



Public Health Association
AUSTRALIA

**Public Health Association of Australia
submission on the *Criminal Law*
(*Raising the Age of Responsibility*)
Amendment Bill 2021**

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The **Public Health Association of Australia** (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia.

The PHAA works to ensure that the public's health is improved through sustained and determined efforts of our Board, National Office, State and Territory Branches, Special Interest Groups and members.

We believe that health is a human right, a vital resource for everyday life, and a key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

Our mission as the leading national organisation for public health representation, policy and advocacy, is to promote better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health. Members of the Association are committed to better health outcomes based on these principles.

Our vision is for a healthy population, a healthy nation and a healthy world, with all people living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health and wellbeing for all.

The reduction of social and health inequities should be an over-arching goal of national policy, and should be recognised as a key measure of our progress as a society. Public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

PHAA submission on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (Qld)

Introduction

PHAA welcomes the opportunity to provide input to the Committee's inquiry into the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* ("the Bill").

In short, PHAA strongly urges that Parliament should enact this Bill, and that the Committee should recommend doing so.

PHAA is an active member in the national Raise the Age campaign (www.raisetheage.org.au), which seeks exactly this reform.

The issue of children aged 10-13 being incarcerated, and the underlying issues of such children undertaking actions which lead to courts ordering such incarceration, reflect powerful underlying social, economic and cultural determinants of behaviour.

There are underlying legal principles about the nature of children's personal development, and the actions they take, which support the conclusion that children age below 14 cannot reasonably be understood as inherently criminal, or as culpable for actions they may commit, in the same manner as adults. Specifically, there are realities about the neurological development of comprehension which support that position. These are discussed below.

Apart from questioning the culpability of children in committing these actions, their ability to participate beneficially from, or be harmed further by, the youth justice system should also be considered in establishing the appropriate minimum age of criminal responsibility.

Legal principle

The law has long recognised that criminality as a concept does not apply to an individual merely for undertaking *actions*, but also requires the presence of a *state of mind* indicating a culpable intention to commit an illegal act. The law has also set boundaries, including youth but also other forms of mental incapacity at older ages, which if applicable mean that the individual cannot be found to have the requisite state of mind, and is thus not guilty of the criminality that is alleged.

Around the world, specific age definitions at which this concept applies vary, but 14 years of age has become a general standard internationally. Australia, unfortunately, still maintains state, territory and federal laws that set 10 years of age as the threshold for applying this presumption.

With respect to young age, the common law concept of *doli incapax*, involves as presumption in law that a child is incapable of forming the criminal intent to commit an offence. We note the comments in the Explanatory Notes to the Bill that:

"Although *doli incapax* (included in the Criminal Code at s29(2)) theoretically creates the presumption that children aged 10-13 are unable to form criminal intent, the 2018 Report on Youth Justice prepared by Bob Atkinson AO, APM ("the Atkinson Report") notes that this is rebuttable and "rarely a barrier to prosecution". Evidence from Victoria also indicates that *doli incapax* is applied inconsistently and "is not working as intended to protect very young children from being held criminally responsible". By its nature, it also does not prevent children from being incarcerated while on remand, including in a detention centre or a watch-house."
(<https://www.legislation.qld.gov.au/view/html/bill.first.exp/bill-2021-018>)

It is this, of course, that the Bill would immediately change.

Health reasons for raising the age

While prison is harmful for all children, the medical evidence and internationally accepted standards make it clear that 14 is the bare minimum governments must raise the age to in order to protect the rights and health of our children.

The current minimum age of criminal responsibility of 10 years of age in all states and territories across Australia is out of step with medical consensus regarding child brain development. Children under the age of 14 are undergoing significant growth and development, which means that they may not have the required capacity to be criminally responsible.¹ Research shows that immaturity can affect a number of areas of cognitive functioning “including impulsivity, reasoning and consequential thinking”. Scientific advances related to the understanding of child cognitive development favour a minimum age of criminal responsibility of at least 14, taking into account the time it takes for the adolescent brain to mature.²

There is now also clear evidence that children in the youth justice system in Australia have high rates of additional neurocognitive impairment, trauma and mental health issues.³ Given the high rate of neurodevelopmental delay experienced by children in youth prisons, some behaviours often reflect the developmental age of the child, which may be several years below their chronological age. Judging criminal responsibility on the basis of a chronological age is inappropriate for children who may have a much lower developmental age due to a number of medical and developmental conditions described in the following sections. The evidence overwhelmingly shows that when children in the very young age bracket of 10 to 13 years of age are forced through a criminal legal process during their formative developmental phases, they suffer immense harm.

Neurocognitive impairment in children caught in the criminal legal system

There is strong evidence that children in youth prisons in Australia have a very different neurodevelopmental and mental health profile compared to children who are not in custody. A recent study found that a third of children caught in the criminal legal system met the criteria for at least two mental health disorders and were twice as likely to experience high or very high psychological distress.⁴

A large multidisciplinary study of 99 children and young people sentenced to detention in Western Australia showed that 89% had at least one severe neurodevelopmental impairment.⁵ These impairments included intellectual disability, trauma/attachment disorders, anxiety, depression, learning difficulties, speech and language disorders, and Fetal Alcohol Spectrum Disorder (FASD). Notably, the majority of children diagnosed with neurodevelopmental disorders had not been previously identified until the study occurred.⁶

These findings highlight that many, if not most, incarcerated children with a chronological age of 12 or 13 years are likely to have a much younger functional age, further impacting their impulsivity, reasoning and decision-making abilities.

¹ Chris Cunneen, ‘Arguments for Raising the Minimum Age of Criminal Responsibility’ (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) 11; Thomas Crofts, ‘A Brighter Tomorrow: Raise the Age of Criminal Responsibility’ (2015) 27(1); *Current Issues in Criminal Justice* 123; Enys Delmage, ‘The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective’ (2013) 13(2) *Youth Justice* 102.

² Cunneen (n 1).

³ Bower C, Watkins RE, Mutch RC, et al *Fetal alcohol spectrum disorder and youth justice a prevalence study among young people sentenced to detention in Western Australia* BMJ Open 2018.

⁴ Meurk C, Steele M, Yap L, Jones J, Heffernan E, Davison S, et al. *Changing direction: mental health needs of justice-involved young people in Australia*. Sydney: Kirby Institute; 2019.

⁵ Bower (n 4).

⁶ Bower (n 4).

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As children driven into contact with the legal system are likely to have a lower functional age and have not yet developed critical cognitive functioning, we are strongly recommending the age of criminal responsibility be raised to at least 14 years of age.

Adolescence and the transition from primary school to high school

Many children aged 12 are still in primary school and many 13 year old children are just entering high school. Neurodevelopmental evidence demonstrates that adolescence is a unique, defining stage of human development. It is characterised by rapid brain development,⁷ increased impulsivity and sensation-seeking behaviour, coupled with a heightened vulnerability to peer influence which affects decision making capacity.⁸ Documented evidence in the fields of child development and neuroscience indicates clearly that maturity and the capacity for abstract reasoning are still evolving in children aged 12 to 13 years, due to the fact that their frontal cortex is still developing.⁹

Transitioning from primary school to high school can be a challenge for a range of children who may require further education and social support. There is evidence that children at risk of experiencing a difficult transition to high school include those with emotional and behavioural difficulties, prior difficult experiences in primary school, and limited engagement in extracurricular activities.¹⁰

A range of behaviours in 10 to 13 year old children that are currently criminal under existing Australian law are better understood as behaviours within the expected range in a typical neurodevelopment of a 10 to 13 year old with a significant trauma history.¹¹ However, instead of being assisted by trauma-informed services to complete primary school and transition to high school, children in this cohort are often criminalised, arrested, strip-searched, and put in prisons.

Committing to develop a proposal to raise the age of criminal responsibility to just 12 is insufficient and does nothing to address the unmet need of the 456 children aged 12 and 13 who were sent to prisons between 2019 and 2020.

Over-representation of Aboriginal and Torres Strait Islander children

All of the above discussion applies to all children who might come before the courts at age 13 or younger. However, it is impossible to address this subject without acknowledging an unavoidable truth: that in Australia incarceration of children aged 10-13 is vastly more common in regard to Aboriginal and Torres Strait Islander children.

As stated in PHAA's [policy position statement on Incarceration of Aboriginal and Torres Strait Islander people](#) (2016):

"2. The high rates of Aboriginal and Torres Strait Islander incarceration are caused by many historical, political, economic and social factors and solutions must take a social determinants approach.²

3. Due to a range of historical, political and social issues such as colonisation, racism, lower levels of education and socio-economic status, Aboriginal and Torres Strait Islander prisoners' health

⁷ Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system.

⁸ Cunneen citing Sentencing Advisory Council (n 1)

⁹ Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system.

¹⁰ Macarthur M, Suomi A, Kendall B, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory: final report* (Justice and Community Safety Directorate ACT, 2021).

¹¹ Royal Australasian College of Physicians (RACP), Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility (July 2019), 3 and 5

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outcomes are worse than those of other Australians. Low levels of education and low socio-economic status are risk factors for substance abuse, risky alcohol consumption, and poor mental health which in turn are contributing factors for contact with the justice system.³

4. The forced removal of Aboriginal and Torres Strait Islander young people from their families and communities can cause dislocation from culture and has an impact on their health and wellbeing.⁴

5. An Aboriginal or Torres Strait Islander youth is 25 times more likely than a non-Aboriginal and Torres Strait Islander youth to be detained in a juvenile facility.”

Australian Institute for Health and Welfare (AIHW) data for the most recent full year (2019) indicates that 499 children aged 10-13 were incarcerated. Of these, an estimated 59% were Aboriginal and Torres Strait Islander children.

We note that the Australian Lawyers Alliance, in its submission to this inquiry, referring to 2018-18 data and approaching their estimate from another direction, finds an even more dramatic figure of 75% of aged 10-13 incarcerated children in Australia being Aboriginal and Torres Strait Islander young people:

“According to the Australian Institute of Health and Welfare (AIHW), in 2017–18 on any given day, 7 per cent of the total number of young people under youth justice supervision were aged between 10 and 13 years of age. This equates to approximately 385 young people. Of these, the overwhelming majority – approximately 75 per cent – were Aboriginal and Torres Strait Islander young people.” (ALA submission, page 5)

Given that general estimates of the proportion of the Australian population that are Aboriginal and Torres Strait Islander people is close to 3%, it is impossible to deny that a racial element underlies the situation under examination.

This is, of course, only part of the national problem of far higher criminalisation, incarceration, and long-term entanglement with the justice system that burdens the Aboriginal and Torres Strait Islander population. There is no legitimate basis for this differential treatment.

The underlying problem is, in part, that Aboriginal and Torres Strait Islander people and communities exist under conditions of disadvantage in terms of social and economic opportunity and wellbeing. In addition, cultural damage and trauma have been experienced throughout our Indigenous communities. But the fact that these conditions impact on the mental health, social stability and family wellbeing of these communities cannot justify differential treatment by our courts, nor by our police and other components of our legal system.

As was so eloquently stated in the Uluru Statement from the Heart (2017):

“Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.”

This intolerable situation must be addressed by coordinated state and national policies. In 2021 the national Closing the Gap framework adopted, for the first time, ‘justice targets’ aimed at seeing the number of Indigenous (adult) people incarcerated start to reduce, albeit at very modest targets for change. This will not possibly be achieved unless the entanglement of young Aboriginal and Torres Strait Islander people is reduced.

*PHAA submission on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (Qld)**The evidence-based pathway to Raising the Age*

There is an evidence-based pathway to raising the age which has already been set out by the ACT Government through the independent review headed by Emeritus Professor Morag McArthur on the steps required to best support this reform.¹² The resulting [report](#) provides options for therapeutic and restorative care to reduce children and young people's interaction with the criminal justice system and outlines the service system and implementation requirements for raising the minimum age of criminal responsibility to 14.

Conclusion

Finally, we note the extreme simplicity of the Bill, the core provision of which simply adjusts the statement of the age at which the law recognises that criminal responsibility may first be accepted by courts in weighing criminal allegations against a child.

PHAA supports this Bill, and urges that:

- the Parliament of Queensland pass the Bill promptly, and
- the Government of Queensland make supporting policy decisions and investments to implement this change.

The PHAA appreciates the opportunity to make this submission. Please do not hesitate to contact us should you require additional information or have any queries in relation to this submission.



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¹² https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rattenbury/2021/raising-the-age-report-releasedhttps://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF