



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

Submission to
Community Support and Services Committee

30 November 2021

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Summary

1. Thank you for the opportunity to make a submission to the Committee's inquiry into the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill). The Bill would increase the minimum age of criminal responsibility (MACR) in Queensland to 14. As the Explanatory Notes discuss, subject to the *doli incapax* presumption¹, the MACR in Queensland is currently 10 years of age.
2. The Explanatory Notes detail the Australian Council of Attorneys-General (COAG) review undertaken in 2019 and cite relevant reports made in Queensland regarding the MACR. The Commission made a submission to the COAG review.
3. The Commission supports increasing the age of criminal responsibility, supported by appropriately developed and funded therapeutic alternatives and in a manner which respects and protects the rights of victims. Evidence suggests that for the majority of children and young people, diversion from custody and the youth justice system will better address their needs and keep the community safer. This is particularly so for Aboriginal and Torres Strait Islander young people, who are disproportionately represented in the Queensland's youth justice system.

¹ Included in s 29(2) of the Queensland Criminal Code as: 'A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.'

4. As detailed in the Explanatory Notes, recommendations and research from many reports and studies emphasise that the criminal justice system is not the appropriate mechanism to deal with the behaviour of children aged under 14, and that instead greater investment and emphasis must be placed on health and education outcomes. This includes providing support for families and protective factors for children, which could be achieved through a justice reinvestment approach. It is unlikely that simply relying on the existing child protection system will be sufficient to respond to a change in the MACR.
5. Even without formally raising the age, such measures can be developed and implemented now to reduce the growing numbers of children involved in the criminal justice system. The over-representation of Aboriginal and Torres Strait Islander children demands urgent response. The Commission notes Mr Berkman's evidence during the Bill's public briefing that at present, many of these supports may only be offered when a child is arrested or charged for their behaviour.²
6. This change is becoming increasingly urgent because Queensland's detention centres and watch houses are overcrowded and unable to appropriately rehabilitate and humanely detain the high numbers of children currently in the system.
7. While recent announcements by state Attorneys-General suggest there is active consideration of raising the age to 12,³ the Commission continues to support the United Nations recommended MACR of 14.
8. The Commission therefore **recommends** the Committee consider:
 - a. Recommending the Government commit to raising the MACR to 14 and this be followed by a state-wide consultation, engagement and review to identify critical new investment necessary to support children at risk.
 - b. Seeking further information from the Government about the number of children aged under 14 detained in Queensland, including for prolonged periods in watch houses.
 - c. Recommending the Government urgently review the impact COVID-19 has had on disengagement from school.

² Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 5 (Michael Berkman)

³ Tammy Mills, Royce Millar, Andrew Taylor and James Massola, 'States a step closer to raising the age of criminal responsibility', *Sydney Morning Herald* (online, 13 November 2021) <<https://www.smh.com.au/national/states-a-step-closer-to-raising-the-age-of-criminal-responsibility-20211113-p598nk.html>>

Introduction

9. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
10. The Commission has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
11. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act.

Consultation with Commission

12. The Explanatory Notes refer to the Bill being developed after extensive consultation with various stakeholders including the Queensland Human Rights Commissioner. To clarify, the Commissioner was invited to comment about the Bill's compatibility with the HR Act but declined to do so.

Application of the HR Act

13. The Statement of Compatibility acknowledges that the Bill positively promotes some rights under the HR Act, while other rights may be limited depending on what alternative arrangements are developed.

Rights of children

14. Children have specific protections under the HR Act by virtue of being children and additionally being in the criminal justice system.⁴ The Bill may positively promote these rights.
15. The United Nations Convention on the Rights of the Child (CRC) is particularly relevant to this issue, which requires state parties to have the best interests of the child as a primary consideration in all decision making, and that the arrest,⁵ detention or imprisonment of a child shall only be used as a measure of last resort.⁶ The United Nations Committee

⁴ HR Act ss 26 and 33.

⁵ *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('Convention on the Rights of the Child'), Article 3

⁶ Convention on the Rights of the Child, Article 37.

on the Rights of Child recommends the minimum of age of responsibility should be at least 14 years, and suggests the minimum age that a child may be deprived of liberty be 16 years (unless there are genuine public safety or public health concerns).⁷ The Committee recommends that Australia increase the MACR, most recently to 14.⁸

16. During the Bill's public briefing, Mr Berkman discussed the medical evidence that led the United Nations to reach this position.⁹ For example, the Australian Medical Association and Law Council of Australia's joint position on MACR states:

Children under the age of 14 are undergoing significant growth and development, which means they may not have the required capacity to be criminally responsible. Scientific advances related to the understanding of child cognitive development favour a higher MACR, taking into account the time taken for the adolescent brain to mature. Research shows immaturity can affect a number of areas of cognitive functioning "including impulsivity, reasoning and consequential thinking".¹⁰

17. The detention of children and young people gives rise to the consideration of other rights. As well as the right to humane treatment and protection of children in the HR Act, the rights to equality, privacy, family and access to health and education and Aboriginal and Torres Strait Islander Peoples' cultural rights are also protected.¹¹

Rights of victims of crime

18. As the Statement of Compatibility notes, the rights of victims may be limited by the Bill. Relevant rights owed by the state to victims of criminal acts include the right to liberty and security of the person and the right to life.¹²
19. Any limitation on the rights of victims and potential victims of crime must be justified according to the factors set out in Section 13(2) of the HR Act including:

⁷ 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], [89].

⁸ United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia* UN DOC CRC/C/AUS/CO/5-6 (30 September 2019) [48]. , See also *Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia*, UN DOC A/HRC/47/8 (24 March 2021)

⁹ Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 2 (Michael Berkman).

¹⁰ Australian Medical Association and Law Council of Australia, 'Minimum Age of Criminal Responsibility' (Policy Statement, 2019).

¹¹ See sections 15, 25, 26, 28, 36 and 37.

¹² HR Act s 29 and s 16.

- (a) the nature of the human right;
 - (b) the nature and purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - (g) the balance between the matters mentioned in paragraphs (e) and (f).
20. The Commission appreciates the serious community concern in response to the recent high profile and tragic events involving alleged offending by children. The risks of motor vehicle theft and dangerous driving are apparent. Previous government data suggesting 10 per cent of all youth offenders accounting for 48 per cent of all youth crime is also troubling.¹³ During the Bill's public briefing, the importance of consulting victims and police were noted.¹⁴ In the time available, the Commission has not had the opportunity to consult victims of crime advocates, nor has it spoken to child advocates, lawyers or experts in child development and health about the Bill, but it is a strength of the Queensland parliamentary process that their voices and rights can be considered by the Committee through this process.
21. Nonetheless, the weight of evidence-informed expertise suggests that punitive 'tough on crime' programs and measures are not effective in rehabilitating offenders and reducing recidivism. Rather, as the Report on Youth Justice (Atkinson Report) states, the best outcomes for victims, young offenders and the broader community will be achieved by initiatives that reduce offending and incarceration, by tackling the causes and consequences of youth crime.¹⁵

¹³ Childrens Court of Queensland, *Annual Report 2019-20* (Report, 2020) 1, 19 (figure 5).

¹⁴ Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 6 (Michael Berkman).

¹⁵ Bob Atkinson AO, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018), 21.

22. This suggests that any limitation on victims' rights cannot be properly understood (or justified) without a clearly articulated plan for a well-funded system of diversion and other community-based, therapeutic supports. The Commission also notes that Mr Berkman suggested during the Bill's public briefing that he did not propose through the Bill that:

...victims of crime should be deprived of any of the avenues that are currently available to them. Obviously, restorative justice is a really important part of putting victims and offenders together. It is a really constructive way of kids, in this instance, seeing the impacts of their behaviour.¹⁶

Rights of staff and police

23. As discussed further below, the high numbers of children in the justice system are leading to overcrowding, putting the safety of staff at risk, particularly in overcrowded detention centres. Raising the MACR may reduce the limitation on staff rights (such as the rights to life and security¹⁷). Similar considerations exist for police.

Further information needed

24. The Commission notes that the Bill would provide for the release of children aged under 14 from all forms of detention, including watch houses and detention centres. Given the present situation, there are benefits to such an approach.
25. The Commission understands the high numbers of young people currently in detention are resulting in prolonged detention in watch houses and declining conditions in detention centres. This includes children regularly spending multiple days (in some cases over a week) in watch house detention, and anecdotal reports of rolling lockdowns and staff shortages particularly at the Cleveland Detention Centre.
26. The Commission also understands that due to a number of factors,¹⁸ there has been an increase in circumstances where children have been remanded in custody notwithstanding that magistrates have acknowledged that the offences are unlikely to result in a custodial sentence; that is, the child is serving 'dead time'.

¹⁶ Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 6-7.

¹⁷ HR Act sections 16 and 29.

¹⁸ These factors may include a recently introduced presumption against bail for children charged with some offences under the *Youth Justice and Other Legislation Amendment Act 2021*, Part 4.

27. Recent data also confirms that Aboriginal and Torres Strait Islander young people continue to be grossly over-represented among young people detained in watch houses. During the Public Briefing, Mr Berkman noted:

The most recent data we have in relation to kids in watch houses, from November 2020 to August 2021, is pretty damning. In this period there were eight 10-year-old children held in a watch house. Only one of these kids did not identify as Indigenous. Of the 558 10- to 13-year-old children held in watch houses, 84 per cent were First Nations Kids, 46 10- to 13-year-old children were held for more than two nights and only one of these 46 kids was not Indigenous. Although figures are not available for children aged 12 and 13 years old, First Nations children account for around 60 per cent of all children aged 10 and 11 in contact with the Queensland Police Service and the overrepresentation increases with each escalation of statutory intervention.¹⁹

28. The Commission suggests the effectiveness of the current system, compared to that proposed in the Bill, can only be assessed with a clear evidence base.
29. While Mr Berkman agreed during the public briefing to provide the Committee with his collated data collected over several years of questions on notice, the Commission **recommends** that the Committee seek further information from the government regarding the number of children aged under 14 detained in Queensland. For example, the number who have been detained for more than 24 hours segmented by:

- a. Gender; and
- b. Indigenous status
- c. Geographic location

This would include information such as:

- Average period of detention in a watch house
- Average period of detention in a detention centre
- Average period of remand compared to sentence
- Current numbers of young people in detention centres compared to the built and safe capacities

¹⁹ Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 3 (Michael Berkman).

- Numbers of repeat offenders.
30. This information would also inform the development of alternative strategies if the MACR were raised.
 31. As detailed above, there are multiple rights limited by the detention of children. Watch houses simply cannot provide children with appropriate health care, education, rehabilitation, contact with family and the community, privacy and protection from mixing with adults.
 32. The rights of police and youth justice staff also appear significantly limited by the present approach to youth justice in Queensland. The reasonableness of those limitations is questionable given the lack of evidence showing the arrest, detention and prosecution of children aged under 14 results in safer communities.

COVID-19 and education

33. The Commission is also concerned about the impact of the COVID-19 pandemic and resulting restrictions on children. During the public briefing, school disengagement was discussed as a key indicator or precursor to problematic behaviour.²⁰
34. There were 10,929 children in out of care as of March this year, compared to 10,190 in the same period last year. Before the pandemic, 2807 children were admitted to care from 2018 to 2019. This increased to 3011 children admitted in the 12 months up to March 31 this year. The Director-General has stated the pandemic ‘really amplified families and community issues.’²¹
35. The Queensland Family and Child Commission’s *Growing up in Queensland* study confirms that young people have acutely felt the impacts of COVID-19,²² and research shows the impacts of COVID-19 are amplified for Indigenous children and young people.²³ In light of COVID-19 further driving school disengagement, the Government should undertake

²⁰ Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 5

²¹ Jocelyn Garcia, ‘More children left in state care after “pressure cooker” pandemic hit’, *Brisbane Times* (Online, 3 November 2021) <<https://www.brisbanetimes.com.au/national/queensland/more-children-left-in-state-care-after-pressure-cooker-pandemic-hit-20211028-p593wa.html>>

²² Queensland Family and Child Commission, *Voices of Home: Growing up in Queensland 2020* (Report, 2021), 39, 46.

²³ Cheryl Vardon, *Impacts of COVID-19 being felt by children and young people* (Web Page) <<https://www.qfcc.qld.gov.au/impacts-covid-19-being-felt-children-and-young-people>>

an audit of all children disengaged from education in 2020 and 2021 and prioritise supporting their return.

36. As part of measures to support raising MACR (or even without a formal legal change), reducing school suspensions and exclusions must be prioritised. Not only would such efforts address many of the pressures on the youth justice system, it would also improve overall wellbeing for many children and young people in Queensland and reduce intergenerational socio-economic disadvantage. At a minimum, the Commission **recommends** the government should urgently review the impact COVID-19 has had on disengagement from school.

Diversion and the service system

37. Increased focus and investment in diverting children out of the justice system can be implemented even without raising MACR, although as already noted, it is critical to justifying any potential limitation on the rights of victims that may arise. The Commission does not have the expertise to necessarily judge how best to respond to the needs of complex children and young people, but suggests multiple indicators would suggest the current system is not working. The review of this Bill provides an opportunity to consider better early intervention and diversion, before a child has had contact with the criminal justice system.
38. A research brief completed by Queensland Government Statistician's Office in April 2021 concluded that:

Research shows that the majority of young people tend to grow out of crime and indicates that their brain development makes them less culpable for their behaviour when compared with adults. Therefore, diverting young people away from formal court proceedings can be an effective response to youth crime given the research that shows that most young offenders will not offend again and intervening with offenders with a low risk of reoffending may actually increase their likelihood of future reoffending. Diverting low risk young people from the criminal justice system may also enable the ability to target limited resources towards responses addressing chronic offenders who are responsible for a disproportionate share of youth crime and more likely to transition into adult offending.

Research suggests that chronic offenders require intensive interventions that address criminogenic risks and support protective factors, or on providing a strength-based approach, focus on developing an individual's skills and opportunities to increase overall wellbeing. Responses to youth offending may benefit from a coordinated, multi-agency approach to appropriately and effectively

address the complex, presenting needs of young offenders. It may also be important to involve the family of the young person to increase the efficacy of interventions (where possible and appropriate). Furthermore, intervening early may result in long-term personal, social and economic benefits.²⁴

39. Reflecting this, in many other jurisdictions success is measured on the low numbers of children that actually appear in court or are detained. As well as the Closing the Gap targets and existing Youth Justice Strategy, other annual measures should be developed to incentivise diversion and transparently report on the success of current measures.
40. For example, the *Royal Commission into the Protection and Detention of Children in the Northern Territory* suggested the New Zealand Police Youth Aid Model be considered further as a way of diverting young people away from the criminal justice system.²⁵
41. The New Zealand *Oranga Tamariki Children, Young Persons and Their Families Act 1989* also enshrines in principle that young people be diverted from the criminal justice system:

unless the public interest requires otherwise, criminal proceedings should be commenced against a child or young person if there is an alternative means of dealing with the issue (including Family Group Conference).²⁶

42. In Australia, ACT Policing has adopted a version of this model, with a policy position to 'to refer all eligible first-time offenders and all juvenile Aboriginal and Torres Strait Islander offenders to restorative justice.'²⁷
43. As discussed during the public briefing, the ACT Government has also committed to raising MACR to 14 and recently released an independent review that identified service gaps and alternative models that will assist in raising the age. The review proposes a model of wraparound and case management services for children and young people, including appropriate after-hours and crisis accommodation for this age group in the ACT. The report recommends building a stronger, more coordinated service system, ensuring early identification of needs and providing more

²⁴ Queensland Government Statistician's Office, *Youth Offending* (Research Brief, 2021) <<https://www.qgso.qld.gov.au/issues/10321/youth-offending-april-2021-edn.pdf>>, 15.

²⁵ *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Report, 17 November 2017), vol 2b, 222.

²⁶ s 208

²⁷ Australian Federal Police, *Diversionary Conferencing Restorative Justice* (Standard Operating Procedure, 16 October 2018) <<https://www.afp.gov.au/sites/default/files/PDF/IPS/SOP-DiversionaryConferencingRestorativeJustice.pdf>>

universal support to meet those needs. Key themes identified include that children who offend have complex needs and that current gaps in the ACT service system are:

- A lack of coordination and integration
- Demand outstrips the availability of services
- Many children aged 10-13 are not commonly eligible for a range of services
- Services may have workforce capability issues including the structure of funding arrangements and tendering
- Need to develop trauma-informed workforce
- Need for safe accommodation

44. The report finds a therapeutic response is necessary to meet children's complex needs and offers an overview of alternative responses. While the ACT may be a different jurisdiction demographically and geographically²⁸, the findings underscoring the reforms seem equally applicable:

These reforms are underscored by a shared responsibility for children's wellbeing and safety. Raising the age of criminal responsibility highlights the importance of early, coordinated and sustained help for children and their families. A key outcome of this reform is to meet children's needs. This outcome will not only be of value to them and their families but will benefit the wider community as well.²⁹

45. Of particular relevance to Queensland, the report recommends a self-determined response for Aboriginal and Torres Strait Islander children, noting their overrepresentation in the justice system.
46. Other jurisdictions have identified similar themes. For example, reports from Scotland indicate a reduction of more than 80 per cent in school exclusions in the past 10 years, and over the same period a halving of youth crime. This is credited to a focus on positive behaviour approaches such as restorative justice techniques and the development of the Scottish Violence Reduction Unit. The unit adopts a public health approach to treating violence as an infection which can be cured across the community including in schools.³⁰

²⁸ Which was conceded by Mr Berkman during the Public Briefing: Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 15 November 2021, 8 (Michael Berkman).

²⁹ Emeritus Professor Morag McArthur, Dr Aino Suomi, Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, August 2021) <<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>>.

³⁰ *Scottish Violence Reduction Unit* (Website) <<http://www.svru.co.uk>>.

Conclusion

47. In conclusion, based on international human rights standards, the Commission supports raising the MACR to 14. However, even without such a change, a coordinated service system must be adequately resourced to respond to at risk young people. This is in light of much of the evidence cited in the material accompanying the Bill and elsewhere, including the Atkinson Report.
48. Further evidence-based programs must be developed and funded that seek to address the underlying causes of youth crime. As Mr Berkman indicated during the Public Briefing, as this Bill is introduced by a private member, it cannot lead to the appropriation of funds.
49. The Commission **recommends** that the government commit to raise MACR to 14 and this be followed by a state-wide consultation, engagement and review (similar to that undertaken in the ACT) to identify critical new investment necessary to support children at risk. Based on the Queensland experience of moving 17 year olds out of the adult justice system, it is critical that this transition is well planned and resourced.
50. Extensive community consultation must inform such programs, with engagement and funding for rural and remote communities being particularly important. The challenges for rural and remote communities to any MACR change should not be ignored. As identified in previous reports, engaging with these communities is critical to developing and funding place-based youth development measures that are trusted and effective.³¹ Such measures must be designed with the inherent challenges of place-based approaches in regional and remote communities including attracting and retaining appropriately skilled personnel, building local capability and overcoming coordination issues.³² Such efforts will likely require a sustained effort over a long period,³³ including engagement with Aboriginal and Torres Strait Islander peoples in particular with the goal of finding Indigenous-led solutions.³⁴

³¹ Major General (Retd) Stuart Smith AO DSC (Townsville Community Champion), *Townsville's voice: local solutions to address youth crime*, 5 December 2018, 34

³² Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism*, August 2019, 138.

³³ Ibid.

³⁴ Ibid, 438 – discusses principles informing reforms across the justice system to reduce indigenous imprisonment.

51. These interventions should adopt a justice reinvestment approach and must address the gross over-representation of Aboriginal and Torres Strait Islander children in the justice system.