Queensland Youth Policy Collective
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30 November 2021

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Committee Secretary,

Re: Submission in relation to the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

The following submission has been written and prepared to assist the Community Support and Services Committee (**Committee**) in its consideration and reporting on the *Criminal Law (Raising the Age of Responsibility) Amendment Bill* 2021 (**the Bill**).

The Queensland Youth Policy Collective are a group of young law and justice students who wish to advocate for a criminal justice system which protects the rights of children, even those who criminally offend. Increasing the age of criminal responsibility in Queensland would be a significant achievement and a crucial reform in ensuring Queensland aligns with international human rights standards and evidence-based justice policy.

Children offenders are the most disadvantaged children in Queensland. Criminal punishment causes, rather than prevents, further criminal offending. We urge the Committee to endorse evidence-based justice which would raise the age of criminal responsibility to 14 years of age.

1. Children offenders in Queensland

Children offenders typically offend as a symptom of broader issues within their families, communities or their own health. In particular, the children offenders who are in detention centres in Queensland are the most disadvantaged children in Queensland. The children who make it into detention are:[1]

- Predominantly boys (over 82%) with some as young as 10;
- Likely to identify as an Aboriginal or Torres Strait Islander (over 70% of children in detention are Aboriginal or Torres Strait Islanders);
- Not yet sentenced with the majority (84%) on remand; and
- Likely to have received child protection service (50%) and therefore likely experienced some form of trauma, abuse, harm, neglect, parental death or incapacitation:
    - 63% had experienced or been impacted by domestic violence;
    - 33% had at least one parent who had been in prison; and
    - 21% were homeless or in unsuitable accommodation;
- Likely to suffer from a mental or physical impairment:
    - 56% suffered from mental health and/or behavioural disorders (diagnosed or suspected);
    - 16% had a disability;

Likely to be disengaged from education (53%). The Youth Advocacy Centre's chair, Damien Atkinson QC, states that the centre assists children offenders who: [2]

> "about 70% have been affected by one or more of a cluster of factors: mental illness, homelessness, domestic violence, learning disorders or substance abuse. They are not being offered an easy place to do homework or a yard to play sport. They have had disadvantage piled upon disadvantage so that, for instance, they've dropped out of dysfunctional homes and challenging school experiences, and now they don't have the support or the literacy to see a doctor, buy clothes or look for a job. They lack social networks but, more than that, they may lack the machinery to make their way in relationships with family, let alone with strangers".

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1 Children's Court of Queensland, *Children's Court of Queensland annual report 2018–19*. <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/636196/ccar-2018-2019.pdf>.

2 Damien Atkinson QC, 'The State of Youth Justice' *Proctor Magazine, Queensland Law Society* (5 February 2021) < https://www.qlsproctor.com.au/2021/02/the-state-of-youth-justice/>.

The vast majority of child offenders commit non-violent crimes.[3] In 2016–17, 58.9% of offences committed by children aged 10-16 in 2016–17 were offences against property, including theft, unlawful entry, unlawful use of a motor vehicle and property damage.[4] By comparison, just 8.8% were offences against the person.[5] According to the Queensland Police Service's Reported Offender Data,[6] Less than 0.7% of offences by children since January 2001 were homicide-related,[7] just 6.75% were assault-related,[8] and less than 1.3% were sexual in nature.[9]

The community would support raising the age of criminal responsibility given the disadvantage children offenders experience and the kinds of crimes which children tend to

2. What is the law in Queensland and how does it operate in practice?

Queensland's minimum age of criminal responsibility is set to 14 years of age, with a rebuttable presumption that a child over 10 may be held responsible if they had capacity to know the act or omission was wrong.[10] This part will explain how this rebuttable presumption does not operate in practice and causes harm to children and injustice.

This law derives from the common law presumption of *doli incapax*: [11] a child lacks the intellectual and moral capacity to comprehend the difference between right and wrong, and thus incapable of mens rea.[12] This presumption exists uniformly across all Australian jurisdictions and has existed in the European law since the 13th century.[13] Since its creation the law, for the most part, the doli incapax presumption in Australia has remained the same,

3 Queensland Government Statistician's Office, 'Youth Offending' (Research Brief, April 2021) 3 <https://www.qgso.qld.gov.au/issues/10321/youth-offending-april-2021-edn.pdf>
4 Ibid.
5 Ibid.
6 Queensland Police Service, *Reported Offenders Number – QLD* (Data File) <https://www.police.qld.gov.au/maps-and-statistics#:~:text=Reported%20offenders%20number%20%2D%20QLD%C2%A0>.
7 This includes murder, attempted murder, conspiracy to murder, manslaughter, driving causing death, and other homicides.
8 This includes assault, common assault, grievous assault and serious assault.
9 This includes rape, attempted rape and other sexual offences.
10 *Criminal Code Act 1899* (Qld) ss 29(1), (2).
11 Raymond Arthur, *Young offenders and the law: How the law responds to Youth Offending* (Routledge, 1st ed, 2010) 4.
12 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown (E. and R. Nutt, and R. Gosling, vol 1, 1736*) 25-28; *RP v The Queen* [2016] HCA 53, 8.
13 Raymond Arthur, *Young offenders and the law: How the law responds to Youth Offending* (Routledge, 1st ed, 2010) 45.

with only numerous attempts by the courts to resolve and rectify much of the confusion as it's operation.

The operation of the presumption in Queensland

The prosecution bears the onus of proof for raising and rebutting the presumption.[14] The prosecution must satisfy the court that the child knew the act was 'seriously wrong' as opposed to merely 'naughty' or mischievous. Although in Queensland, the prosecution proving that the child had capacity to know the act was wrong may suffice, regardless of if they had actual knowledge. [15] Evidence relied upon by prosecution must be 'clear and clear beyond all doubt or contradiction.'[16]

The complexity arises in understanding that the test of seriously wrong relates to the individual's child's understanding of serious wrong, rather than by measure of a reasonable child or person. [17] Although much of this evidence to assess the contemporaneous understanding of the child is still subject to evidentiary and interpretative dilemmas[18] – such being that current approaches and methods used to assist the court of fact are only effective for the current time of the act or omission, which rarely occurs.[19]

It is very difficult to father evidence of a child's state of mind: evidence that goes towards an assessment of the child's capacity to understand wrongfulness of their behaviour are at the contemporaneous time of the offence are:[20]

(a) Age

(b) Offence committed

(c) Circumstances surrounding the act

(d) Evidence of normality

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14 *RP v The Queen* [2016] HCA 53, [32].
15 *R v B* [1997] QCA 486.
16 *RP v The Queen* [2016] HCA 53.
17 Thomas Croft, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax' (2018) 40(3) *Sydney Law Review* 339.
18 Ian Freckelton, 'Children's Responsibility for Criminal Conduct: The Principle of Doli Incapax under Contemporary Australian Law' (2017) 24(6) *Psychiatry, Psychology and Law* 793.
19 Nicholas J. Lennings & Chris J. Lennings (2014) 21(5)*Psychiatry, Psychology and Law* 791.
20 Ian Freckelton, 'Children's Responsibility for Criminal Conduct: The Principle of Doli Incapax under Contemporary Australian Law' (2017) 24(6) *Psychiatry, Psychology and Law* 793.

(e) Expert evidence

(f) Home background and school life

(g) Previous criminal history, statement by the child to police (including confessions).[21]

The presumption in practice operates unjustly

While this presumption may attempt to provide a safeguard to between 10-13 year-olds, in practice this means children are subject to the criminal justice procedures while waiting for the presumption to be upheld in court. The impact of this deficient operation of law means Queensland's minimum age of criminal responsibility is 10 years.[22] Additionally, in actual practice the law does not operate as a presumption to safeguard but instead operates as a defence. Fitz-Gibbon and O'Brien identify that the law operates in a reverse onus for the defence to raise, argue and supply the Children's Court with evidence that the presumption applies.[23] Once children come in contact with the criminal justice system, much of the damage is already done.

In a review of children in the legal process, the Australian Law Reform Commission found in 1997 that the rebuttable presumption of *doli incapax* 'can be problematic for a number of reasons', including that:[24]

> "it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage."

21 Thomas Croft, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax' (2018) 40(3) *Sydney Law Review* 339.
22 Ibid.
23 Ibid 22.
24 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* (Report No 84, November 1997).

Raising the age the only way to prevent injustice

The problems associated with the sentencing and incarceration of child offenders are not ones that can be fixed by increasing judicial discretion in the sentencing of children.[25] Sentencing is founded on two premises: consistency, and individualised justice.[26] Courts should impose sentences that are just and appropriate in all the circumstances of a case. Simultaneously similar offenders should receive similar penalties.[27] Judges must balance these two approaches to ensure offenders receive fair and just punishment. If judicial discretion in sentencing is to be increased, the courts run the risk of decreasing consistency in decision making.[28]

Sentencing disparities by race, gender, education, and socioeconomic status are already prevalent in the criminal justice system. Aboriginal and Torres Strait Islander people are more likely to be imprisoned for offences than non-indigenous offenders;[29] Snowball and Weatherburn concluded that Aboriginal and Torres Strait Islander people are two times as likely than non-indigenous offenders to be imprisoned for the same offences.[30] Increasing the amount of judicial discretion in sentencing is unlikely to resolve these deep-rooted systemic issues, and rather, studies from the United States have shown that when Judges are given more discretion, African American people are even more likely to receive harsher sentences.[31] Increasing judicial discretion will lead to a decrease in consistency in sentencing outcomes.[32]

Aboriginal and Torres Strait Islander children are disproportionately victimised by the low age of criminal responsibility in Queensland.[33] The evidence is clear that increasing judicial discretion will not change this. Even more Aboriginal and Torres Strait Islander children may end up imprisoned than currently if judicial discretion is increased.[34] Instead, Queensland

25 Crystal Yang, 'Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing' (2015) 44(1) *Journal of Legal Studies* 75

26 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265.

27 Ibid.

28 Ibid.

29 Lucy Snowball and Don Weatherburn, 'Does racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40(3) *The Australian and New Zealand Journal of Criminology*

30 Ibid 281.

31 Crystal Yang, (n 26) 75.

32 Sarah Krasnosteing and Arie Freiberg (n 2) 265.

33 Bob Atkinson (2018) Report on Youth Justice, 7.

34 Crystal Yang (n 1) 78.

should raise the age of criminal responsibility and support holistic and rehabilitative measures to reform and benefit child offenders.

> The operation of the rebuttable presumption fails to act as safeguard to shield children of 10-14 years of age from the criminal justice system. In practice, the law is difficult to apply, and does not effectively consider the psychological and mental development of a child.

Modern neuroscience indicates children cannot be held criminally responsible

There are defining attributes of adolescence which distinguish children from adults. The clearest of these attributes is the developmental nature of a child's "neurological, cognitive, behavioural… and moral functioning". [35] The brain does not fully develop until a person reaches their mid-twenties.[36] Notably, the transient nature of a child's developing brain lowers culpability as it is less likely for a child's conduct to be indicative of an irreparable character, such that reoffending would be a continued and real risk post-adolescence.[37]

Further, the attributes so clearly associated with youth have long been relied upon as mitigating factors. A "reduced ability to assess the full consequences of an act, recklessness, impulsivity, heedless risk taking and susceptibility to external coercion" are well accepted mitigating circumstances.[38] The developmental nature of a child's brain further impacts areas of cognitive functioning, including consequential thinking, and prevents children from understanding the wider social impact of their actions.[39]

Criminal offending can be a symptom of children's underlying mental health issues

83% of children in detention struggle with a psychological disorder.[40] A study in New South Wales further shows that between 39% and 46% of children in custody have borderline cognitive abilities.[41] In addition, children in youth detention are more likely to have co-

35 Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility* (Working Group Review, 2 March 2020) 11 ('*Law Council Review*').
36 Queensland Government Statistician's Office, *Youth Offending* (Research Brief, April 2021) 7 ('*Youth Offending*'); Michael Perlin, 'Some Mother's Child Has Gone Astray: Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing' (2021) 59(3) *Family Court Review* 478, 478.
37 Elizabeth Scott, 'Children are Different: Constitutional Values and Justice Policy' [2013] (11) *Ohio State Journal of Criminal Law* 71, 85-86 ('*The Children are Different*').
38 *The Children are Different* (n 3) 86; *Youth Offending* (no 2) 7.
39 *Law Council Review* (no 1) 11; *Youth Offending* (no 2) 7.
40 *Law Councill Review* (no 1) 15.
41 Ibid.

morbidities such as communication disorders, Attention Deficit Hyperactivity Disorder and traumatic brain injuries.[42] More specifically, 67% of sentenced children struggle with three forms of neurodevelopment impairments and 25% struggle with five or more impairments.[43] The co-relation between mental challenges and association with the youth criminal justice system is well-founded. These cognitive disadvantages greatly hinder a child's ability to "participate in the legal system in an informed and equal manner."[44]

Indigenous Australian Children

Indigenous Australians and Torres Strait Islander children make up the overwhelming majority of children in detention. In 2018, Indigenous children between the ages of 10 to 17 were 26 times more likely to be in detention on any given night.[45] This figure fluctuates between the States and Territories however, the gross overrepresentation of Indigenous Australian children is a constant. The fact that, in 2019, all children in detention in the Northern Territory were Indigenous Australian demonstrates this disproportionality.[46] Indigenous Australian children face systematic and pervasive challenges which increase their chances of incarceration. Issues such as intergenerational trauma, culturally inappropriate support mechanisms, financial hardship and familial instability are significant causal factors which contribute to higher rates of incarceration.[47] Each of these risk factors are compounded by a child's lowered cognitive functioning and the prevalence of mental illnesses in sentenced children.

In conclusion, the children under 14 who come in contact with the criminal justice system as offenders are **the most disadvantaged children in Queensland.** These children deserve compassion, not retributive justice. The age of criminal responsibility should be raised to age 14 to prevent further injustice.

42 Ibid 16.
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid 17.

3. The age of criminal responsibility should be raised to 14 to align with Queensland's human rights obligations

Context of Human Rights Act 2018 (Qld)

The *Human Rights Act 2019* (Qld) (**HR Act**) protects fundamental human rights recognised in international covenants including the *International Covenant on Civil and Political Rights* (**ICCPR**), the *Universal Declaration of Human Rights* (**UDHR**), the *United Nations Declaration on the Rights of Indigenous People* (**UNDRIP**) and the *Convention on the Rights of the Child* (**CRC**).[48]

All 16 of Australia's children commissioners, guardians and advocates agree that the proposal to raise the age of criminal responsibility to 12 was insufficient.[49] Australia has signed and ratified the CRC that recognises the right for a child to be treated fairly, educated and have a say about decisions affecting them.[50] Article 3 of the CRC states that in all actions concerning children must have the best interests of the child as a primary consideration.[51]

The HR Act provides that children offenders are entitled to:

- Recognition and equality before the law (s 15)
- Protection of families and children (s 26)
- Cultural rights- Aboriginal peoples and Torres Strait Islander peoples (s 28)
- Children's rights in criminal proceedings (s 32(3))
- Children in the criminal process (s 33)

The following sub-sections discuss why increasing the age of criminal responsibility is consistent with the best interests of the child and other relevant human rights obligations and considerations. Our analysis here is underpinned by our previous points regarding detention being a sub-optimal avenue to address crimes involving children for reasons such

48 *Guide: Nature and scope of the protected human rights* (Version 1, June 2019) 2.
49 Ibid.
50 'What are Children's Rights?' *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/education/what-are-childrens-rights>.
51 *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 of September 1990) Article 3.

as developmental capabilities and the particular context that contributes to children committing crimes.

Recognition and Equality before the law (s 15)

Pursuant to section 15 of the HR Act, laws and policies affecting children should not be discriminatory.[52] Section 7 of the *Anti- Discrimination Act 1991* provides a person's age can not be used as a factor to discriminate.[53] The current policy in Queensland fails to take into account the different attributes of a 10-year child. Children aged 10-14 years old are still developing and are unlikely to understand or take into consideration the nature or consequences of their actions in comparison to adults. Placing criminal responsibility on a child that is 10 years old is discriminatory in nature and is in violation of section 7 of the *Anti-Discrimination Act 1991*. Subjecting children to criminal charges and procedures fails to recognise a child's character and attributes before the law and fails to uphold section 15 of the HR Act.

Protection of Families and Children (s 26)

The HR Act states that every child has a right, without discrimination, to the protection that is needed by the child, and is in the child's best interest, because of being a child.[54] The current policy of the age of criminal responsibility is not in the best interest of a child. Children exposed to the criminal justice system at an early age such as 10 would have long-term harmful effects and a likely chance of recidivism. Section 26 recognises that a child is needed to be protected from the social and environmental factors that would lead them to commit an offence such as neglect, family disfunction, mental health issues and socio-economic disadvantages. Early contact with the criminal justice system from the age of 10 would automatically disregard this section of the HR Act and would not serve in the child's best interest.

Cultural Rights – Aboriginal peoples and Torres Strait Islander peoples (s 28)

In Queensland, the incarceration rate of Indigenous children is double than non-Indigenous.[55] Effectively, the purposes of section 28 of the HR Act and to raise the age of criminal

52 *Human Rights Act 2019* (Qld), s 15.
53 *Anti- Discrimination Act 1991*, s 7.
54 *Human Rights Act 2019* (Qld), s 26(2).
55 Victorian Sentencing Advisory Council, *Indigenous Young People in Detention* (2019) at https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/indigenous-young-people-in-detention updated in 21 June 2021.

responsibility is to limit the cognitive damages of a 10-14 year old Aboriginal and Torres Strait Islanders whose connection to their culture is sacred and is protected under this section. As most children in contact with the criminal justice system are Indigenous, section 28 of the HR Act must be considered of greater importance and the resources used by the criminal justice system must instead be diverted to resources that are more cultural and age appropriate for Aboriginal and Torres Strait Islander children.

Children in the criminal process and their rights (s 32; s 33(3) HR Act)

Section 33 of the HR Act provides that for the protection of children involved in criminal processes, a child must be separated from adults in detention and trials involving children be expedited. More importantly, section 33(3) ensures a child charged with a criminal offence is treated in a way appropriate for the child's age, ensuring promotion of the child's rehabilitation.

An investigation conducted by Amnesty International revealed 2,655 breaches of international and Queensland laws and Queensland Police Operational Procedures Manual against children from 10 years of age.[56] The source confirms that there is a lack of care and consideration when it comes to protecting children and deterring them away from the criminal justice system, let alone a consideration of the age of a 10-year-old child in a criminal responsibility process. Additionally, the United Nations Committee on the Rights of the Child provided that 14 years of age is the absolute minimum age for criminal responsibility.[57] The evidence provided suggest that the maturity and capacity level of children are still developing.[58] The rights under section 32 and 33(3) of the HR Act inherently provide the protection of children in criminal process and a right to consider a child's age and desirability of promoting rehabilitation fail on both accounts under the current Queensland policy.

Queensland should raise the age of criminal responsibility to align with other jurisdictions

The age of criminal responsibility varies in many countries. In the United Kingdom children can be found guilty of an offence from age 10,[59] analogous to the current approach in Queensland. However, in Luxembourg children cannot be found criminally responsible until

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56 Amnesty International, 'Human Rights Abuses Against Kids in the Brisbane City Police Watch House' (Web Page) < https://www.amnesty.org.au/watch-houses/# >.

57 'Raising the Age of Criminal Responsibility' *Australian Human Rights Commission* (Web Page, 20 November 2019) <https://humanrights.gov.au/about/news/raising-age-criminal-responsibility>.

58 Ibid.

59 *Children and Young Persons Act 1933*, s 50; *Criminal Justice (Children) (Northern Ireland Order 1988)*, art 3.

reaching the age of 18.[60] These two examples are extremes within Europe and the average age of criminal responsibility across all European nations is 13.1 years.[61]

Most of the laws within these countries also contain provisions providing that, children can be tried as an adult if they have committed a serious offence. For example, in The Republic of Ireland, 'persons under the age of 12 cannot generally be held liable for any criminal offence, but children aged 10 or 11 can be held criminally liable for murder, manslaughter, rape, rape under section 4 of the *Criminal Law (Rape) (Amendment) Act* 1990 or aggravated sexual assault.'

By raising the age of criminal responsibility to 14 years of age, Queensland would come align with many other jurisdictions internationally. Appendix 1 provides a list of jurisdictions and the minimum age of criminal responsibility.

The Bill is an opportunity for Queensland to further its established preeminence in recognizing human rights, as well as contribute towards the fulfilment of Australia's international obligations.[62]

It is arguable that Australia, including Queensland, has not fulfilled its obligations under the UNCRC by having such a low age of criminal responsibility.[63] While no international standard expresses a minimum age of criminal responsibility,[64] international law mandates the implementation of a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law'.[65] The Committee on the Rights of the Child has recommended that a minimum the age of 14 years, but preferably an age between 14 and 16, be established as the minimum age of criminal responsibility.[66]

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60 *Loi du 10 août 1992 relative à la protection de la jeunesse*, art 1 and 2.

61 See APPENDIX 1.

62 Note the national process in respect of raising the age has been stymied by an inability of the Australian Council of Attorneys-General, now the Meeting of Attorneys-General, who in July 2020 indefinitely postponed their report on the issue of the minimum age of criminal responsibility.

63 Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1) *Current Issues in Criminal Justice* 123, 12-124.

64 Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 Current Issues in Criminal Justice 173, 176.

65 United Nations Convention on the Rights of the Child article 40(3)(a).

66 Report of the Working Group on the Universal Periodic Review: Australia, Human Rights Council, United Nations General Assembly, 146.142; UNCRC 2007: [32] – [33].

Raising the age of criminal responsibility to 14 would be more in line with United Nations conventions suggesting it is most appropriate to deal with children without resorting to judicial proceedings.[67] As it stands, the Committee on the Rights of the Child has been critical of Australia's stubborn entrenchment of the low age of criminal responsibility.[68]

The European Court of Human Rights has held that where a child is to be prosecuted in criminal courts, the procedure must be adapted to enable the child to participate effectively in proceedings.[69] Many Australian commentators have questioned whether children are generally afforded a fair trial,[70] as is required by various international covenants.[71]

4. Raising the age of criminal responsibility to 14 aligns with evidence-based justice policy

A 'future looking' justice system should consider the needs of the community in addition to allowing an opportunity to rehabilitate criminal offenders. Children who commit criminal offences require rehabilitation rather than retribution.

Retributive punishment against children offenders does not work.[72] A criminal age of responsibility of 10 years old overlooks unique differences between children and adults, and as such it is counter-intuitive to the rehabilitation process.[73] Comparatively, interventions embedded in the principles of rehabilitation contribute to a reduction in youth offending. This has lasting effects for communities and can often aid in avoiding cycles of recidivism.

As the Chair of the Queensland Youth Advocacy Centre states: "The kids who hit the youth justice system were, for the most part, badly damaged way before they came to make choices, and the drivers are usually still in place. The knot of unhappiness, confusion and powerlessness

67 United Nations Convention on the Rights of the Child article 40(3)(b).
68 UNRC 2007: [73].
69 In Scotland, this requirement has been understood to mean that a child under twelve cannot be prosecuted. See *V v United Kingdom* (2000) 30 Eur. H.R. Rep. 121; Gerry Maher, 'Age and Criminal Responsibility' (2005) 2 Ohio State Journal of Criminal Law 493, 498.
70 Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in the Legal* Process, Report 84; Sheehan R and Borowski A (eds) (2013) *Australian Children's Courts Today and* Tomorrow, Springer; O'Connor I and Sweetapple P (1988) *Children in* Justice, Longman; Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 Current Issues in Criminal Justice 173, 179.
71 CRC articles 9, 12, 31 and 40; Beijing Rules r 11; ICCPR article 14.
72 Scott, E. (2013). "Children are Different": Constitutional Values and Justice Policy, 11 OHIO ST. J. CRIM. L. 71. Available at: https://scholarship.law.columbia.edu/faculty_scholarship/320.
73 Perlin, & Lynch, A. J. (2021). "Some Mother's Child Has Gone Astray": Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing1. *Family Court Review, 59*(3), 478–490. https://doi.org/10.1111/fcre.12589.

that presents as offending is not going to be unravelled by the binary levers of a penal system."[74]

Raising the age of criminal responsibility aligns the four pillars described in the 'Atkinson Report on Youth Justice' from Special Advisor, Bob Atkinson. ('Atkinson Report').[75] These pillars (which are to intervene early, keep children out of court, keep children out of custody and reduce reoffending) are referred to in the Explanatory Notes of the Bill.[76]

Evidence consistently demonstrates that incarcerating and punishing children offenders does not reduce criminal offending and in fact increases recidivism. The age of criminal responsibility should be raised to 14 in accordance with evidence-based justice.

Children offenders need support, not criminal punishment

Locally, the potential for criminogenic tendencies to arise in incarcerated youths was recognised by the Hon. Judge McGuire in the Children's Court of Queensland's *Third Annual Report 1995-96*.[77] We acknowledge that removing children from being criminal responsible does not truly rehabilitate child offenders: holistic, wrap-around services are required to achieve that end.

Restorative justice theory, a hallmark of Australia's justice system, is concerned with the child's best interest and the State's interest in doing what could be done to save them from a 'downward career'.[78] The protection and betterment of youth offenders, in this case through

74 Damien Atkinson QC, 'The State of Youth Justice' *Proctor Magazine, Queensland Law Society* (5 February 2021) < https://www.qlsproctor.com.au/2021/02/the-state-of-youth-justice/>.

75 Atkinson, B (2018) 'Report on Youth Justice'.

76 Explanatory Notes: Criminal Law (Raising the age of Responsibility) Amendment Bill 2021.

77 Locally, the potential for criminogenic tendencies to arise in incarcerated youths was first recognised by his Honour McGuire J in the Children's Court of Qld *Third Annual Report 1995-96* Children's Court of Qld Brisbane 1996, 50. See also: Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 *Current Issues in Criminal Justice* 173, 176; J Payne, 'Recidivism in Australia: Findings and Future Research' (2007) Research and Public Policy Series Australian Institute of Criminology; Chen S, Matruglio T, Weatherburn D and Hua J (2005) 'The Transition from Juvenile to Adult Criminal Careers', Crime and Justice Bulletin No 86, NSW BOCSAR; The Integrated Approach: The Philosophy and Directions of Juvenile Detention Qld Corrective Services Commission Brisbane 1997, 27.

78 Such a position was adopted by the United States Juvenile Court shortly after its conception in the case of *Re Gault* (1967) 387 U.S. 1, 17. See, David S. Tanehaus, Juvenile Justice in the Making (2004). Therein, the American Juvenile Court seemingly adopted, perhaps in tandem to but at least stemming from, rehabilitative theories of justice. Of course, no explicit recognition of a societal duty to the child exists within Australia, such is an American conception. There is, however, strong logic in accepting its relevance when considering whether to raise the minimum age of criminal responsibility.

early interventional rehabilitation, is more desirous than incarceration and the instillment of criminogenic roots. Prioritising treatments or services which affect rehabilitation[79] is more effective in preventing recidivism and rehabilitating offenders.[80] Youth offenders should instead be diverted from state legal systems towards community-based services, including therapy, vocational training and educational advocacy.[81] As mentioned, such policy disturbs the formation of criminogenic roots, steering youth offenders towards a constructive life during which they can make measurable contributions to the progression of society. Currently, Queensland acknowledges the importance of rehabilitating juveniles,[82] and has progressed from punishment based rehabilitative models.[83] Queensland should expand on this first step, raise the age and support the provision of holistic, wrap-around services for youth offenders.

The age of criminal responsibility should be increased to age 14 in concert with the provision of holistic support services for child offenders.

Resisting 'tough on crime' politics

The relationship between politicians, rhetoric rallying against youth crime and its effect on public perceptions is a manipulative one. Generally, those without legal training or insight into sentencing practices will often take a retributive stance on youth crime.[84] This is reinforced by

79 C.S. Lewis, 'The Humanitarian Theory of Punishment' (1953) 6 *Res Judicatae* 224, 226; Norval Morris and Donald Buckle, 'The Humanitarian Theory of Punishment – A Reply to C.S. Lewis (1953) 6 *Res Judicatae* 231.

80 Barret, James G et al, 'Diversion as a Pathway to Improving Service utilization among At-Risk Youth' (2021) *Psychology, Public Policy, and Law*; James Dolittle and Matthew Aalsma, 'Predictors of Recidivism Among Juvenile Detainees: The Impact of Mental Health Screening and Court-Ordered Counselling' (2012) 50(2) *Journal of Adolescent Health* S90; Patrick M Carter et al, 'Efficacy of a Universal Brief Intervention for Violence Among Urban Emergency Department Youth' (2016) 23(9) Academic Emergency Medicine 1061; NCR03556618, 'A Pilot Trial of a Network Intervention for Youth After Incarceration' (2019) *Cochrane Central Register of Controlled Trials*; Bill Sanders et al, 'Gang Youth as a Vulnerable Population for Nursing Intervention' (2009) 26(4) *Public Health Nursing* 346; Laura White and Matthew Aalsma, 'Mental Health Screenings in Juvenile Detention Centres: Predictors of Recidivism and Mental Healthcare Utilization Among Detained Adolescents With Mental Illness' (2013) 52(2) *Journal of Adolescent Health* S11.

81 Preston A. Britner, 'Psychology and Efforts to Divert Children and Youth From State Legal Systems' (2011) *Children, Youth, and Families Office*.

82 *Youth Justice Act 1992* (Qld) s 2(e)(i) – (ii).

83 Ibid s 9. See also Australian Law Reform Commission, 'Seen and Heard: Priority for Children in the Legal Process (QLRC Report 84) at 20.18 and note the amendments made to the *Youth Justice Act 1992* (Qld) at section 9 which no longer consider rehabilitation in terms of punishment,

84 Suzanne Ellis 'Give them a chance: Public Attitudes to Sentencing Young Offender in Western Australia. (2018) 18(2) 169

some political actors who take advantage of the media's stance on youth crime in order to garner votes for their own re-election.[85]

A ten-year retrospective cohort analysis of youth offending in Australia found that punitive punishment of children offenders does not adequately address youth crime.[86] Rather, adopting a more compassionate yet utilitarian approach to children involved in criminal activities through processes of early intervention to 'at risk' children[87] and consideration of where children came from, where they are and where they aim to go, is the path towards a more successful criminal justice process

What do other jurisdictions do with children offenders?

Of course, in the very rare cases where children do commit serious crimes, it is necessary to implement a response which both protects and supports the children involved while ensuring the ongoing safety and wellbeing of the wider community. We encourage the Committee to look to other jurisdictions for guidance, an outline of which can be found in this submission: for instance, the example from Ireland mentioned earlier.

The age of criminal responsibility in England and Wales is 10 years old and has, in a similar vein to Australia, received due criticism. However, it is relevant for the Committee to consider the approach being taken in response to children who are at risk of or who have committed crimes in England and Wales.

The Youth Justice Board for England and Wales (**YJB**) is a non-departmental public body established under section 41 of the *Crimes and Disorder Act 1998* (UK), tasked with monitoring the operation and provision of the youth justice system and youth justice services in England and Wales.[88] The statutory aim of introducing the YJB is to reduce offending by children and young people.

A key difference between the adult and youth justice systems in England and Wales, is the requirement for local authorities to establish Youth Offending Teams (**YOTs**) under section

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85 Ellis, Lorana Bartels and Marietta Martinovic, 'Electronic Monitoring: The experience in Australia*'* (2017) 9(1), 80, Nigel Stobbs et al, 'Sentencing and public confidence in Australia: The dynamics and foci of cmall group deliberations' (2014) 1(19) *Australian and New Zealand Journal of Criminology* 1

86 Jason Payne and Don Weatherburn, '*Juvenile reoffending: A ten- year retrospective cohort analysis.* (2015) 50(4) *Australian Journal of Social Issues'.* 349

87 Ibid

88 *Crimes and Disorder Act 1998* (UK) s 41(5)(a).

39 of the *Crimes and Disorder Act 1998 (UK).* YOTs are multi-disciplinary teams which include representatives from the police, education, health and social services, probation, and other specialist workers.[89] YOTs supervise 10-18 year-olds who have been sentenced formally by a court, or children who have not been formally charged but have come to the attention of police because of certain behaviour.[90] YOTS were created to assist in addressing known risk factors associated with youth offending such as family, social, educational and health factors.[91] YOTs engage in a wide variety of work in order to address these risk factors and to reduce the number children who offend, and this work includes undertaking risk assessments for children. In their decision-making, YOTs give high priority to public safety and protecting previous and protentional victims of children identified as being at risk of offending or reoffending.[92]

For highly complex cases which usually involve serious risk, YOTs have established dedicated multi-disciplinary panels. These panels have been particularly successful where there was a range of participants from different disciplines, as the different perspectives from the diverse range of participants was found to have enhanced the relevant case manager's approach to evaluating the high-risk case.[93] We urge the Committee to consider the use of a multi-agency approach to address serious offending or the risk of serious offending by children. The use of YOTs to address the behaviour of children who have or are at risk of offending in England and Wales, clearly demonstrates that addressing offending amongst children is a complex task that requires a nuanced multi-disciplinary approach.

Case Study: Jon Venables

In 1993, 10-year-old Jon Venables and his co-defendant Robert Thompson abducted and murdered 2-year-hold James Bulger in Liverpool, England. He was sentenced under the *Children and Young Persons Act* (UK) 53(1) to an eight-year term of detention.

89 Joanna Adler, Sarah Edwards, Mia Scally, Dorothy Gill, Michael Puniskis, Anna Gekoski and Miranda Horvath, 'What Works in Managing Young People Who Offend? A Summary of the International Evidence' (Ministry of Justice Analytical Series, Forensic Psychology Services at Middlesex University, 2016) 66.

90 HM Inspectorate of Probation, 'The Work of Youth Offending Teams to Protect the Public' (October 2017) 6 ('*The Work of Youth Offending Teams*').

91 Philip Whitehead and Raymond Arthur, 'Let No One Despise Your Youth: A Sociological Approach to Youth Justice Under New Labour 1997-2010' *International Journal of Sociology and Social Policy* (2011) 31(7/8) 469, 470.

92 *The Work of Youth Offending Teams* (n 90) 32.

93 Ibid

The custodial portion of his sentence was served at a Red Bank Community Home, a secure local authority unit where he received intensive psychiatric and social care.[94] During this time, he did not demonstrate any violent or psychopathic behaviour. He did well educationally and demonstrated maturity 'over and above the level of his peers'.[95]

Upon his release in 2001, he was given a new identity for his own safety and protection.[96] As a condition of his release, he is required to report to a supervising officer and remain under the clinical supervision of a forensic psychiatrist. He is prohibited from contacting the victim's family and from having unsupervised contact with children under the age of 12.[97]

To manage Jon's case, a National Management Board (NMB) was set up. The NMB initially met quarterly and included representatives from the police, the Public Protection Unit and children's services.[98] In 2006, given the low risk Jon was assessed to pose to the community, management of Jon's case was transferred to local probation services in Jon's area instead.[99]

5. Conclusion

Thank you for considering our submission. We can be contacted on [redacted]

Yours faithfully,

The Queensland Youth Policy Collective

[redacted]

[redacted]

Ph: [redacted]

[redacted]

94 David Omand, *Independent Serious Further Offence Review: The Case of Jon Venables* (1 November 2010) 15.
95 Ibid.
96 Ibid 33.
97 Ibid 16.
98 Ibid 21-22.
99 Ibid 23.

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APPENDIX 1

COUNTRY	AGE OF RESPONSIBILITY (Years of Age)	LEGISLATION
Albania	14	*Criminal Code of the Republic of Albania (1995)*, art 12.
Andorra	12	*Qualified Law on Juvenile Justice (1999)*, art 3.
Armenia	16	*Criminal Code of the Republic of Armenia (2003)*, art 24(1), (2).
Austria	14	*Jugendgerichtsgesetz* (Youth Courts Act), s 1(1)-(2), 4(2).
Belarus	16	Уголовный кодекс Республики Беларусь № 275-З от 09.07.1999 г. (Belarus Penal Code) Article 27
Belgium	12	*Criminal Code of the Kingdom of Belgium (1867)* p, 191
Bosnia and Herzegovina	14	*Criminal Code of Bosnia and Herzegovina (2003)* art 8.
Bulgaria	14	*Criminal Code of the Republic of Bulgaria* (1968) art 31(2).
Croatia	14	*Juvenile Courts Act*, art 44; *Criminal Code of the Republic of Croatia*, art 10.
Cyprus	14	*Criminal Code (Amendment) Law No. 1 8(1)(/2006*
Czech Republic	15	*Criminal Code of the Czech Republic (2009)*, provision 11.
Denmark	15	*Criminal Code of Denmark* (2005), s 15

Estonia	14	*Criminal Procedure Code of the Republic of Estonia 2001*, s 33; *Juvenile Sanctions Act 1998*, ss 2, 3(9).
Finland	15	*Criminal Code of the Republic of Finland 1889*, Ch.3, s 4(1); Ch.6, s 12
France	13	*Criminal Code of the French Republic 2020*, Art 122-8.
Georgia	14	*Criminal Code of Georgia 1999* Art 80(1)
Germany	14	*Criminal Code of the Federal Republic of Germany 1971*, s 19
Greece	15	*Criminal Code*, art 126, 127
Hungary	14	*Criminal Code of the Republic of Hungary*, s 16
Iceland	15	*General Penal Code of Iceland*, art 14
Ireland	12	*Childrens Act 2001*, s52(1),(2)
Italy	14	*Criminal Procedure Code of the Republic of Italy 2011*, Art 97, 98
Latvia	14	*Criminal Law 1998*, s 11
Lichtenstein	14	*Jungenderichtgesetz (Juvenile Court Act* 1998, s 2(1)
Lithuania	16	*Criminal Code of Lithuania 2000*, Art 13(1)
Luxembourg	18	*Loi du 10 août 1992 relative à la protection de la jeunesse*, art 1 and 2
Macedonia	14	*Criminal Code*, art 71
Malta	14	*Criminal Code of the Republic of Malta*, Art 21(1)

Moldova	16	*Criminal Procedure Code of the republic of Moldova 2003*, art 21(1), (2)
Monaco	13	*CRC/C/28* Add 15, para 37
Montenegro	14	*Criminal Code of Montenegro 2003*, Art 80
Netherlands	12	*Criminal Procedure Code of the Kingdom of Netherlands 2012*, s 486
Norway	15	*General Civil Penal Code*, s 46
Poland	17	*Criminal Code of the Republic of Poland 1997*, art 10
Portugal	16	*Criminal Code*, Art 19; Lei Tutelar Educativa 1999, Art 1, 4
Romania	14	*Criminal Code of the Republic of Romania*, Art 113(1)-(3)
Russian Federation	16	*Criminal Code of the Russian Federation 1996*, art 20(1)
San Marino	12	*Criminal Code*, Art 10
Serbia	14	*Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles*, Art 2; Criminal Code, art 4(3)
Slovakia	14	*Criminal Code of the Slovak Republic 2005*, s 22(1), (2)
Slovenia	14	*Criminal Procedure Code 1994*, Art 71
Spain	14	*Organic Law 5/2000 of 12 January*, art 1(1)-(3)
Sweden	15	*Criminal Code of the Kingdom of Sweden*, Ch. 1, s 6

Switzerland	10	*Loi fédèrale régissant la condition pénaledes mineures, 2003*, art 3(1)
Turkey	12	*Criminal Procedure Code of the Republic of Turkey*, art 31(1), (2)
Ukraine	16	*Criminal Code of Ukraine 2001*, Art 22(1), (2)
England and Wales	10	*Children and Young Persons Act 1933*, s 50
Northern Ireland	10	*Criminal Justice (Children) (Northern Ireland Order 1988)*, art 3
Scotland	8	*Criminal Procedure (Scotland) Act*, s 41, 41A(1)-(2).