

Sisters Inside Inc.

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Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system

2 December 2021

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000**By email only: CSSC@parliament.qld.gov.au**

Dear Committee Secretary

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

I write to you in relation to the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill). Sisters Inside welcomes the opportunity to provide a submission to the Queensland Community Support and Services Committee regarding the Bill.

About Sisters Inside

Established in 1992, Sisters Inside is an independent community organisation that advocates for the collective human rights and interests of women and children affected by the criminal justice system. Our policy advocacy is informed by our work alongside women and children to address their immediate, individual needs.

Our work is guided by our underpinning Values and Vision.¹ We believe that prisons are an irrational response to social problems that serve to further alienate socially marginalised groups in our communities, especially Aboriginal and Torres Strait Islander women and girls. Over the past 24 years, Sisters Inside has developed a unique model of service and highly successful programs.² All of our work is directly informed by the wisdom of criminalised women and, wherever possible, Sisters Inside employs staff with lived prison experience.

Sisters Inside is uniquely placed to contribute to this consultation. We daily see the realities of prison life for women and girls in all (adult and children's) prisons throughout Queensland. We also work with women and girls following their release from prison. We see the wider consequences of policies and practices within the Queensland criminal justice system through our support services with the children and wider families of women and girls in prison.

¹ Sisters Inside Inc., 'Values and Visions'. Available at: www.sistersinside.com.au/values.htm

² Sisters Inside Inc., 'Inclusive Support: A Responsive Alternative to Case Management' (2010). Available at: www.sistersinside.com.au/reports.htm.

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Our view

Sisters Inside strongly supports the proposed amendments to raise the minimum age of criminal responsibility to 14 years. We have long held that the age of criminal responsibility should be raised to 18 years old. In our view, no child should ever be criminalised or incarcerated. We are disappointed that the State does not have the courage to abolish the criminalisation and imprisonment of all children in Queensland. However, we believe that this legislation is a step in that direction.

Specifically, we support the amendments contained in the Bill that:

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

Our reasons for supporting the Bill are outlined below.

Existing law

At present, the minimum age of criminal responsibility in Queensland is 10 years old. There is a rebuttable presumption (known as *doli incapax*), which provides that children under 14 years old are not criminally responsible unless it is proven by the prosecution that they had capacity at the time of the alleged offence to know that they ought not to do the act or omission. In our experience it is commonplace for children under 14 years to be sentenced for offences. Recent Australian research found that 'inconsistencies in practice undermine the extent to which the common law presumption of *doli incapax* offers a legal safeguard for very young children in conflict with the law'.³ This view was also expressed by Bob Atkinson AO in his *Report on Youth Justice*:

We were told that the presumption of doli incapax is rarely a barrier to prosecution. In Queensland, the threshold to rebut the presumption of doli incapax is perceived by some

³ O'Brien, W. and Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, 17(2): 134-152.

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stakeholders to be too low, with the result that many children who do not have the level of cognitive functioning required to be criminally responsible are receiving criminal outcomes and becoming embedded in the criminal justice system.⁴

It is commonly the case that children are held on remand before *doli incapax* assessments can be conducted and ruled upon in court. These children are subjected to the highly damaging and traumatising effects of prison in the meantime, even if they are later held to not have capacity, meaning that in reality, ‘the damage has already been done’.⁵ Raising the age of responsibility to 14 will resolve the issues associated with the application of *doli incapax* and ensure that children are kept out of courts and watch houses.

Current context

Data from 2019-2020 indicates that approximately 9% of Queensland’s child prison population is comprised of young people aged between 10 to 13 years.⁶ Data from the same period indicates that there were, on average, 17 children aged 10 to 13 held in Queensland watch-houses each day.⁷ It is particularly shameful that Aboriginal and Torres Strait Islander children make up 70% of the children in prison in Queensland every day.⁸ An exceptionally high rate of the children in prison each day – 85% – are unsentenced, which indicates that raising the age of criminal responsibility is essential to keeping children out of prison. Queensland is the only state which has consistently reported an increase in the number of children in child prisons since 2014-15.⁹

It is important to note the extreme prevalence of ‘cross-over kids’ – children involved in the child “protection” and criminal legal system. National data shows that in 2018-19, 61% of children in prison during 2018– 19 had received a child “protection” intervention in the last 5 years.¹⁰ Of the children who experienced both child ‘protection’ and youth prison, 81% experienced child ‘protection’ first. Over a 4-year period from 2014-18, Aboriginal and Torres Strait Islander children in Australia were 17 times more likely than other children to be under the supervision of

⁴ Bob Atkinson AO, *Report on Youth Justice* (8 June 2018), <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/reform/youth-justice-report.pdf>>.

⁵ 2019, Fitz-Gibbon K and O’Brien, W., ‘A Child’s Capacity to Commit Crime: Examining the operation of Doli Incapax in Victoria (Australia)’ *International Journal for Crime, Justice and Social Democracy*, p.25, accessed 12 February 2020, available at: <https://www.crimejusticejournal.com/article/view/1047/714>.

⁶ Department of Children, Youth Justice and Multicultural Affairs, *Youth Justice annual summary statistics: 2015-16 to 2019-20*, <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/resources/yj-annual-summary-stats-detention.pdf>>.

⁷ Explanatory Note, Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, 4 – 5.

⁸ Department of Children, Youth Justice and Multicultural Affairs, *Youth Justice annual summary statistics: 2015-16 to 2019-20*, <<https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/resources/yj-annual-summary-stats-detention.pdf>>.

⁹ Ibid.

¹⁰ Australian Institute of Health and Welfare, *Young people under youth justice supervision and in child protection 2018–19* (Data linkage series no. 26, 2020).

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both the child 'protection' and the youth legal systems in the same year.¹¹ In Sisters Inside's experience, girls and young women in residential facilities are highly likely to be criminalised because of their placement. We have worked with young women who have been charged with wilful damage for breaking locks on fridges because they were hungry, and assault for throwing blu-tac at care workers. We consider that raising the minimum age of criminal responsibility will eliminate some of the opportunity for children to be criminalised in these environments. Ultimately, we believe that residential "care" facilities are wholly inappropriate and that no child should be placed into these environments.

Scientific evidence

There is general acceptance that children aged between 10-14 years are undergoing significant hormonal, physical and emotional development. Scientific evidence indicates that brains mature gradually over adolescence, until around the age of 21-25 years, and that young children are unable to fully understand the impact and consequences of their actions.¹² The immaturity of a child's brain can affect areas of cognitive functioning including 'impulsivity, reasoning, and consequential thinking'.¹³ Additionally, the psychosocial development necessary to establish a sense of a 'serious' or 'legal' wrong is generally not developed until the later teens, though this is of course dependant on the individual child in question¹⁴ The lowered cognitive ability of children is compounded by Fetal Alcohol Syndrome Disorder (FASD), amongst other cognitive disabilities, which is known to be disproportionately high amongst incarcerated children, and even higher amongst incarcerated Aboriginal and Torres Strait Islander children.¹⁵ We concur with the statement by Goldson, that rather than becoming:

pre-occupied with whether or not children aged 10 years and above are sufficiently capacitated to legitimize their exposure to the formal youth justice apparatus... the question might be more profitably framed in terms of whether it is preferable to decriminalize children's transgressions and address their behaviour without recourse to prosecution, sentence and youth justice intervention.¹⁶

¹¹ Ibid.

¹² Farmer, E, 'The age of criminal responsibility: Developmental science and human rights perspectives (2011) 6(2) *Journal of Children's Services* 86, 87

¹³ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 6-7; Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

¹⁴ UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018) 3; Michael Lamb and Megan Sim, 'Developmental Factors Affecting Children in Legal Contexts' (2013) 13(2) *Youth Justice* 131.

¹⁵ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 17.

¹⁶ Goldson, B. (2013) "'Unsafe, unjust and harmful to wider society": grounds for raising the minimum age of criminal responsibility in England and Wales', *Youth Justice*, 13(2): 111-130.

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Children who have been impacted by the criminal legal system frequently come from highly traumatic backgrounds which have been marked by ‘profound childhood adversity and trauma, including histories of physical or sexual abuse, neglect, family disruption and/or significant economic disadvantage’.¹⁷ Trauma has the potential to disrupt their neurodevelopment and lead to cognitive impairment.¹⁸ A NSW study found that 92% of females and 86% of males in detention have a mental illness.¹⁹ Additionally, a 2008 study of 164 young people detained at the Brisbane Youth Detention Centre showed high levels of mental illness indicative of trauma (75% of boys and 90% of girls).²⁰ These statistics are consistent with our experience working with criminalised girls and reflect that children with mental illness and cognitive impairments tend to be incarcerated rather than treated.²¹ The State fails everyday to provide the social services and supports children and families need in their communities.

We consider that this experience of trauma is likely to be exacerbated by the highly concerning treatment children receive in Queensland’s prisons, such as routine strip searching and the management of supposed “misbehaviour” by force, mechanical restraints and separation.²² In reality, this ‘misbehaviour’ is often the expression of severe stress, suffering, and trauma. Children – particularly children who have experienced trauma – require support and guidance, not punishment or punitive supervision through the criminal legal system. We consider that raising the age of criminal responsibility to at least 14 years, if not older, is necessary to keep Queensland’s law in line with modern scientific understanding and to protect the ‘best interest’ of inherently vulnerable children.

Effectiveness of criminalisation and imprisonment

¹⁷ O’Brien, W. and Fitz-Gibbon, K. (2017) ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’, *Youth Justice*, 17(2): 134-152.

¹⁸ Judy Cashmore, ‘The link between child maltreatment and adolescent offending: Systems neglect of adolescents’ (2011) 89 *Family Matters: Australian Institute of Family Studies* 31, 33-34; Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (2 March 2020) 12, 16, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

¹⁹ Indig et al. (2011) *Young People in Custody Health Survey: Full Report*, Sydney: Justice Health.

²⁰ Stathis et al, ‘Use of the Massachusetts youth screening instrument to assess mental health problems in young people within an Australian youth detention centre’ (2008) 44 *Journal of Paediatrics and Child Health* 438 – 443.

²¹ Walsh, Tamara (2018). *Keeping vulnerable offenders out of the courts: lessons from the United Kingdom. Criminal Law Journal* 42 (3) 160-177; see also Walsh, Tamara (2019). *From child protection to youth justice: Legal responses to the plight of ‘Crossover Kids’*. *University of Western Australia Law Review* 46 (1) 90-110.

²² See Sisters Inside, ‘Submission to Independent Review of Youth Detention in Queensland’ (October 2016) http://www.youthdetentionreview.qld.gov.au/data/assets/pdf_file/0016/2554/Sisters-Inside.pdf.

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Imprisoning children is neither necessary for community safety, nor effective in stopping behaviours that are deemed criminal by the State. Children aged 10-14 are rarely criminalised for serious offences, with the most common being theft.²³ Cunneen has highlighted that these young children tend to be underrepresented when it comes to serious offences.²⁴ The average minimum age of criminal responsibility in Europe is 14 years and there has been 'no negative consequences to be seen in terms of crime rates'.²⁵ Additionally, in countries such as Germany and Norway, the rate of incarceration for older teenagers who are held criminally responsible is significantly lower than in Australia, suggesting that diversion of children younger than 14 years old leads to a reduction in recidivism.²⁶ This indicates that the risk of adverse affect on crime is not a rational argument for opposing the Bill.

Prisons do not stop criminal "offending", on the contrary, evidence suggests that prisons are themselves criminogenic. The Australian Institute of Health and Welfare (AIHW) study for 2019-20 found that 80% of children who were imprisoned returned to prison within 12 months.²⁷ In general, the youth legal system in Australia has a large return (failure) rate. Nationally, the average return rate within 12 months of release from "sentenced supervision" (in prison or the community) is 41%.²⁸ Among those with an initial supervised community-based sentence, young people aged 10-12 at first sentenced supervision had the highest return rate (90%) of all age group.²⁹ Early contact with the criminal justice system is one of the key predictors of ongoing youth and adult criminalisation, which may lead to pipelining into adult prisons.³⁰ The evidence is clear that the lower age of criminal responsibility, the more children in that society are going to be pushed into a life of "criminality" and disadvantage.³¹

These statistics demonstrate that the criminal justice system does not stop children being re-criminalised. Instead, criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future criminalisation and imprisonment. This is

²³ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017).

²⁴ Chris Cunneen, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) 57.

²⁵ Goldson, B. (2013) "'Unsafe, unjust and harmful to wider society": grounds for raising the minimum age of criminal responsibility in England and Wales', *Youth Justice*, 13(2): 111-130.

²⁶ Jesuit Social Services (2017) Justice Solutions Tour. Expanding the Conversation, Jesuit Social Services, Melbourne.

²⁷ Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2019-20* (Juvenile justice series no. 25, 2021).

²⁸ Ibid.

²⁹ Ibid.

³⁰ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 17; Law Council of Australia, Council of Attorneys-General – Age of Criminal Responsibility Working Group Review (2 March 2020) 9, <<https://www.lawcouncil.asn.au/publicassets/c74ddce5-375c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>>.

³¹ Ibid.

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unsurprising when it is considered that custody separates children from family and community, disrupts their education, and prevents them from accessing therapeutic programs in the community.³² This understanding formed the basis of Queensland's *Youth Justice Strategy 2019-2023*, which focuses on keeping children out of the courts and custody. We consider that the Bill will further legislative fulfilment of the *Youth Justice Strategy*.

International and national trends

There is emerging international and national consensus to raise the minimum age of criminal responsibility to at least 14 years old. The UN Committee on the Rights of the Child has recommended 12 years old as the absolute minimum age and in its General Comment on children's rights in juvenile justice, the Committee states:

*... a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower [minimum age of criminal responsibility] to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. [...] A higher [minimum age of criminal responsibility], for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40(3)(b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected.*³³

Australia is therefore severely out of step with the international community in keeping the age of criminal responsibility as low as 10 years old and the UNCRC 'has maintained a longstanding criticism of the low age of criminal responsibility in Australia'.³⁴ This is particularly shameful in the context of Australia's colonial history and the ongoing disproportionate incarceration of Aboriginal and Torres Strait Islander children and adults.

At the domestic level, the ACT Government has committed to raising the minimum age of criminal responsibility to 14 years old and a report into the steps required to best support this reform was published this year.³⁵ In November 2017, representatives from over 60 organisations

³² Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project', *Research and public policy series no. 125*. Canberra: Australian Institute of Criminology <<https://aic.gov.au/publications/rpp/rpp125?>>.

³³ United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in juvenile justice* (CRC/C/GC/24, 18 September 2019) [22], accessed at <[http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRICAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUXFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRICAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUXFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRICAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUXFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4)>.

³⁴ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017).

³⁵ McArthur et al, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, October 2021)

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signed an open letter calling on the Premier of Victoria to raise the minimum age of criminal responsibility to 14 years. The Royal Commission into the Protection and Detention of Children in the Northern Territory recommended that the Northern Territory Government raise the minimum age of criminal responsibility to 12 years old, and amend the *Youth Justice Act* (NT) so that children under 14 years old may not be ordered to serve time in youth prisons (with very limited exceptions).³⁶ Additionally, raising the age has also been considered at the Federal level with the establishment of the Council of Attorneys-General Age of Criminal Responsibility Working Group. Clearly, therefore, there is a national appetite for increasing the minimum age.

In Queensland's specific legislative context, we note the *Human Rights Act 2019* (Qld) provides specific rights for children in the criminal legal system context. Notably, section 33(3) of the Human Rights Act states that a child who has been convicted of an offence must be treated in a way that is 'appropriate for the child's age'. We consider that no prison is suitable for a child, and that no matter how 'human rights compliant' that prison is claimed to be, imprisonment is always an inappropriate penalty to impose on a child. Sisters Inside believes that by imprisoning a child, the government is failing to care for their mental, physical and emotional needs, as required by the Human Rights Act.

Alternatives to criminalisation

Raising the minimum age of criminal responsibility is a low-cost, high-impact and effective reform to address the over-imprisonment of children. The money saved by reducing imprisonment, as well as through eliminating the costly court processes associated with convicting children, must be directed to improved social services and independent, community-based initiatives that provide ongoing support to children and their families. This will be more effective than knee-jerk, 'tough on crime' laws, which have been proven to fail in managing so-called "youth crime". Additionally, raising the age will prevent the entrenchment of children in the criminal legal system and the pipelining of children into adult prisons, resulting in long term cost-savings for tax payers.

Addressing the underlying factors which lead to criminalisation through improved social services and supports will better protect young people and the community in the short and long term. There is a substantial body of research which tell us that the factors which ensure criminalisation and imprisonment of children are racism, poverty, homelessness, intergenerational trauma, discrimination, poor education and health, and substance use. The Government must commit to funding holistic services, including family support, mental health, disability support, youth engagement and education, and rehabilitation services. One possible avenue for reform recommended in the ACT report is the establishment of an "independent authority...to create an integrated, whole-of-government and whole-of-community system to support children, by fostering a greater sense of shared responsibility across government and within communities for

<https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF>

³⁶ Royal Commission into the Protection and Detention of Children in the Northern Territory (Final report, November 2017) <https://www.royalcommission.gov.au/child-detention/final-report>

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children's wellbeing and safety needs".³⁷ Sisters Inside strongly believe that any legislative change must take a health and wellbeing response that focuses on family support and strengthening a child's connection to community and country.

It is essential that young people's participation in any targeted 'early intervention' programs are fully voluntary and non-coercive; otherwise, we will risk replicating the demonstrably ineffective prison model at the community level. Additionally, these programs must be developed and operated by Aboriginal and Torres Strait Islander communities, given the disproportionate numbers of First Nations children in the criminal legal system. We strongly believe that ending the criminalisation and imprisonment of children cannot be fully realised without raising the minimum age of criminal responsibility and diverting the resources to supporting Aboriginal and Torres Strait Islander young people, their families and communities.

Conclusion

Connections to country, family and services are essential to ensure children are not criminalised and imprisoned. These connections cannot be built or maintained if children are in prisons or watch houses. We believe that the complete abolition of child prisons is necessary to ensure community safety and to create a just society that truly respects the 'best interests' of the child. The youth justice system has been demonstrably ineffective in ending the criminalisation and imprisonment of children. The only response, therefore, is to invest in keeping children and their families safe and well. Raising the minimum age to at least 14 years old will force us to consider more appropriate responses to this targeted group of children. We consider that this Bill is a step in the right direction and ought to be supported by the Committee.

Thank you for considering this letter. If you would like to discuss this letter further, please do not hesitate to contact me on [REDACTED].

Yours sincerely

Debbie Kilroy
Chief Executive Officer

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³⁷ McArthur et al, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* (Final Report, October 2021) <https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF> 78.

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