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Submission of Youth Law Australia to the Queensland Community Support and Services Committee on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

Acknowledgment of Country

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation as well as the Turrbul and Jagera people of Meanjin as the custodians of the lands on which we work. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

Introduction

Youth Law Australia (***YLA***) is an accredited national community legal service that is dedicated to helping young people around Australia understand their legal rights and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time and receive free and confidential legal advice and help. We are also dedicated to addressing the human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

We are grateful to have the opportunity to make a submission in support of the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the ***Bill***) and we strongly applaud Mr Michael Berkman MP for introducing the Bill, which, if passed, will ensure that children under 14 years of age in Queensland are no longer incarcerated or otherwise punished under the criminal legal system.

Raising the minimum age of criminal responsibility is not only consistent with international human rights law, it also has the potential to result in a new approach to dealing with children and young people who engage in problematic behaviour in a way that is focused on their welfare. Such an approach has the potential to deliver great benefits not only to young people and their families, but to society more generally.

In this submission we have touched on a number of aspects of the Bill including:

- the need for raising the minimum age of criminal responsibility to 14 years of age in Queensland and the need to raise that age for all offences;

- support of the Bill's recognition that the current principle of *doli incapax* should have no role in Queensland's reformed youth justice system;
- the need for a child rights approach to raising the minimum age of criminal responsibility reforms in Queensland;
- support of the Bill's intention to expunge historical convictions of children under 14 and to transition children under 14 out of detention;
- the need for information sharing between and within organisations to ensure that risk factors for young people are identified early;
- the need for the Queensland government to work in partnership with Aboriginal and Torres Strait Islander representatives and communities when implementing any alternative model to responding to harmful behaviour by young people; and
- support for the Queensland government commissioning an independent review alongside the legislative changes that would be enacted by this Bill.

1. The need for raising the MACR to 14 years in Queensland

We acknowledge that raising the minimum age of criminal responsibility to 14 in any jurisdiction in Australia will require significant reform and expansion to the services and interventions available to young people. However, we consider that as a society, we owe it to our young people to provide these supports.

YLA considers that raising the age of criminal responsibility should be used to recast 'offending behaviour' by young people as problematic behaviour. YLA therefore strongly supports the Bill's intention to shift the response to problematic behaviour by children under 14 from a criminal to a rehabilitative one that addresses the underlying needs of the child and their family.[1] This is particularly important given 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.'[2]

It is our view that problematic behaviour by young people should be considered a health and welfare issue, with social services rather than legal institutions determining the appropriate response. There should be clear frameworks in place to identify at-risk behaviour early, and appropriate service pathways for young people at risk. The policy goal is to try and prevent young people from reaching the point where they engage in this behaviour.

[1] The Bill's Explanatory Notes, page 5.
[2] The Bill's Explanatory Notes, page 5.

YLA agrees that the Bill must be accompanied by the widespread implementation of an alternative model for young people aged 10-13 who display problematic behaviour.[3] That approach should be based on prevention and early intervention by culturally-safe and trauma-responsive services (including education, health and community services) and by supporting and building the capacity of families.

Joined-up preventative and early-intervention services for children and young people, which address the complexity of the needs of those at risk of engaging in problematic behaviour, are needed. The Australian Medical Association has stated that 'Early intervention and prevention, rather than criminalisation, is important because it can substantially reduce the risk of secondary medical, social, emotional and behavioural problems, especially in younger children.'[4]

Internationally, the United Nations Committee on the Rights of the Child has called for child-friendly and multidisciplinary responses to the first signs of behaviour that would constitute an offence, and stated that these should 'be developed to reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience'.[5]

The International Convention on the Rights of the Child also requires Australia to ensure that detention or imprisonment of a child is used as a measure of last resort, and for the shortest appropriate period of time. [6] The best and most reliable way to achieve this, is to withdraw detention as an option for young people altogether.

International research confirms that 'the particular circumstances of detention are directly harmful to the mental and physical health of children across all situations of deprivation of liberty'.[7] It is YLA's view that involving a young person in the criminal legal system at such a formative age is very likely to cause further harm to the young person and to negatively impact their health, wellbeing and future. It is also worth repeating the comments of the *Global study on children deprived of liberty* that:

[3] The Bill's Explanatory Notes, page 7.
[4] AMA submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review, 2 February 2020, page 3: https://ama.com.au/submission/ama-submission-council-attorneys-general-agecriminal-responsibility-working-group-review.
[5] United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, at paragraphs 9, 11.
[6] United Nations, Convention on the Rights of the Child, Article 37(b).
[7] United Nations, Global study on children deprived of liberty, United Nations General Assembly, 74th session, 11 July 2019 at paragraph 26.

> *Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.*[8]

Finally, we note that there is recent support by attorneys-general to raise the minimum age from 10 to 12 years old. YLA considers that this falls short of what is required, which is a minimum age of at least 14. Raising the minimum age to 12 does not appear to be supported by evidence, and is not in line with international best practice. Data also indicates that the majority of young people aged between 10 and 14 who come into contact with the criminal justice system, or who spend time in detention, are aged 12 and 13.[9]

2. Raising the MACR to 14 years for all offences

YLA is supportive of the Bill's objective to raise the minimum age of criminal responsibility to 14 for all behaviour that constitutes a criminal offence. There should be no exceptions.

The reasons which support raising the minimum age apply equally to serious offences.[10] It should be noted that the offences commonly raised in support of creating an 'exception' are things like murder, manslaughter, and sexual assault. However, as noted in the Bill's Explanatory Notes,[11] existing research and publicly available data suggest it is extremely rare that a young person under the age of 14 commits a very serious offence such as murder.[12]

Harmful sexual behaviour by children and young people, such as a sexual assault, is a complex issue. Unsurprisingly, research suggests that many (but not all) children who engage in harmful sexual behaviours have experienced prior trauma or abuse.[13] Rather than criminalising trauma, such behaviour should be viewed as a health and welfare issue for children and young people under 14, with social services rather than legal institutions determining the appropriate response.

YLA agrees with the observations of the United Nations Committee on the Rights of the Child that:

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[8] United Nations, Global study on children deprived of liberty, United Nations General Assembly, 74th session, 11 July 2019 at paragraph 3.

[9] Australian Institute of Health and Welfare, Youth justice in Australia 2019-20, Page 12.

[10] *United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system,* paragraph 25. See also paragraphs 7-10 of the Discussion Paper.

[11] The Bill's Explanatory Notes, page 5.

[12] Kelly Richards, '*What makes juvenile offenders different from adult offenders?*',
Trends & issues in crime and criminal justice no. 409, Australian Institute of Criminology February 2011) 409, Canberra: Australian Institute of Criminology. See also paragraph 24 of the Discussion Paper.

[13] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 20.

> *The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.*[14]

The Royal Commission into Institutional Responses to Child Sexual Abuse considered how to respond to children with harmful sexual behaviours in its final report. The Commissioners were of the view that the public health approach – encompassing three tiers of intervention – can be applied to preventing these behaviours.[15] It noted that research suggests that therapeutic interventions can reduce or eliminate children's harmful sexual behaviours. The best practice principles developed by that Royal Commission provide a useful guide to addressing this behaviour.

In very serious cases, there are already existing legal frameworks in place for protecting young people and the community (including child protection and mental health frameworks). While these could undoubtedly be reformed and improved, additional frameworks should only be added when supported by a strong evidence base.

3. *Doli incapax* principle is not an adequate safeguard

The Bill's Explanatory Notes rightfully acknowledge that the principle of *doli incapax* (the presumption that a young person aged between 10 and 13 is unable to form a criminal intent) is rarely a barrier to prosecution, and is not working as intended to protect young people from being held criminally responsible.[16] YLA strongly agrees with this view - *doli incapax* is not an adequate safeguard for children and young people, and should not have a role in the reformed youth justice system.

The problems with the presumption of *doli incapax* (including its statutory manifestations) have been well-documented and were the subject of a submission by YLA to the Australian Council of Attorneys-General in February 2020.

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[14] See research into brain development and maturity of children, and capacity to engage with the criminal justice system. For example: Elly Farmer, *'The age of criminal responsibility: developmental science and human rights perspectives'* (2011) 6(2) Journal of Children's Services, pages 86-87.

[15] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 13.

[16] The Bill's Explanatory Notes, page 1.

In practice *doli incapax* operates unevenly, inconsistently and results in children remaining remanded in detention for longer periods of time. In our view, the impact of the intractable practice issues in applying *doli incapax*, is that the principle is an inadequate justification for refusing to increase the minimum age of criminal responsibility in Australia.

One of the insurmountable problems with the *doli incapax* principle, however formulated, is that it does not prevent children from becoming involved in the criminal justice system in the first place. Commentators note that: 'while the presumption is in itself designed to remove children who lack the necessary capacity from the justice system, for this to be an effective safeguard such a response must occur at the earliest point and without requiring the child to spend prolonged periods of time within the bounds of the criminogenic justice system institutions'.[17]

We note also the comments of the United Nations Committee on the Rights of the Child that *doli incapax* and similar presumptions:

1. were initially devised as a protective system, but have not proved so in practice
2. leave much to the discretion of the court, and can result in discriminatory practices
3. risk becoming a retrogressive position regarding the minimum age of criminal responsibility.[18]

4. Child rights approach to the MACR reforms

YLA submits that a child rights approach should underpin any reform in Queensland to raise the minimum of age of criminal responsibility.

Child rights bring a focus on minimum standards and the justification for a violation of a young person's rights. They also provide a mechanism for holding duty-bearers accountable for individual violations.[19]

Raising the minimum age, and adopting a child rights approach to these reforms, is consistent with the Queensland Human Rights Act. That Act makes it clear that children who are involved

[17] Wendy O'Brien 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.
[18] United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, paragraph 25.
[19] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017).

in youth justice system in Queensland have the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.[20]

A child rights-based approach also importantly 'demands that the views of children have an impact on decisions regarding matters affecting them'.[21] We consider that the right to participation, reflected in article 12 of the United Nations *Convention on the Rights of the Child*, is of particular importance for children and young people who are at risk of, or who have engaged in, problematic behaviours. Free and accessible independent advocacy services for these children and young people will be an important aspect of ensuring the effective implementation of their rights.[22]

5. Expungement of historical convictions and transition of children under 14 out of detention

YLA strongly supports the Bill's inclusion of automatic expungement of historical convictions for offences committed by children when they were under 14. The Bill also ensures that any prior conviction and certain actions taken against a young person when they are under 14 (such as action taken by a court or a police officer against the young person for the relevant offence) cannot be disclosed in any future court proceedings the young person is involved in.

This is consistent with principles of fairness and will give all young people in Queensland who have been in contact with the criminal justice system the opportunity to avoid the prospect of being treated differently on account of their record.[23]

In keeping with these principles of fairness, YLA also strongly agrees with Bill's objective 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, and to require the transition of children and young people out of custody and detention in Queensland as soon as practicable, and no later than one month from commencement of the Bill.

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[20] *Human Rights Act 2019* (Qld), s 32(3).

[21] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017), pages 48-49.

[22] See for example United Nations Committee on the Rights of the Child, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child.

[23] There are no Queensland laws which specifically provide protection against discrimination based on a criminal record. Although discrimination on the basis of irrelevant criminal record is protected in certain areas under the *Australian Human Rights Commission Act 1986* (Cth), discrimination cases can be notoriously difficult to prove, particularly in areas such as employment.

6. Information sharing

YLA submits that information sharing should be considered in any reform in Queensland to raise the minimum of age of criminal responsibility. Information sharing between and within organisations is a critical part of ensuring that risk factors for young people are identified early, and that services work collaboratively and effectively to provide appropriate supports and interventions.

Services, programs and interventions will only be effective in supporting young people with complex needs if they are able to work collaboratively and share information. Information sharing is also a critical aspect of preventing silos and duplication of service delivery.

Information sharing laws that enable relevant agencies to share information about the safety and wellbeing of children and young people within Queensland, and between Queensland and other jurisdictions, are required:

- to ensure risk factors for children and young people are identified early, and that they are connected with appropriate early intervention services
- to ensure services for children and young people who exhibit harmful behaviours or who may be at risk work collaboratively and effectively[24]
- to protect children and young people from those who may pose a risk (including children and young people exhibiting harmful sexual behaviours).[25]

For these reasons, we consider that nationally consistent information sharing laws will be an important component of the effectiveness of minimum age of criminal responsibility reforms in Australian jurisdictions, as well as other child protection-related schemes.[26]

The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that the Commonwealth and state and territory governments make nationally consistent arrangements for sharing information about the safety and wellbeing of children, which can operate in and across all Australian jurisdictions. It also recommended that governments work

[24] See for example Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, pages 221-222.
[25] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, pages 219-221.
[26] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, page 140.

together to support the implementation of this recommendation with education, training and guidelines.[27]

7. Aboriginal and Torres Strait Islander children and young people

YLA is strongly supportive of the Bill's objective to reduce the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the Queensland youth justice system.[28]

YLA submits that the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the justice and care and protection systems in Queensland points to the need to give specific and careful consideration to the response to Aboriginal and Torres Strait Islander children and young people who may be at risk of or who exhibit harmful behaviour.

We urge the Queensland government to work in partnership with Aboriginal and Torres Strait Islander representatives and communities when implementing any alternative model to responding to harmful behaviour by young people. Self-determination of Aboriginal and Torres Strait Islander communities in service design and delivery should underpin the development of an alternative model to responding to harmful behaviours by children and young people.

We note the importance that Aboriginal and Torres Strait Islander communities are at the centre of the design and delivery of interventions and services, and that these should be tailored to the specific social and cultural circumstances of that community. The implementation of approaches imposed by external decision-makers or that have been implemented effectively in another community which may have different circumstances, should be avoided.[29] This is consistent with a child rights-based approach, which is one that is 'culturally sensitive and locally owned'.[30]

The Murri School in Brisbane which is funded by the national Aboriginal and Torres Strait Islander organisation, Healing Foundation, is an instructive example of the strength of a program tailored to cultural needs. The Murri School combines therapeutic intervention, service coordination, family case work, cultural and group activities, and (re)connection with educational and sporting activities to help to improve outcomes for young Aboriginal or Torres Strait Islanders including reduced contact with child protection and the youth justice system. A 2017 cost benefit analysis of the Murri School program undertaken by Deloitte estimated that

[27] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, recommendations 8.6-8.8.
[28] The Bill's Explanatory Notes, page 2.
[29] Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation*, commissioned by the Bugmy Bar Book 2021.
[30] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017), pages 51-52.

the Murri School reduced incarcerations of young Aboriginal or Torres Strait Islanders by 13.9% which also resulted in an estimated saving of $0.8 million in the cost of incarcerations.[31]

8. The need for an independent review

YLA agrees that alongside the legislative changes enacted by this Bill, the Queensland government should commission an independent review to:

- consult with community organisations, First Nations representatives, government stakeholders and young 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.[32]

YLA submits that such a review should include mapping of existing services and identification of gaps or limitations with reference to Queensland-specific research and data on young people who exhibit problematic behaviour, as well as consultation with on-the-ground service providers.

It should also:

- review the efficacy of alternative programs, interventions and supports in other states and territories, and overseas which could be implemented in Queensland
- consider systemic issues, such as breaking down silos and barriers to information sharing between organisations and government departments (including those responsible for child protection, health and education)
- address practical, economic and financial considerations
- take a child rights approach to its terms of reference.

While we consider that such a review is critical, it should have short and defined time limits so that it can be undertaken alongside the legislative changes enacted by this Bill. It should not delay these important reforms.

[31] Cost Benefit Analysis of the Murri School Healing Program, Deloitte Access Economics, February 2017, page 28.
[32] The Bill's Explanatory Notes, page 8.