



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

Submission to Community Support and Services Committee

November 2021

The Queensland Mental Health Commission

The Queensland Mental Health Commission (the Commission) is an independent statutory agency established under the *Queensland Mental Health Commission Act 2013* (the Act).

It was established to drive ongoing reform towards a more integrated, evidence-based and recovery-oriented mental health and substance misuse system. Under the Act, the Commission must focus on systemic mental health and substance misuse issues.¹

In exercising its functions under the Act, the Commission takes account of issues affecting people who are vulnerable to, or otherwise at significant risk of, developing mental health issues, as well as recognising the importance of cultural safety and healing when providing treatment, care and support to Aboriginal and Torres Strait Islander peoples.

The Commission works in four main ways:

- developing a whole-of-government strategic plan for improving mental health and limiting the harm associated with problematic alcohol and other drug (AOD) use
- undertaking reviews and research to inform decision-making, build the evidence base, support innovation and identify good practice
- facilitating and promoting mental health awareness, prevention and early intervention
- establishing and supporting statewide mechanisms that are collaborative, representative, transparent and accountable.

The Commission promotes policies and practices that are aligned to the vision of the *Shifting Minds Queensland Mental Health, Alcohol and Other Drugs Strategic Plan 2018-2023*² (*Shifting minds*) for a fair and inclusive Queensland, where all people – including children – can achieve positive mental health and wellbeing.

People living with mental illness and/or experiencing problematic AOD use are overrepresented in the adult and youth justice systems. *Shifting minds* Focus area 1 “Better lives” has a focus on reducing involvement with the criminal justice system. Opportunities exist to reduce involvement with the criminal justice system through diversionary programs, as well as by improving interventions for people in the court system, on community-based orders, and within correctional settings. Comprehensive and integrated models between mental health, AOD services, justice, housing, disability, employment and a range of social services and supports are required. These need to consider the specific needs of children and young people involved in the youth justice system.

Shifting minds Focus area 2 “Invest to save” highlights the importance of prevention and early intervention early in life and continuing into childhood and adolescence. Between one-quarter and one-half of adult mental illness may be preventable through intervention during childhood. Half of all serious mental health problems commence by the age of 14 years, and 75 per cent before the age of 25 years. This coincides with important developmental milestones, including participation and completion of education or training and the commencement of employment. It is also the time that many young people experiment with alcohol and other drugs, thus heightening their vulnerability. The experience of mental illness affects social, educational and longer-term vocational participation and achievement.

Shifting Minds also includes a commitment to strengthening human rights protections.

¹ Section 11(2)(a) of the *Queensland Mental Health Commission Act 2013*

² https://www.qmhc.qld.gov.au/sites/default/files/files/qmhc_2018_strategic_plan.pdf

Overview

The Commission welcomes the opportunity to make a submission to the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*.

We note that the objective of the Bill is to ensure children under 14 years of age are not incarcerated or otherwise punished under the criminal legal system, consistent with current medical understanding of child development and contemporary human rights standards.

The Bill aims to achieve this objective by raising the minimum age of criminal responsibility in Queensland from 10 to 14 years old and transferring any children under 14 years old out of custody. Additionally, the Bill aims to negate the consequences of prior offending by children while under the age of 14, including, for example, the creation of records in relation to such offending.

Issues considered by the Commission in relation to the Bill

Stakeholder Statement to the Meeting of Attorneys-General

- Evidence shows that the current system and practice can cause significant harm for young children involved in criminal legal processes during their formative developmental phases; some can suffer physical and psychological harm and are more likely to reoffend.
- Research shows that the earlier a child comes into the justice system, the more likely their future trajectory is negatively impacted and increases the likelihood of entering a recidivist cycle. Entering the criminal justice system is also recognised to place limits and barriers on lifelong learning and children's ability to complete education and to get jobs.
- Harms associated with involvement in the criminal justice system include negative impacts to their physical and mental health and wellbeing, and their future trajectory. These impacts are further exacerbated for young people with pre-existing vulnerabilities such as conditions including Fetal Alcohol Spectrum Disorder (FASD), the Autism spectrum or other complex developmental related delays and difficulties and those impacted by trauma and neglect.
- These risks can be avoided if relevant services are provided to children at the earliest possible time and outside the criminal justice system.
- Presently, some services are only provided once children and young people have entered the detention system. Raising the age of criminal responsibility as proposed in the Bill could leave many children without services. However, this risk must be mitigated through the investment in the proposed alternative model of service provision outside the justice system. This model is preferable as it avoids the unintended negative consequences for children in detention, but the legislative process needs to be accompanied by an improved service delivery model for this age group with problematic behavioural issues. Although this is likely to require additional investment, studies show that significant savings can be made by avoiding in the criminal justice system.
- Experts argue that a health response not a criminal response is required and that prison systems are not a good place for children to be, to help them grow up to healthy adults; that behavioural difficulties should be addressed in the health system; and the fact that brains and decision making of children is still developing is put forward as an argument to not hold them criminally responsible.
- As a result, the Royal Australian College of General Practitioners and more than 70 other organisations recently signed the 19 May 2021 statement to the Meeting of Attorneys-General, which strongly supports the Raise the Age campaign³ and advocates for the

³ www.raisetheage.org.au

removal of criminal responsibility for children aged 10 to 13 and a change of the age of criminal responsibility to at least 14 years⁴.

- This is a view shared by Aboriginal and Torres Strait Islander organisations, medical and legal experts, service providers, Australian and international human rights organisations, the global community and multiple foreign governments through United Nations (UN) processes, and UN human rights bodies.

Human Rights Act 2019 (QLD)

- The Queensland Law Society advocates for raising the age of criminal responsibility to 14 years and its letter to the Shadow Attorney-General in April 2020⁵ highlighted concerns with regard to the *Human Rights Act 2019* (HRA).
- The HRA protects the rights of children and young people. Section 32(3) of the HRA states that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. The HRA further provides section 33(3), that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age. These rights are to be read in conjunction with other rights protected by the HRA, including the protection of children in their best interests and without discrimination (section 26), cultural rights generally (section 27) and the particular cultural rights of Aboriginal and Torres Strait Islander peoples (section 28).

Impact on overrepresentation of Aboriginal and Torres Strait Islander children

- A key target of the *Closing the Gap* initiative is reducing the overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system and there is an argument that raising the age of criminal responsibility would have a significant impact on reducing overrepresentation.
- The submission to the Meetings of Attorneys-General states:
 - The low age of criminal responsibility disproportionately impacts these children and is a key driver of their contact with police and the justice system.
 - Aboriginal and Torres Strait Islander children have a right to grow up connected to culture and in a safe and healthy environment, supported to remain with their families and communities.

Data

- The Australian Institute of Health and Welfare 2020 youth detention population data for Australia⁶ identifies:
 - an average of 798 young people in youth detention on any one night, with 80% aged 10–17 years, and 91% male
 - 64% of young people in detention were unsentenced, either awaiting the outcome of their court matter or sentencing
- Aboriginal or Torres Strait Islander young people aged 10–17 years remain 17 times as likely as young non-Indigenous Australians to be in detention, with just under half (48%) of all

⁴ <https://www.raisetheage.org.au/cag-statement>

⁵ <https://www.qls.com.au/getattachment/21b3e734-05cd-4d3c-bd11-f2d232a19ece/2020-4056-letter-to-a-g-d-ath-on-raising-the-minimum-age-of-criminal-responsibility.pdf>

⁶ <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2020/contents/data-visualisation/number-of-young-people-in-detention>

young people in detention being Indigenous (compared to being 6% of the Australian population aged 10–17years).

Statistics from the ‘National data on the health of justice-involved young people: a feasibility study 2016–17’⁷ indicate that children under 14 years who enter the justice system are more likely to be experiencing underlying trauma, have an undiagnosed disability and come from a low-socioeconomic background. Almost 70% of 10-year-olds in detention have received child protection services at some point and Australia has the highest known rate in the world of fetal alcohol spectrum disorder in the juvenile detention system.

Age of criminal responsibility in European countries

- In line with the recommendations from the United Nations Committee on the Rights of the Child most European countries, including Germany, Italy, Austria, Hungary and Croatia have an age of criminal responsibility of 14 years.⁸
- Other examples are Poland (15), Czech Republic (15), Denmark (15), Netherlands (12), England and Wales (10), and Northern Island (10).

Alternative Model

The Explanatory Notes outline that raising the minimum age of criminal responsibility is only one part of a better approach to youth justice and must be accompanied by the widespread implementation of an alternative model for young people aged 10-13 who display problematic behaviour.

The Commission agrees that a key problem with Queensland’s current system is that the path to services is often through the criminal justice system. There is a risk that by raising the age of criminal responsibility, the mechanism for referral to support services is disconnected from offending or involvement with the criminal justice system. This disconnect can only be addressed when referrals are offered at the earliest possible point of identifying concern (for example, when a child’s behaviour raises concerns within the home, community or school, or, failing this, when they come into contact with police). The Queensland Family and Child Commission⁹ suggests intervention should be available in primary school, particularly during known sensitive transition points like the move into year two and from Primary to High school.

An alternative model could allow for greater self-determination and community-led decision making through investment in the Aboriginal and Torres Strait Islander community-controlled sector.

Conclusion

The Commission supports raising the age of criminal responsibility to 14 years. The Commission also agrees that a national approach is required to raise the age of criminal responsibility across Australia. Most developed countries in the world have done this already.

This approach is consistent with the recommendation by UN Committee on the Rights of the Child. It is also supported by evidence and many experts in the medical, legal, education, community and

⁷ <https://www.aihw.gov.au/reports/youth-justice/health-justice-involved-young-people-2016-17/contents/table-of-contents>

⁸ <https://archive.crin.org/en/home/ages/europe.html>

⁹ Qld Family and Child Commission (2021). Changing the Sentence: Overseeing Queensland’s youth justice reforms

social services fields. Importantly, it is strongly supported by First Nations people and Aboriginal and Torres Strait Islander organisations and advocates. Their voices need to be heard due to the overrepresentation of Indigenous children in the criminal justice system.

The agreement at the recent Meeting of Attorney's General to "develop a proposal towards raising the age to 12" falls short of a commitment to work towards the recommendation of the UN Committee on the Rights of the Child and international standards. A successful national approach will require leadership from States and Territories to support and drive this important and long overdue reform. This Bill provides an example of how this reform can be implemented.

The Commission also acknowledges that a change to the criminal age of responsibility to 14 years must be supported through concurrent and much needed enhancements to prevention and early interventions available to children, families, and communities. This must include enhanced models of services based on the clear evidence of effective early and systemic intervention.