Speech By

Michael Berkman

MEMBER FOR MAIWAR

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CRIMINAL LAW (RAISING THE AGE OF RESPONSIBILITY) AMENDMENT BILL

Introduction

Mr BERKMAN (Maiwar—Grn) (12.28 pm): I present a bill for an act to amend the Criminal Code and the Youth Justice Act 1992 to raise the age of criminal responsibility to 14 years. I table the bill, the explanatory notes and a statement of compatibility with human rights. I nominate the Community Support and Services Committee to consider the bill.

Tabled paper: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 [1398].

Tabled paper: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, explanatory notes [1399].

Tabled paper: Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021, statement of compatibility with human rights [1400].

Just last weekend my daughter Bonnie turned 10. She is an intelligent, thoughtful and precocious kid, but she is still a kid. Just the night before her birthday she lost her ninth baby tooth. The most important things in her life are gymnastics classes and having dessert as often as possible, even if she has to sneak it past her baby sister. No matter how often she is asked, she cannot seem to remember to hang up her towel after her shower or keep her room tidy. She is a lucky kid. She never wants for any of the basics of life and she is dearly loved by all of her parents, grandparents and her broader community of family and friends.

Not all kids are as lucky as Bonnie. Right now under Queensland law, kids her age can be formally charged as criminals, sentenced and locked up in prison. I am introducing a bill today to end that practice by raising the age of criminal responsibility from 10 to 14 years old. Alongside this straightforward legislative change I am calling on the government to implement and fully fund an alternative model of early intervention and prevention and therapeutic responses for children under 14. I want to be very clear before anyone starts that I am not proposing to simply ignore children's problematic behaviour. My proposal is that we treat them like kids not criminals and we invest in solutions that work, not more prison cells. I will talk a bit more about that later. First I want to give some more context for the bill and why we must urgently raise the age of criminal responsibility.

Fundamentally, a state that claims to be committed to upholding human rights cannot continue to lock up kids as young as 10. The UN committee overseeing implementation of the Convention on the Rights of the Child has been clear: states should set a minimum age of criminal responsibility that is no lower than 14. Our current age, 10 years old, is an international embarrassment. The most common age across the globe is 14 and most European countries set the age between 14 and 16 years old. Since it issued that recommendation in 2019, the UN and other human rights bodies have repeatedly criticised Australia for its shamefully low age, yet the only jurisdiction that has committed to raise the age to 14 is the ACT where the Greens share government with Labor.

Here in Queensland the Labor government's excuse for not raising the age is to defer to the national process. They are talking about the Australian Council of Attorneys-General, now the Meeting of Attorneys-General, which was tasked with looking at this back in 2019. They set up a working group

to report on the issue, but in July 2020 they indefinitely postponed their decision. When the council next met in March this year, raising the age was removed from the agenda to instead be considered out of session. While they will not tell us exactly what happened, the council's draft report was leaked to the *Australian* in March and this leaked report recommended the age be raised to 14. Apparently, the problem is that the states and territories cannot reach consensus. As much as we would like to see a national approach, it is now up to us, as the federal Attorney-General has explicitly said. It seems trite, but it is apparently necessary to note that it is our job as Queensland legislators to amend Queensland legislation and it is time for us to get on with it.

This is not something the government is just hearing about now. The 2018 report on youth justice prepared by Bob Atkinson also recommended the government support raising the minimum age of criminal responsibility through the national process and, as an interim measure, legislate to ensure children aged 10 to 11 years old cannot be incarcerated except for very serious offences. Importantly, while the Atkinson report talks about raising the age to 12, this was with reference to the UN convention which has since been revised to specify 'at least 14'. The UN also explicitly advised against including exceptions.

Not only is the government stymieing the national process; it has done nothing to keep young children from being locked up. In 2019-2020 there were, on average, about 17 children aged 10 to 13 held in a police watch house every day. From July 2019 to October 2020 there were 48 children under 14 held in a watch house for more than three days. All but five of these kids were Indigenous. I do not think any prison is a place for a child, but watch houses are not even regulated under the Youth Justice Act like detention centres are. These places are not resourced to adequately care for children and we have seen multiple instances where children are kept with, or in the eye line of, adult inmates in direct violation of their human rights.

Queensland has the most children aged 10 to 13 locked up in detention centres and by far the greatest proportion of Indigenous kids of any Australian state. Around 130 children under 14 are sent to detention each year. One piece of good news is that children under 14 years old make up a relatively small proportion of the overall youth detention centre population—about 17 children on any given day of an average total of 200. This makes it an eminently achievable task to get them out of there. This bill includes amendments to the Youth Justice Act to transition children under 14 out of detention and into safe housing. Similarly, it would remove children under 14 from the watch house and end any proceedings underway or orders in place against a child under 14.

There is a wealth of evidence that this early contact with the criminal legal system is damaging to a child's wellbeing. In its submission to COAG on raising the age, the Royal Australasian College of Physicians said—

> … the physical vulnerabilities of a 10 year old are such that it is inappropriate that under current Australian law they can be arrested, held in police cells and/or incarcerated.

A compounding factor when it comes to the traumatic experience of criminalisation as a child is that you are far more likely to have already experienced trauma or to be particularly vulnerable or marginalised. The government's 2019-2021 youth justice strategy action plan notes that of young people coming into contact with the criminal legal system 31 per cent have a parent that has been held in adult custody, 58 per cent have a diagnosed or suspected mental health or behavioural disorder, 52 per cent were totally disengaged from education and almost 20 per cent were homeless or had unsuitable accommodation.

The Atkinson report states that 83 per cent of children in the youth justice system are known to child protection services. While around two to four per cent of the general population have an intellectual disability, prevalence is around 23 to 32 per cent among young people in custody. Studies from Western Australia indicate that up to 36 per cent of children in detention experience fetal alcohol spectrum disorder. But the most significant single determinant of your likelihood of being criminalised before your 14th birthday in Queensland is whether you are Indigenous. On average, 84 per cent of children aged 10 to 13 in a Queensland detention centre on any given day are Indigenous. These kids make up about seven per cent of the population outside prison and 84 per cent inside.

Overall, First Nations kids are 29 times more likely to be locked up in Queensland. This country's violent history of colonisation and stolen generations continues in Queensland with the imprisonment of young Indigenous kids. Although figures are not available for children aged 12 and 13 years old, First Nations children account for 60 per cent of all children aged 10 and 11 in contact with the Queensland Police Service and their over-representation increases at every stage of the criminal process. Research shows First Nations children are 10 per cent less likely to be offered diversion for their first contact with police and about half as likely for their second, third and fourth contacts. Early contact with police and detention compounds existing social inequalities and intergenerational trauma and it is contributing to

the over-representation of First Nations children and adults in the criminal system. If this government is genuinely committed to Closing the Gap and reducing black deaths in custody, raising the age is a crucial first step.

Those who argue that raising the age will endanger our community fail to recognise that not only do children under 14 account for a very small proportion of offences but also the vast majority of offences they commit are not very serious or violent. Among children aged 10 to 14, around 55 per cent of offences are theft, burglary and property related crimes while just over 20 per cent are acts intended to cause injury. A really important part of this has to do with the developmental stage these kids are at. Research suggests that children and young people tend to commit offences that are attention seeking, episodic, unplanned and opportunistic and the medical evidence helps us explain this. The prefrontal cortex, the part of the brain that allows us to plan, foresee consequences and control impulses, develops gradually from age 10 to 17 and is not fully developed until around the age of 25. At the same time, for children under 14, the amygdala, which is responsible for reward seeking, is developed. This gives us a bit of perspective on why we might see these kids engage in risky or thrillseeking behaviours like theft, trespass or riding in stolen cars with little or no regard for the consequences. To be clear, the medical evidence tells us that these behaviours by children should not be characterised as criminal in the same way they would be for an adult.

Even if you are not swayed by the circumstances of these kids and why they might be offending, all the medical evidence and the human rights arguments against locking them up, the fact remains that criminalising children does not work. The problem with locking a kid up is that unless you want to keep them in prison for the rest of their life—and I assume we are all on the same page in not wanting that—what happens to those kids when they get out? If you put a young child in detention with older kids all you do is teach them how to be a better criminal.

The government's own youth justice strategy says that children and young people who have been through detention are at more risk of committing an offence when they return to the community, and for the majority of offenders detention is not the best way to stop offending behaviour. As Amnesty International pointed out in their report on raising the age, children arrested before the age of 14 are three times more likely to reoffend as adults than children arrested after they are 14 years old. Increasing the age of criminal responsibility improves outcomes by delaying the point at which a child can become involved in the criminal legal system or spend time in detention given the particular impacts that that can have on young children's wellbeing and their likelihood of reoffending.

Research is very clear that diverting more children away from the criminal legal system and providing support to address their individual needs will mean those children are less likely to offend later on. Keeping kids under 14 out of detention will also improve their likelihood of finishing school, tertiary education and other training, and their chances of securing a job. While the current age of criminal responsibility may temporarily limit some immediate risks to the community while some very young children are in detention, diversion, particularly for children under 14, is likely to ultimately be far more effective in improving community safety. We need a new approach that puts prevention and care at the centre, not punishment.

The bill itself is relatively simple. It amends section 29 of the Criminal Code to raise the minimum age at which a person is criminally responsible for any act or omission from 10 to 14 years old. This amended section regarding the minimum age of criminal responsibility will replace the doli incapax provision at existing section 29(2), which does not prevent incarceration of young children on remand and was described by Bob Atkinson as rarely a barrier to prosecution.

The bill's transitional amendments to the Youth Justice Act ensure that for a child who committed an offence before they were 14 the offence must be expunged from their criminal history, that the Police Commissioner must ensure any identifying particulars such as fingerprints and DNA samples taken in relation to the offence are destroyed in a timely manner, and that no proceedings or orders can be commenced or continued against them for that offence. For children who are in detention for an offence committed when they were under 14, the chief executive must arrange for their release as soon as is reasonably practicable and no later than one month from commencement, or the date they would have otherwise been released, whichever is sooner. For children in a watch house for an offence committed when they were under 14, the chief executive must arrange for their release within no more than three days.

When transitioning the child from detention or a watch house, the chief executive must consider the child's welfare and, together with the chief executive of Child Safety, make efforts to ensure they have access to things such as accommodation, parental or guardianship support and health and other support services. Any supports that are currently in place for children removed from the youth justice system under this bill must remain in place, and all efforts should be made to ensure the ongoing provision of therapeutic programs and care, including accommodation, substance misuse treatment, education and training and restorative justice.

As outlined in the explanatory notes, the legislative amendments to raise the age must be accompanied by an alternative model to divert children aged 10 to 13 from the criminal legal system. In the first instance, the government should commission an independent review to consult with community organisations, First Nations representatives, government stakeholders and people who have had contact with the child protection and youth justice systems in Queensland to identify existing service gaps for children aged 10 to 13 displaying problematic behaviours and make recommendations for pathways to access the supports needed. This is similar to the process currently being undertaken by the ACT government as part of their commitment to raising the age.

It is worth noting that a lot of good work has already been done to develop an alternative model to raising the age. For example, the Jesuit Social Services' 2019 report on raising the age details a staged response including, first of all, prevention and early intervention, followed by responding to low-level problematic behaviour and, finally, responding to more serious or violent behaviour. I will start with prevention and early intervention.

Experts in child welfare and criminology often emphasise the importance of prevention and early intervention so I will point out just a few areas that I think could make a huge difference for young people in Queensland, particularly young people who are likely to find themselves in contact with the youth justice system under our current laws. The first is housing. Too many children are ending up in detention simply because they do not have a safe place to sleep at night. I will never forget, in the hearings on the Youth Justice Amendment Bill earlier this year, the young woman who spoke about her experiences. She said that sometimes she would offend just so that she could get sent back to detention and have a roof over her head.

In particular, children who are subject to protection orders but who do not have a placement end up with a detention centre as their de facto placement. The QFCC's recent report identified housing as a key service gap particularly for children between the ages of 10 and 16; that is, kids who do not meet the definition for independent living and therefore cannot get housing. For kids whose families are waiting for social housing, the government's complete failure to build enough homes means their prospects are really bleak. As of December last year, in Queensland there were about 40,000 people on the social housing waiting list, including at least 15,000 children. The government should urgently invest in building more public housing and stop selling off the homes they already have.

The second big issue is schools. Both the Atkinson report and the QFFC have identified that disengagement from school is a major problem and exacerbates problematic behaviour by kids. First, we should stop excluding kids from school at such high rates—in 2019, almost 10 times as many as Victoria, despite them having a larger school-age population. If we want kids to stay in school, one of the best ways to do that would be with a universal free school breakfast and lunch program at every state school in Queensland. We know from evidence in Tasmania that a free universal school meal program would improve school attendance, particularly among the same cohort of kids who are otherwise likely to get involved with the youth justice system.

In schools we should look at establishing service hubs with allied health personnel and equip teachers and other school staff to identify warning signs and help refer families to services. As the QFCC report suggests, intervention should be available in primary school, particularly during known sensitive transition points like the move into year 2 and from primary to high school where children shift from learning to read to reading to learn. Also, at that early intervention stage we need to invest in things like maternal child health outreach programs, community education and activation programs, and cultural strengthening activities led by First Nations communities. Given the overrepresentation of kids subject to protection orders in youth justice, we also need to better equip out-of-home care staff to work with children in trauma informed ways.

When a child does cause harm or comes into contact with police, rather than ignore it we need a therapeutic evidence based response that addresses the underlying needs of the child and their family. We need a better response to low-level problematic behaviour. That response should be coordinated by a multidisciplinary expert panel or commission that could confidentially identify, assess and refer a young person and their family to develop a plan of action and access services. The government already uses specialist multiagency response teams, also known as SMART, to develop holistic intervention plans to address a child's needs, overseen by a panel of core departmental officers.

The key difference I am proposing, based on feedback from frontline workers, First Nations people and other experts, is a panel that operates outside of Youth Justice and Child Safety to organise referrals to services such as housing, support to engage with education, coordinated health care including disability and mental health support, therapeutic family supports, and community education and cultural programs, especially Indigenous-led programs. This stage of response could also include family conferencing similar to the approach already operating in New Zealand. When we stop criminalising children under 14, we should ensure that community members who are affected by harmful

behaviours still have access to the same support as current victims, including restorative justice, assistance with recovery, financial support through Victim Assist Queensland and access to information about the steps taken in relation to the child.

Responding to serious problematic and harmful behaviour is the final issue I want to address. If a child is continuing to display serious and harmful behaviour, this multidisciplinary panel could choose to refer them for more intensive therapeutic—I emphasise 'therapeutic', not criminal—interventions. That could include things like residential drug treatment or specialised responses to adolescent family violence and sex offending, again as recommended by the QFCC. For the very rare instances where a child under the age of 14 poses a serious threat of violent harm, children could be placed under alternative tailored forms of supervision in small therapeutic facilities with multidisciplinary staff trained in trauma informed practice. That should be a last resort outside of the regular system for addressing children's problematic behaviour and it will be exceedingly rare.

One of the problems with our current process, as identified in the Atkinson report, is that the path to services is often through the criminal legal system. In raising the age of criminal responsibility, we should also decouple the mechanisms for referral from offending and offer help at the earliest possible point of identifying concern.

Ultimately this bill is not just about delaying engagement with the youth justice system but creating a new trajectory altogether for these young people. It is entirely possible—and something we should aspire to—to eventually roll out an alternative model like this for children. Starting with under-14s allows us to develop and refine a process that really works while ensuring we immediately protect the most vulnerable children from particularly damaging involvement with the criminal legal system.

There are already a number of community-led programs operating in Queensland that have been shown to improve outcomes for children, their families and their communities and are far more cost effective than criminalisation. If none of the earlier arguments or evidence win you over, it costs more than $1,600 to keep one young person in detention for one day, and that does not even include the government's enormous capital spend building and expanding youth prisons—more than $30 million this financial year alone.

We should be reinvesting those funds into proven therapeutic programs and facilities like the Murri School, Life Without Barriers #YouthChoices MST Program, Cairns based Youth Empowered Towards Independence, the Tern program in Townsville, and the PALM residential drug and alcohol treatment program to be run by the Ted Noffs Foundation in Queensland.

At the most fundamental level, I am introducing this bill because I believe children do not belong in prison, but this is not just about my opinion. The list of legal, medical, human rights and Indigenous justice experts and advocacy organisations who have expressed their support for raising the age of criminal responsibility to at least 14 is far too long for me to list here, but to name just a few: Amnesty International, NATSILS, the Australian Medical Association, ACOSS, QCOSS, the Queensland Indigenous Labor Network and the Queensland Human Rights Commission.

Raising the age of criminal responsibility is one crucial part of a better approach to justice, one that includes: getting all kids out of watch houses; a moratorium on new youth prisons; decriminalising public space offences; increased investment in health, education, social housing and support services; implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody; and more.

The medical evidence, human rights advice and statistics are crystal clear. We must act now to ensure that children under 14 years of age are not incarcerated or otherwise punished under the criminal legal system. It is a big task, but we can start here.

I implore the House to take this first step to ensure that vulnerable 10-year-old, 11-year-old, 12-year-old and 13-year-old children are met with the care and compassion they need in Queensland, not put in a jail cell.

First Reading

Mr BERKMAN (Maiwar—Grn) (12.52 pm): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Community Support and Services Committee

Mr DEPUTY SPEAKER (Mr Krause): In accordance with standing order 131, the bill is now referred to the Community Support and Services Committee.