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

Explanatory Notes

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

The short title of the Bill is the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (**the Bill**).

Policy objectives and the reasons for them

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 achieves 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.

Current context

The minimum age of criminal responsibility in Queensland is currently 10 years old. Children who are below the minimum age of criminal responsibility at the time of the commission of an offence cannot be held responsible in criminal legal proceedings. Children at or above the minimum age can be formally charged and subjected to criminal procedures and sanctions through the courts and youth justice system.

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".[1] Evidence from Victoria also indicates that *doli incapax* is applied inconsistently and "is not working as intended to protect very young children

[1] Atkinson, B. (2018). *Report on Youth Justice*.

from being held criminally responsible".[2] By its nature, it also does not prevent children from being incarcerated while on remand, including in a detention centre or a watch-house.

The Bill supports the Government to deliver a youth justice strategy consistent with the four pillars detailed in the Atkinson Report:

1. Intervene early
2. Keep children out of court
3. Keep children out of custody
4. Reduce reoffending

In particular, by removing children aged 10-13 from detention, who have particularly high rates of Indigenous overrepresentation, the Bill helps achieve several of the recommended targets in the report:

- reducing the number of children on remand in detention;
- reducing the number of children entering detention for the first time by half; and
- reducing the disproportionate representation of Indigenous children in detention.

The Atkinson Report also recommended that the Government support raising the minimum age of criminal responsibility through a national process, and legislate to ensure children aged 10-11 years old cannot be remanded in custody or sentenced to detention (except for very serious offences) in the interim. Neither of these recommendations have been implemented to date.

While the Atkinson Report recommended raising the age to 12 years old, this was based on the United Nations Committee on Rights of the Child, which has since revised the benchmark for a minimum age of criminal responsibility from 12 to 14 years old.[3]

In 2019, the Australian Council of Attorneys-General (COAG) was tasked with considering raising the minimum age of criminal responsibility in Australian jurisdictions, and set up an Age of Criminal Responsibility Working Group to report on the issue that was tasked with providing a report with recommendations to the COAG in 2020.[4] However, in July 2020, COAG indefinitely postponed their decision on the issue, and when the Council next met in March 2021, the minimum age of criminal responsibility was removed from the agenda, to be instead considered "out of session" (effectively ending the national process).[5] At the time of introduction of the Bill,

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[2] Amnesty International (2020) *Raise the Age: Kids in Community*

[3] United Nations Committee on the Rights of the Child (2019). *General Comment No. 24 (201x), replacing General Comment No. 10 (2007): Children's rights in juvenile justice*.

[4] Council of Attorneys-General (2019). *Council of Attorneys-General Communique - November 2019*.

[5] Meeting of Attorneys-General (2021). *Meeting of Attorneys-General Communique - March 2021*.

no report or recommendations of the Age of Criminal Responsibility Working Group had been published. However, a leaked draft report of COAG included a proposal to raise the age to 14 years old but consensus among the States and Territories could not be reached.[6]

While a national approach would be preferable, the failure to achieve consensus and progress this matter over the past two years requires that it now be considered at the State level in Queensland, particularly given that the primary legislative change must occur within State jurisdiction.

Various legal, medical, human rights and Indigenous justice experts and advocacy organisations have expressed their support to raise the age of criminal responsibility to at least 14, including:

- Amnesty International
- Human Rights Law Centre
- Change the Record
- Australian Indigenous Doctors' Association
- National Aboriginal and Torres Strait Islander Legal Services (NATSILS)
- Law Council of Australia
- Australian Medical Association
- Royal Australasian College of Physicians
- Public Health Association of Australia
- Save the Children
- Anglicare Australia
- Australian Council of Social Services (ACOSS) and Qld Council of Social Services (QCOSS)
- Australian Healthcare and Hospitals Association
- Aboriginal Justice Caucus
- Community Legal Centres Australia
- Queensland Indigenous Labor Network
- Jesuit Social Services
- Centre for Multicultural Youth
- Mission Australia
- Youth Advocacy Centre
- Queensland Human Rights Commission
- The Royal Australian College of General Practitioners
- Australian Association of Social Workers
- Australian Red Cross
- UnitingCare Australia

[6] Allam, L. & Knaus, C. (2021). 'Australian governments accused of hiding evidence supporting lift in age of criminal responsibility', *The Guardian.*

- First Peoples Disability Network
- ANTaR
- PeakCare Queensland
- World Vision Australia
- Children and Young People with Disability Australia
- Oxfam Australia.[7]

Medical evidence

Neuroscientific evidence indicates that many problematic behaviours displayed by children under 14, whose prefrontal cortex is still developing, reflect their incomplete capacity to plan, foresee consequences or control impulses. While the prefrontal cortex develops gradually from ages 10-17 and is not fully developed until 25, the amygdala, which is responsible for reward seeking, is developed in early adolescence. Consequently, reward- or thrill-seeking behaviours taken by children such as theft or trespass should not be characterised as "criminal" in the same way those actions by an adult would be.[8]

Commencement of the *Youth Justice and Other Legislation Amendment Act 2021* created a presumption against bail for children charged with a prescribed indictable offence between apprehension and trial for another indictable offence. The expectation that children aged 10-13 must show cause for their release from detention is particularly problematic, given their reduced capacity.

The cohort affected by the Bill

On any given day in Queensland in 2019-20, there were on average 17 children aged 10-13 years old in detention, representing approximately 9% of the Queensland youth detention centre population.[9] The Bill proposes that this very small cohort of children, as well as any other children serving a sentence in detention for only an offence committed before they were 14, be transitioned out of detention as soon as practicable, and no later than one month from commencement.

The Bill also provides for the transition of children under the age of 14 out of adult police watch-houses as soon as practicable, and no later than three days after commencement. In 2019-20 there were on average around 17 children aged 10-13 held in a police watch-house

[7] Raise the Age Campaign Alliance website - *Organisations*

[8] Royal Australasian College of Physicians (2019). *Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility*.

[9] Youth Justice annual summary statistics: 2015-16 to 2019-20, Detention Centre Data

each day. More than 90% of children in this age range held in the watch-house for more than 3 nights were Indigenous.[10]

Organisations such as Amnesty International have criticised the use of watch-houses for detention of children due to a lack of protections (given watch-houses are not regulated under the *Youth Justice Act 1992*, as youth detention centres are), insufficient resources to adequately care for children, and human rights concerns associated with children being kept with or in the eye-line of adult inmates.[11]

In addition to removing the potential for children under 14 to be held in a watch-house, the Bill will reduce the numbers of children held in youth detention centres in Queensland, alleviating some of the overcrowding that can result in more children of all ages being held in watch-houses.

With the age of criminal responsibility raised to 14 years old, around 130 children aged 10-13 years old would be diverted from detention each year.[12] Although figures are not available for children aged 10-13, in 2019 around 5,826 children aged 10-14 had formal contact with the Queensland Police Service.[13] Upon commencement of the Bill, those children aged 10-13 would all be diverted from any criminal proceedings.

While specific offence data for children aged 10-13 in Queensland is not available, the majority of offences currently committed by children aged 10-14 are not serious or violent.[14] The intention of the Bill, rather than ignore problematic behaviour by children under 14, is to shift the response from a criminal to a rehabilitative one, which addresses the underlying needs of the child and their family.

This reflects the disproportionate disadvantage experienced by young people who display the kinds of problematic behaviour that may cause them to come to the attention of police. The Government's 2019-2021 Youth Justice Strategy notes that, of young people coming into contact with the criminal legal system:

- 31% have a parent that has been held in adult custody;

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[10] Qld Department of Youth Justice (2020) Answer to Estimates Pre-hearings Question on Notice No. 16

[11] Amnesty International (2019). *Kids in watch-houses: Exposing the Truth*

[12] Youth Justice annual summary statistics: 2015-16 to 2019-20, Detention Centre Data

[13] Qld Family and Child Commission (2017). *The Age of Criminal Responsibility in Queensland.*

[14] Cunneen, C. et al., (2015). *Juvenile Justice in Australia*. Cited in Sentencing Advisory Council. (2019). *Crossover kids: Vulnerable children in the youth justice system*. See also Australian Bureau of Statistics, cited in Amnesty International (2020). *Raise the Age: Kids in Community*

- 58% had a diagnosed or suspected mental health or behavioural disorder;
- 52% were totally disengaged from education;
- almost 20% were homeless or had unsuitable accommodation.[15]

Where children and young people have ongoing contact with the legal system, this is largely linked to environmental and social factors. The factors that can lead a child or young person into the criminal legal system are largely the same as those that can lead them into child protection – namely, family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage.

The Atkinson Report states that 83% of children in the youth justice system are known to child protection.[16] While 2-4% of the general population have an intellectual disability, prevalence is around 23-32% among young people in custody.[17] Studies in Western Australia indicate that up to 36% of children in detention experience Foetal Alcohol Spectrum Disorder (FASD).[18]

First Nations children, particularly those aged 10-13, are also drastically overrepresented in Queensland's youth justice system. First Nations children aged 10-17 are 29 times more likely than their non-Indigenous counterparts to be sentenced to detention in Queensland, and Queensland has the greatest proportion of First Nations children aged 10-14 held in detention of any Australian state, with on average 84% of children aged 10-13 in a Queensland detention centre on any given day in 2019-20 identifying as Indigenous.[19]

Although figures are not available for children aged 12 and 13 years old, First Nations children account for around 60% of all children aged 10 and 11 in contact with the Queensland Police Service, and their overrepresentation increases with each escalation of statutory intervention.[20]

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[15] The State of Queensland (Department of Youth Justice) 2019. *Working Together, Changing the Story: 2019-2021 Youth Justice Strategy*

[16] Atkinson, B. (2018). *Report on Youth Justice*

[17] Hughes W. et al. (2012). *Nobody Made the Connection: Neurodisability in the youth justice system.*

[18] Bower C, Watkins RE, Mutch RC, et al. (2018) *Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia.*

[19] Australian Institute of Health and Welfare (2021). *Queensland Fact Sheet*. Youth justice in Australia 2019-20.

[20] Qld Family and Child Commission (2021) *Changing the Sentence: Overseeing Queensland's youth justice reforms*

In Queensland, First Nations young people are 10% less likely to be offered diversion for their first contact with police, and about half as likely for their second, third, and forth contacts.[21]

This Bill recognises and aims to address the reality that early contact with police and detention compounds existing social inequalities and is contributing to the overrepresentation of First Nations children and adults in the criminal system. Raising the age of criminal responsibility and diverting funding towards therapeutic, community-based services will support the State Government in achieving its commitments under the new National Agreement on Closing the Gap, including building the community-controlled sector and reducing Indigenous youth incarceration rates by 30%. Raising the age alone would reduce the number of First Nations children being incarcerated by 17.8%, which would have an immediate and generational effect on reducing the overrepresentation of our First Nations children in youth prisons.[22]

The Atkinson Report identified multiple causal factors that lead some children to continue to display problematic behaviour, including:

- non-attendance, truancy, suspension or expulsion from school;
- exposure to domestic violence, or physical, sexual and emotional abuse;
- Foetal Alcohol Spectrum Disorder (FASD) and other neurological disabilities;
- behavioural and mental health issues;
- substance misuse;
- inadequate sleep and nutrition; and
- homelessness.[23]

A punitive, criminal response to these young people's behaviour at a young age, that does not address these underlying factors, will not only fail to prevent reoffending, but will cause further harm.

Alternative model

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. This is consistent with several of the recommended immediate actions in the Atkinson Report, including:

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[21] Little, S., Allard, T., Chrzanowski, A & Stewart, A (2011). *Diverting young Indigenous people from the Queensland Youth Justice System: The use and impact of police diversionary practices and alternatives for reducing Indigenous over-representation.*

[22] Australian Institute of Health and Welfare, *Youth Justice National Minimum Dataset 2019-20*

[23] Atkinson, B. (2018). *Report on Youth Justice*.

- supporting coordinated, multi-government agency approaches to high-risk children and families;
- improving service availability at times of need (including night-time and weekends);
- a focus on school and training attendance;
- increased options for diversion from prosecution and detention; and
- increased options for children to remain in the community rather than be remanded in custody.[24]

Alongside the legislative changes enacted by this Bill, 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;
- identify existing services and gaps for children aged 10-13 displaying problematic behaviours; and
- make recommendations for pathways and supports to replace the current criminal system for that cohort - similar to the process conducted by the ACT Government to raise the age of criminal responsibility to 14 in that jurisdiction.

A key problem with Queensland's current system, as identified in the Atkinson report, is that the path to services is often through the criminal legal system. By raising the age of criminal responsibility, the mechanism for referral to support services is decoupled from offending or involvement with the criminal legal system, and referrals should be 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 Qld Family and Child Commission 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[25].

An alternative model should include multiple levels of response, such as:

1. prevention and early intervention, including investing in universal public healthcare, housing, education and transport services, Indigenous-led and community education and cultural strengthening programs, and trauma-informed training for school and out-of-home care staff to support children;

[24] Atkinson, B. (2018). *Report on Youth Justice*.

[25] Qld Family and Child Commission (2021). *Changing the Sentence: Overseeing Queensland's youth justice reforms*

2. responding to low-level problematic behaviour by working with children and their families to address their needs, and working with children and victims on restorative approaches; and
3. responding to serious problematic and harmful behaviour with intensive, evidence-based, therapeutic interventions.

Separate, tailored and therapeutic responses could be developed in the very rare instances where a child under the age of 14 poses a serious threat of violent harm.

This alternative model could include the establishment of a multidisciplinary expert panel or commission, separate from Youth Justice and Child Safety departments, to confidentially identify, assess, refer and support a young person and their family to access services such as:

- housing;
- support to engage with education;
- specialist drug rehabilitation treatment;
- coordinated healthcare (including disability and mental health support);
- therapeutic family supports such as Functional Family Therapy; and
- trauma-informed, evidence-based community education and cultural programs, including Indigenous-led programs.

There are a number of existing community-led programs operating in Queensland that have been shown to improve outcomes for children, their families and their communities, and are also more cost effective than a criminal response. For example:

- The Tern program, run by Townsville Headspace, provides therapy, social inclusion programs, advocacy and general practitioner support for young people who have experienced trauma;[26]
- Indigenous-led organisation Healing Foundation runs programs including The Murri School in Brisbane,[27] which uses a holistic, family-centred approach to improve educational outcomes and mental health, and reduce contact with child protection and the criminal legal system;[28]
- Life Without Barriers' YouthChoices program works with families and caregivers to deliver Multi-Systemic Therapy to children at risk of recidivism;[29]

[26] Qld Family and Child Commission (2021). *Changing the Sentence: Overseeing Queensland's youth justice reforms*

[27] Healing Foundation (2021) *Murri School Report Launch*

[28] Deloitte Access Economics (2017), *Cost Benefit Analysis of the Murri School Healing Program*

[29] Youth Justice Services (2021) *Life Without Barriers*

- Cairns-based Youth Empowered Towards Independence (YETI) run various community programs for at-risk young people including Strong Together, a trauma-informed, therapeutic crime prevention program supporting families of children aged 10-15 to support them and strengthen self-management skills.[30]

One recent example which should be replicated and expanded is the State Government's commitment in its 2021-22 Budget of $7.7M capital expenditure over four years and $2.5M ongoing for the Ted Noffs Foundation to deliver their harm-reduction based residential drug and alcohol treatment program to young people in Queensland.

There are also numerous examples of successful therapeutic programs for young people and their families operating in other jurisdictions which could be adopted by Queensland in place of a criminal approach for children under 14, such as:

- Olabud Doogethu, a justice reinvestment program in the East Kimberley co-designed, co-led and co-ordinated by 11 Aboriginal nations offering support across the spectrum from prevention and early intervention to diversion, rehabilitation and reintegration with education and training, recreational programs, physical and mental healthcare and On Country programs;[31]
- Dardi Munwurro's Bramung Jaarn ("Brothers Walking Together") program, which supports Aboriginal boys aged 10-17 to nurture positive social networks and cultural connections through one-on-one mentoring and fortnightly group sessions, supplemented by early intervention and wrap-around services for boys most at risk of criminalisation by the Aboriginal Youth Support Service;[32]
- Programs run by the Victorian Child Care Agency in collaboration with Jesuit Social Services and the Victorian Aboriginal Legal Service including respectful relationships courses, Return to Country trips and Barreng Moorop (intensive case management for Aboriginal children aged 10-14 who are at risk of interaction with the criminal legal system).[33]

Upon commencement of the Bill, although non-custodial sentence orders will no longer be legally enforceable, all efforts can and should be taken to encourage and support the ongoing provision of existing therapeutic programs and care to children aged 10-13 outside of the criminal legal system, including accommodation, substance misuse treatment, education and training, and restorative justice. While the Bill will prevent the criminal division of a court

[30] Youth Empowered Towards Independence website

[31] Olabud Doogethu website

[32] Dardi Munwurro *Youth Journeys Program*

[33] Jesuit Social Services (2019) *Raising the Age of Criminal Responsibility: There is a better way*

referring children aged between 10 to 13 for therapeutic treatment orders, such referrals can still be made by the police or any person, although greater funding for such programs will be required.

Community members who are affected by harmful behaviour of children under the age of 14 should also continue to have access to the same support as current victims of crime, including restorative justice mechanisms, assistance with recovery, financial support via Victim Assist Queensland, and access to de-identified information regarding the steps taken in relation to the child in response to their harmful behaviour.

Community safety and reducing reoffending

Increasing the age of criminal responsibility delays the point at which a child can become involved with the criminal legal system or spend time in detention, to address the particular impacts this can have on young children's wellbeing[34] and also their likelihood of reoffending[35].

As the Northern Territory Royal Commission stated:

> *The reality of this cohort's developmental status; the harsh consequences of separation of younger children from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth detention can interrupt the normal pattern of 'aging out' of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism.*[36]

Similarly, the Atkinson Report stated:

> *For children, even a short episode of remand has been associated with future remand episodes. The seriousness and numbers of charges also tended to escalate following the first remand episode, presumably in part due to the criminogenic nature of custody. This is consistent with research from the Pathways to Desistance studies in the United States that found that for some youth incarceration may actually raise the level of offending.*[37]

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[34] Atkinson, B. (2018). *Report on Youth Justice*.

[35] Amnesty International (2020) *Raise the Age: Kids in Community*.

[36] Northern Territory (2017). *Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report.*

[37] Atkinson, B. (2018). *Report on Youth Justice*.

Research suggests that diverting more children away from the criminal legal system and providing support to address their individual needs will mean these children are less likely to continue to engage in criminal behaviours throughout their lifetime.[38] Ensuring children under 14 are not placed in detention will also improve their likelihood of finishing school, tertiary education and other training, and their chances of securing a job.[39] While the current age of criminal responsibility may temporarily limit some immediate risks to the community while some children are in detention, diversion, particularly for children under 14, is likely to be far more effective in improving community safety.

Achievement of policy objectives

The Bill achieves its policy objective by amending Section 29 of the Criminal Code ('Immature age') 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) for persons under the age of 14 years old.

The Bill also includes transitional amendments to the *Youth Justice Act 1992* to:

- End any proceedings underway or orders in place against a child who committed (or is alleged to have committed) an offence prior to commencement if they were under the age of 14 at the time of the offence;
- Release from custody in a police watch-house, as soon as reasonably practicable and within no more than three days from commencement, any children who are held in watch-house upon commencement in relation to an offence committed when they were under the age of 14;
- Release from detention, as soon as reasonably practicable and within no more than one month from commencement, any children who are in detention upon commencement in relation to an offence committed when they were under the age of 14;
- Require the destruction of any identifying particulars (such as fingerprints) of a child taken or photographed, or other forensic evidence gathered, prior to commencement in relation to an offence committed when they were under the age of 14; and
- Expunge the criminal history (including the record of convictions or finding of guilt with no conviction recorded) and other relevant records of any child who had a finding of guilt

[38] Allard, T. et al. (2010). *Police diversion of young offenders and Indigenous over-representation*. Trends & issues in crime and criminal justice, no.390

[39] Qld Family and Child Commission (2017). *The Age of Criminal Responsibility in Queensland.*

against them prior to commencement in relation to an offence committed when they were under the age of 14.

Alternative ways of achieving policy objectives

There is no alternative method of achieving the policy objective.

Estimated cost for government implementation

There will be a small short-term cost related to the physical transition of children out of prisons. Governments will also need to review existing services, and further develop and fully fund these to provide an alternative model for non-criminal, therapeutic approaches for children aged 10-13 who display harmful behaviours. A long term funding strategy must also be devised for the appropriate programs and services that are needed to address the needs of children, particularly those who display or are at risk of engaging in harmful behaviours.

These costs must be weighed against the direct costs of involving children aged 10-13 years old in the criminal system, including policing costs, court proceedings and incarceration. It costs an estimated $1,640.51 to keep one young person in detention for one day (excluding the significant capital expenditure on maintaining and expanding detention infrastructure).[40] The Bill will also lead to indirect savings through reduced recidivism and greater engagement by young people in education, employment and their community.

Consistency with Fundamental Legislative Principles (FLPs)

The fundamental legislative principle that legislation must not confer immunity from proceeding or prosecution without adequate justification may be relevant to this Bill, as its primary policy objective is to confer immunity from criminal responsibility on children under the age of 14 years old. However, this immunity is justified by medical evidence that children under 14 years of age lack the neurodevelopmental capacity to understand consequences of their actions (i.e. being held criminally responsible for those actions) and the criminological evidence that incarceration will increase the likelihood of reoffending. The immunity from prosecution for children under 14 years old is also justifiable as it enacts Queensland's human rights obligations, as outlined by the United Nations Committee on the Rights of the Child, to have a minimum age of criminal responsibility no lower than 14.

Further, the Bill does not create a new category of immunity based on any characteristic other than age, which is already the case under the existing section 29 of the *Criminal Code* - this Bill simply extends that immunity to children aged 10-13 years old.

[40] Australian Productivity Commission (2021). 'Youth Justice Services', *Report on Government Services*.

Consultation

The Bill has been developed based on community feedback and extensive consultation with relevant stakeholders including:

- Amnesty International
- Human Rights Law Centre
- Qld Council of Social Services (QCOSS)
- Maludh Gunya
- Change the Record
- Youth Advocacy Centre
- Community Legal Centres Queensland
- Youth Affairs Network Queensland
- CREATE Foundation
- Aboriginal & Torres Strait Islander Legal Service (ATSILS)
- Childwise
- Queensland Mental Health Commissioner, Ivan Frkovic
- Queensland Human Rights Commissioner, Scott McDougall
- Former Australian Federal Police Commissioner, Mick Palmer
- Justice Reform Initiative
- Ted Noffs Foundation

Consistency with legislation of other jurisdictions

Although the current age of criminal responsibility in Queensland is consistent with some other common law countries, including England, Wales and the USA, it is not consistent with the global standard. The age ranges from seven years old in Libya, Egypt, Sudan and parts of the US, to 12 in Canada and Mexico, 14 or 15 in most of Europe and parts of South America, and 16 in Argentina, Angola and Mozambique. China, Russia, Germany, Spain, Sierra Leone, Azerbaijan, Cambodia and Rwanda have all raised the minimum age of criminal responsibility to 14 years old. A study of 90 countries in 2008 showed that the most common minimum age of criminal responsibility is 14.

While the minimum age of criminal responsibility is currently 10 years old in all Australian states and territories, the ACT Government has committed to raise the age to 14 years old, and a Bill has been introduced to the Victorian Parliament to do the same. The Northern Territory Government previously indicated it would implement a recommendation of the Don Dale Royal Commission to raise the age of criminal responsibility to 12 years old and ban the detention of those aged 12-14 except for serious crimes, however the law remains unchanged to date.

Notes on provisions

Part 1 Preliminary

Clause 1 Short Title

Clause 1 provides that when enacted, the Bill may be cited as the *Criminal Law (Raising the Age of Responsibility) Amendment Act 2021.*

Part 2 Amendment of Criminal Code

Clause 2 Act Amended

Clause 2 states that this part amends the Criminal Code.

Clause 3 Replacement of s 29 (Immature age)

Clause 3 amends section 29 of the Act to raise the minimum age at which a person cannot be found criminally responsible for an act or omission in Queensland from 10 to 14 years old.

It removes the provision known as *doli incapax* at subsection (2), which allowed children aged between 10 and 14 years old to be found criminally responsible if it could be proved that they had the capacity to know that they ought not to do the act or make the omission.

Part 3 Amendment of the Youth Justice Act 1992

Clause 4 Act Amended

Clause 4 states that this part amends the *Youth Justice Act 1992.*

Clause 5 Insertion of new pt 11, div 20

Clause 5 inserts a new division into the Act to create transitional provisions for the Bill.

Proposed section 407 states that the division applies to persons who committed an offence while under the age of 14 years old, before the commencement of the Bill, and clarifies that the division prevails despite any law to the contrary and whether or not the person is still a child upon commencement.

While this division refers to an offence which was “committed”, it also applies to a person who is alleged to have committed an offence while under the age of 14 years old, before the commencement of the Bill. This is because, in use as a condition precedent in legislation, a

person has committed an offence if they have engaged in the conduct that constitutes the offences, whether or not the person was charged or convicted for the offence.

Proposed section 408 provides that no proceedings or punishment in relation to an offence committed by a child under 14 years of age may be commenced, and any existing arrest, proceeding, warrant, summons, alternative police action or other orders (including bail orders, sentence orders, detention orders, and community-based orders) in relation to such offence are no longer enforceable.

Although no longer legally enforceable, all efforts should be taken to encourage and support the ongoing provision of therapeutic programs and care such as substance misuse treatment, education and training, and restorative justice outside of the criminal legal system for children who committed an offence when they were under 14 years old.

Proposed section 409 relates to the release of children from police watch-houses. Subsections (1)-(2) provide that any children who are currently held in a police watch-house in relation to an offence committed when they were under the age of 14 (including an alleged offence) must be released as soon as possible and no later than 3 days from commencement. Proposed subsection 409(7) clarifies that this does not apply to a person who is also being held in a police watch-house in relation to an offence committed when they were 14 or older.

Proposed subsection 409(3) provides that the watch-house manager (as defined in Schedule 6 of the *Police Powers and Responsibilities Act 2000*) must have regard to the child's welfare in deciding when to release them, including access to accommodation, parental or guardianship support and health services.

Proposed subsection 409(4) clarifies that a lack of access to these things alone does not prevent the watch-house manager arranging for the release of the child, and subsection (5) states that they may consult with the chief executive or the chief executive (child safety), including by sharing confidential information as defined in Part 9 of the *Youth Justice Act 1992,* and must make all reasonable efforts in consultation with the chief executive and the chief executive (child safety) to ensure access to those needs.

Proposed subsection 409(6) affirms that children who remain in a watch-house during this transitional period will remain subject to the rules of that watch-house until their release.

Proposed section 410 relates to the release of children from detention. Subsections (1)-(2) provide that any children currently in a detention centre in relation to an offence committed when they were under the age of 14 must be released as soon as possible and no later than 1 month from commencement, or the date they would have otherwise been released (whichever is sooner). Proposed subsection 410(7) clarifies that this does not apply to a person who is also being held in detention in relation to an offence committed when they were 14 or older.

Proposed subsection 410(3) provides that the chief executive must have regard to the child's welfare in deciding when to release them from detention, including access to accommodation, parental or guardianship support and health and other support services.

Proposed subsection 410(4) clarifies that a lack of access to these things alone does not prevent the chief executive from arranging for the release of the child, and subsection (5) states that they may consult with the chief executive (child safety), including by sharing confidential information as defined in Part 9 of the *Youth Justice Act 1992,* and must make all reasonable efforts in consultation with the chief executive (child safety) to ensure access to those needs.

Proposed subsection 410(6) affirms that children who remain in detention during this transitional period will remain subject to the rules of that detention centre until their release.

Proposed section 411 provides that the police commissioner must ensure that any identifying particulars, DNA sample, or results of DNA analysis or other forensic procedure conducted in relation to a person, taken or photographed in relation to an offence committed when they were under 14 years of age, are destroyed within a reasonable time in the presence of a justice. In accordance with the *Police Powers and Responsibilities Act 2000*, identifying particulars includes fingerprints, body measurements, handwriting, voiceprints, footprints, or photographs of identifying features and DNA samples includes hair samples and mouth swabs. Forensic procedure is defined by reference to the *Police Powers and Responsibilities Act 2000*.

Proposed section 412 provides that any finding of guilt against a person for an offence committed when they were under 14 years of age is expunged, various records relevant to the offence (including a record of conviction) must be amended to omit the relevant conviction, and the relevant finding of guilt need not be disclosed by the child and must not be disclosed by any other person. This section includes a record of conviction or a finding of guilt where no conviction was recorded.

Proposed subsection 412(4) provides that certain records that must not be disclosed in court proceedings the person is subject to. Such records include records of: action taken by a police officer against the person for the offence; a failure of the person to comply with a police or other direction made in relation to the offence; action taken by a court against the person for the offence, including, for example, granting bail or convicting the person; a failure of the person to comply with a court order in relation to the offence.