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Office of the President

30 November 2021

Our ref: [BDS/KS:MC]

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: CSSC@parliament.qld.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (**the Bill**).

This submission has been compiled with the assistance of the Queensland Law Society (QLS) Children's Law Committee, First Nations Legal Policy Committee, Human Rights and Public Law Committee, Access to Justice and Pro Bono Law Committee, and the Criminal Law Committee, whose members have substantial expertise and involvement in this practice area and in representing and supporting children and young people through the youth justice system.

1. Community safety

QLS recognises the importance of Queenslanders to be and feel safe in their community. We acknowledge the concerns held by community members and those who have been impacted by youth crime in Queensland. The Society considers that the safety and security of all Queenslanders should be front of mind when considering any legislative reform.

In order to address safety concerns and better facilitate understanding of the issues relating to youth crime, the community must have ready access to accurate and reliable information and data. It is the role of the Queensland legal profession to assist the public and the media in its understanding of legal processes (such as bail and sentencing) as they apply to children and young people and the Society takes this role very seriously.

2. QLS position

QLS strongly supports the proposed amendments to raise the minimum age of criminal responsibility to 14 years. The Bill aligns with QLS's longstanding position that the minimum age of criminal responsibility should be raised to at least 14 years. Through proactive advocacy to

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the Government and Opposition and through our State and Federal Call to Parties Statements, the Society has been a strong advocate for raising the minimum age of criminal responsibility.

QLS welcomes the proposed amendments contained in the Bill, including those provisions that:

- Raise the age of criminal responsibility to 14 years;¹
- End proceedings and punishment against a child where they committed an offence under 14 years;²
- End the detention of a child in a detention centre or a watch-house where a child committed an offence under 14 years;³
- Allow the destruction of any identifying particulars and evidence collected for an offence that committed when the child was under the age of 14 years;⁴ and
- Expunge the criminal history of a child who committed an offence under 14 years.⁵

QLS holds some reservations regarding the transitional provisions in the Bill that amend the *Youth Justice Act 1992*. Those concerns are addressed below.

3. Background

Currently, the minimum age of criminal responsibility is 10 across all Australian jurisdictions (subject to the rebuttable presumption of *doli incapax*, which is discussed below).⁶ However, we note that the ACT Government has committed to raising the minimum age of criminal responsibility with public consultation which was undertaken earlier this year.⁷ We also note that raising the age has also been considered at the Federal level, through the Council of Attorneys-General Age of Criminal Responsibility Working Group.

QLS understands community concerns regarding how children and young people who commit serious or violent offences are dealt with in the youth justice system if these amendments were enacted. Whilst QLS recognises this as a genuine concern, the evidence demonstrates that it is rare for children aged 10 to 14 to commit serious or violent offences.⁸ The data indicates that

¹ Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 cl 3.

² Ibid cl 5.

³ Ibid cl 5.

⁴ Ibid cl 5.

⁵ Ibid cl 5.

⁶ *Criminal Code Act 1899* (Qld) s 29; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Children, Youth and Families Act 2005* (Vic) s 344; *Criminal Code 2002* (ACT) s 25; *Young Offenders Act 1993* (SA) s 5; *Criminal Code Act Compilation Act 1913* (WA) s 29; *Criminal Code Act 1924* (Tas) s 18; *Crimes Act 1914* (Cth) s 4M.

⁷ See: <https://yoursayconversations.act.gov.au/raising-minimum-age-criminal-responsibility>.

⁸ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 38.

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young offenders tend to be underrepresented when it comes to serious offences.⁹ In countries where the minimum age of criminal responsibility is 14 years or higher, research indicates there are no negative consequences in terms of crime rates.¹⁰

Further, QLS notes that children and young people who commit serious or violent offences are unlikely to have the necessary capacity to understand the criminal nature of their offending (this is discussed further below). It is also unlikely that serious or violent offences committed by children and young people will satisfy the principle of *doli incapax*, provided it is administered appropriately (this is discussed further below).

By contrast, low minimum ages for criminal responsibility can contribute to early criminal pathways for young people. Early contact with the criminal justice system is one of the key predictors of youth and adult offending; children who come into contact with the criminal justice system are seven times more likely to become adult offenders.¹¹ A low age of criminal responsibility can therefore entrench criminality, heighten reoffending rates and create cycles of disadvantage.¹²

4. *Doli incapax*

Children aged between 10 and 14 are subject to a rebuttable legal presumption known as *doli incapax*, which provides that children under the age of 14 are presumed not to possess the necessary knowledge required to have criminal intent.¹³ *Doli incapax* can be rebutted by evidence indicating that a child knew their actions were morally wrong.¹⁴

The principle of *doli incapax* has been criticised as ineffective and discriminatory. For example, the United Nations Committee on the Rights of the Child has criticised systems such as *doli incapax*, as it can lead to discriminatory practices.¹⁵ The Atkinson Report on Youth Justice observed that the 'presumption is rarely a barrier to prosecutions', with many in the profession reporting that the threshold to rebut the presumption is 'too low'.¹⁶ As a result, many children

⁹ Chris Cunneen, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) 57.

¹⁰ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 38.

¹¹ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 9, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹² Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 9, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹³ *Criminal Code Act 1899* (Qld) s 29(2).

¹⁴ *Ibid* s 29(2).

¹⁵ Australian Human Rights Committee, *Review of the age of criminal responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 15.

¹⁶ Bob Atkinson AO, *Report on Youth Justice* (8 June 2018), <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/reform/youth-justice-report.pdf>>.

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are being held criminally responsible, despite lacking the cognitive maturity required to understand the criminal nature of their behaviour.¹⁷

Further, the presumption has been criticised for its complexity, which leads to errors and inconsistencies in its application, both procedurally and substantively.¹⁸ While the onus of rebutting the presumption lies with the prosecution, reports suggest that in practice, the defence often bears the onus of raising and establishing incapacity.¹⁹ For example, if the defence wishes to rely on the presumption, the prosecution or the Court may request that a psychological assessment of the child be undertaken and prepared by the defence in order to establish their capacity.²⁰ Not only does this reverse the onus, but it also presents a barrier for those in the youth justice system who do not have access to funding to undertake capacity assessments and to obtain the necessary reports to diagnose mental health issues or neurological disorders bearing on their capacity. This is a significant access to justice issue.

In order to overcome the complexity in rebutting the presumption, the Australian Human Rights Commission has observed that in some cases the prosecution has been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible.²¹

Moreover, children are subject to criminal processes, including detention, while they wait to have the presumption of capacity heard and determined in a court hearing.²² This is the case even where children are eventually found not to have the necessary knowledge for criminal intent. QLS has received member feedback that there are significant delays associated with progressing matters where *doli incapax* is an issue. In part, this can be contributed to the complexity of *doli incapax* and the fact that the defence is required to collate material to substantiate the presumption. This consequence is of particular concern given that research demonstrates that custody has damaging effects on children, including by separating them from family and community and disrupting their education and access to therapeutic programs.²³ The presumption of *doli incapax* is intended to remove children who lack the capacity for criminal behaviour from the criminal justice system. However, the experience of children on remand can

¹⁷ Ibid.

¹⁸ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 21, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹⁹ Australian Human Rights Committee, *Review of the age of criminal responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 15; Kate Fitz-Gibbon and Wendy O'Brien, *A Child's Capacity to Commit Crime: examining the Operation of Doli Incapax in Victoria (Australia)* (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 22-23.

²⁰ National Legal Aid, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (28 February 2020) 30, <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-nla-submission-cag-age-of-criminal-responsibility-review-28-feb-2020.pdf>>.

²¹ Australian Human Rights Commission, *Review of the age of criminal responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 15.

²² Amnesty International, *Raise the Age: Kids belong in community* (May 2020), <<https://www.amnesty.org.au/wp-content/uploads/2020/05/Raise-the-Age-Kids-Belong-in-Community-2020.pdf>>.

²³ Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project', *Research and public policy series no. 125*. Canberra: Australian Institute of Criminology <<https://aic.gov.au/publications/rpp/rpp125?>>.

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defeat this purpose and exacerbate the underlying issues that contribute to the offending behaviour.²⁴

Raising the age of criminal responsibility to 14 removes the need to apply *doli incapax*, and addresses the problematic consequences associated with its application. For this reason, QLS supports the amendments contained in the Bill that increase the age of criminal responsibility to 14 years.

5. The science of cognitive development in young people

Raising the minimum age of criminal responsibility is supported by neuroscience and child development research, which indicates that brains mature gradually over adolescence, nearing complete maturity at 25 years.²⁵ In particular, the capacity for abstract reasoning is still undergoing significant development in children aged 12 to 13 years.²⁶ Ongoing neurodevelopment in early adolescence can affect a range of areas of cognitive functioning including impulsivity, reasoning and consequential thinking.²⁷ Research studies establish that a 'law and order' morality is generally not achieved until mid-teens,²⁸ and logical thinking and problem-solving abilities develop considerably between the ages of 11 and 15.²⁹

It is largely for these reasons that Federal, State and Territory laws recognise adolescence as an indicator of the ability of a young person to make decisions about their lives. For example, children do not have legal capacity to enter into a contract, rent a home, apply for a passport, get married, vote, sit on a jury or make other long-term decisions about their care. There is a significant disparity between these laws and the current criminal law that permits children as young as 10 to be charged, convicted and incarcerated.

Further, as a consequence of ongoing neurodevelopment, children in their early adolescence are unlikely to adequately understand the impact of their actions nor comprehend criminal

²⁴ Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project' (2013) 125 AIC Reports: Research and public policy series.

²⁵ Royal Australian College of Physicians, *RACP submission to the Council of Attorneys General Working Group reviewing the age of criminal responsibility* (July 2019), 3, <https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review_final-gm-approved.pdf?sfvrsn=b384e61a_6>, citing Sara B. Jonson et al., 'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy' (2009) *Journal of Adolescent Health* 45(3), 216 – 221. See also Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales' (2016) 67 Northern Ireland Legal Quarterly 269, 277.

²⁶ Australian Institute of Health and Welfare, *Youth Justice in Australia 208-19* (2020) 42, <<https://www.aihw.gov.au/getmedia/a5a364b9-fe69-4d02-9c93-1965a69a3d93/aihw-juv-132.pdf.aspx?inline=true>>; Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) quoting Nicholas Lennings and Chris Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

²⁷ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

²⁸ UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018) 3.

²⁹ Michael Lamb and Megan Sim, 'Developmental Factors Affecting Children in Legal Contexts' (2013) 13(2) *Youth Justice* 131.

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proceedings. In addition, child development, including the capacity for reasoning and consequential thinking, can be profoundly impacted by the environment in which a child is raised. Young people who come into contact with the criminal justice system typically have higher levels of neurodevelopmental impairment owing to experiences of childhood adversity, including neglect, physical and sexual abuse, family disruption, poverty and homelessness, and trauma.³⁰

In this context, Queensland's low age of criminal responsibility is out of step with current medical, behavioural and psychological research which suggests that young people, particularly those from disadvantaged backgrounds, largely do not have the cognitive capacity for the consequential thinking necessary to impute criminal intent. Accordingly, the Bill's proposal to raise the age of criminal responsibility to 14 years goes some way in bringing the law in Queensland in line with contemporary science and research.

6. The 'crossover' with the child protection system

QLS also highlights the considerable crossover between youth detention and child protection services, with 55% of young people in detention having received child protection services.³¹ This is of particular concern as child protection correlates with earlier contact with the criminal justice system.³² The crossover from care to crime is multifaceted, however, there is evidence to suggest that for children in care there is a practice of relying on police and the justice system in lieu of adequate behavioural management.³³ The result of this is that challenging behaviour of children in out-of-home care, such as property damage, is often criminalised, where the same behaviour by other children would not have elicited a criminal justice response.

Reducing the criminalisation of children in care requires a therapeutic response, which can be facilitated in part by raising the minimum age of criminal responsibility.

7. Human rights considerations

Australia is a party to the United Nations Convention on the Rights of the Child, which requires State parties to establish a minimum age below which children are presumed not to have the capacity to infringe penal law.³⁴

In 2019, the United Nations Committee on the Rights of the Child (the UN Committee) issued an update recommending the minimum age of criminal responsibility be raised to at least 14

³⁰ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 12, 16, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

³¹ Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 1 July 2014 to 30 June 2018*, (Report, 2019) 19.

³² Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 1 July 2014 to 30 June 2018*, (Report, 2019) 17.

³³ Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 14, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

³⁴ United Nations Convention on the Rights of the Child, art 40.

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years, and commending State parties with minimum ages set at 15 and 16.³⁵ The UN Committee also recommended that no child be deprived of liberty unless there are genuine public safety or public health concerns and encouraged State parties to set a minimum age for deprivation of liberty at 16 years.³⁶ In its concluding observations on Australia, the UN Committee expressed concern at the low age of criminal responsibility. It recommended that Australia raise the minimum age of criminal responsibility to an internationally accepted level of at least 14 years, after which the presumption of *doli incapax* would apply.

Additionally, section 32(3) of the *Human Rights Act 2019* (Qld) provides that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. Section 33(3) further states that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age. Incarcerating children under the age of 14 years fails to account for the mental, physical and emotional needs of a child, as required by the *Human Rights Act 2019* (Qld), and in our view, imposes a penalty that is inappropriate for a child of that age.

8. Cohort impacted by the Bill

The Bill amends section 29 of the *Criminal Code 1899* (Qld) to raise the criminal age of responsibility to 14 years.³⁷ The Bill also contains a number of transitional provisions that will divert or provide for the release of young offenders already held in detention centres or watch-houses, provided they committed the offence under the age of 14 years.³⁸

Accordingly, the Bill has the capacity to divert a number of young offenders from interacting with the criminal justice system. Recent data from 2019-2020 indicates that approximately 9% of Queensland's youth detention centre population is comprised of young people aged between 10 to 13 years.³⁹ Data from the same period indicates that there were, on average, 17 children aged 10 to 13 held in watch-houses each day.⁴⁰ There is also a concerning rate of incarceration for young First Nations young people, with Aboriginal and Torres Strait Islander children 22 times more likely to be in detention than their non-Indigenous counterparts.⁴¹

³⁵ United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in juvenile justice* (CRC/C/GC/24, 18 September 2019) [22], accessed at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>>.

³⁶ United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in juvenile justice* (CRC/C/GC/24, 18 September 2019) [89], accessed at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>>.

³⁷ Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 cl 3.

³⁸ *Ibid* cl 5.

³⁹ Department of Children, Youth Justice and Multicultural Affairs, *Youth Justice annual summary statistics: 2015-16 to 2019-20*, <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/resources/yj-annual-summary-stats-detention.pdf>>.

⁴⁰ Explanatory Note, Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, 4 – 5.

⁴¹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19* (Report, 15 May 2020) <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/contents/summary>>.

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Raising the age of criminal responsibility to 14 years will therefore divert a small but significant number of young offenders from the criminal justice system.

9. Release from detention and watch-houses

As noted above, the Bill amends the *Youth Justice Act 1992* to allow for the release of children in detention or watch-houses, provided they are being detained for an offence they committed under 14 years.

Where a child is held in a watch-house, the watch-house manager must arrange for the person to be released from custody as soon as reasonably practicable to do so but no later than three days after the commencement of the provision or the time the person would have otherwise been released from custody. In deciding when it is reasonably practicable to release the person from custody, section 409(3) provides that the watch-house manager *must* have regard to the welfare of the person, including whether the child will have access to appropriate accommodation, support from a parent or guardian, or any health or other services the person required while in custody. However, section 409(4) states that subsection (3) does not prevent the watch-house manager releasing the person from custody merely because the person will not have access to a thing mentioned in that subsection. The wording of this provision is concerning as a child could be released without appropriate accommodation, a parent or guardian, or a health or other service. Accordingly, the provision should be amended to ensure that children who are released from watch-houses are provided with the things mentioned in section 409(3).

A similar set of provisions and exceptions are contained in section 410 as they relate to releasing children from detention where they committed an offence under 14 years. For the reasons provided above, namely that a child could be released from custody without appropriate accommodation, a parent or guardian, or a health or other service, QLS is of the view that these provisions should be amended to ensure that a child who is released from custody is provided with the things mentioned in section 410. In our view, it is essential that support services are appropriately funded.

10. Alternatives to criminal proceedings

Prevention and early intervention strategies that aim to address the underlying factors which lead to criminality would better protect young people and the community. An effective response to youth offenders must combat the underlying factors that produce criminal behaviour, including poverty, homelessness (often because of lack of safety at home due to family and domestic violence), lack of educational engagement and attainment, physical and mental health conditions, including those that often manifest in challenging and difficult behaviours, and problems of addiction or substance abuse. This requires a whole of government response that invests in services directed towards family support, health support, disability support, educational strategies to support at risk youth, youth engagement and rehabilitation.

It is the experience of our members that children do not have sufficient access to suitable health and rehabilitation services and educational services once placed in youth detention. By placing children in the youth justice system, particularly in detention, government is not meeting its

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responsibility to address the underlying factors that contribute to criminal offending by children. This ultimately leaves the socio-economic drivers of crime unaddressed, which will lead to the behaviours continuing.

Raising the age of criminal responsibility from 10 to 14 and treatment of the underlying causes of crime will provide greater protection for the community, in that it will result in fewer recidivist young offenders, whilst also preventing the entrenchment of children and young people in the youth justice and adult criminal justice systems.

We look forward to the public hearing on the Bill.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED].

Yours faithfully



Elizabeth Shearer
President