboriginal and Islander independent community school in Brisbane’s South. The Murri School centres holistic and family-centred approaches to Indigenous children’s education. Recognising the importance of physical, emotional and cultural health, the school emphasises Indigenous family ties and engages a wide community in the support of a student.

The Foundation and its programs have been evaluated over 20 times. A 2017 evaluation of the Murri School by Deloitte found that students who attended the school had better education outcomes, better mental health and less contact with the child protection and justice systems. Deloitte found that for every dollar invested in the program, there was a community benefit of \$8.85.²² The Murri School demonstrates the importance of caring for Indigenous children in their communities, and the enormous fiscal cost of punitive carceral approaches compared to care and support.

Life Without Barriers

Life Without Barriers is a national community services provider that delivers programs in foster care, disability, aged care and youth services. They have an approach for working with Aboriginal and Torres Strait Islander peoples that emphasises cultural respect and safety, self-determination, partnership and holistic and strengths-based practices.

Their program YouthChoices targets children aged 10–16 who are at high risk of recidivism. YouthChoices emphasises evidence-based Multi-Systemic Therapy, working closely with families and caregivers at least two to three times a week in their homes. The holistic approach considers the different environments, or ‘systems’, in a child’s life and considers how each of them —

²² Deloitte Access Economics, ‘Cost Benefit Analysis of the Murri School Healing Program’, Report, February 2017, <https://www.healingfoundation.org.au//app/uploads/2017/09/HF2017_Murri_School_Healing_Program_Report_V9_WEB.pdf>.

including home, family, school, culture, neighbourhood and friends — can facilitate positive behavioural change.

YouthChoices recognises the importance of maintaining and supporting relationships in a stable home life, relationships that are threatened if a child is sent to youth detention.

Youth Empowered Towards Independence (YETI)

YETI is a youth support agency based in Cairns. They run many programs supporting children in Far North Queensland, including in general youth support, drugs and alcohol, mental health and Next Step Plus which supports young adults with experience in out-of-home arrangements to build independent lives.

They also run a strengths-based and trauma-informed crime prevention program called Strong Together aimed at young people aged 10–15. Strong Together is therapeutic and strengths-based, helping families to support the child and strengthen existing skills in self-management.

The program involves intensive and tailored family case management, individual supports, highly accessible phone contact and culturally responsive community resources and initiatives. Crucially, Strong Together supports children over an extended period — typically 18 months — and focuses on empowering agency for clients, including around legal decisions.

Referrals are primarily made by Youth Justice and the local Bail Support Services. Strong Together is funded by the Queensland Government's Community Youth Response Diversion program. YETI have been externally accredited in the Standard on Culturally Secure Practice (Alcohol and Other Drug Sector). Two other YETI programs have been positively evaluated.

November 2021 Meeting of Attorneys-General communique

We note that at the 12 November 2021 Meeting of Attorneys-General, 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.'²³ Change the Record Co-Chair Cheryl Axelby condemned the announcement as 'a

²³ Meeting of Attorneys-General Communique - 15 November 2021, <<https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>>

nothing announcement that does nothing to improve the lives of children, and nothing to close the gap', and noted that '[t]hree years ago Attorneys General committed to explore options to raise the age and they have done nothing since then. Only the ACT has taken action in line with the medical evidence to raise the age.'²⁴ We consider this communique to be little more than a political stunt designed to create the impression of action in the face of growing community support for this critical reform.

We are further disturbed by the limited scope of this to-be-developed proposal, indicating Attorneys-General intend to consider raising the MACR to 12 rather than 14 years of age. We note that if the Queensland government chose only to raise the age to 12 years old, 131 out of the 145 children under 14 behind bars last year would remain locked away in prison cells.²⁵ Raising the age to just 12 years old flies in the face of the medical evidence and would leave hundreds of children languishing in the criminal legal system without the support they deserve and need to thrive.

Attorneys-General have been provided with sufficient expert advice and evidence to support raising the age to 14, with the Council of Attorneys-General's own draft report on raising the age reportedly recommending the reform.²⁶ In acting to raise the MACR to 14 years old in its own jurisdiction and developing an action plan to replace carceral responses with support, the ACT government has demonstrated that reform is eminently achievable if the political will exists.

We urge the Queensland parliament to act on the medical, legal and social evidence and finally commit to raising the MACR to at least 14 years old with no exemptions or carve outs. Implementing this critical reform and replacing carceral responses to children in trouble with holistic, culturally safe, wraparound supports will reduce offending, incarceration and disadvantage across the lifecourse, improve health and wellbeing outcomes for vulnerable children and young people, and keep children, families and communities safer.

²⁴ Change the Record, 'A "nothing announcement" that does nothing to help children', 13 November 2021, media release, <<https://www.changetherecord.org.au/change-the-record/posts/a-nothing-announcement-that-does-nothing-to-help-children-says-change-the-record>>.

²⁵ AIHW, *Youth Justice National Minimum Data Set 2000-01 to 2019-20*, op. cit., Supplementary Table S74b.

²⁶ The Guardian, 'Australian governments accused of hiding evidence supporting lift in age of criminal responsibility', 19 May 2021, online article, <<https://www.theguardian.com/australia-news/2021/may/19/australian-governments-accused-of-hiding-evidence-supporting-lift-in-age-of-criminal-responsibility>>.

We thank the committee for the opportunity to provide this submission, and would welcome the opportunity to engage further.

Yours sincerely,

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