

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

**Report No. 16, 57th Parliament  
Community Support and Services Committee  
March 2022**

## **Community Support and Services Committee**

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All web address references are current at the time of publishing.

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## Abbreviations

AARJ	Australian Association for Restorative Justice
ACT	Australian Capital Territory
ADD	Attention deficit disorder
ADHD	Attention deficit hyperactivity disorder
AIA	Amnesty International Australia
Atkinson Report	<i>Report on Youth Justice</i> by Mr Bob Atkinson AO, APM
Bill	Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021
CAG	Council of Attorneys-General
chief executive	Chief executive of the Department of Children, Youth Justice and Multicultural Affairs
CIFACEC	Cooee Indigenous Family and Community Education Centre
committee	Community Support and Services Committee
CREATE	CREATE Foundation
Criminal Code	<i>Criminal Code Act 1899</i>
DCYJMA	Department of Children, Youth Justice and Multicultural Affairs
DoE	Department of Education
ETS	Evolve Therapeutic Services
FARE	Foundation for Alcohol Research & Education
FASD	Fetal alcohol spectrum disorders
HRA	<i>Human Rights Act 2019</i>
HRLC	Human Rights Law Centre
LSA	<i>Legislative Standards Act 1992</i>
MAG	Meeting of Attorneys-General
MACR	Minimum age of criminal responsibility
MHC	Mental Health Commission
NT	Northern Territory

OPG	Office of the Public Guardian
PeakCare	PeakCare Queensland Inc.
QATSICPP	Queensland Aboriginal and Torres Strait Islander Child Protection Peak
QCOSS	Queensland Council of Social Service Ltd
QFCC	Queensland Family and Child Commission
QLS	Queensland Law Society
QPS	Queensland Police Service
QPU	Queensland Police Union
QYPC	Queensland Youth Policy Collective
RACP	Royal Australasian College of Physicians
Report of the Royal Commission	<i>Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory</i>
Sisters Inside Inc.	Sisters Inside
UNCRC	United Nations Committee on the Rights of the Child
YAC	Youth Advocacy Centre Inc
YANQ	Youth Affairs Network of Queensland
YJ Act	<i>Youth Justice Act 1992</i>
YLA	Youth Law Australia
YOTS	Youth Off The Streets Limited
Youth Justice Strategy	<i>Working Together changing the Story: Youth Justice Strategy 2019-2023</i>
Atkinson Report	<i>Report on Youth Justice</i> by Mr Bob Atkinson AO APM
Bill	Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021
committee	Community Support and Services Committee
HRA	<i>Human Rights Act 2019</i>
LSA	<i>Legislative Standards Act 1992</i>
MAG	Meeting of Attorneys-General

Youth Justice Strategy	<i>Working Together changing the Story: Youth Justice Strategy 2019-2023</i>
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All Acts are Queensland Acts, unless otherwise specified.

## Chair's foreword

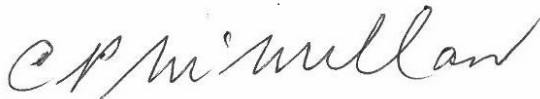
This report presents a summary of the Community Support and Services Committee's examination of the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021.

The issues relating the Bill's objectives, such as community safety, criminal responsibility, childhood disadvantage and the overrepresentation of First Nations' children and adults in the criminal system are of great concern to the committee and to the wider community, as reflected in the large number of substantive submissions received by the committee to this Bill.

The committee's task was to consider the policy to be achieved by the proposed legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*. The committee heard from young people's advocates and representatives, carers, teachers and defenders, and I would like to acknowledge their ongoing work to improve the lives of Queensland's children.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill and appeared before the committee at the public hearing. I also thank our Parliamentary Service staff and the Department of Children, Youth Justice and Multicultural Affairs, the Queensland Police Service and the Department of Education.

I commend this report to the House.



Corrine McMillan MP

Chair



## Recommendations

### **Recommendation 1** **7**

The committee recommends the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 not be passed.

### **Recommendation 2** **17**

The committee recommends that the Queensland Government evaluate the training currently provided to residential care workers to determine whether its residential care workers are given sufficient training in diversionary tactics and de-escalation techniques.

### **Recommendation 3** **18**

The committee recommends that the Queensland Government continue to work with all State and Territory Attorneys-General to consider the increase of the minimum age of criminal responsibility from 10 to 12, including any caveats, timing and discussion of implementation requirements.

This recommendation reflects the work of Bob Atkinson AO, APM's *Youth Justice Report*, in which one of his recommendations was that the Queensland Government should advocate for consideration of raising the minimum age of criminal responsibility to 12 years as part of a national agenda for all states and territories, as a uniform approach.

### **Recommendation 4** **22**

The committee recommends the Queensland Government consider targeted training and accreditation processes and clear practice direction for stakeholders regarding procedural requirements for court proceedings.

### **Recommendation 5** **41**

The committee recommends that any alternative proposal to the youth justice system considered by the Queensland Government should include adequate and effective diversion programs and services, including place-based and culturally appropriate practices, to support young people and address factors which lead to offending behaviour.



## 1 Introduction

### 1.1 Role of the committee

The Community Support and Services Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's areas of portfolio responsibility are:

- Communities, Housing, Digital Economy and the Arts
- Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
- Children, Youth Justice and Multicultural Affairs.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019*
- for subordinate legislation – its lawfulness.<sup>2</sup>

The Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly and referred to the committee on 15 September 2021. The committee is to report to the Legislative Assembly by 15 March 2022.

### 1.2 Inquiry process

On 17 September 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. The committee received a total of 78 submissions, comprising:

- 76 individual submissions
- 2 'form submissions'<sup>3</sup> in respect of which a total of 228 total submissions were made (a list of all individual and form submitters is provided at Appendix A).

The committee received a public briefing about the Bill from the Member for Maiwar on 15 November 2021. A transcript is published on the committee's web page; see Appendix B for a list of attendees at the public briefing. The committee also received written advice from the Member for Maiwar in response to a question asked by the committee during the public hearing.

The committee held a public hearing on 14 February 2021 (see Appendix C for a list of witnesses).

The submissions, correspondence from the Member for Maiwar and transcripts of the briefing and hearing are available on the committee's webpage.

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<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

<sup>2</sup> *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

<sup>3</sup> Where the committee received 3 or more submissions with substantially uniform content, those submissions were treated as 'form submissions', with the committee publishing one example of the form submission, together with a list of the names of submitters and form submissions received.

### 1.3 Policy objectives of the Bill

The Bill proposes to amend the Criminal Code and the *Youth Justice Act 1992* to raise the minimum age of criminal responsibility in Queensland. The objectives of the Bill are to:

- raise the minimum age of criminal responsibility in Queensland from 10 to 14 years old and transfer any children under 14 years of age out of custody
- 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.<sup>4</sup>

### 1.4 Private Member Consultation on the Bill

The explanatory notes state the Bill was ‘developed based on community feedback and extensive consultation with relevant stakeholders’,<sup>5</sup> including Amnesty International; the Human Rights Law Centre; the Queensland Council of Social Services; Maludh Gunya; Change the Record; the Youth Advocacy Centre; Community Legal Centres Queensland; Youth Affairs Network Queensland; CREATE Foundation; the Aboriginal & Torres Strait Islander Legal Service; Childwise; Queensland Mental Health Commissioner, Ivan Frkovic; Queensland Human Rights Commissioner, Scott McDougall;<sup>6</sup> former Australian Federal Police Commissioner, Mick Palmer; the Justice Reform Initiative; and the Ted Noffs Foundation.<sup>7</sup>

### 1.5 Background to the Bill

#### 1.5.1 Report on Youth Justice

On 12 February 2018, the Queensland Government appointed former Police Commissioner Mr Robert (Bob) Atkinson AO, APM as Special Adviser to Hon Di Farmer MP, then Minister for Child Safety, Youth and Women, and Minister for the Prevention of Domestic and Family Violence.<sup>8</sup> Mr Atkinson was asked to examine and report on a series of youth justice matters,<sup>9</sup> and to advise on the following terms of reference:

1. progress of the government’s youth justice reforms, and next steps
2. other measures to reduce recidivism, and
3. recommendations for youth detention stemming from the Royal Commission into Institutional Responses to Child Sex Abuse.<sup>10</sup>

The *Report on Youth Justice* (Atkinson Report) made 77 recommendations in response to the first 2 terms of references.<sup>11</sup> The third term of reference was addressed by the Queensland Government Response to the Royal Commission into Institutional Responses to Child Sex Abuse.<sup>12</sup>

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<sup>4</sup> Explanatory notes, p 1.

<sup>5</sup> Explanatory notes, p 14.

<sup>6</sup> In its submission to the inquiry, the Queensland Human Rights Commission clarified that consultation had consisted of the Queensland Human Rights Commissioner being invited to comment about the Bill’s compatibility with the HR Act and declining to do so. See submission 67, p 4.

<sup>7</sup> Explanatory notes, p 14.

<sup>8</sup> Queensland Government, Department of Children, Youth Justice and Multicultural Affairs, ‘Atkinson Report’, <https://www.cyjma.qld.gov.au/about-us/reviews-inquiries/atkinson-report>

<sup>9</sup> *Report on Youth Justice* (Atkinson Report), Bob Atkinson AO, APM, Version 2, (Atkinson Report), June 2018, p 6.

<sup>10</sup> Atkinson Report, p 6.

<sup>11</sup> Atkinson Report, pp 8-13.

<sup>12</sup> Atkinson Report, p 1. Queensland Government, Department of Children, Youth Justice and Multicultural Affairs, ‘Atkinson Report’, <https://www.cyjma.qld.gov.au/about-us/reviews-inquiries/atkinson-report>.

The Atkinson Report identified ‘Four Pillars’ of reform:

- Intervene early
- Keep children out of court
- Keep children out of custody, and
- Reduce reoffending.<sup>13</sup>

The ‘key finding and recommendation’<sup>14</sup> of the Atkinson Report was that the Queensland Government adopt the Four Pillars as its policy position for youth justice, ‘framed or “bookended” by two fundamental principles – that public safety is paramount and that community confidence is essential’.<sup>15</sup> The Four Pillars were adopted as the Queensland Government policy position for youth justice on 11 December 2018 in the *Working Together changing the Story: Youth Justice Strategy 2019-2023* (Youth Justice Strategy).<sup>16</sup>

In regard to the minimum age of criminal responsibility, the Atkinson Report recommended (Recommendations 68 to 70):

68. That the Government support in principle raising the MACR to 12 years, subject to:
- a. national agreement and implementation by State and Territory governments
  - b. a comprehensive impact analysis
  - c. establishment of needs based programs and diversions for 8-11 year old children engaged in offending behaviour.
69. That the Government advocate for consideration of raising the MACR to 12 years as part of a national agenda for all states and territories for implementation as a uniform approach.
70. In the interim, that the Government consider legislating so that 10-11 year olds should not be remanded in custody or sentenced to detention except for a very serious offence.<sup>17</sup>

At the time of the Atkinson report these recommendations were consistent with the United Nations Committee on the Rights of the Child (UNCRC) guidance.

### **1.5.2 United Nations Committee on the Rights of the Child**

The UNCRC provides comment and guidance on juvenile justice in accordance with the UN Rights of the Child. In 2019, the UNCRC revised its 2007 benchmark for the minimum age of criminal responsibility upwards from 12 to 14 years old.<sup>18</sup>

The UNCRC outlined some of the reasons for the revision:

[The revision] reflects the developments that have occurred during the intervening decade through the promulgation of various resolutions and other guiding documents on violence against children in juvenile justice, the knowledge about child and adolescent development, the Committee’s own jurisprudence and various concerns, including negative trends relating to the minimum age of criminal responsibility and the persistent use of deprivation of liberty, and emerging issues, such as children recruited and used by

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<sup>13</sup> Atkinson Report, p 21.

<sup>14</sup> Atkinson Report, p 6.

<sup>15</sup> Atkinson Report, p 6.

<sup>16</sup> Youth Justice and Other Legislation Amendment Bill 2021, explanatory notes, p 1.

<sup>17</sup> Atkinson Report, p 106.

<sup>18</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children’s rights in juvenile justice*, 2019, CRC/C/GC/24, <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

non-State armed groups, or terrorist or violent extremist groups, and children in customary justice systems.<sup>19</sup>

The UNCRC further stated:

In the original general comment No. 10 (2007), the Committee had considered 12 years as the absolute minimum age. However, the Committee finds that this age indication is still low. States parties are encouraged to increase their minimum age to at least 14 years of age. At the same time, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age.<sup>20</sup>

A majority of submitters to the Bill expressed support for raising the age of criminal responsibility in Queensland in accordance with the UNCRC's recommended minimum age of 14.<sup>21</sup>

### 1.5.3 Australian jurisdictions

The minimum age of criminal responsibility is currently 10 years of age in all Australian states and territories.

The Attorneys-General of the states and territories regularly meet to discuss legal matters on a national level. The Meeting of Attorneys-General (MAG) (formerly the Council of Attorneys-General (CAG)), comprises Attorneys-General from the Australian Government, each state and territory, and Minister for Justice from New Zealand.<sup>22</sup> The purpose of MAG is to 'implement a national and trans-Tasman focus on maintaining and promoting best practice in law reform'.<sup>23</sup>

An Age of Criminal Responsibility Working Group was established by CAG on 23 November 2018 to consider whether to raise the age of criminal responsibility. The working group called for submissions and presented a report to CAG on 27 July 2020. At this meeting further consideration of the report and a decision in regard to the age of criminal responsibility was deferred.<sup>24</sup>

At the 12 November 2021 meeting of MAG, Attorneys-General expressed support for the 'development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and discussion of implementation requirements'.<sup>25</sup> The communique from the meeting noted that '[t]he Northern Territory has committed to raising the age to 12, and will continue to work on reforms including adequate and effective diversion programs and

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<sup>19</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice*, 2019, CRC/C/GC/24, paragraph 1, page 3, <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

<sup>20</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice*, CRC/C/GC/24, paragraph 33, page 9, <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

<sup>21</sup> Submissions 2, 6, 11, 18, 19, 28, 33, 37, 46, 49, 54, 55, 57, 58, 60 and 67.

<sup>22</sup> Australian Government, Attorney-General's Department, 'Meeting of Attorneys-General', <https://www.ag.gov.au/about-us/who-we-are/committees-and-councils/meeting-attorneys-general>.

<sup>23</sup> Australian Government, Attorney-General's Department, 'Meeting of Attorneys-General', <https://www.ag.gov.au/about-us/who-we-are/committees-and-councils/meeting-attorneys-general>.

<sup>24</sup> Council of Attorneys-General, *Communique*, 23 November 2018, <https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2018.pdf>; Human Rights Law Centre, 'Dozens of submissions made public after AGs refuse to act on raising the age of criminal responsibility', 19 May 2021, <https://www.hrlc.org.au/news/2021/5/19/dozens-of-submissions-made-public-after-ags-refuse-to-act-on-raising-the-age-of-criminal-responsibility>

<sup>25</sup> Meeting of Attorneys-General, *Communique*, 12 November 2021, p 4, <https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>.

services'.<sup>26</sup> The communique advised, '[t]he Australian Capital Territory has also committed to raising the age, and is working on its own reforms'.<sup>27</sup>

#### 1.5.3.1 *Northern Territory*

The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Report of the Royal Commission) was tabled in the Northern Territory Parliament and the Australian Parliament on 17 November 2017. The report of the Royal Commission included a number of key recommendations, including that the age of criminal responsibility be increased to 12 years.<sup>28</sup>

In December 2021, Chief Minister Michael Gunner stated his government supported raising the age of criminal responsibility before his current term of government expired in 2024.<sup>29</sup>

#### 1.5.3.2 *Australian Capital Territory*

In February 2021, the Australian Capital Territory (ACT) Government commissioned an independent review headed by Emeritus Professor Morag McArthur on how a higher minimum age of criminal responsibility could be implemented in the ACT, having adopted a policy reform of raising the age to 14. The report from the review was released in October 2021.<sup>30</sup> The report supported wide-ranging reform to the youth justice and education sector, and the establishment of an independent authority to oversee reform of support systems and create 'an integrated, whole-of-government and whole-of-community system to support children'.<sup>31</sup> In response, the ACT Government referred to the minimum age of criminal responsibility as a 'priority reform' to raise the age of responsibility to 14.<sup>32</sup>

In reference to implementation of the Bill's proposed reforms, the Member for Maiwar spoke to the ACT proposed model as one that Queensland could use as a foundation model:

The review that the ACT has done is a really comprehensive piece of work, but it also lays the groundwork beautifully for the Queensland government to follow in its footsteps to do that really comprehensive service analysis, the gaps analysis, of what is missing and to better understand on the ground what the lack of services means for service provision in Queensland. I should note as well that we are not really talking about reinventing the wheel with these kinds of services.<sup>33</sup>

<sup>26</sup> Meeting of Attorneys-General, *Communique*, 12 November 2021, p 4, <https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>.

<sup>27</sup> Meeting of Attorneys-General, *Communique*, 12 November 2021, p 4, <https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>.

<sup>28</sup> Royal commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations, Recommendation 27.1, <https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf>

<sup>29</sup> Lorena Allam, 'Warning 'cage-like' conditions for young people in NT detention is "history repeating"', *The Guardian*, 4 December 2021, <https://www.theguardian.com/australia-news/2021/dec/04/warning-cage-like-conditions-for-young-people-in-nt-detention-is-history-repeating#:~:text=Chief%20minister%20Michael%20Gunner%20told,its%20term%20expired%20in%202024>.

<sup>30</sup> Australian Capital Territory Government, *Your Say Conversations*, 'Raising the minimum age of criminal responsibility', <https://yoursayconversations.act.gov.au/raising-minimum-age-criminal-responsibility>

<sup>31</sup> Australian National University, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory*, Final Report, August 2021, ACT report, p 78, Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory (act.gov.au)

<sup>32</sup> Australian Capital Territory Government, *Justice and Community Safety Directorate*, 'Raising the Age', <https://justice.act.gov.au/safer-communities/raising-age>.

<sup>33</sup> Public briefing transcript, 15 November 2022, p 3.

## 1.6 Children in detention in Queensland

The committee received key statistics relating to the number of children aged 10 to 13 in Queensland's youth justice system, from the Member for Maiwar, the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA), the Queensland Police Service and other stakeholders.

The following data provides an indication of the cohort of young people in the criminal justice system in Queensland in 2020-21, presented as a daily average over a period of 12 months:

- 17.9 children aged 10 to 13 were in youth justice custody each night, or 7.7% of the average total of 231.9<sup>34</sup>
- of the 17.9 children above, 0.8 were aged 10 to 11 and all were Aboriginal or Torres Strait Islander; and 17.1 were aged 12 or 13, of whom 13.9 were Aboriginal or Torres Strait Islander<sup>35</sup>
- an average of 64.9 children under 14 were supervised in the community, including on a supervised sentence order, on a conditional bail program or referred by a court for a restorative justice conference<sup>36</sup>
- the 64.9 children aged under 14 and under supervision represent just under 5% of the average daily number of total young people under supervision; and comprises of 6.6 children under 12; of whom all were Aboriginal or Torres Strait Islander, while the remaining 58.3 children were aged 12 or 13, of whom 49.8 were Aboriginal or Torres Strait Islander<sup>37</sup>
- of the average 83 children aged 10 to 13 in custody or under supervision on an average day in 2020-21, 31 (or 37%) were on an active child protection order<sup>38</sup>
- for the period 2018-19 to 2020-21, the three-year average proportion of Aboriginal and/or Torres Strait Islander children aged 10 to 13 in youth justice custody was 84%<sup>39</sup>
- in 2021, the average daily number of children aged 10 to 13 in police watch-houses was 5.13, of whom 3.91 (76%) were Aboriginal and/or Torres Strait Islander children.<sup>40</sup>

Commenting on the statistics of children who enter Queensland's youth justice system, Ms Kate Connors, Deputy Director-General, Strategy, DCYJMA, stated:

The evidence tells us that children who become repeat offenders at an early age have in almost every case lived with profound and complex disadvantage for all of their short lives. Sometimes, while there might be supports and services in place, there are risks that need to be managed. At present in the most serious circumstances the criminal justice system uses custody to manage that risk.<sup>41</sup>

In regard to the policy objectives proposed by the Bill, Mr Phillip Brooks, Deputy Director-General, Youth Justice, DCYJMA, stated; 'Evidence and research show that any delay to a young person touching the criminal justice system has a profound impact on trajectories'.<sup>42</sup>

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<sup>34</sup> DCYJMA, correspondence, 22 February 2022, attachment, p 1.

<sup>35</sup> DCYJMA, correspondence, 22 February 2022, attachment, p 3.

<sup>36</sup> DCYJMA, correspondence, 22 February 2022, attachment, p 3.

<sup>37</sup> DCYJMA, correspondence, 22 February 2022, attachment, p 3.

<sup>38</sup> DCYJMA, correspondence, 22 February 2022, attachment, p 3.

<sup>39</sup> Mr Michael Berkman, correspondence, 24 November 2021, attachment.

<sup>40</sup> Queensland Police Service, correspondence, 2 March 2022, attachment, p 1.

<sup>41</sup> Public hearing transcript, Brisbane, 14 February 2022, p 3.

<sup>42</sup> Public hearing transcript, Brisbane, 14 February 2022, p 3.



Committee comment

The committee acknowledges the over-representation of First Nations children in the criminal justice system as a challenge for all Australian jurisdictions which requires an urgent, concentrated and collaborative approach.

**1.7 Should the Bill be passed?**

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Committee comment

Considering all evidence before the committee and noting the importance of appropriately balancing the welfare of children with community safety, as well as the need to address the complex problems that give rise to children entering the justice system, the committee considers there is more work to be done before the minimum age of criminal responsibility is raised in Queensland.

**Recommendation 1**

The committee recommends the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 not be passed.

## 2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

### 2.1 Amendment to the Criminal Code

The minimum age of criminal responsibility in Queensland is 10 years of age.<sup>43</sup> Clause 3 of the Bill proposes to amend the *Criminal Code Act 1899* (Criminal Code) to raise the minimum age of criminal age of criminal responsibility in Queensland to 14 years of age.

#### 2.1.1 Raising the minimum age of criminal responsibility

Upon its introduction the Member for Maiwar described clause 3 of the Bill to amend the Criminal Code as 'relatively simple', and stated:

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.<sup>44</sup>

The principle of *doli incapax* and its application and effectiveness within the justice system is discussed in detail in section 2.1.2 below.

##### 2.1.1.1 Stakeholder views

While opinions differed over the preferred age of criminal responsibility, how the justice system might support the reform, and the possible consequences of the proposed reform, submitters to the Bill were consistent in their support for raising the minimum age of criminal responsibility by amending the Criminal Code.

Key reasons cited in submissions for raising the current age of criminal responsibility included:

- the over-representation of First Nations children in the youth justice system<sup>45</sup>
- children under the age of 14 years lack sufficient neurodevelopment capacity to understand the consequences of their actions<sup>46</sup>
- offenders aged 10-13 rarely commit serious offences, yet their detention results in a higher likelihood of recidivism and more serious offending behaviours when they are older<sup>47</sup>
- children in out-of-home care are at greater risk of offending and of being brought to the attention of police<sup>48</sup>
- offending behaviour may be driven by underlying complex issues such as mental ill-health, disability, fetal alcohol spectrum syndrome (FASD), attention deficit hyperactivity disorder (ADHD), family trauma and violence in the home, drug use, socio-economic disadvantage and homelessness, learning difficulties and speech language impairment, which detention will not address or alleviate<sup>49</sup>

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<sup>43</sup> Criminal Code, subsection 29(1).

<sup>44</sup> Queensland Parliament, Record of Proceedings, 15 September 2021, p 2687.

<sup>45</sup> Submissions 2, 4, 8, 16, 20, 28, 30, 32, 34, 43, 44, 47, 51, 63, 68, 69.

<sup>46</sup> Submissions 1, 2, 9, 17, 22, 35, 36, 37, 38, 44, 46, 48, 53, 54, 56, 57, 61, 64, 69, 70, 73.

<sup>47</sup> Submissions 6, 10, 11, 16, 22, 28, 30, 58, 59, 62, 64.

<sup>48</sup> Submissions 19, 21, 48, 64, 72.

<sup>49</sup> Submissions 1, 2, 3, 4, 6, 14, 17, 18, 19, 37, 39, 45, 46, 50, 55, 60, 62, 63, 66, 67, 68, 71.

- detention may expose children to a greater risk of sexual and other abuse, and long-term harm to physical and mental health.<sup>50</sup>

Mr Bob Atkinson AO, APM, appearing at the public hearing as Co-Chair, Domestic and Family Violence Prevention Council and Chair, Truth, Healing and Reconciliation Taskforce, spoke to his recommendations from the Atkinson Report at the public hearing (refer to section 1.5.1 above). He maintained support for raising the age of criminal responsibility, although to the proposed provisions in the Bill to amend the Criminal Code, he stated:

I would be concerned that raising the age of criminal responsibility to any age from 10, to either 12 or 14 or to any other age, would have to be accompanied by a capacity to properly respond to what would otherwise be a serious criminal offence.<sup>51</sup>

Mr Atkinson also expressed the opinion that raising the age of criminal responsibility to 14, as proposed by clause 3 of the Bill, was currently a 'bridge too far', without full implementation of recommendations 68, 69 and 70 of the Atkinson Report (relating to actions including national agreement, implementation of needs-based programs and diversions, and comprehensive impact analysis).<sup>52</sup>

Concerns from some stakeholders over the consequences of amendment to the Criminal Code to raise the age of criminal responsibility were expressed during the public hearing, and may be summarised as follows:

- there are currently insufficient resources and programs to manage and support offending children, especially in regional and remote areas, and they will need to be in place before, or at the same time, there is legislative reform<sup>53</sup>
- community safety may be threatened, leading to a loss of community confidence<sup>54</sup>
- victims of crime will not be adequately protected or supported<sup>55</sup>
- the reforms proposed could result in the creation of a cohort of undetected, at-risk children.<sup>56</sup>

The Queensland Police Union (QPU) did not support the Bill. Mr Ian Leavers, General President and Chief Executive Officer, QPU, 3vfbgggnolpoooo called for the status quo to remain in place, and reasoned:

Consistent with international research, the decline in the number of young people being actioned against by police for offending behaviour is primarily comprised of a reduction in young people offending as a one-off or at low to moderate levels. However, at the same time, there has been a growth in chronic offenders, i.e. young people recorded for 10 or more offences each year. This increase is distressing and has caused alarm and concern in the Queensland community.<sup>57</sup>

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<sup>50</sup> Submissions 11, 14, 39, 49, 51, 74.

<sup>51</sup> Public hearing transcript, Brisbane, 14 February 2022, p 18.

<sup>52</sup> Public hearing transcript, Brisbane, 14 February 2022, p 19

<sup>53</sup> Ian Leavers, Queensland Police Union, public hearing transcript, Brisbane, 14 February 2022, p 12; Luke Twyford, Principal Commissioner, QFCC, public hearing transcript, Brisbane, 14 February 2022, p 26.

<sup>54</sup> Phillip Brooks, Deputy Director-General, Youth Justice, DCYJMA, public hearing transcript, Brisbane, 14 February 2022, p 5; Bob Atkinson AO, APM public hearing transcript, Brisbane, 14 February 2022, p 17; Scott McDougall, Queensland Human Rights Commissioner, public hearing transcript, Brisbane, 14 February 2022, p 22; Ms Lara Thompson, President, Queensland Law Society, public hearing transcript, Brisbane, 14 February 2022, p 53.

<sup>55</sup> Ian Leavers, Queensland Police Union, public hearing transcript, Brisbane, 14 February 2022, p 16.

<sup>56</sup> Ian Leavers, Queensland Police Union, public hearing transcript, Brisbane, 14 February 2022, p 12.

<sup>57</sup> Queensland Police Union, submission tabled at the public hearing, Brisbane, 14 February 2022, p 3.

Whilst not expressing a position on the Bill, Police Commissioner Katarina Carroll, Queensland Police Service (QPS), was cognisant of the need to appropriately manage young offenders:

Any change to the age of criminal responsibility for children will have impacts to the QPS. Children aged under 14 years do come to police attention for anti-social behaviour and police officers already apply their discretion to divert children from the youth justice system. However, some incidents do result in children being charged with criminal offences.<sup>58</sup>

Committee comment

The committee acknowledges the evidence provided by stakeholders in regard to children in the criminal justice system and shares their concern not only for their welfare of, and outcomes for, these children, but also for the safety of the community.

Every member of our community has the right to be safe and the right to feel safe. The Committee encourages the Government to remain strong in its response to youth crime.

Over-representation of First Nations children in the youth justice system

Concern was expressed in submissions, and by all stakeholders at the public hearing, of the over-representation of First Nations children in the youth justice system. For example, Ms Natalie Lewis, Commissioner, Queensland Family and Child Commission (QFCC), stated:

Queensland's current minimum age of criminal responsibility has had devastating effects for Aboriginal and Torres Strait Islander children and young people. The empirical reality for our children is that their rate of contact with the youth justice system remains unacceptably high. The level of over-representation and disparity of outcomes are present across all points on the youth justice continuum. They enter earlier, stay longer and exit the system under positive circumstances far less often.<sup>59</sup>

Mr Leavers described for the committee the insufficient support services currently available to manage First Nations children who are committing crime, especially in regional and remote communities:

In remote areas there are very few options available. Sadly, I have to call it for what it is. It is really saddening to me that in areas where our First Nations children are there are no services or no facilities to take them to. At times the only safe place is the PCYCs. They have now restricted their hours at times, but that is the only place where youth will go.<sup>60</sup>

Taking a wider view, the Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) drew upon the one of the key findings of the landmark 1991 Royal Commission into Aboriginal Deaths in Custody:<sup>61</sup>

The more fundamental causes of over-representation of Aboriginal people in custody are not to be found in the criminal justice system but those factors which bring Aboriginal people into conflict with the criminal justice system in the first place ... [and] the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in society - socially, economically and culturally.<sup>62</sup>

The QATSICPP provided a list of the characteristics of Aboriginal and Torres Strait Islander young people involved with the youth justice system, as follows:

- being impacted by intergenerational trauma, which has been proven to affect their neurological, psychological and even physical development

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<sup>58</sup> Queensland Police Service, correspondence, 27 January 2022, p 1.

<sup>59</sup> Public hearing transcript, Brisbane, 14 February 2022, p 24.

<sup>60</sup> Public hearing transcript, Brisbane, 14 February 2022, p 12.

<sup>61</sup> Submission 34, quoting from Royal Commission into Aboriginal Deaths in Custody report, Vol. 1, p. 1.7.1.

<sup>62</sup> Submission 34, p 3.

- high rates of exposure to domestic violence, sexual abuse and neglect
- high rates of intellectual disability and cognitive impairment, which research links to being more likely to have police contact, be charged, be imprisoned and receive longer sentences
- frequent out-of-home care placements which disrupts or prevents access to treatment and support, resulting in placement breakdown and sometimes homelessness (and consequently extended periods of time in youth detention)
- a high prevalence of diagnosable trauma related mental illness
- high rates of substance misuse with research suggesting drug use and crime can both develop in response to a range of other factors such as poverty, trauma, mental health issues and a lack of engagement with education and employment.<sup>63</sup>

Many stakeholders supported the Bill's proposed amendments to the Criminal Code as an opportunity for First Nations children at risk of offending to benefit from diversionary, alternative pathways.<sup>64</sup> Ms Keryn Ruska, Member, Human Rights and Public Law Committee, Queensland Law Society (QLS), stated:

We know that a strong sense of identity, developed by connection to family, community and culture, is a protective factor for Aboriginal and Torres Strait Islander people and it contributes to their long-term wellbeing, including less likelihood of contact with the criminal justice system.<sup>65</sup>

Ms Ruska further submitted that once First Nations children have entered the youth justice system, they become more susceptible to adverse life outcomes:

Children really need to be supported to develop that strong sense of identity. The criminalisation of children under 14, particularly, is going to really disrupt that development of identity. That identity and connection can be with other young people in the youth justice system; that is where children can develop their sense of connection, which is problematic. Being able to support children and young people, particularly those under the age of 14, to instead have that support, to have connection to their family, to develop strong identities is really crucial.<sup>66</sup>

The committee noted the evidence provided by Mr Phillip Brooks, Deputy Director-General, Youth Justice, DCYJMA:

It is important to note that 94.9 per cent of all Aboriginal and Torres Strait Islander young people in Queensland last financial year did not touch the youth justice system, despite the wicked over-representation. There is a lot of strength in our communities. The *Bringing them home* report in 1997 talked about child-rearing practices being removed and never replaced. Why is that important? This is really at the crux of what we are talking about because, ultimately, if we are able to assist young people, especially Indigenous young people, we could see a dramatic change in relation to the offences seen in Queensland.<sup>67</sup>

#### Neurological capacity and decision making

The committee received a number of submissions documenting medical evidence to support the Bill's objective to ensure children under 14 years are not incarcerated or otherwise punished, as being 'consistent with current medical understanding of child development'.<sup>68</sup>

<sup>63</sup> Submission 34, p 4.

<sup>64</sup> Submissions 4, 5, 15, 16, 17, 19, 20, 21, 28, 32, 36, 42, 43, 44, 46, 49, 50, 51, 54, 55, 57, 61, 62, 64, 71 and 73 call for alternative support and services. Submissions 15, 19, 28, 42, 43, 48, 49, 50, 57, 64, 73 suggested alternative models.

<sup>65</sup> Public transcript, p 57.

<sup>66</sup> Public transcript, p 57.

<sup>67</sup> Public transcript, p 4.

<sup>68</sup> Explanatory notes, p 1; submissions 1, 2, 4, 14, 19, 34, 53, 54, 70, 71 and 73.

The Royal Australian and New Zealand College of Psychiatrists Queensland Branch submitted that many children under 14 years of age lack the neurodevelopmental capacity to fully understand the consequences of their actions.<sup>69</sup> The submission further stated:

The medical evidence is that early adolescence represents a phase of increased impulsivity and sensation-seeking behaviour, and a heightened vulnerability to peer influence. As the prefrontal cortex of the brain is still developing, children under 14 years of age have a compromised capacity to plan, foresee consequences or control impulses.

...

In contrast to the frontal lobe's slow-paced development, the amygdala (which is the part of the brain responsible for reward and emotional processing) develops more quickly, and this imbalance is thought to be a major factor accounting for increased risk-taking behaviour in adolescence.<sup>70</sup>

Similarly, the Royal Australian College of Physicians (RACP) cited research from functional neuro-imaging that indicated 'the pre-frontal cortex of the brain, the part of the brain that controls executive functions (e.g. impulse control, planning and weighing up long term consequences of one's actions), is not fully developed until around 25 years of age'.<sup>71</sup> Professor Sue McGinty and others similarly stated in their joint submission, 'there is enough scientific evidence to show that the brains of 10-14 year old children are far from developed with regard to responsible vs impulsive behaviour'; and contended that '[m]edical and criminological evidence shows that a therapeutic and diversionary response is far more effective than a criminal one for young children'.<sup>72</sup>

In terms of behaviour exhibited by some young people, Steve Fisher, CEO, Beyond Abuse, observed:

Ordinary and healthy human development takes time and is marked by a series of try-fail-try again. That is normal human development in all children not just traumatised children who have come to the attention of the legal system.<sup>73</sup>

The RACP argued that, as well as considering the normal neurocognitive development of children aged 10-13 years:

Most children in the youth justice system have significant additional neurodevelopmental delays. Children aged 10 to 13 years old in juvenile detention have higher rates of pre-existing psycho-social trauma which demands a different response to behavioural issues than older children.<sup>74</sup>

Some causes of neurodevelopmental delay were cited by stakeholders, and are considered below.

#### *Mental and physical health and disability*

A number of submissions received by the committee drew on research, experience and statistics to detail the prevalence of a variety of conditions leading to impaired decision making among children in the youth justice system.<sup>75</sup> Those conditions included neurodevelopmental conditions, such as attention deficit disorder (ADD), ADHD and autism spectrum disorder; intellectual impairment, including fetal alcohol spectrum disorders (FASD); and mental health challenges, including trauma-related mental illness. Among those submitters were ANTaR Queensland and Youth Advocacy Centre Inc (YAC), which referred to DCYJMA statistics for 2019-20 indicating that 46% of young offenders in custody in Queensland had a mental health and/or behavioural disorder (diagnosed or suspected) and

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<sup>69</sup> Submission 54, p 2.

<sup>70</sup> Submission 54, p 2.

<sup>71</sup> Submission 73, pp 3-4.

<sup>72</sup> Submission 70, p 1.

<sup>73</sup> Submission 39, p 3.

<sup>74</sup> Submission 73, p 1.

<sup>75</sup> See for example submissions 1, 4, 6, 8, 10, 15, 17, 34, 44, 45, 46, 48, 50, 51, 53, 55, 58, 62, 68, 69, 70, 71, 72, 73, 74.

12% had a disability (assessed or suspected).<sup>76</sup> Submitters were in general agreement that children experiencing such conditions required a therapeutic response to their behaviour and not punitive measures, including incarceration.<sup>77</sup>

Several submitters discussed the impact of FASD on children who come in contact with the youth justice system,<sup>78</sup> and the higher incidence rates of FASD in First Nations children.<sup>79</sup> The Foundation for Alcohol Research & Education (FARE) explained that 'FASD is a diagnostic term describing a range of neurodevelopmental impairments that impact on the brain and body of individuals prenatally exposed to alcohol'.<sup>80</sup> FARE stated:

Children with FASD can have cognitive, behavioural, health and learning difficulties, including problems with memory, attention, cause and effect reasoning, impulsivity, receptive language and adaptive functioning difficulties. Despite the lack of intent, this can place them at increased risk of early contact with the criminal justice system.<sup>81</sup>

Long-term measures proposed to address FASD included a community trial of goal setting, with the first goal being 'that no child will be born into this community with foetal alcohol syndrome'<sup>82</sup> and 'interventions for alcohol problems' because 'you do not want to create more FASD children'.<sup>83</sup>

Multiple submitters discussed the impact of trauma experienced by children who come in contact with the youth justice system.<sup>84</sup> The RACP submitted that exposure to childhood trauma disrupts the development of normal neural pathways in a child's brain. Further, the RACP explained that this disruption 'often results in: learning difficulties, a lack of self-regulatory skills, being in a persistent heightened state, and/or dissociation due to misreading of cues and being quickly triggered into a fear response',<sup>85</sup> which 'often presents as aggression and disobedience'.<sup>86</sup> The RACP further stated that when considering the minimum age of criminal responsibility, 'it is important to note that the younger the child enters the youth justice system, the greater the likelihood that they have been exposed to trauma...'.<sup>87</sup> Similarly, the Australian Red Cross stated that '[c]hildren who have progressed furthest into the criminal justice system are more likely to have experienced prolonged periods of trauma, to be diagnosed with mental health and development delays'.<sup>88</sup>

<sup>76</sup> ANTAr Queensland, submission 58, p 4; YAC, submission 62, p 14. The Youth Justice census summary 2018-2020, which provides a broad breakdown of disability, mental health and behavioural disorders among young people in a youth detention or watch-house found at <https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/resources/yj-census-summary-custody.pdf>

<sup>77</sup> See for example submissions 1, 4, 8, 16, 22, 28, 46, 47, 48, 50, 51, 53, 54, 55, 62, 63, 66, 70, 71, 72, 73.

<sup>78</sup> See for example submissions 10, 44, 50, 62, 65. See also Bob Atkinson AO, APM public hearing transcript, Brisbane, 14 February 2022, p 18; Dr Carlo Longhitano, public hearing transcript, Brisbane, 14 February 2022, pp 32-33.

<sup>79</sup> See for example submission 44, 70, 72; Prof. Sue McGinty, public hearing transcript, Brisbane, 14 February 2022, p 32.

<sup>80</sup> Submission 50, p 1, (reference removed).

<sup>81</sup> Submission 50, p 3, (references removed).

<sup>82</sup> Bob Atkinson AO, APM, public hearing transcript, Brisbane, 14 February 2022, p 19.

<sup>83</sup> Dr Carlo Longhitano, public hearing transcript, Brisbane, 14 February 2022, p 33. See also Bob Atkinson AO, APM, public hearing transcript, Brisbane, 14 February 2022, p 19.

<sup>84</sup> See for example submissions 3, 4, 9, 10, 14, 15, 16, 17, 18, 19, 21, 34, 37, 39, 41, 44, 48, 51, 53, 55, 57, 59, 61, 62, 63, 65, 66, 68, 69, 72, 73, 75.

<sup>85</sup> Submission 73, p 7.

<sup>86</sup> Submission 73, p 7.

<sup>87</sup> Submission 73, p 9, (reference removed).

<sup>88</sup> Submission 48, p 11.

Some submitters discussed difficulties associated with access to diagnostic assessment and treatment of such conditions,<sup>89</sup> with a number of submitters calling for screening.<sup>90</sup> Dr Meg Perkins considered the costs associated with assessment and treatment amounted to ‘discrimination against poor and disadvantaged children, and in the Australian context, against First Nations children’.<sup>91</sup> Stating ‘only parents who can afford private assessment and treatment are able to manage their children’s disabilities or difficulties and keep them engaged with school’,<sup>92</sup> Dr Perkins asserted ‘[t]hose children who have poor parents, or who are in the care of the state, and are behaving in an inappropriate or antisocial manner, are suspended and excluded from school and find themselves sliding down the “school to prison pipeline”’.<sup>93</sup>

Disadvantage, family environment

Many submitters expressed the view that children who come in contact with the youth justice system are among the most disadvantaged cohort in Queensland community.<sup>94</sup> This view was encapsulated in the submission of paediatrician Dr Michael Williams, who stated that, in addition to the neurodevelopmental and other health conditions mentioned earlier, these children ‘have almost all had significant adverse childhood experiences which at an early stage cause long term harm’, set ‘on a background of inter-generational medical, social, and economic disadvantage, especially seen in the indigenous community’.<sup>95</sup> Dr Meg Perkins elaborated on the compounding effect of disadvantage, stating: ‘The combination of a less healthy and functional brain (learning difficulties) and a less supportive and functional family (poor, disadvantaged) is a sure recipe for childhood offending behaviour’.<sup>96</sup>

Witnesses at the public hearing echoed the submissions in this regard. Mr Keith Hamburger, Cooe Indigenous Family and Community Education Centre (CIFACEC), drew on his experience of working in the corrections system and explained a correlation between socio-economic circumstances and offending:

If you look at the postcodes of prisoners and young people in detention, you can draw rings on the map in Queensland of where these people come from—lower socio-economic, disadvantaged communities, First Nations communities. It is a place based problem.<sup>97</sup>

Further, in its submission to the inquiry, the CIFACEC stated that ‘crime is a terrible consequence of largely place-based challenges that create insurmountable difficulties for impoverished families and communities lacking resilience and capacity to change their circumstances’.<sup>98</sup> The CIFACEC considered the objective of the Bill ‘a worthy one’; however, it did not support the Bill in its current form given its view that ‘no child of any age should be criminalised’.<sup>99</sup> CIFACEC proposed an alternative system to provide for a holistic response to family and community dysfunction, including the development of ‘a Resilience Building Plan for First Nations and other disadvantaged communities’.<sup>100</sup>

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<sup>89</sup> Submission 4, 34, 50, 54, 62, 64, 70.

<sup>90</sup> Submissions 4, 11, 15, 50, 54, 63, 73, 74.

<sup>91</sup> Submission 4, p 8.

<sup>92</sup> Submission 4, p 8.

<sup>93</sup> Submission 4, p 8.

<sup>94</sup> See for example submissions 4, 2, 6, 18, 41, 55, 57, 58, 62, 65, 66.

<sup>95</sup> Submission 1.

<sup>96</sup> Submission 4, p. 4.

<sup>97</sup> Public hearing transcript, Brisbane, 14 February 2022, p 39.

<sup>98</sup> Submission 16, p 8.

<sup>99</sup> Submission 16, p 12.

<sup>100</sup> Submission 16, p 12.



In the context of raising the minimum age of criminal responsibility, Ms Natalie Lewis, Commissioner, QFCC, stated ‘a dedicated focus upon 10 to 13-year-olds presents a significant opportunity to disrupt the offending trajectory of young people and move beyond rhetoric to close the gap in the incarceration rates of Aboriginal and Torres Strait Islander young people and adults’.<sup>101</sup> However, Commissioner Lewis cautioned:

This success, though, is contingent on meeting each of the other socioeconomic targets across the areas that have an impact on the life outcomes for Aboriginal and Torres Strait Islander children: things like infant and early years, health equity, stable housing, living free from violence, education and employment, achieving equality and economic participation and, critically, the preservation or restoration of our connection to culture.<sup>102</sup>

The committee received a number of submissions outlining a relationship between serious problems in a child’s life and environment and their entering the youth justice system.<sup>103</sup> In this context, in evidence to the committee’s public hearing, Mr Atkinson spoke of a lack of awareness of the life and family environment of children in the youth justice system, stating:

There is not an awareness that children who are born perhaps with fetal alcohol syndrome into a dysfunctional family; exposed to domestic violence; exposed to abuse in any form, whether that is physical, emotional, psychological, neglect or sexual abuse; exposed to an environment where the role model might be someone who just got out of prison for committing a crime of violence are in an entirely different context to the young person they are aware of.<sup>104</sup>

The Griffith Criminology Institute referred to its own research which ‘has shown the links between child maltreatment, domestic violence, mental health and juvenile offending’,<sup>105</sup> and added that ‘[m]any children offend not because they are innately criminal and deserving of punishment, but as a logical reaction to their deprived and abusive circumstances’.<sup>106</sup>

Citing research demonstrating that ‘[p]arenting is so influential that it can moderate the impact of social and economic disadvantage’,<sup>107</sup> the YAC asserted that ‘[c]hildren should not be criminalised because of the challenges experienced by the parents; nor should we seek to blame the parents for the behaviours of the child’.<sup>108</sup> Rather, the YAC recommended ‘where parents are experiencing capacity or parenting issues, greater assistance should be made available to parents to address these and support them in supporting their children’.<sup>109</sup>

The Queensland Council of Civil Liberties considered economic and social policy could do more to ‘ameliorate the conditions that foster inadequate parenting in the first place’,<sup>110</sup> and to ‘slow down the spatial concentration of poverty and revitalise neighbourhoods where disadvantage and crime have become deeply entrenched’.<sup>111</sup>

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<sup>101</sup> Public hearing transcript, Brisbane, 14 February 2022, p 24.

<sup>102</sup> Public hearing transcript, Brisbane, 14 February 2022, p 24.

<sup>103</sup> See, for example, submissions 1, 3, 8, 11, 16, 17, 18, 19, 21, 22, 30, 38, 42, 44, 58, 59, 61, 62, 68.

<sup>104</sup> Public hearing transcript, Brisbane, 14 February 2022, p 18.

<sup>105</sup> Submission 37, p 1.

<sup>106</sup> Submission 37, pp 1-2.

<sup>107</sup> Submission 62, p 15, (reference removed).

<sup>108</sup> Public hearing transcript, Brisbane, 14 February 2022, p 46.

<sup>109</sup> Public hearing transcript, Brisbane, 14 February 2022, p 46; see also submission 44, p 18.

<sup>110</sup> Submission 22, p 3.

<sup>111</sup> Submission 22, p 3, citing ‘Turning boys into fine men: The role of economic and social policy’, speech delivered by Dr Don Weatherburn.

Child protection and out-of-home care

Many submitters linked contact with the youth justice system and a child's living arrangements, including experiencing homelessness or living in insecure or inappropriate accommodation or in out-of-home care.<sup>112</sup> At the committee's public hearing, the CREATE Foundation (CREATE) addressed the nexus between child protection and out-of-home care and the youth justice system:

We know that in the general population about 0.3 per cent of children within this age group would ever be concerned with youth justice, whereas in child protection we know it is seven per cent. There is a huge over-representation of young people from child protection heading into youth justice. If we look at it from the other point of view, of the young people in youth justice we know that over half—54 per cent—have had some connection with child protection. We know that about a quarter of them would be taken into out-of-home care. This makes a huge connection. The big issue in this context is that we know that 71 per cent of young people between the ages of 10 and 13 who have had their first connection with youth justice at that age have had a connection with child protection services.<sup>113</sup>

Submitters and public hearing witnesses also addressed the 'criminalisation of the care system'.<sup>114</sup> Stating '[t]he crossover from care to crime is multifaceted',<sup>115</sup> the QLS stated:

... there is evidence to suggest that for children in care there is a practice of relying on police and the justice system in lieu of adequate behavioural management.<sup>33</sup> The result of this is that challenging behaviour of children in out-of-home care, such as property damage, is often criminalised, where the same behaviour by other children would not have elicited a criminal justice response.<sup>116</sup>

Representatives from CREATE and YAC concurred, and recommended better training for residential care workers in diversionary tactics and de-escalation techniques.<sup>117</sup> CREATE stated:

If we had better trained staff in those contexts who understood trauma informed behaviour and could employ diversionary tactics, there would not be any need to call the police to do the behaviour modification. If the staff are not appropriately trained or experienced then obviously that is going to be the course of action. It is like self-protection. The staff feel as though that is the only way they can handle the situation.<sup>118</sup>

In response to a question from the committee regarding police attending incidents in residential care settings, Ms Kate Connors, Deputy Director-General, Strategy, DCYJMA explained that 'a considerable amount of work' is being done 'between the department on the child safety side and police to limit the number of police responses for calls out to residential care services'.<sup>119</sup> Ms Connors continued:

We have an MOU with police around having the police only come when it is appropriate, and we are doing a lot of work with the sector as well. We are aware of the concerns that have been raised around criminalising children in out-of-home care and we are doing considerable work. There are examples—and the QPS could give more detail on this—particularly around the Logan area where there has been a lot of success around police working with residential care providers to make sure they only come when it is actually the most appropriate response for the young person.

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<sup>112</sup> See, for example, submissions 4, 6, 16, 19, 21, 34, 44, 45, 48, 51, 55, 58, 63, 64, 65, 66, 68, 72, 73, 75.

<sup>113</sup> Public hearing transcript, Brisbane, 14 February 2022, p 46. See also submissions 72, 73.

<sup>114</sup> Create Foundation, public hearing transcript, Brisbane, 14 February 2022, p 50; See also public hearing transcript, Brisbane, 14 February 2022, p 50 and submissions 61, 72.

<sup>115</sup> Submission 61, p 6.

<sup>116</sup> Submission 61, p 6.

<sup>117</sup> Public hearing transcript, Brisbane 14 February 2022, p 50, submissions 64, p 3.

<sup>118</sup> Public hearing transcript, Brisbane, 14 February 2022, p 50.

<sup>119</sup> Public hearing transcript, Brisbane, 14 February 2022, p 4.

We continue to work with police on this. I do not want to speak for the QPS, but can I say that they are also keen to ensure that police are only called when it is an appropriate time for police to be called. We are aware, and there would be continuing cases, but I think both the department and the QPS have the same wish in mind on that issue.<sup>120</sup>

Committee comment

The committee acknowledges the work by the Queensland Police Service and the Department of Children, Youth Justice and Multicultural Affairs to minimise inappropriate police attendance following incidents at residential care services. The committee notes submitters' concerns regarding the 'criminalisation of care', and the suggestions that this may be reduced through training for residential care workers in diversionary tactics and de-escalation techniques.

**Recommendation 2**

The committee recommends that the Queensland Government evaluate the training currently provided to residential care workers to determine whether its residential care workers are given sufficient training in diversionary tactics and de-escalation techniques.

2.1.1.2 Stakeholder views on a national approach

A number of stakeholders commented on a national approach to reform, noting that the Northern Territory and the ACT have already taken divergent approaches in respect to their policies on the issue. The Atkinson Report recommended 'national agreement and implementation by all State and Territory governments'.<sup>121</sup> At the public hearing Mr Atkinson maintained that this was his preferred approach:

For what it is worth, it is really regrettable when we have different legislation in the six states and two territories. It would seem very unfair that a 10-yearold might do something in Tweed Heads that is not an offence but if they stepped over the border into Coolangatta it would be. I think that is a quite unfair. I think that is why it is so important to have a national approach.<sup>122</sup>

Ms McKeon, YAC, attested to some of the benefits of consistent national reform:

We would argue from purely a justice perspective that if you are an Australian, wherever you are in country, you should be dealt with in the same way. It is a problem for this country in general, in my opinion. I would not presume to speak on YAC's behalf on this, but in my opinion the idea that the criminal justice system can vary around the country is problematic because of things like convictions, criminal records and so on. In one state you might attract a conviction that remains with you while in another state you do not and those sorts of things. Consistency is important, but I would not like to see consistency drive 12 rather than 14 by way of raising the age.<sup>123</sup>

Taking a different view Mr Damian Bartholomew, Chair, Children's Law Committee, Queensland Law Society (QLS), expressed concern over any delay in reaching national agreement:

Of course I think it would be highly desirable if the whole country adopted the position of this bill. That does seem to be highly desirable. The Law Society's point of view is that we have an obligation to represent the views of Queensland's children and we would not allow an injustice to perpetuate simply because the rest of the country was unable or was unwilling to address that injustice in relation to young people.

<sup>120</sup> Public hearing transcript, Brisbane, 14 February 2022, p 4.

<sup>121</sup> Atkinson Report, p 13.

<sup>122</sup> Public hearing transcript, Brisbane, 14 February 2022, p 19.

<sup>123</sup> Public hearing transcript, Brisbane, 14 February 2022, p 51.

...

I do not think we should allow an injustice to happen in relation to our children because we are waiting for the other states to realise that that injustice is occurring.<sup>124</sup>

Committee comment

The committee is cognisant of the urgency expressed by many stakeholders that children must be prevented from entering the criminal justice system, but considers taking a national, uniform approach to reform is paramount to ensure effective implementation of reform.

**Recommendation 3**

The committee recommends that the Queensland Government continue to work with all State and Territory Attorneys-General to consider the increase of the minimum age of criminal responsibility from 10 to 12, including any caveats, timing and discussion of implementation requirements.

This recommendation reflects the work of Bob Atkinson AO, APM's *Youth Justice Report*, in which one of his recommendations was that the Queensland Government should advocate for consideration of raising the minimum age of criminal responsibility to 12 years as part of a national agenda for all states and territories, as a uniform approach.

**2.1.2 The principle of *doli incapax***

The Bill proposes to replace s 29 of the Criminal Code with a proposed new s 29, an effect of which would be to 'remove the provision known as *doli incapax*'<sup>125</sup> from Queensland's Criminal Code.<sup>126</sup>

*Doli incapax* means 'a presumption that a child is "incapable of crime" under legislation or common law'.<sup>127</sup> The rationale for the presumption of *doli incapax* is the 'view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea* [criminal intent]'.<sup>128</sup>

In all Australian jurisdictions, the *doli incapax* presumption applies between 10 years of age to under 14 years of age.<sup>129</sup> In Queensland, a rebuttable principle of *doli incapax* is codified in subsection 29(2) of the Criminal Code:

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.<sup>130</sup>

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<sup>124</sup> Public hearing transcript, Brisbane, 14 February 2022, p 57

<sup>125</sup> Explanatory notes, p15.

<sup>126</sup> Bill, cl 3.

<sup>127</sup> Australian Government, Australian Institute of Criminology, 'The age of criminal responsibility', 2005, <https://www.aic.gov.au/publications/cfi/cfi106>.

<sup>128</sup> *RP v The Queen* [2016] HCA 53, [8].

<sup>129</sup> Australian Government, Australian Institute of Criminology, 'The age of criminal responsibility', <https://www.aic.gov.au/publications/cfi/cfi106>.

<sup>130</sup> Criminal Code, subsection 29(2).

The onus is on the prosecution to rebut the presumption of *doli incapax* by the calling of proper and admissible evidence to prove the child had the relevant capacity.<sup>131</sup> Any rebuttal of the presumption involves an examination of the intellectual and moral development of the particular child, given children do not mature at a uniform rate.<sup>132</sup> For example, some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not have that capacity.<sup>133</sup>

#### Stakeholder views

The application of the principle of *doli incapax* in practice was a key theme of stakeholder commentary on the Bill. Multiple submitters asserted that the principle of *doli incapax* ‘does not prevent a child’s contact with the harmful aspects of our criminal justice system’ given ‘[i]t can take weeks or months to make a determination’ on the presumption of *doli incapax*.<sup>134</sup> In the meantime, according to the Human Rights Law Centre (HRLC), ‘the young child awaiting trial will have already experienced and been exposed to certain aspects of the criminal legal process that can itself be criminogenic and reinforce the very behaviours and attitudes sought to be prevented’,<sup>135</sup> for example:

... a child suspected of committing an offence may be arrested and taken into custody by police, handcuffed, strip searched, subjected to forensic examinations including intimate procedures, interrogated, remanded in custody or subject to conditional bail and multiple court appearances, and identified or labelled as a criminal through media or social media reporting.<sup>136</sup>

Further in relation to the application of the principle of *doli incapax*, various submitters asserted that the principle was ‘highly problematic’;<sup>137</sup> ‘ineffective’;<sup>138</sup> ‘applied inconsistently’<sup>139</sup>, and led to ‘discriminatory practices’.<sup>140</sup>

The Queensland Youth Policy Collective (QYPC) and the QLS asserted that, in practice, the principle of *doli incapax* operated as a defence.<sup>141</sup> QYPC stated ‘the law operates in a reverse onus for the defence to raise, argue and supply the Children’s Court with evidence that the presumption applies’.<sup>142</sup> By way of example, QLS stated:

... if the defence wishes to rely on the presumption, the prosecution or the Court may request that a psychological assessment of the child be undertaken and prepared by the defence in order to establish their capacity. ... Not only does this reverse the onus, but it also presents a barrier for those in the youth justice system who do not have access to funding to undertake capacity assessments and to obtain the

<sup>131</sup> R v B (an infant) [1979] Qd R 417, [425]; Queensland Courts, Department of Justice and Attorney-General, *Youth Justice Benchbook*, p 47, May 2021.

<sup>132</sup> RP v The Queen [2016] HCA 53, [12].

<sup>133</sup> RP v The Queen [2016] HCA 53, [12].

<sup>134</sup> Amnesty International Australia, submission 44, p 13. See also submissions 46, 49, 56, 61, 66, 72.

<sup>135</sup> Submission 56, p 5.

<sup>136</sup> Submission 56, p 5.

<sup>137</sup> National Justice Project, submission 46, p 6.

<sup>138</sup> National Justice Project, submission 46, p 5; Youth Advocacy Centre Inc, submission 62, p 10; Queensland Law Society, submission 61, p 3.

<sup>139</sup> Submissions 44, 46, 61, 66, 72.

<sup>140</sup> National Justice Project, submission 46, p 6; Youth Law Australia, submission 49, p 6; Human Rights Law Centre, submission 56, p 5; Queensland Law Society, submission 61, p 3.

<sup>141</sup> Submissions 61, p 4; 66, p 5.

<sup>142</sup> Queensland Youth Policy Collective, submission 66, p 5, citing Kate Fitz-Gibbon & Wendy O’Brien, ‘A Child’s Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)’, *International Journal for Crime, Justice and Social Democracy*, 2019 8(1), p 22, footnote deleted from original. See also submission 62, p 4.

necessary reports to diagnose mental health issues or neurological disorders bearing on their capacity. This is a significant access to justice issue.<sup>143</sup>

Several submitters<sup>144</sup> cited the Australian Law Reform Commission regarding evidence led by the prosecution when rebutting the presumption of *doli incapax*:

... it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.<sup>145</sup>

Submitters also cited the Atkinson Report in relation to *doli incapax*,<sup>146</sup> which states:

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 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.<sup>147</sup>

The YAC argued that amending s 29 of the Criminal Code by raising the age to 14 'would, in fact, align with *doli incapax* by simply replacing the rebuttable presumption for those under 14 to an irrebuttable presumption'.<sup>148</sup>

In the context of support for raising of the minimum age of criminal responsibility, Amnesty International Australia (AIA) called for a 'safeguard for children aged 14 to 16', and the replacement of the principle of *doli incapax* with 'a statutory defence and/or rebuttable presumption of "developmental immaturity"'.<sup>149</sup> AIA considered age as 'not being a good indicator of transition between various cognitive or developmental stages', and asserted that 'maturity is a far better indicator, made up of three primary traits'.<sup>150</sup>

- (a) the capacity to entertain responsibility for an act;
- (b) the capacity to have perspective (consequential thinking and thinking about the effects of an act on others);
- (c) and temperance (impulse control).<sup>151</sup>

Similarly, the FARE asserted 'the legal system also needs to recognise that children who are above 14 years of age also may not have the neurological capacity to form criminal intent',<sup>152</sup> and recommended replacing '[d]oli incapax by raising the MACR to at least 14 years old',<sup>153</sup> and retaining the presumption of *doli incapax* 'for people older than the MACR'.<sup>154</sup>

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<sup>143</sup> QLS, submission 61, p 4.

<sup>144</sup> Queensland Council of Civil Liberties, submission 22, p 6; Human Rights Law Centre, submission 56, p 4; QYPC, submission 66, p 5. See also submissions 11, 46, 61.

<sup>145</sup> Australian Law Reform Commission Report, 'Seen and Heard: Priority for Children in the Legal Process', Report No. 84, 1997.

<sup>146</sup> Atkinson Report, p 105; submissions 11, 22, 56, 61, 72.

<sup>147</sup> Atkinson Report, p 105.

<sup>148</sup> YAC, submission 62, p 10.

<sup>149</sup> Submission 44, p 19.

<sup>150</sup> Submission 44, p 14.

<sup>151</sup> Submission 44, p 14.

<sup>152</sup> Submission 50, p 6.

<sup>153</sup> Submission 50, p 2.

<sup>154</sup> Submission 50, p 2.

The Office of the Public Guardian (OPG) recognised ‘the problems associated with this principle [of *doli incapax*]’, and in its role in advocating for children had ‘observed that it is not the most appropriate means for protecting the rights and interests of children in the youth justice system, especially those residing in out-of-home care’.<sup>155</sup> However, the OPG urged the committee ‘to thoroughly consider the implications of completely removing the *doli incapax* principle’.<sup>156</sup> Recognising ‘the potential value of the presumption should the age of criminal responsibility be raised to an age less than 14 years’,<sup>157</sup> the OPG conditionally recommended ‘that the presumption of *doli incapax* be retained’.<sup>158</sup> The OPG outlined and provided a case example of the protection the presumption of *doli incapax* can provide to ‘children from disadvantaged backgrounds’,<sup>159</sup> with ‘added significance in the context of children charged with criminal offences who have also been placed in the child protection system’,<sup>160</sup> ‘by directing attention to the child’s education and the environment in which the child has been raised, as opposed to their biological age acting as the sole determinant of capacity’.<sup>161</sup> The OPG submitted:

By reason of their significant trauma experiences and heightened vulnerabilities, children in the out-of-home care system should be entitled to the protection of legal principles that recognise their behaviours as a function of impaired cognitive capacity rather than criminal conduct, including the *doli incapax* principle. This will ensure they are diverted away from the criminal justice system to more appropriate functional supports.<sup>162</sup>

Further, the OPG recommended that should the presumption of *doli incapax* be retained ‘it could be applied more effectively in practice through’:<sup>163</sup>

- considering a child’s daily functioning, historical and current circumstances and vulnerabilities ... more closely rather than their actions in isolation;
- a more functional and timely case management process; and
- implementation of targeted training and accreditation processes and clear practice direction for stakeholders regarding procedural requirements for court proceedings.<sup>164</sup>

#### Committee comment

The committee notes the concerns raised by stakeholders regarding the application in practice of the principle of *doli incapax*. In particular, the committee notes the view of the Public Guardian to the application of *doli incapax* in practice and the recommendation to implement targeted training for stakeholders in the court system around the relevant principles (including evidentiary requirements) and court processes.

<sup>155</sup> Submission 19, p 4.

<sup>156</sup> Submission 19, p 4.

<sup>157</sup> Submission 19, p 6.

<sup>158</sup> Submission 19, p 5.

<sup>159</sup> OPG, submission 19, p 5.

<sup>160</sup> OPG, submission 19, p 5.

<sup>161</sup> OPG, submission 19, p 5.

<sup>162</sup> OPG, submission 19, p 5.

<sup>163</sup> OPG, submission 19, p 5.

<sup>164</sup> OPG, submission 19, pp 6-7.

#### **Recommendation 4**

The committee recommends the Queensland Government consider targeted training and accreditation processes and clear practice direction for stakeholders regarding procedural requirements for court proceedings.

## **2.2 Amendment of the *Youth Justice Act 1992* - transitional provisions**

The Bill proposes to amend the *Youth Justice Act 1992* (YJ Act) to insert a new division to create transitional provisions for the Bill.<sup>165</sup> If the Bill were passed, the proposed division would apply to a person who committed an offence before the Act's commencement and while under the age of 14 years old.<sup>166</sup> The division would apply despite any law to the contrary and regardless of whether the person was still a child when the division commenced.<sup>167</sup>

Although not specified in the Bill, the explanatory notes state that the proposed division would also apply 'to a person who is alleged to have committed an offence while under the age of 14 years old, before the commencement'<sup>168</sup> of the Act the Bill would establish, 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'.<sup>169</sup>

### Stakeholder comment

Child Wise considered the transitional provisions contained in proposed ss 407-410 to be 'positive adjustments as they mean that as soon as the Bill comes into effect that legal proceedings will cease, and all forms of detention would finish'.<sup>170</sup> While supporting those provisions 'on the basis of minimising risk to trauma', Child Wise acknowledged that 'to ensure success there needs to be planning undertaken to avoid confusion, build community confidence and minimise risk of children offending or undertaking dangerous behaviour'. Child Wise recommended the Queensland Parliament 'follow the Australian Capital Territory's (ACT) lead in establishing clear pathways for children at risk of offending ahead of the legislation enactment'.<sup>171</sup>

The HRLC and the Queensland Council of Social Service Ltd (QCOS) recommended that proposed new subsection 407(1), which sets out the application of the proposed division, be amended through the insertion of a provision to ensure the transitional provisions applied to persons who, before commencement, were 'alleged to have committed an offence or committed an offence when the person was under the age of 14 years'.<sup>172</sup>

The HRLC explained:

Without this clarification, sections 407-412 could be interpreted as not applying to children and people who:

- Are on bail orders for charges alleged to have occurred when they were under 14 that they did not commit, or are contesting;

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<sup>165</sup> Bill, clause 5.

<sup>166</sup> Bill, clause 5, (YJ Act, proposed s 407); explanatory notes, p 15.

<sup>167</sup> Bill, clause 5, (YJ Act, proposed subsection 407(4)).

<sup>168</sup> Explanatory notes, p 15.

<sup>169</sup> Explanatory notes, pp 15-16.

<sup>170</sup> Submission 57, p 9.

<sup>171</sup> Submission 57, p 9.

<sup>172</sup> QCOS, submissions 59, p 5; HRLC, submission 56, p 5.



- Are on remand for offences alleged to have occurred when they were under 14 that they did not commit, or are contesting; and
- Have entries on their criminal records, conviction record or bail histories for offences alleged to have occurred when they were under 14, that were subsequently withdrawn or they were found not guilty of.<sup>173</sup>

### 2.2.1 Ending proceedings and punishment

Proposed new section 408 provides that a police officer would not be permitted to commence a proceeding or take any alternative action against a person who committed an offence while under the age of 14 prior to the commencement of the Act that the Bill would establish.<sup>174</sup> 'Alternative action' includes administering a caution to the child, referring the offence to the chief executive of DCYJMA for a restorative justice process, and offering the child the opportunity to attend particular programs, including the drug diversion assessment program and the graffiti removal program.<sup>175</sup>

Under that proposed new section, 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 an offence committed by a child while under the age of 14 years old would no longer be enforceable.<sup>176</sup>

#### Stakeholder views

The HRLC welcomed the specificity of this transitional provision 'due to the likelihood of administrative errors in ceasing certain types of orders, such as bail orders'.<sup>177</sup> The HRLC considered the confirmation in legislation of the end of the listed proceedings, orders and associated actions to be a 'necessary protection for children caught in the criminal legal system'.<sup>178</sup>

### 2.2.2 Release from watch-houses and ending detention

Proposed new section 409 would require that children who are held in police watch-houses in relation to an offence committed when they were under the age of 14 would be released as soon as reasonably practicable but no later than either the time they would have been released from custody if the section had not commenced, or 3 days after commencement of the Act the Bill would establish, whichever was the sooner.<sup>179</sup> Although not specified in the Bill, the explanatory notes state that the proposed provision would also apply to alleged offences.<sup>180</sup> Proposed subsection 409(7) clarifies that the provision would not apply to a person who was also being held in custody in a watch-house in relation to an offence committed when they were 14 years of age or older.<sup>181</sup>

A similar set of provisions and exceptions are contained in proposed section 410 in relation to releasing persons who are detained in detention centres for offences committed when they were under the age of 14.<sup>182</sup> The Bill proposes that the chief executive would be required to arrange for the person to be released from detention or custody as soon as reasonably practicable to do so, but no later than either the day the person would have been released if the section had not commenced or

<sup>173</sup> Submission 56, p 6.

<sup>174</sup> Bill, clause 5 (YJ Act, proposed subsection 408(1)).

<sup>175</sup> YJ Act, s 11.

<sup>176</sup> Explanatory notes p 16. Bill, clause 5 (YJ Act, proposed subsection 408(2)).

<sup>177</sup> Submission 56, p 6.

<sup>178</sup> Submission 56, p 6.

<sup>179</sup> Bill, clause 5 (YJ Act, proposed subsections 409(1)-(2)).

<sup>180</sup> Explanatory notes, p 16.

<sup>181</sup> Bill, clause 5 (YJ Act, proposed subsection 409(7)); explanatory notes p 16.

<sup>182</sup> Bill, clause 5 (YJ Act, proposed s 410).

the day that is one month after the commencement of the Act the Bill would establish, whichever was the sooner.<sup>183</sup>

Under the provisions, the watch-house manager<sup>184</sup> or chief executive would be required to have regard to the person's welfare in deciding when it is reasonably practicable to release the person from custody, including whether the person would have access from the day of release to appropriate accommodation, support from a consistent parent or guardian, and any health or other services the child required while in custody.<sup>185</sup> In making arrangements for the person to be released from custody, the watch-house manager would be permitted to share confidential information<sup>186</sup> with the chief executive or chief executive (child safety) and would be required, in consultation with them, to 'make all reasonable efforts to ensure the person has access' to those things listed in proposed subsection 409(3).<sup>187</sup> Similar provisions would apply relating to the release of a person from detention.<sup>188</sup> The Bill clarifies that the watch-house manager or chief executive would not be prevented from releasing the person from custody merely because the person would not have access to those things.<sup>189</sup>

### Stakeholder views

In common with several other submitters,<sup>190</sup> the Aboriginal & Torres Strait Islander Women's Legal Services NQ Inc supported the release of children under 14 years old from watch-houses and detention centres, noting that 'approximately 86% of children on remand are First Nations children'.<sup>191</sup>

In correspondence to the committee, Commissioner Katarina Carroll APM stated that the QPS 'does not support'<sup>192</sup> the proposal in proposed subsection 409(2) that the QPS 'be able to detain a child for three days after the commencement of amendments (if passed)'.<sup>193</sup> Commissioner Carroll stated: 'Any child should be released at the earliest reasonable opportunity if the reason for detaining the child in police custody no longer exists'.<sup>194</sup>

The QLS expressed concern regarding the wording of proposed ss 409-410 'as a child could be released without appropriate accommodation, a parent or guardian, or a health or other service'.<sup>195</sup> The QLS recommended the provisions be amended to ensure that children who are released from custody are provided with the things mentioned in proposed subsections 409(3) and 410(3).<sup>196</sup>

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<sup>183</sup> Bill, clause 5 (YJ Act, proposed subsections 410(1)-(2)).

<sup>184</sup> The *Police Powers and Responsibilities Act 2000* defines 'watch-house manager' as 'a police officer for the time being in charge of a watch-house'.

<sup>185</sup> Bill, clause 5 (YJ Act, proposed subsection 409(3)); explanatory notes p 16.

<sup>186</sup> Part 9 of the YJA defines 'confidential information' as including (a) identifying information about the child; and (b) a report made for the purposes of, or tendered in, a court proceeding relating to the child; and (c) a report about the child made for the department or another government department; and (d) a report about the child given to an agency for the purpose of carrying out the objects of this Act; and (e) information about the child gained by a convenor or coordinator in relation to the convening of a conference; and (f) a record or transcription of a court proceeding relating to the child.

<sup>187</sup> Bill, clause 5 (YJ Act, proposed subsection 409(5)).

<sup>188</sup> Bill, clause 5 (YJ Act, proposed subsection 409(3),(5)(c)).

<sup>189</sup> Bill, clause 5 (proposed subsection 409(4)).

<sup>190</sup> See, for example, submission 11, 17, 41, 44, 56, 57, 61, 62, 67, 72.

<sup>191</sup> Submission 68, p 2.

<sup>192</sup> Correspondence, 27 January 2022, p 2.

<sup>193</sup> Correspondence, 27 January 2022, p 2.

<sup>194</sup> Commissioner Katarina Carroll APM, correspondence, 27 January 2022, p 2.

<sup>195</sup> Submission 61, p 8.

<sup>196</sup> Submission 61, p 8.

While PeakCare Queensland Inc. (PeakCare) supported ‘the timely transition of children who are either on orders, in custody or in detention for offences committed (or alleged to have been committed) where they were under 14 years of age at the time of the offence’,<sup>197</sup> the submission stated that ‘there is a need to ensure appropriate services and supports are in place for these children’.<sup>198</sup> According to PeakCare, the transition process should include ‘the participation of their families and communities in planning for and facilitating transition arrangements and the provision of therapeutic supports to children who are at risk of re-engagement with the youth justice system’.<sup>199</sup> Save the Children and Child Wise concurred, stating the engagement of children and their families/carers ‘in determining what potential risk factors exist before exit, and what wraparound support is required’ would ‘bring about the best results in the implementation of these provisions’.<sup>200</sup> Further, PeakCare recommended that ‘any transition arrangements are developed in consultation and partnership with relevant peak bodies, service organisations and importantly include and reflect the voices of children and young people with lived experience of the youth justice system’.<sup>201</sup>

PeakCare continued:

Without appropriate and effective transition planning, there is a risk of further traumatising children who already face significant disadvantage and/or recidivist offending by children who are not appropriately supported with community-based diversionary and therapeutic interventions to address their problematic behaviours.<sup>202</sup>

In contrast, while stating that it was ‘crucial that the release of children from watch-houses is accompanied by significant enquiries by watch-house staff to ensure that children are released safely, with their health and housing needs able to be met, and to the custody of an adult who is able to care for them’,<sup>203</sup> the HRLC considered ‘a lack of timely enquiries being made, or the absence of these supports being available, should not be a barrier to the release of children’.<sup>204</sup> Accordingly, the HRLC considered the 3-day limit outlined in proposed subsection 409(2)(b) to be ‘appropriate’.<sup>205</sup>

In relation to the release of persons from detention centres, the HRLC and QCOSS recommended that the proposed the wording for subsection 410(2)(b) be amended to read ‘3 days after commencement’ instead of the one-month limit as currently drafted in the Bill.<sup>206</sup> The HRLC reasoned the ‘maximum amount of time a child can be held in prisons before being released should be consistent throughout the Bill’.<sup>207</sup> HRLC continued:

A month is too long a time to hold a child under 14 in detention, either on remand or pursuant to a detention order, once the age of criminal responsibility has been raised. Children who are held on remand in detention centres should not be subject to a different and lengthier time limit, compared to children on remand in watch-houses.<sup>208</sup>

<sup>197</sup> Submission 42, p 5.

<sup>198</sup> Submission 42, p 5.

<sup>199</sup> Submission 42, p 5.

<sup>200</sup> Submission 57, p 9.

<sup>201</sup> Submission 42, p 5.

<sup>202</sup> Submission 42, p 5.

<sup>203</sup> HRLC, submission 56, p 6.

<sup>204</sup> Submission 56, p 6.

<sup>205</sup> Submission 56, p 6.

<sup>206</sup> Submission 56, p 6; submission 59, p 5.

<sup>207</sup> Submission 56, p 6.

<sup>208</sup> Submission 56, p 6.

FARE supported the restricted sharing of relevant information provided for in the Bill, adding:

In addition to facilitating their release from watch-houses and detention, police may also need to collect information about the child's harmful behaviour for child protection services, and the investigation of exploitation by adults. There may also need to be information-sharing provision for the multi-disciplinary panel assessing the needs of the child.<sup>209</sup>

### **2.2.3 Destruction of evidence collected by forensic procedures**

Under the Bill, the police commissioner would be required to ensure, in the presence of a justice, the destruction of the following evidence relating to a person who, before the commencement of the Act the Bill would establish, committed an offence when they were under the age of 14 years:

- any identifying particulars taken or photographed, including fingerprints, body measurements, handwriting, voiceprints, footprints, photographs of identifying features
- a DNA sample taken from a person, including hair samples and mouth swabs, and the results of any DNA analysis of the sample
- the results of any analysis of intimate and non-intimate forensic procedures and the record of any information collected from the forensic procedure.<sup>210</sup>

The police commissioner would also be required, within a reasonable time after the commencement of the Act the Bill would establish, to ensure the removal of any information collected from the identifying particulars, DNA sample or forensic procedure from a database or record into which it had been entered.<sup>211</sup>

#### Stakeholder views

Several submitters stated that they supported the destruction of identifying particulars and evidence collected by forensic procedures for an offence committed when the child was under the age of 14 years.<sup>212</sup>

The HRLC considered this 'an important measure for ensuring the privacy and rights of people who may have been trapped in the police and criminal legal system due to the current low age of criminal responsibility'.<sup>213</sup>

### **2.2.4 Expungement of records of convictions and related actions**

The Bill provides that on commencement of the Act the Bill would establish that any finding of guilt against a person for an offence committed when they were under 14 years of age would be expunged.<sup>214</sup> The Bill clarifies that the provisions would apply whether or not a conviction was recorded.<sup>215</sup>

Various records relevant to the offence, including a record of conviction, would be required to be amended to omit the relevant conviction, and the relevant finding of guilt would not need to be disclosed by the child and would not be permitted to be disclosed by any other person.<sup>216</sup>

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<sup>209</sup> Submission 50, p 7.

<sup>210</sup> Bill, cl 5 (YJ Act, proposed subsections 411(1)-(2)); explanatory notes p 17; *Police Powers and Responsibilities Act 2000*, schedule 6.

<sup>211</sup> Bill, cl 5 (YJ Act, proposed subsections 411(3)-(4)).

<sup>212</sup> See, for example, submissions 12, 50, 56, 61, 68, 72.

<sup>213</sup> Submission 56, p 7.

<sup>214</sup> Bill, cl 5 (YJ Act, proposed s 412); explanatory notes p 17.

<sup>215</sup> Bill, cl 5 (YJ Act, proposed subsection 412(6)).

<sup>216</sup> Bill, cl 5 (YJ Act proposed s 412); explanatory notes p 17.

Proposed subsection 412(4) provides that the following matters would not be permitted to be disclosed in any court proceeding the person were subject to:

- action taken by a police officer against the person for the offence (including, for example, a caution or arresting the person)
- a failure of the person to comply with a police direction or other direction 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.<sup>217</sup>

#### Stakeholder views

The expungement of records of convictions and related actions of a child who committed an offence under 14 years was supported by several submitters,<sup>218</sup> including Child Wise which considered the transitional provision would avoid 'the long run effect of detention and records on children'.<sup>219</sup>

QCOSS and the HRLC recommended amendments to proposed new s 412.<sup>220</sup> QCOSS sought all court findings, 'including but not limited to verdicts, bail reports, failure to appear' to be included in the proposed new section.<sup>221</sup> Recommending that proposed new section 412 be amended 'to require that applicable records relating to "not guilty" findings, withdrawn charges and breaches of bail be expunged from a person's criminal records and bail reports',<sup>222</sup> the HRLC explained: 'Such provisions are necessary to ensure that people are not prejudiced, and their chances of getting bail later in life are not adversely affected, by historical bail orders for offences committed while under the age of 14'.<sup>223</sup>

In correspondence to the committee, the QPS noted that the transitional provisions do not reference a court order for identifying particulars under s 25 of the YJA, 'noting there is a mandated destruction requirement of the identifying particulars if proceedings end under existing section 28'.<sup>224</sup>

Noting the Bill would prohibit the disclosure in any future court proceeding of any prior conviction and certain actions taken against a young person when they were under 14, Youth Law Australia stated: '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'.<sup>225</sup>

Noting that information management practices relating to child protection and child safety were 'the subject of recommendations by the Royal Commission into the Institutional Responses to Child Sexual Abuse',<sup>226</sup> AIA considered 'particular attention' would be required 'to manage the personal information of children'.<sup>227</sup> AIA suggested the review of services proposed in the explanatory notes to

<sup>217</sup> Bill, cl 5 (YJ Act proposed subsections 412 (4)); explanatory notes, p 17.

<sup>218</sup> See, for example, submissions 42, 44, 49, 50, 57, 61, 68, 72.

<sup>219</sup> Submission 57, p 10.

<sup>220</sup> Submission 56, p 3; submission 59, p 5.

<sup>221</sup> Submission 59, p 5.

<sup>222</sup> Submission 56, p 3.

<sup>223</sup> HRLC, submission 56, p 7.

<sup>224</sup> QPS, correspondence, 27 January 2022, p 2.

<sup>225</sup> Submission 49, p 7.

<sup>226</sup> Submission 44, p 12.

<sup>227</sup> Submission 44, p 12.

the Bill may ‘provide an opportunity to review the principles, policies, and practices in relation to information sharing and the improved coordination of services’.<sup>228</sup>

## 2.3 Alternative models

The explanatory notes to the Bill detail ‘an alternative model for young people aged 10-13 who display problematic behaviour’,<sup>229</sup> including ‘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;
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.<sup>230</sup>

Submitters also presented alternative responses to juvenile offending, with some incorporating elements of the model proposed in the explanatory notes. Alternative approaches presented to the committee included the hybrid model of offences,<sup>231</sup> early intervention and prevention,<sup>232</sup> restorative justice,<sup>233</sup> multi-disciplinary services and strategies,<sup>234</sup> justice reinvestment<sup>235</sup>, and community and family engagement strategies.<sup>236</sup>

### 2.3.1 The hybrid model

The hybrid model of offences was brought to the committee’s attention at the public hearing by Mr Atkinson. Under that model, which is variously applied in international jurisdictions, including New Zealand, Scotland and Ireland,<sup>237</sup> different police procedures come into force if children commit serious offences, including murder and manslaughter. For example, in Ireland, where the minimum age of criminal responsibility is 12, children aged 10 or 11 may be charged with very serious offences.<sup>238</sup>

Addressing the necessity for any model to have ‘capacity to properly and effectively deal with young people who other would be committing offences’<sup>239</sup> if the minimum age of responsibility were raised in Queensland, Mr Atkinson described the operation of a hybrid model:

Hypothetically, serious crime would still be in scope—so murder, rape, armed robbery and violent and serious crime would still be in scope—and perhaps offences that were regarded as less serious would not

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<sup>228</sup> Submission 44, p 12.

<sup>229</sup> Explanatory notes, pp 7-11.

<sup>230</sup> Explanatory notes, pp 8-9.

<sup>231</sup> Bob Atkinson AO, APM, public hearing transcript, Brisbane, 14 February 2022, p 17.

<sup>232</sup> See for example submissions 3, 7, 18, 19, 22, 27, 33, 34, 37, 42, 47, 49, 50, 51, 53, 54, 57, 58, 61, 62, 64, 66, 72, 73, 74, 75, 76.

<sup>233</sup> See for example submissions 7, 11, 14, 16, 28, 30, 32, 34, 38, 42, 45, 46, 47, 48, 50, 54, 55, 57, 58, 66, 67, 69, 75.

<sup>234</sup> See for example submissions 7, 15, 28, 32, 43, 45, 47, 48, 50, 51, 58, 66, 73.

<sup>235</sup> See for example submissions 8, 15, 16, 34, 44, 48, 55, 58, 59, 62, 67, 75, 76.

<sup>236</sup> See for example submissions 3, 15, 16, 20, 28, 29, 31, 34, 43, 44, 45, 51, 55, 64, 70.

<sup>237</sup> Bob Atkinson AO, APM, public hearing transcript, Brisbane, 14 February 2022, p 17; *Oranga Tamariki Act 1989* (NZ), s 272; *Age of Criminal Responsibility (Scotland) Act 2019*; part 4; *Children Act 2001* (Ireland), s 52.

<sup>238</sup> *Children Act 2001* (Ireland), s 52.

<sup>239</sup> Public hearing transcript, Brisbane, 14 February 2022, p 18.

be. That is the hybrid model. It is absolutely essential ... that there is a capacity to engage with young people whose behaviour becomes problematic.<sup>240</sup>

#### Stakeholder comment

Multiple stakeholders asserted that there should be no exceptions or carve-outs to raising the minimum age of criminal responsibility in Queensland to 14 years as proposed by the Bill,<sup>241</sup> with some submitters clarifying that that assertion included, 'serious sexual offences, serious assault resulting in grievous bodily harm, murder, or manslaughter'.<sup>242</sup>

Youth Law Australia (YLA) considered that '[t]he reasons which support raising the minimum age apply equally to serious offences',<sup>243</sup> and 'for very serious cases',<sup>244</sup> legal frameworks are in place 'for protecting young people and the community (including child protection and mental health frameworks)'.<sup>245</sup> Acknowledging that the existing frameworks 'could undoubtedly be reformed and improved', the YLA considered 'additional frameworks should only be added when supported by a strong evidence base'.<sup>246</sup> The YLA continued, citing the observations of the UNCRC:

The Committee [UNCRC] 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.<sup>247</sup>

Yourtown was also 'strongly opposed to some offences being carved out and excluded from the minimum age of criminal responsibility',<sup>248</sup> stating:

The raising of the minimum age of criminal responsibility is to ensure that young people are not criminalised for behaviours and actions they do not understand. It would be a legal absurdity and make a mockery of justice if some 'serious' crimes were 'carved out' and others were not. It would mean that a 13 year old would not have the capacity to be found guilty of stealing, yet a 10 year old could have capacity and be found guilty for the far more heinous and serious crime of murder.<sup>249</sup>

### **2.3.2 Early intervention/prevention**

There was general agreement among stakeholders about the importance of prevention programs and early intervention for at-risk children.<sup>250</sup>

#### Stakeholder comment

The Youth Affairs Network of Queensland (YANQ) supported the object of the Bill to raise the minimum age of criminal responsibility, but were critical of some alternative solutions suggested by

<sup>240</sup> Public hearing transcript, Brisbane, 14 February 2022, p 17.

<sup>241</sup> Submission 21, 32, 36, 43, 44, 46, 49, 50, 51, 53, 55, 56, 57, 62, 64, 45, 51.

<sup>242</sup> Submission 55, p 3. See also submissions 45, 49,

<sup>243</sup> Submission 49, p 4.

<sup>244</sup> Submission 49, p 5.

<sup>245</sup> Submission 49, p 5.

<sup>246</sup> Submission 49, p 5.

<sup>247</sup> Submission 49, p 5, (reference removed); 57, p 6.

<sup>248</sup> Submission 45, Attachment A, p 13.

<sup>249</sup> Submission 45, Attachment A, p 14.

<sup>250</sup> See for example submissions 3, 7, 18, 19, 22, 27, 33, 34, 37, 42, 47, 49, 50, 51, 53, 54, 57, 58, 61, 62, 64, 66, 72, 73, 74, 75, 76.

advocates of raising the age, including the Four Pillars reforms proposed by Mr Atkinson, stating they ‘miss a crucial point about the need to focus on primary prevention’.<sup>251</sup> The YANQ stated:

If we are to gain broad support from the community for bringing an end to the shameful approach of incarcerating disadvantaged people, we need to demonstrate what can really reduce the engagement in criminal activity in the first place. This requires a total shift in policy and program design, development and implementation of a genuine whole of government children and youth strategy, significant redirection of investment into the primary prevention area and support for the Queensland youth sector to undertake the necessary work.<sup>252</sup>

The YANQ asserted that ‘[i]t is inconceivable that in this day and age, in a country as wealthy as Australia is, that the only place some children could experience having three meals a day, medical check up, dental care, supportive education tailored to their needs is in a prison’.<sup>253</sup> Proposing ‘a social health response focusing on supporting young people’s family and strengthening connection with their community and country’, YANQ considered ‘[a] well designed and resourced Primary Crime Prevention Program which adopts a Community Development Model is the best way to facilitate this process.’<sup>254</sup>

Noting that ‘Queensland’s current system is that the path to services is often through the criminal justice system’,<sup>255</sup> the Mental Health Commission (MHC) considered that there was ‘a risk that by raising the age of criminal responsibility, the mechanism for referral to support services is disconnected from offending or involvement with the criminal justice system’.<sup>256</sup> The MHC stated:

This disconnect can only be addressed when referrals are offered at the earliest possible point of identifying concern (for example, when a child’s behaviour raises concerns within the home, community or school, or, failing this, when they come into contact with police). The Queensland Family and Child Commission suggests intervention should be available in primary school, particularly during known sensitive transition points like the move into year two and from Primary to High school.<sup>257</sup>

Youth Off The Streets Limited (YOTS) submitted that ‘[e]arly, place-based interventions that have been developed by children and community ensure that children at risk of involvement with the criminal justice system can remain connected to their support networks, education, and family’.<sup>258</sup> Stating ‘[e]vidence from the neuroplasticity field confirms that children have a unique capacity for behavioural change through positive experiences’,<sup>259</sup> YOTS asserted that failure to intervene early is “‘likely to make intervention much more difficult and less likely to be successful’” at a later age.<sup>260</sup>

Citing the Atkinson Report, CREATE asserted that ‘[e]arly intervention for children and young people in care who are exhibiting trauma-based behavioural issues has the potential to minimise involvement in the youth and adult justice systems’.<sup>261</sup>

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<sup>251</sup> Submission 30, p 4.

<sup>252</sup> Submission 30, p 4.

<sup>253</sup> Submission 30, p 4.

<sup>254</sup> Submission 30, p 4.

<sup>255</sup> Submission 71, p 5.

<sup>256</sup> Submission 71, p 5.

<sup>257</sup> Submission 71, p 5 (reference removed).

<sup>258</sup> Submission 55, p 7.

<sup>259</sup> Submission 55, p 7.

<sup>260</sup> Submission 55, p 7 (reference removed).

<sup>261</sup> Submission 64, p 5 (reference removed).



Outlining its work in youth justice, the Queensland African Communities Council (QACC) submitted 'An African Village Model of Youth early intervention and rehabilitation strategy'.<sup>262</sup> The strategy states:

The youth and family's early intervention strategy will employ a variety of specifically, culturally appropriate and strategically targeted mechanisms to support families and children at home and in identified schools. The carefully selected competent African youth mentors at various locations across Queensland will organise their locally designed and structured activities to support individual young people and families and schools in order to ensure those who are at risk of falling into wrong crowds or becoming disengaged from learning at schools, are identified and supported at early stage before things escalate and get out of control.<sup>263</sup>

When 'developing and expanding alternatives to criminal legal responses to children',<sup>264</sup> Change the Record recommended 'the inclusion of principles that reflect the overrepresentation of First Nations children within the criminal justice system, and the specific changes and interventions that are required to reverse this trend',<sup>265</sup> including 'investing in Aboriginal controlled community organisations, programs and early intervention initiatives'.<sup>266</sup> Change the Record stated:

Current systems for working with children and young people in trouble, including police, are overwhelmingly crisis-oriented. Investment in early intervention and prevention services and a refocusing on early referral to supportive services are needed to give children and young people the best chance of never having to interact with the criminal legal system. It should not be the case that a young person's first referral to a support service should come after they have come into contact with the criminal legal system.<sup>267</sup>

The AIA discussed 'the positive impact Indigenous designed and led preventative programs can have in addressing the needs of children under 14 years at risk of entering the justice system'.<sup>268</sup> In the context of justice reinvestment (discussed at section 2.3.5) AIA stated:

There is a significant body of evidence most recently from the Royal Commission into the Protection and Detention of Children in the Northern Territory and the Australian Law Reform Commission which indicates that for Aboriginal and Torres Strait Islander People including children, early intervention and diversion programs run by Indigenous-led organisations and leaders work best.<sup>269</sup>

Regarding closing the gap in the incarceration rates of Aboriginal and Torres Strait Islander young people and adults, Ms Natalie Lewis, Commissioner, QFCC, asserted:

What is certain is that without disruption, without a circuit-breaker, to divert investment inaction towards prevention and early intervention to address the drivers of the offences, there will continue to be relentless demand on the criminal justice system and absolutely no hope of reaching those targets.<sup>270</sup>

Sisters Inside Inc. (Sisters Inside) submitted that '[i]t 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'.<sup>271</sup> Further Sisters Inside stated 'these programs must be developed and operated by Aboriginal and Torres Strait

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<sup>262</sup> Submission 3, Appendix 1, pp 11-18.

<sup>263</sup> Submission 3, p 15.

<sup>264</sup> Submission 51, p 7.

<sup>265</sup> Submission 51, p 7.

<sup>266</sup> Submission 51, p 8.

<sup>267</sup> Submission 51, p 8.

<sup>268</sup> Submission 44, p 4.

<sup>269</sup> Submission 44, p 14.

<sup>270</sup> Public hearing transcript, Brisbane, 14 February 2022, p 24.

<sup>271</sup> Submission 72, p 9.

Islander communities, given the disproportionate numbers of First Nations children in the criminal legal system'.<sup>272</sup>

While endorsing prevention and early intervention, Australian Child Rights Taskforce cautioned that '[e]arly intervention models can be built on risk and need but must still be wary of the stigmatising impact of interventions that are not based on supporting family and involving willing participation by children, families, and communities'.<sup>273</sup>

Stating that the impediment to successfully addressing youth offending is 'not a gap in knowledge', Queensland Human Rights Commissioner, Mr Scott McDougall, added:

The major issue appears to be a capability gap in developing effective early intervention and diversion capacity with sufficient coverage to meet the needs of children and families right across Queensland.

This is not just a question of the need for a substantial increase in investment in both program and capital expenditure. It also requires a demonstrable commitment to enter into genuine power-sharing relationships with Indigenous controlled organisations to ensure Aboriginal and Torres Strait Islander stewardship of programs. It also requires focused coordination of various portfolios, including essential agencies such as Queensland Health and Education Queensland, which clearly need to be much more engaged in youth justice prevention strategies.<sup>274</sup>

Addressing the proportion of departmental spending on prevention and early intervention, in correspondence to the committee DCYJMA stated:

Prevention and early intervention can be understood in different ways. The most effective prevention and early intervention occurs at a very early age – even before a potential offender is born; but this does not stop prevention and early intervention at a later age, and even if a young person is deeply entrenched in the youth justice system.

The department only comes into contact with a young person after they enter the youth justice system. The department's aim is to then do everything possible to prevent further offending, including intervening 'early' while the young person is still a child. It is therefore impossible to distinguish between spending on formal interventions, and spending on prevention and early intervention.<sup>275</sup>

Further, DYJMA listed programs provided by the department, other government agencies, or by funded non-government service providers that are intended to prevent further offending, including:

- evidence-based interventions (e.g. utilising cognitive behavioural therapy and/or motivational interviewing) dealing with common issues such as aggression, emotional regulation and impulse control, and changing other offending-related thoughts and behaviours;
- culturally specific programs delivered by Aboriginal and Torres Strait Islander staff and/or community-controlled organisations;
- appropriate educational and vocational options such as flexi-schools, or Youth Justice's Transition to Success program;
- drug and alcohol counselling and support;
- support to address other health needs;
- support and advocacy to obtain appropriate services through the National Disability Insurance Scheme;
- family-led decision-making; and

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<sup>272</sup> Submission 72, p 9.

<sup>273</sup> Submission 43, p 10.

<sup>274</sup> Public hearing transcript, Brisbane, 14 February 2022, p 22.

<sup>275</sup> DCYJMA, correspondence, 22 February 2022, p 2.

- other flexible youth and family support services.<sup>276</sup>

### 2.3.3 Restorative justice

The alternative model outlined in the explanatory notes included ‘working with children and victims on restorative approaches’.<sup>277</sup> Multiple submitters also recommended restorative justice as a constructive and effective response to offending behaviour.<sup>278</sup>

A widely accepted definition of ‘restorative justice’ is: ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’.<sup>279</sup> The most commonly used restorative justice practices are victim-offender mediation, conferencing, and circle and forum sentencing.<sup>280</sup>

At the public briefing, the Member for Maiwar addressed the role of restorative justice in relation to victims of crime should the minimum age of criminal responsibility be raised to 14 years of age:

... I do not think—and we do not propose—that victims of crime should be deprived of any of the avenues that are currently available to them. Obviously, restorative justice is a really important part of putting victims and offenders together. It is a really constructive way of kids, in this instance, seeing the impacts of their behaviour. I do not imagine any change in the way that victims of crime are able to access those kinds of outcomes.<sup>281</sup>

#### Stakeholder comment

The Australian Association for Restorative Justice (AARJ) listed ‘principles common across effective restorative programs’: to cause no further harm, to work with those involved, and set relations right.<sup>282</sup> Stating that the core restorative justice process is group conferencing,<sup>283</sup> the AARJ explained:

Meaningful restorative interventions bring together members of one or more *small* communities and coordinate the efforts of these community/familial networks with the work of professional services, so as to assist *recovery and* healing. Community members can work together to address harm, and then develop practical strategies for setting relations right.<sup>284</sup>

AARJ further stated ‘[t]here is a consistent and growing base of evidence that restorative approaches can deliver an effective *response* for all those affected by a ... crime, and that a broader set of restorative practices can help to *prevent crime*’.<sup>285</sup>

<sup>276</sup> DCYJMA, correspondence 22 February 2022, p 2.

<sup>277</sup> Explanatory notes, p 9.

<sup>278</sup> See for example submissions 7, 11, 14, 16, 28, 30, 32, 34, 38, 42, 45, 46, 47, 48, 50, 54, 55, 57, 58, 66, 67, 69, 75.

<sup>279</sup> Australian Government, Australian Law Reform Commission, ‘Restorative justice’, <https://www.alrc.gov.au/publication/family-violence-improving-legal-frameworks-alrc-cps-1/11-alternative-processes/restorative-justice/>, citing T Marshall, *Restorative Justice: An Overview* (1996) Home Office—United Kingdom, p 5.

<sup>280</sup> Australian Government, Australian Law Reform Commission, ‘Restorative justice’, <https://www.alrc.gov.au/publication/family-violence-improving-legal-frameworks-alrc-cps-1/11-alternative-processes/restorative-justice/>.

<sup>281</sup> Public briefing transcript, Brisbane, 15 November 2021, pp 6-7.

<sup>282</sup> Submission 75, p 6.

<sup>283</sup> Submission 75, p 9.

<sup>284</sup> Submission 75, p 7, emphasis in original.

<sup>285</sup> Submission 75, p 2 (reference removed), emphasis in original.

QYPC regarded restorative justice theory as ‘a hallmark of Australia’s justice system’ and stated that it ‘is concerned with the child’s best interest and the State’s interest in doing what could be done to save them from a “downward career”’.<sup>286</sup>

CIFACEC considered ‘[t]he functioning of the criminal justice system should reflect the higher order goal of *keeping peace in society*’.<sup>287</sup> Therefore, CIFACEC asserted, the criminal justice system ‘should fulfill its *punitive* function within a *restorative* framework that seeks, if possible, to restore something to the victim, restore something to society if appropriate and if possible, restore the offender to a law-abiding lifestyle, that is, a *restorative justice* model’.<sup>288</sup>

Other submitters also considered restorative justice in the context of victims of child offending,<sup>289</sup> with YOTS stating that ‘[r]estorative justice provides young people with an opportunity to redress the harm they have caused and to understand the experiences of people harmed by their actions’.<sup>290</sup> FARE and the AARJ asserted that ‘[r]estorative justice programs that involve victims in justice processes have been found to increase victim and community satisfaction with the criminal justice system’.<sup>291</sup>

Noting that ‘participation in restorative justice conferences in Queensland occurs on a voluntary basis’,<sup>292</sup> FARE recommended the design of a new model for youth justice include ‘voluntary restorative justice processes or elements’.<sup>293</sup> Further, FARE stated that ‘any mandatory compliance consequences risks both net-widening and undermining the principles that raising the MACR is based on, including the need to act in the best interests of the child’.<sup>294</sup> FARE also cautioned that ‘[t]he appropriateness of restorative justice would be dependent upon the cognitive capacity of the individual’.<sup>295</sup>

The QATSICPP viewed ‘[e]xpanding and improving the current restorative justice processes offered to children and young people’<sup>296</sup> as ‘another opportunity in terms of replacing current statutory youth justice responses’.<sup>297</sup> The QATSICPP further stated that ‘[w]hilst recent research suggests the current delivery of restorative justice services may not improve recidivism rates, it should be noted that this study was based on the current restorative youth justice being delivered via government as opposed to the community sector’.<sup>298</sup> Drawing on practices in New Zealand, ‘where restorative justice processes have been used with young people for over 20 years and often deal with Maori offenders through Maori customs’, the QATSICPP asserted that ‘evidence reveals it has been effective response for all children in reducing reoffending’.<sup>299</sup>

Mr Luke Twyford, Principal Commissioner, QFCC, stated that ‘[t]esting boundaries and making mistakes are an important part of growing up’,<sup>300</sup> and added that ‘[i]t is our role as a community to

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<sup>286</sup> Submission 66, p 14 (reference removed).

<sup>287</sup> Submission 16, p 27, emphasis in original.

<sup>288</sup> Submission 16, p 27, emphasis in original.

<sup>289</sup> See for example submissions 42, 43, 55, 75.

<sup>290</sup> Submission 55, p 7.

<sup>291</sup> Submission 50, p 5 (reference removed); submission 75, p 13.

<sup>292</sup> Submission 50, p 5 (reference removed).

<sup>293</sup> Submission 50, p 2.

<sup>294</sup> Submission 50, p 5.

<sup>295</sup> Submission 50, p 5.

<sup>296</sup> Submission 34, p 8.

<sup>297</sup> Submission 34, p 8.

<sup>298</sup> Submission 34, p 8 (references removed).

<sup>299</sup> Submission 34, p 8 (references removed).

<sup>300</sup> Public hearing transcript, Brisbane, 14 February 2022, p 23.

ensure that young people learn responsibility and accountability for their actions in ways that are pro social'.<sup>301</sup> Clarifying that 'raising the age of criminal responsibility does not mean taking away responsibility',<sup>302</sup> Principal Commissioner Twyford asserted that '[f]or young people, a restorative justice response is more effective than a criminal justice response'.<sup>303</sup>

In the context of creating an ideal youth justice system modelled on the actions of a good parent,<sup>304</sup> Principal Commissioner Twyford identified restorative justice approaches as providing an opportunity for increased understanding:

... we need to understand what is driving each young person and take them through a process of learning why what they did was wrong but, more deeply, why they did what they did; and engaging victims, the community and, in fact, statutory authorities around them to put in place the pillars that we have also spoken about today to ensure that the community is safer.<sup>305</sup>

Acknowledging 'some incredible diversionary options that are being utilised in Queensland already', Commissioner Lewis of the QFCC suggested a role for service providers in community justice panels or conferencing panels:

... we could actually bring them to the table and expect that they are able to shape the service offerings that they have to meet the needs of that particular child. I think some of the limitations that we have in the use of our restorative justice practices are that we cannot come good on the promise to provide young people with the supports that they need. They are then no more supported and no more ready to change their behaviour because we have actually not been able to deliver the services that are required.<sup>306</sup>

#### **2.3.4 Multi-disciplinary support services and strategies**

The alternative model 'for young people aged 10-13 who display problematic behaviour'<sup>307</sup> proposed in the explanatory notes to the Bill included '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'.<sup>308</sup> Indicative services listed in the explanatory notes included:

- 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.<sup>309</sup>

<sup>301</sup> Public hearing transcript, Brisbane, 14 February 2022, p 23.

<sup>302</sup> Public hearing transcript, Brisbane, 14 February 2022, p 23.

<sup>303</sup> Public hearing transcript, Brisbane, 14 February 2022, p 23.

<sup>304</sup> Public hearing transcript, Brisbane, 14 February 2022, p 28.

<sup>305</sup> Public hearing transcript, Brisbane, 14 February 2022, p 28.

<sup>306</sup> Public hearing transcript, Brisbane, 14 February 2022, p 27.

<sup>307</sup> Explanatory notes, p 7.

<sup>308</sup> Explanatory notes, p 9.

<sup>309</sup> Explanatory notes, p 9.

Addressing the proposed composition of the proposed multidisciplinary panel, the Member for Maiwar stated:

The composition of the panels really does need to address all of the needs of the children. Effectively, we are looking at people who have expertise and can drill down into the trauma-informed mental health or other psychological supports that are required and look at any of the cognitive impairment or other disability issues that need to be addressed.<sup>310</sup>

Given ‘cognitive impairment, particularly foetal alcohol spectrum disorder, is far more prevalent amongst this cohort of young offenders’ the Member for Maiwar, envisaged the multidisciplinary panel would also include relevant health and psychology experts.<sup>311</sup>

Further the Member for Maiwar stated:

We cannot really conceive of a panel like this that does not have really solid First Nations representation to understand the community context and background, but again it comes down to those unmet needs—education specialists, folks who are dealing with kids through the lens of child protection and housing needs.<sup>312</sup>

#### Stakeholder comment

The committee received multiple submissions that advocated for the use of multidisciplinary services and strategies.<sup>313</sup>

ANTaR called for a ‘cohesive and coordinated independent multi-disciplinary body’ to include, but not be limited to, ‘parents, medical professionals, educators, lawyers, critical disability advocates, child protection advocates, juvenile justice practitioners and Indigenous organizations’.<sup>314</sup>

Change the Record recommended the exploration of multidisciplinary panels ‘where children can be referred if they come into contact with police or if their behaviour raises concerns within the home, community or school’,<sup>315</sup> and outlined how it envisaged such a panel would operate:

Such panels bring together key service providers to support the needs of children and families, diverting children away from the criminal legal system and ensuring that appropriate assessments, identification of needs and further referrals to relevant services occur. Processes would be voluntary, confidential and limited to the service providers in the room unless consent is given for further referral or case coordination. To avoid the risk of alienating families and children who fear that participation in case coordination may result in forced child removal, processes would explicitly not involve referrals to the child protection system.<sup>316</sup>

YOTS urged the committee ‘to consider the use of a multi-agency approach to address serious offending or the risk of serious offending by children’.<sup>317</sup> Having established ‘dedicated multi-disciplinary panels’ in its work with young people, YOTS explained:

These panels have been particularly successful where there was a range of participants from different disciplines, as the different perspectives from the diverse range of participants was found to have enhanced the relevant case manager’s approach to evaluating the high-risk case.<sup>318</sup>

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<sup>310</sup> Public briefing transcript, Brisbane, 15 November 2021, p 7.

<sup>311</sup> Public briefing transcript, Brisbane, 15 November 2021, p 7.

<sup>312</sup> Public briefing transcript, Brisbane, 15 November 2021, p 7.

<sup>313</sup> See for example submissions 7, 15, 28, 32, 43, 45, 47, 48, 50, 51, 58, 66, 73.

<sup>314</sup> Submission 48, p 2.

<sup>315</sup> Submission 51, p 8.

<sup>316</sup> Submission 51, p 8.

<sup>317</sup> Submission 66, p 17.

<sup>318</sup> Submission 66, p 17 (reference removed).

The RACP recommended ‘increasing access to preventative, early intervention, trauma informed and integrated multidisciplinary programs for children with complex needs’,<sup>319</sup> and stated it was ‘crucial that programs are wraparound services, not delivered in silos’.<sup>320</sup> Given children in the youth justice system ‘have high rates of additional neurocognitive impairment, trauma and mental health issues’,<sup>321</sup> which increase their vulnerability and risk of disengagement from the education system, the RACP considered ‘preventative, integrated multidisciplinary programs should be available to all children regardless of location, socio-economic status or living circumstances’.<sup>322</sup>

Further, the RACP advised ‘[p]roviding access to multidisciplinary health care to children who are in the child protection system or are at risk of coming into contact with the child protection system, aims to reduce the number of children in the justice system’.<sup>323</sup> In this regard, Yourtown stated ‘[m]uch can be gleaned from programs such as Evolve Therapeutic Services (ETS) model’<sup>324</sup> operated by DCYJMA. Yourtown explained:

ETS provides therapeutic mental health support to help improve the social and emotional wellbeing of the young people, and support their participation at school and in the community. They also support the knowledge and skill development of foster/kinship carers, residential care providers, government, nongovernment and young people in care. Support is provided by a multidisciplinary team which can include allied health professionals (psychologists, social workers, occupational therapists and speech pathologists), nursing, medical, Aboriginal and Torres Strait Islander health workers and administrative staff, with each team having a team leader and psychiatrist overseeing the young person’s care.<sup>325</sup>

In contrast, emphasising the need for primary prevention (discussed at section 2.3.2), the YANQ stated:

The multidisciplinary panels, case managers and trauma informed practices all lay down the blame on children, young people and their communities. They all are highly patronising to people who fall victim to and are forced into these programs. Class ignorance is at the root of this problem with advocates of such approaches having never experienced the disadvantages faced by low socio-economic communities.<sup>326</sup>

### 2.3.5 Justice reinvestment

On introducing the Bill, the Member for Maiwar referred to the concept of justice reinvestment, stating:

‘...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’.<sup>327</sup>

We should be reinvesting those funds into proven therapeutic programs and facilities ...<sup>328</sup>

<sup>319</sup> Submission 73, p 8.

<sup>320</sup> Submission 73, p 8.

<sup>321</sup> Submission 73, p 9.

<sup>322</sup> Submission 73, p 9.

<sup>323</sup> Submission 73, p 9.

<sup>324</sup> Submission 45, Attachment A, p 4.

<sup>325</sup> Submission 45, Attachment A, p 4.

<sup>326</sup> Submission 30, p 3. See also submission 43, p 12, which emphasised the need for referral to services to be voluntary.

<sup>327</sup> Queensland Parliament, Record of Proceedings, 15 September 2021, p 2689.

<sup>328</sup> Queensland Parliament, Record of Proceedings, 15 September 2021, p 2689.

Several submissions received by the committee also recommended the adoption of a justice reinvestment approach to redirect resources from financing detention to programs that would improve outcomes for children and address the causes of crime.<sup>329</sup>

#### Stakeholder comments

The AIA explained that the operation of ‘justice reinvestment approach to criminal justice reform’, stating the approach:

... involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration. Justice reinvestment calculates savings as a result of reducing contact with the justice system and avoiding prison expansions by investing in front-end, long term community development instead. These savings are diverted and reinvested into communities to support them to thrive.<sup>330</sup>

Further, the AIA asserted that this approach has been supported on economic grounds, in that it provides a means for redirecting public money from imprisonment to strengthening individual and community capacity.<sup>331</sup>

Noting a commitment by Australian governments to reduce the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system by setting a target in the Closing the Gap targets, the AIA stated:

To meet this target, the justice reinvestment model - as a community-led and evidence-based solution that addresses the root causes of offending - must be adopted, and be based on:

- (a) use a trauma informed therapeutic approach;
- (b) be locally run place-based programs; and
- (c) are run and controlled by Indigenous People.<sup>332</sup>

To address the disproportionate imprisonment of First Nations people, Eileen Clarke reported calls for a justice reinvestment approach to be adopted ‘to reduce the funds incurred in correction and shift it to prevention solutions’, to address the causes of crimes and to find ‘better and cheaper’ alternatives to imprisonment.<sup>333</sup> Further, Ms Clarke cited the Australian Medical Association in calling for the government to shift their investment from financing the building of ‘more prisons for the culprits to conducting programs that help in the prevention of crimes’.<sup>334</sup>

Similarly, the Cultural Development Manager at YOTS stated:

Instead of spending money on Aboriginal children in the justice system, use that money wisely and allow it to be put back into Aboriginal services, to allow us to go back into our community and repair what broke on that child’s journey. Allow us to be the subject matter experts in our own community.<sup>335</sup>

In common with AIA and CIFACEC, the QATSICPP referred the committee to the success of the Maranguka Justice Reinvestment project in Bourke, New South Wales.<sup>336</sup> In this context, the QATSICPP stated that ‘[k]ey features of the Justice reinvestment model’, including ‘its focus on early intervention

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<sup>329</sup> See for example submissions 8, 15, 16, 34, 44, 48, 55, 58, 59, 62, 67, 75, 76.

<sup>330</sup> Submission 44, p 15 (reference removed).

<sup>331</sup> Submission 44, p 15.

<sup>332</sup> Submission 44, p 15 (reference removed).

<sup>333</sup> Submission 8, p 5 (reference removed).

<sup>334</sup> Submission 8, p 7 (reference removed).

<sup>335</sup> Submission 55, p 2.

<sup>336</sup> Submission 34, p 7; 44, p 16; Brett Nutley, public hearing transcript, Brisbane, 14 February 2022, p 35.



and community-led, place-based approaches', have been identified as particularly relevant 'in terms of reducing the over-imprisonment of Aboriginal and Torres Strait Islander peoples'.<sup>337</sup>

CIFACEC proposed a *Resilience Building Plan* for First Nations 'where surpluses are directed back into the community to improve social wellbeing and reduce crime', which was 'derived from experience within Australia and internationally with *Justice Reinvestment* initiatives'.<sup>338</sup> CIFACEC stated that under its model, the creation of jobs and new local infrastructure 'would achieve progress towards reducing poverty and creating local wealth'.<sup>339</sup> CIFACEC submitted that its proposed model would:

... facilitate a concerted commitment to *Justice Reinvestment* and holistic reform that empowers First Nations and other disadvantaged communities to create thriving environments that places our children on a pathway in life that nurtures their social, emotional, spiritual and psychological wellbeing, and equips them with the skills and resources required to avert and divert them away from negative engagement with the criminal justice system.<sup>340</sup>

In the context of justice reinvestment, at the public hearing Mr Phillip Brooks, Deputy Director-General, Youth Justice, DCYJMA addressed the need to balance multiple elements of youth justice:

The evidence is really clear around the investment in early intervention and prevention in terms of reducing the number of young people in youth detention and being able to attend to their needs. Equally, we have to balance that with community safety. At the moment the public is quite vocal regarding their safety, and they have a right to feel safe. If you have a look at the principles under the Youth Justice Act, one of them is regarding community safety. We have to balance both of those.<sup>341</sup>

### 2.3.6 Education and family engagement strategies

A key theme of submissions to the committee was the importance of education and family involvement in dealing with children with problematic behaviour.<sup>342</sup> The committee notes the Department of Education's programs to foster the continued engagement of children and young people in their schooling. The comments of Mrs Hayley Stevenson, Acting Assistant Director-General, State Schools— Operations, Department of Education are relevant:

The department recognises the importance of working not only with schools but also with parents, with other service providers and with the community in providing high-quality support to these children and young people [in contact with the youth justice system]. Without adequate support, young people who engage in antisocial behaviour risk becoming excluded from important support mechanisms such as school but also their families and support services. Early identification of students who are at risk and providing them with targeted but continuous support is crucial to their success.<sup>343</sup>

#### Stakeholder comment

Yourtown stated that '[a]ny effective child interventions need to be integrated within broader family and community context, working with the child's family, school and wider community'.<sup>344</sup> Sisters Inside concurred stating 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.<sup>345</sup>

<sup>337</sup> Submission 34, p 8 (reference removed).

<sup>338</sup> Submission 16, p 36, emphasis in original.

<sup>339</sup> Submission 16, p 36.

<sup>340</sup> Submission 16, 44.

<sup>341</sup> Public hearing transcript, Brisbane, 14 February 2022, p 5.

<sup>342</sup> See for example submissions 3, 15, 16, 20, 28, 29, 31, 34, 43, 44, 45, 51, 55, 64, 70, 72.

<sup>343</sup> Public hearing transcript, Brisbane, 14 February 2022, p 7.

<sup>344</sup> Submission 45, Attachment A, p 7.

<sup>345</sup> Submission 72, p 9.

CREATE firmly advocated that ‘efforts should be put towards addressing potentially criminal or harmful behaviours by helping children learn from their mistakes, without harming them for life’.<sup>346</sup> In this regard, CREATE stated that ‘[c]ommunity-driven solutions, intensive family support programs, trauma-informed mentorship, and on-country learning are all alternative programs that work and support children and young people to redirect their lives for the better, instead of being locked away’.<sup>347</sup>

Emphasising that funding for ‘First Nations community-led solutions should be prioritised’,<sup>348</sup> Professor Sue McGinty et al submitted that ‘First Nations families and communities have the cultural knowledge and skills to inform this process for better outcomes for First Nations children’.<sup>349</sup> ‘Therefore’, Professor McGinty et al asserted, ‘they must be at the forefront of decisions in this regard’.<sup>350</sup>

In the context of trauma-informed preventative programs, Yourtown and Change the Record commended the Murri School, a P-12 First Nations independent community school in Brisbane’s South.<sup>351</sup> Change the Record explained the Healing Foundation’s program at the Murri School:

The Murri School centres holistic and family-centred approaches to Indigenous children’s education. Recognising the importance of physical, emotional and cultural health, the school emphasises Indigenous family ties and engages a wide community in the support of a student.

Citing findings that ‘students who attended the school had better education outcomes, better mental health and less contact with the child protection and justice systems’,<sup>352</sup> Change the Record asserted that the Murri School ‘demonstrates the importance of caring for Indigenous children in their communities, and the enormous fiscal cost of punitive carceral approaches compared to care and support’,<sup>353</sup>

The QACC and AIA also recommended school-based prevention and early intervention programs as part of alternative models for children.<sup>354</sup>

As mentioned earlier, CIFACEC submitted a model of resilience building for first nations and other disadvantaged communities.<sup>355</sup> CIFACEC emphasised that it is ‘critical that each disadvantaged community is treated with respect’,<sup>356</sup> and explained that community development ‘is not *a one size fits all* approach’. Stating that ‘[e]ach community has its own unique strengths’,<sup>357</sup> CIFACEC asserted ‘[t]hese must be identified in each place and local people support to build upon these’.<sup>358</sup>

#### Committee comment

The committee commends the work of the Department of Education, the Department of Children, Youth Justice and Multicultural Affairs, other government agencies, non-government service providers

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<sup>346</sup> Submission 64, p 4.

<sup>347</sup> Submission 64, p 4.

<sup>348</sup> Submission 70, p 1.

<sup>349</sup> Submission 70, p 1.

<sup>350</sup> Submission 70, p 1.

<sup>351</sup> Submission 45, Attachment A, p 4; 51, p 10.

<sup>352</sup> Submission 51, p 10.

<sup>353</sup> Submission 51, p 10.

<sup>354</sup> Submissions 3, p 15-16; 28, p 9.

<sup>355</sup> Submission 16, pp 35-36.

<sup>356</sup> Submission 16, p 36.

<sup>357</sup> Submission 16, p 36.

<sup>358</sup> Submission 16, p 36.

and community members in Queensland who are changing the trajectory of many young lives for the better, by providing alternative pathways to the youth justice system.

**Recommendation 5**

The committee recommends that any alternative proposal to the youth justice system considered by the Queensland Government should include adequate and effective diversion programs and services, including place-based and culturally appropriate practices, to support young people and address factors which lead to offending behaviour.

### 3 Compliance with the *Legislative Standards Act 1992*

#### 3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

##### 3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

###### 3.1.1.1 *Privacy*

The right to privacy and the disclosure of confidential information are relevant to a consideration of whether a Bill has sufficient regard to the rights and liberties of individuals.<sup>359</sup>

The Bill provides that in making arrangements for the release from custody or detention of a person who, before the commencement, committed an offence when aged under 14 years, the chief executive may, during consultation with the chief executive (child safety), share confidential information with the chief executive (child safety) about the person.<sup>360</sup>

*Confidential information*, relating to a child, includes:

- identifying information about the child
- a report made for the purposes of, or tendered in, a court proceeding relating to the child
- a report about the child made for the department or another government department
- a report about the child given to an agency for the purpose of carrying out the objects of the YJ Act
- information about the child gained by a convenor or coordinator in relation to the convening of a conference
- a record or transcription of a court proceeding relating to the child.<sup>361</sup>

The chief executive may share the confidential information with a view to making all reasonable efforts to ensure the person has access to the following things after release:

- appropriate accommodation
- support from a consistent parent or guardian
- any health or other services the person required while in custody.<sup>362</sup>

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<sup>359</sup> Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC notebook*, 2008, pp 95, 113-115.

<sup>360</sup> Bill, cl 5 (*Youth Justice Act 1992* (YJ Act), new ss 409(5), 410(5)).

<sup>361</sup> YJ Act, s 284; Bill, cl 5 (YJ Act, new ss 409(8), 410(8)).

<sup>362</sup> Bill, cl 5 (YJ Act, new ss 409, 410).

The explanatory notes do not address the issue of fundamental legislative principle relating to the disclosure of confidential information.

The committee notes that the YJ Act makes it an offence for a person to record or use confidential information, or intentionally disclose it to anyone, other than as provided under the YJ Act, or to recklessly disclose the information to anyone. A maximum penalty of 100 penalty units (\$13,785<sup>363</sup>) or 2 years' imprisonment applies.<sup>364</sup>

In addition, the relevant provisions of the Bill are transitional provisions and would only operate until all of the children who committed an offence when aged under 14 years are released from custody or detention.

#### Committee comment

Given that the intention of the sharing of confidential information in the Bill is to provide the person with access to appropriate accommodation, support and services, and that significant penalties apply to the unauthorised disclosure of confidential information, and that the provisions would only operate for a limited period, the committee is satisfied that the Bill, in relation to the sharing of confidential information, has sufficient regard to the rights and liberties of individuals.

##### 3.1.1.2 Immunity from proceeding

In determining whether legislation has sufficient regard to rights and liberties of individuals, a matter to consider is whether the legislation confers immunity from proceeding or prosecution without adequate justification.<sup>365</sup>

At present, a child under the age of 10 years is not criminally responsible for any act or omission, and there is a presumption that children aged between 10 and 13 are unable to form criminal intent.<sup>366</sup>

If the Bill is passed, children aged under 14 years would be immune from criminal responsibility.<sup>367</sup>

The explanatory notes to the Bill state that the conferral of such immunity is justified:

... 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.<sup>368</sup>

#### Committee comment

The committee considers the immunity for children aged under 14 years is sufficiently justified.

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<sup>363</sup> The value of a penalty unit is \$137.85. Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, s 5A.

<sup>364</sup> YJ Act, s 288.

<sup>365</sup> LSA, s 4(3)(h); OQPC, *Fundamental legislative principles: the OQPC notebook*, p 64.

<sup>366</sup> Explanatory notes, p 1; Criminal Code, s 29.

<sup>367</sup> Explanatory notes, p 13.

<sup>368</sup> Explanatory notes, p 13.

### **3.1.2 Explanatory notes**

Part 4 of the *LSA* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

## 4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.<sup>369</sup>

A Bill is compatible with human rights if the Bill:

- (a) does not limit a human right, or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.<sup>370</sup>

The HRA protects fundamental human rights drawn from international human rights law.<sup>371</sup> Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

### 4.1 Human rights compatibility

The committee is satisfied that the human rights limitations identified are reasonable and are demonstrably justified, having regard to section 13 of the *Human Rights Act 2019* (HRA).

#### 4.1.1 Amendment to the Criminal Code and *Youth Justice Act 1992* (clauses 3 and 5)

Various human rights relevant to the protection of the human rights of children are directly implicated by increasing the age of criminal responsibility. Relevant sections from the HRA include:

- section 26—Protection of families and children
- section 32(3)—Rights in criminal proceedings
- section 33—Children in the criminal process
- section 28—Cultural rights—Aboriginal peoples and Torres Strait Islander peoples
- section 25—Privacy and reputation.

The Victorian Supreme Court has interpreted the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) in light of international legal instruments that have been negotiated in the context of the human rights of the child.<sup>372</sup>

In General Comment No 24 (2019), the Committee on the Rights of Child noted that:

21. Under article 40 (3) of the Convention on the Rights of the Child<sup>373</sup>, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common

<sup>369</sup> HRA, s 39.

<sup>370</sup> HRA, s 8.

<sup>371</sup> The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

<sup>372</sup> See, for example, *ZZ v Secretary, Department of Justice* [2013] VSC 267, [55]–[71], per Bell J (these passages from Bell J's judgment were cited with apparent approval in *Certain Children v Minister for Families and Children* (2016) 51 VR 473; [2016] VSC 796, [146], per Garde J).

<sup>373</sup> Australia ratified the *Convention on the Rights of the Child* on 17 December 1990 and the treaty is referred to in section 95(4)(a)(ii) of the HRA. [This footnote has been added to the quotation.]

minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by States parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.

22. Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.<sup>374</sup>

Acts or omissions giving rise to criminal responsibility are capable of interfering with the human rights of others. Such rights include those set out in the HRA in section 16 (right to life), section 24 (property rights) and section 29 (right to liberty and security of person). Increasing the age of criminal responsibility does not affect the capacity of victims of crime to seek civil remedies against perpetrators, for example, in relation to tortious liability for personal injury, or damage, destruction or conversion of property. The human rights obligations on the State of Queensland under the HRA to ensure respect for the human rights to life, security of person and property of the population of Queensland are independent of and discrete from issues related to criminal responsibility of persons under 14 years of age.

#### Committee comment

Having regard to material before the committee, including evidence received from stakeholders to the Bill, the committee considers the nature of the rights set out in sections 26, 32(3), 33, 28 and 25 of the HRA related to children under the age of 14 who are unable to understand the impact of their actions or to comprehend criminal proceedings, justify any incidental limitations on the enjoyment of other human rights which the State of Queensland is independently required to protect. The change is proportionate and directly related to the purpose of protecting the rights of children and related rights. There are no less restrictive means to achieve the protection of these rights achieved through raising the age of criminal responsibility.

The committee finds the proposed reform to the Criminal Code would strike an appropriate balance between any limitation on human rights, and the important human rights of children and others affected by raising the age of criminal responsibility.

#### **4.1.2 Statement of compatibility**

Section 38 of the HRA requires a statement of compatibility to be tabled for a Bill.

The statement of compatibility tabled with the introduction of the Bill provides a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

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<sup>374</sup> Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24, 18 September 2019, [21]-[22].



## Appendix A – Submitters

Sub #	Submitter
001	Dr Michael Williams
002	Australian Lawyers Alliance
003	Queensland African Community Council
004	Dr Meg Perkins
005	Form A – 140 submitters
006	Queensland Family and Child Commission
007	Form B - 88 submitters
008	Eileen Clarke
009	Confidential
010	EREA Flexible Schools Networks
011	YFS Ltd
012	Bar Association of Queensland
013	Michael Holliday
014	knowmore
015	Jan Gillies
016	Cooee Indigenous Family and Community Education Centre, Bidjara Community and Goorathuntha Traditional Owners Pty Ltd, Southeast Qld First Nations Elders Alliance, Bayside Community Justice Group Elders, Brisbane Elders, Knowledge Consulting Pty Ltd
017	Life Without Barriers
018	The Salvation Army Australia
019	Office of the Public Guardian
020	Kanat Wano
021	Children in Care Collective
022	Queensland Council for Civil Liberties
023	Leigh Freaser-Gray
024	Natasha Iselin

025	Tara Wightwick
026	Maureen Reid
027	Suze Collett
028	Amnesty International Australia's QLD / N.NSW Activism Leadership Committee
029	Anne-Maree Brady
030	Youth Affairs Network of Queensland
031	Julia Rothwell
032	ANTaR
033	Uniting Church in Australia Queensland Synod
034	Queensland Aboriginal and Torres Strait Islander Child Protection Peak
035	Name withheld
036	Justice Reform Initiative
037	Griffith Criminology Institute
038	Anglicare Southern Queensland
039	Beyond Abuse
040	Dr Mary Bastable
041	Caxton Legal Centre
042	PeakCare Queensland Inc
043	Australian Child Rights Taskforce
044	Amnesty International Australia
045	yourtown
046	National Justice Project
047	Common Grace
048	Red Cross Australia
049	Youth Law Australia
050	Foundation for Alcohol Research and Education
051	Change the Record

052	Foundation for Aboriginal and Islander Research Action
053	Australian Association of Social Workers
054	The Royal Australian and New Zealand College of Psychiatrists
055	Youth Off The Streets Limited
056	Human Rights Law Centre
057	Save the Children Australia and Child Wise
058	ANTaR Queensland
059	Queensland Council of Social Service
060	AFL Queensland
061	Queensland Law Society
062	Youth Advocacy Centre Inc
063	World Vision Australia
064	CREATE Foundation
065	Dr Terry Hutchinson
066	Queensland Youth Policy Collective
067	Queensland Human Rights Commission
068	Aboriginal & Torres Strait Islander Women's Legal Service NQ Inc.
069	Public Health Association of Australia
070	Prof Suzanne McGinty, Dr Catherine Day OAM, Prof Max Bennett OA, Cathy O'Toole, Prof Zoltan Sarnyai, A/Prof Calogero Longhitano, Dr Omer Shareef, Aunty Florence Onus, Dr Lynore Geia, Lee Kynaston, Dr Anthony McMahon, Albert Abdul Rahman, Evelyn Edwards
071	Queensland Mental Health Commission
072	Sisters Inside Inc
073	The Royal Australasian College of Physicians
074	Dr Bruno van Aaken
075	Australian Association for Restorative Justice
076	Dr Bruno van Aaken and Karl McKenzie

**FORM A SUBMITTERS**

001	Natalie Hill
002	Willi Redding
003	Tonia Walker
004	Sarah Klenbort
005	Jacob Walsh
006	Grant Shatford
007	Beth Charleston
008	Michael Niemira-Dowjat
009	Francia Rodriguez
010	Holstein Wong
011	Kerry Lawrence
012	Martin Eggesfield
013	Leanne Beikoff
014	Jillian Watt
015	Suzette Markwell
016	Emily Alexander
017	Annie Hill
018	Patricia Morrow
019	Steven McCormack
020	Charlie Smith
021	Wendy Tubman
022	Georgia Lee
023	Matisse Coyle
024	Tania Aveling
025	David Hordern
026	Melinda Aldons

027	Fiorenza Jones
028	Joanna Duddy
029	Jules Morton
030	Ewen Heathdale
031	Olivia Waterson
032	Dereka Ogden
033	Allan McKay
034	Rachel Murray
035	Veronica Lever-Shaw
036	Anna Sri
037	Anna Middleton
038	Annabelle Whitehead-Broad
039	Gail Artley
040	Emily Hughes
041	Christine Bennett
042	Isabella Spencer
043	Ian Connon
044	Elaine Summersford
045	Lucy Jackson
046	Rebecca Moser
047	Chelsea Goodman
048	Esther Vale
049	Leona Lees
050	T Wilson-Brown
051	Erica Parker
052	Heather Rees
053	Brett Carvolth

054	Nadia G
055	Leanne Smith
056	Chris Sachs
057	Andrew Stimson
058	Liz Thornton
059	Joan McVilly
060	Felicity Jodell
061	Eliza Wilson
062	Sue Cory
063	Kim Harper
064	Nicholas Byrnes
065	Rebecca Moser
066	Lynn West
067	Jake Russell
068	Claire Hutchinson
069	Renee Rothberg
070	Rhia Wilson
071	Jennifer Embelton
072	Charlotte O'Sullivan
073	Faith Hage
074	Karishma Tanvi
075	Hannah Carey
076	Abigail Knight
077	Chrystal Hall
078	Anthea Whitwell
079	Zigrid Strads
080	Alexander Downs

081	Aleesha Isaacs
082	Elizabeth Shield
083	Kirk Radunz
084	Maddison Warren
085	Steph Moss
086	Gladeys De Vera
087	Melanie Williams
088	Samantha Fryar
089	Stephanie Anne
090	Narelle Knobel
091	Elizabeth Boardman
092	Jacqui Cresswell
093	Courtney Loudon
094	Camille Smith-Watkins
095	Zu Hui Chen
096	Soren Dunn
097	Susan Fletcher
098	Mohini Dewhirst
099	Samuel Green
100	Lisa Goode
101	Emma Smith
102	Fusha-Hope Benson
103	Fiona Richards
104	Sean Corrigan
105	Karen Bourke
106	Gelena Wolf
107	Maree Hanson

108	Jade Croft
109	Stephen Hoult
110	Dereka Ogden
111	Nathan Vindis
112	Collins (D'Arcy) Burg
113	Anne Jackson
114	Sarah O'Connell
115	Cate Aberdeen
116	Robyn Ford
117	Christina Livesey
118	Lesli Knetter
119	Greg Nunan
120	Melissa Grace
121	Lachlan Gammon
122	Sasha Zuniga
123	Saska Scoon
124	Jane Whipp
125	Tanya Flynn
126	Kate Fardell
127	Maddison Williams
128	Sally-Anne Judge
129	Renee Huddy
130	Joshua Hall
131	James Blyth
132	Sarah Buckley
133	Beka Hunter
134	Tyrone D'Lisle



- 135 Elaine Summersford
- 136 Adrian Jones
- 137 N Osborn
- 138 Caroline Cooper
- 139 Ludmila Andersson
- 140 Katie Watts

**FORM B SUBMITTERS**

001	Ollie Conti
002	Mackenzie Van Dijken
003	Rachele Quested
004	Natalie Keene
005	Kelly Eckers
006	Deborah Moseley
007	L Stewart
008	Winsome Fox
009	Katie Everingham
010	Paul Harnett
011	Shannon Maugham
012	Hayley Pilgrim
013	Paul Bambrick
014	Anne Etchells
015	Beth Norman
016	Pam Blamey
017	Jemma Chalmers
018	Zoe Moore
019	David Pincus
020	Andrew Reeson
021	Julie Hislop
022	Kerry Lawrence
023	Helen Spyrou
024	Eileen Clarke
025	Allison Wills
026	Sue McGinty

027	Taylor Bast
028	Anne Leondiou
029	Rebecca Moser
030	Julia Johnson
031	Tegan Nuckey
032	John Williams
033	Glyn Geoghegan
034	Darryl Nelson
035	Isabella Pennings
036	Madeleine Shield
037	Tarja Clarke
038	Jack Shield
039	Marilyn Wright
040	Kevin Martin
041	Kiera Denman
042	Elliot Bailey
043	John van Grieken
044	Ravindi Herath
045	Pamela Abrey
046	Brielle Ensby
047	Margaret Ferguson
048	Ben Larsen-Smith
049	Rosemary Butler
050	Dr Stefan Preissler
051	Anna Erskine
052	Jenny Jackson
053	Maria Macdonald

054 Khal Morganlowe  
055 David Singleton  
056 Ruth Hubbard  
057 Annette Philp  
058 Ollie Conti  
059 Lorelle Sellick  
060 Ewen Heathdale  
061 Rachele Quested  
062 Colin Apelt  
063 Darryl Nelson  
064 Gail Artley  
065 Col Burg  
066 Michael Chanas  
067 Sono Weatherall  
068 Tristan Lewis  
069 Joan McVilly  
070 Dereka Ogden  
071 Suzette Markwell  
072 Danielle Mutton  
073 Beth Charleston  
074 Brett Carvolth  
075 David Sayer  
076 Holstein Wong  
077 Mary Thatcher  
078 Margid Bryn-Burns  
079 Tabitha Cleaves  
080 Prof. Mark Nielsen

- 081 Kay Boulden
- 082 Shaun Bickley
- 083 Frances Long
- 084 Bria Lauren
- 085 Narelle Young

## **Appendix B – Attendees at public briefing**

### **Public Briefing – 15 November 2021**

#### **Private Member**

- Michael Berkman MP, Member for Maiwar

## Appendix C – Witnesses at public hearing

### Public Hearing – 14 February 2022

#### Department of Children, Youth Justice and Multicultural Affairs

- Kate Connors, Deputy Director-General, Strategy
- Philip Brooks, Deputy Director-General, Youth Justice
- Michael Drane, Senior Executive Director, Youth Detention Operations and Reform
- Phil Hall, Acting Director, Youth Justice Legislation
- Bob Atkinson AO APM, Co-Chair, Domestic and Family Violence Prevention Council and Chair, Truth, Healing and Reconciliation Taskforce

#### Department of Education

- Hayley Stevenson, A/Assistant Director-General, State Schools – Operations
- Dr Sharon Mullins, Executive Director, State Schools – Operations

#### Queensland Police Union

- Ian Leavers, General President and Chief Executive Officer
- Luke Moore, Policy Officer

#### Queensland Human Rights Commission

- Scott McDougall, Commissioner

#### Queensland Family and Child Commission

- Luke Twyford, Principal Commissioner
- Natalie Lewis, Commissioner

#### Tropical Brain and Mind Foundation (*via videoconference*)

- Professor Sue McGinty, Deputy Chair
- Albert Abdul Rahman, Community Activist
- Cathy O'Toole, Consultant on Mentally Healthy City Townsville
- Dr Carlo Longhitano, Forensic Psychiatrist, Townsville University Hospital and Associate Professor of Mental Health, James Cook University
- Professor Zoltan Sarnyai, Professor of Neuroscience, James Cook University

#### Cooee Indigenous Family and Community Education Centre

- Professor Boni Robertson
- Brett Nutley
- Keith Hamburger

#### Common Grace

- Brooke Prentis, Chief Executive Officer and Aboriginal Christian Leader
- Bianca Manning, Aboriginal and Torres Strait Islander Justice Coordinator

#### ANTaR Queensland

- Dr Anne Brown, President
- Rev Dr Wayne Sanderson, Researcher and Advocate on Youth Justice Policy

**knowmore**

- Lauren Hancock, Law Reform and Advocacy Officer
- Roba Rayan, Senior Lawyer

**Youth Off The Streets**

- Michelle Ackerman, Engagement and Support Manager
- Beny Bol, Logan Program Manager

**Youth Advocacy Centre Inc**

- Katie Acheson, Chief Executive Officer
- Janet McKeon, Policy and Systemic Reform Officer

**CREATE Foundation** *(via videoconference)*

- Dr Joseph McDowall, Executive Director (Research)

**Queensland Law Society**

- Kara Thomson, President
- Damian Bartholomew, Chair, Children's Law Committee
- Keryn Ruska, Member, Human Rights and Public Law Committee

**Southern Cross University**

- Dr Terry Hutchinson, Adjunct Professor



## Dissenting Report

14 March 2022

### **Dissenting report - Member for Maiwar**

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

Report No. 16 of the Community Support and Services Committee, 57th Parliament (**the Report**), makes 5 recommendations, the most significant and concerning of which are:

- Recommendation 1: that the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill)* not be passed; and
- Recommendation 3: that the Queensland Government continue to work with all State and Territory Attorneys-General to consider the increase of the minimum age of criminal responsibility from 10 to 12, including any caveats, timing and discussion of implementation requirements.

Recommendations 2, 4 and 5 provide useful suggestions about additional training relevant to residential care and court settings, and recognise some important features of any alternative approach to youth justice, but these are severely undermined by the Committee's unwillingness to support meaningful, evidence-based reform to raise the minimum age of criminal responsibility to 14.

Despite the overwhelming evidence, the Committee has not recommended raising the age of criminal responsibility. Instead, the recommendations inch Queensland ever so slightly closer to a policy position of raising the age to 12 - a position that is inconsistent with our international human rights obligations, inconsistent with the medical and criminological evidence, and a position that will improve the lives of less than 10% of the 10-13 year old children in custody or under supervision in Queensland.

Despite the overwhelming evidence, the Committee has also not recommended that the Government adequately fund the kind of supports and services that all the available research says are necessary to positively influence the lives of the vulnerable children caught up in the criminal legal system. Countless witnesses before this Committee supported adequate funding for supports and services, including the sole witness who entirely opposed raising the age, and representatives of the Department accepted without hesitation that the current funding of these services doesn't meet existing demand.

Instead, and in direct contradiction of essentially all the submissions, witness testimony and other evidence before the Committee, it has adopted the Government's rhetorical and policy position, which involves no change to the law, justified by baseless comments like "[t]he Committee encourages the Government to remain strong in its response to youth crime."

If the Committee, and particularly the Government Members, treated this inquiry process as anything more than a political fig leaf, to obscure or justify the ineffective, politicised, and harmful pre-existing policy position of the Queensland Government, this report would unequivocally support raising the age to at least 14.

Not a single one of the 300+ written submissions opposed raising the age to at least 14, including submissions from lawyers, doctors, social workers, academics, and others, on behalf of such diverse organisations as Red Cross Australia, the Uniting Church, the Australian Association of Social Workers, the Public Health Association of Australia, QCOSS, Bar Association of Qld and AFL Queensland. Some submitters argued that the age of criminal responsibility should be higher than 14, including the suggestion that no child should be subject to criminal sanction and 18 was a more appropriate minimum age of criminal responsibility. With no stakeholders opposing the Bill, and in an apparent attempt to justify the Government's position, the Committee went out of its way to seek the input of current or former police - inviting the Queensland Police Union and a former Police Commissioner to appear at the public hearing. Of all the witnesses and submitters, only these opposed raising the age. It is entirely unsurprising that some police officers, whose work and careers are built on the breadth of criminal sanctions used as a tool of government, would oppose reform like this. This is not the fault of individual police officers, but when the only tool you have is a hammer, everything looks like a nail.

The Secretariat has done a commendable job in summarising the vast volume of evidence and submissions provided in support of both the Bill and the broader objective of raising the minimum age of criminal responsibility. This dissenting report will focus on some key shortcomings of the Committee's recommendations and comments in the Report, most of which emerged at the Committee hearing, including:

1. The Committee's flawed and politicised recommendation that the Government work with other states towards raising the age to 12, despite the fact that this area is wholly within State jurisdiction, despite the weight of evidence that supports raising the age to 14, and despite the fact that the ACT (the jurisdiction most progressed in this law reform) is moving towards raising the age to 14;
2. The Committee's suggestion that this reform needs to wait until the Government has done 'more work', despite all the evidence around the efficacy of alternative, therapeutic approaches; the plethora of existing but underfunded organisations who could do that work; the need for long-term programs to address the underlying disadvantage of the children and communities most affected by this reform; and, past experience of unnecessary delay in youth justice reform;
3. The minimisation of considerable evidence that community safety will be improved by raising the age and pursuing an alternative, therapeutic approach to offending behaviour. This included the misrepresentation of evidence from two key witnesses at the hearing, the Queensland Law Society (**QLS**) and the Queensland Human Rights Commissioner;
4. The skewed and disproportionate focus on the few voices opposing the Bill, and the overemphasis on the continuation of failed policing responses supported by only two witnesses at the hearing.

Raising the minimum age of criminal responsibility to 14, in line with all the best evidence, calls for leadership and political will. There are no insurmountable practical barriers. The only question is whether the Government will stand up to the persistent misinformation and politicisation of young, vulnerable Queenslanders - children who need care and support to realise their potential - not courts, prisons and punishment.

## 1. Raising the Age to anything less than 14 would be a complete policy failure

The Committee's Recommendation 3 - to work with other jurisdictions "to consider" raising the age to 12 - is incredibly disappointing.

The Government has a long-held policy of allowing 10-13 year old children to be locked up. The relevant Ministers will likely argue that the agreement at the November 2021 Meeting of Attorneys-General's (MAG) to pursue the 'development of a proposal to increase the minimum age of criminal responsibility from 10 to 12' represents significant progress.

This could not be further from the truth.

As outlined below, raising the age of criminal responsibility to 12 achieves almost nothing in practical terms, and I'm concerned that reform of this nature would ultimately be worse than nothing, since it will delay meaningful, evidenced-based reform to raise the age to at least 14, and serves to push this urgently needed reform off the agenda indefinitely.

### 1.1. *Raising the age to 12 benefits a tiny fraction of 10-13 year old children*

Based on the 2020-21 data provided by the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) at the hearings, and referred to in Section 1.6 of the Committee's Report, **raising the age to 12 would have no impact on more than 90% of the 10-13 year old children** in custody or under supervision in Queensland.

Dr Terry Hutchinson, adjunct Professor from Southern Cross University told the Committee:

If you look at the statistics, there are not too many 10- and 11-year-olds in detention. It is the 12-year-olds and the 13-year-olds—the grade 9 cohort... This is my own opinion: if we raise it to 12, you are not really making too much of a difference. It is 14 where, as we have heard from the other presenter, especially with boys, the maturity is kicking in."<sup>1</sup>

Damien Bartholomew, appearing for QLS, gave the following answer when asked what it would mean for the state to raise the age to 12 rather than 14:

What it would do is perpetuate a problem. It would not solve it. It would be a partial situation to a significant human rights issue and to a significant injustice for young people. What would it do to partially fix a problem when we have a solution? It would be better to have a partial solution than to have no solution, but of course where you have the option of completely resolving an issue then obviously that is what the Law Society would endorse the government doing.<sup>2</sup>

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<sup>1</sup> Public hearing transcript, Brisbane, 14 February 2022, p 32.

<sup>2</sup> Public hearing transcript, Brisbane, 14 February 2022, p 57.

### **1.2. The evidence applies equally to all 10-13 year old children**

There is no basis in the evidence to exclude 12-13 year olds from reform to raise the age. All the medical and criminological evidence provided to the Committee made clear that the reasons to raise the age to 12 equally apply to 12-13 year old children. Commissioner Lewis from the QFCC told the Committee “Effectively we would be looking at trying to address precisely the same issues, but having a much more significant impact by including 14-year-olds.”<sup>3</sup>

Janet McKeon, one of Queensland’s most experienced youth advocates from the Youth Advocacy Centre (YAC), told the Committee:

it is not a compromise, if I can put it that way, by going to 12 rather than 14. It is still about the capacity of a child to have the experience, the life skills and so on to be held accountable in a criminal justice system.<sup>4</sup>

The Report touches on the extensive medical evidence that supports raising the age to at least 14, noting in particular that typical neurological and cognitive development of children under 14 leads to limited capacity to plan, foresee consequences, control impulses, and a propensity for risk-taking behaviour.

This neurodevelopmental evidence was reinforced by Dr Carlo Longhitano, Forensic Psychiatrist at Townsville University Hospital and Associate Professor of Mental Health, James Cook University. When asked about the possibility of raising the age to 12 rather than 14, Dr Longhitano told the Committee:

I think it is a step in the right direction compared to 10, but I think it is not a far enough step. Fourteen is around the age when most of the early development will have taken place. It is a bit gender specific as well. Females tend to have brain maturation that is slightly earlier compared to males. I would expect most of the females by 12 years old would have reached the next level of maturation, although I guess it is more likely to be completed by 13 years in a female, but the males would certainly need up to 13 or 14 for sure in order to have that step taken. *I do not think 12 is good enough. It should be 14.*<sup>5</sup>

### **1.3. Waiting for a “national approach” is a misleading distraction**

State governments have complete and nearly unfettered control over the age of criminal responsibility under their respective criminal law regimes. Discussion about a ‘national approach’ to this issue has primarily served to give State and Territory governments a veneer of justification to delay progress on raising the age, or even the adoption of a clear, evidence based policy position that would bring State and Territory laws in line with our human rights obligations.

In over 3 years since the MAG established its Age of Criminal Responsibility Working Group in November 2018, it has achieved little more than burying a report (prepared by the then Council of Attorneys-General) that recommended all governments raise the age of criminal responsibility to 14

<sup>3</sup> Public hearing transcript, Brisbane, 14 February 2022, p 26.

<sup>4</sup> Public hearing transcript, Brisbane, 14 February 2022, p 51.

<sup>5</sup> Public hearing transcript, Brisbane, 14 February 2022, p 31-32.

years,<sup>6</sup> and most recently offering only non-committal support for “development of a proposal” to raise the age to 12. The most recent statement from the MAG also downplays the fact that the ACT is proceeding with reform under a clear commitment to raise the age to 14.<sup>7</sup>

In truth, a national approach now appears impossible. By the time this Bill is debated, it is very likely that legislation will have been introduced in the ACT to raise the age to 14. Meanwhile, the NT has clearly committed to raise the age to 12, although it appears further from having legislation ready to introduce. If the Queensland Government continues to suggest it is waiting for progress on a nationally consistent approach, it is simply denying reality and misleading Queenslanders.

While the Committee’s Report acknowledges that the NT and ACT have “already taken divergent approaches in respect to their policies on the issue”, it conspicuously avoids mentioning that this divergence is on the fundamental point of the proposed age of criminal responsibility. This seems like an attempt to deny the clear improbability of a genuinely national approach, and the fact that the Queensland Government cannot use this as a justification to pursue a minimum age of 12 rather than 14.

To reiterate, if Queensland is to take its lead from any other jurisdiction in Australia, the ACT’s approach of raising the age to 14 years old is clearly the best aligned with the medical and criminological evidence, our human rights obligations, and in the interests of community safety.

Janet McKeon from YAC was very clear in her view that the benefits of national consistency should not drive adoption of 12 as the minimum age of criminal responsibility, rather than 14:

I would not presume to speak on YAC’s behalf on this, but in my opinion the idea that the criminal justice system can vary around the country is problematic because of things like convictions, criminal records and so on. In one state you might attract a conviction that remains with you while in another state you do not and those sorts of things. Consistency is important, **but I would not like to see consistency drive 12 rather than 14 by way of raising the age.**

While the MAG communique contemplates “carve outs”, it’s important to note that there is little to no support from submitters for any carve outs for specific offenses, or the kind of “hybrid model” touched on by Mr Atkinson.<sup>8</sup>

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<sup>6</sup>The Australian, 14 April 2021, *Major justice reform: push to lift age bar on crime*. Available online at <https://www.theaustralian.com.au/nation/major-justice-reform-push-to-lift-age-bar-on-crime/news-story/29e66d6ea24e79ca976c67c195c4ea21>

<sup>7</sup>The complete statement from the Meeting of Attorneys-General Communique on 12 November 2021 is:  
*State Attorneys-General supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and discussion of implementation requirements. The Northern Territory has committed to raising the age to 12, and will continue to work on reforms including adequate and effective diversion programs and services. The Australian Capital Territory has also committed to raising the age, and is working on its own reforms.*

See p 4 of the Communique, Available online at:

<https://www.ag.gov.au/sites/default/files/2021-11/Meeting%20of%20Attorneys-General%20%28MAG%29%20communique%C3%A9%20%E2%80%93%20November%202021.DOCX>

<sup>8</sup>Public hearing transcript, Brisbane, 14 February 2022, pp 17-18.

## **2. This reform cannot wait for the Queensland Government to do ‘more work’**

Like the supposed preference for a national approach, the Committee’s suggestion that “there is more work to be done before the minimum age of criminal responsibility is raised in Queensland” is a recipe for needless delay. Worse, delay to this end is essentially without an end point.

Representatives from DCYJMA made clear at the hearing that prevention and early intervention programs are not adequately funded to meet all the existing need,<sup>9</sup> despite acknowledging the clear evidence about the efficacy of these programs:

The evidence is really clear around the investment in early intervention and prevention in terms of reducing the number of young people in youth detention and being able to attend to their needs.<sup>10</sup>

It is deeply frustrating, and telling, that the Committee’s Report suggests that any reform to raise the age needs to wait for the Queensland Government to do ‘more work’, but it fails to recommend that the Government increase funding as necessary to ensure the proven, effective, existing programs and supports are able to meet existing demand. This is a contradiction and a cop out.

### ***2.1. Programs exist but need more funding***

Professor Bonnie Robertson, appearing on behalf of the Cooee Indigenous Family and Community Education Centre, spoke to her experience as an Indigenous elder with a long history of waiting for change:

The one thing that our people need to ask good-hearted people like yourselves and people in government of all persuasions—it is about our people and governments working together—is: at what stage does the delusion stop? Our people have come to the table over the past 40, 50 or 60 years. An avalanche of reports have been commissioned by all levels of government. The recommendations are there. Money gets allocated. We come to the table in good faith only to find out 10 or 15 years later that nothing has been happening.

No-one is talking about going soft on crime. What we are talking about is making it a safer community, a more productive community—a community where healing really does take place. It means giving life to the text and tenor of all those recommendations that have been made and giving life to the commitment to justice reform. That is what we are asking for, not to retain the same old ineffective system.<sup>11</sup>

In response to the suggestion that raising the age at this stage was “putting the cart before the horse”, Professor Robertson described the decades of work done by Elders in establishing Cooee, and told the Committee:

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<sup>9</sup> Public hearing transcript, Brisbane, 14 February 2022, pp 3-4.

<sup>10</sup> Public hearing transcript, Brisbane, 14 February 2022, pp 5.

<sup>11</sup> Public hearing transcript, Brisbane, 14 February 2022, p 39.

For us to sit here today—it is an emotional plea. It is an emotional plea, not in a way that is nonsensical but in a way that says to good-hearted people like yourselves—and I have said this ad nauseam: we cannot do it by ourselves. We know the answers, we have the solutions and we have faith that we can make a difference; we ask that you have faith in us that we do have the solutions. We just have to be funded appropriately to do that, because most of us are using our own funds to do what we know does work, can work, can bring about change, can transform young people when they are doing the wrong thing, can bring about change in communities and can really and truly give life to the aspirations that we have of this country being a healed country where truth is told and where we are at a point of true reconciliation.<sup>12</sup>

Luke Twyford, Principal Commissioner at the QFCC gave the following evidence:

CHAIR: Commissioner Twyford, is it your opinion that perhaps the cart is put before the horse? Is it your opinion that it would be better to put forward programs of support and have those programs, interventions and specialists in the field prior to implementing such legislation?

Mr Twyford: It is my strong view that the programs and services have to be in place at the time the legal change would take effect. I have experience in another jurisdiction and I have watched many other jurisdictions struggle with what is the first step on this journey. I think the honest answer is that it needs to be a jump. We need the services, the legislation, the policy and the appropriate practices to all occur at the same time. Having a solid plan around implementation is critical.

I would say that changing the law in and of itself without the services would not be successful, but I would also comment that there are services out there. There are many Queenslanders providing services to young people.<sup>13</sup>

The Explanatory Note to the Bill explicitly addresses the need for immediate investment in the services and supports identified in the evidence. As a matter of parliamentary procedure, I cannot put forward legislation to fund these programs in a private members' Bill.

The Queensland Government simply needs to stump up and properly fund these services. There is no mystery about how to most effectively engage with and support vulnerable young people at risk of criminalisation, but the Government seems to lack both the political will and foresight to properly invest in the organisations and people best equipped to do this work.

This investment will not be cheap, but spending endless millions on prisons, courts and police to lock up children has failed. It is not keeping the community safe by stopping offending behavior and it is further damaging the children concerned. The current approach is a waste of money and a waste of lives.

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<sup>12</sup> Public hearing transcript, Brisbane, 14 February 2022, p 41. (*Emphasis added*)

<sup>13</sup> Public hearing transcript, Brisbane, 14 February 2022, p 25. (*Emphasis added*)



## 2.2. Addressing disadvantage

While the focus of the evidence on this Bill was quite rightly on the delivery and adequacy of programs and services directly aligned with the youth justice system, it is also vital that the Government address the other factors that are characteristic of the disadvantage experienced by these children. The statistics included in YAC's submission paint a sobering picture of the nature and extent of the disadvantage experienced by children in youth detention:

- 30% had at least one parent who spent time in adult custody
- 60% had experienced or been impacted by domestic and family violence
- 55% were disengaged from education, training or employment
- 29% were in unstable and/or unsuitable accommodation
- 46% had a mental health and/or behavioural disorder (diagnosed or suspected)
- 12% had a disability (assessed or suspected)
- 38% had used ice or other methamphetamines.<sup>14</sup>

It will not be sufficient to invest in interventions adjacent to the youth justice system without significant investment to address the need for better services and supports in housing, education, mental health, disability, drug and alcohol support, and domestic and family violence.

Commissioner Lewis from the QFCC made this point quite directly in relation to the over-incarceration of Aboriginal and Torres Strait Islander people:

In the context of raising the minimum age of criminal responsibility, a dedicated focus upon 10 to 13- year-olds presents a significant opportunity to disrupt the offending trajectory of young people and move beyond rhetoric to close the gap in the incarceration rates of Aboriginal and Torres Strait Islander young people and adults. *This success, though, is contingent on meeting each of the other socioeconomic targets across the areas that have an impact on the life outcomes for Aboriginal and Torres Strait Islander children: things like infant and early years, health equity, stable housing, living free from violence, education and employment, achieving equality and economic participation and, critically, the preservation or restoration of our connection to culture.*<sup>15</sup>

The work required to address this broader, persistent disadvantage and growing social inequality is simply not a project that will one day be 'finished', allowing the government to eventually raise the age. The Government must urgently prioritise investment to address this broader socioeconomic disadvantage, particularly among communities and children most at risk of criminalisation, but the reform proposed in this Bill cannot wait for these outcomes.

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<sup>14</sup> Submission No. 62, p14.

<sup>15</sup> Public hearing transcript, Brisbane, 14 February 2022, p 24. (*Emphasis added*)

### **2.3. A 25 year wait to get 17 year old out of adult prisons**

Damien Bartholomew, representing QLS, and Professor Terry Hutchinson each discussed their earlier experience regarding the 25 year delay in getting 17 year old children brought into the youth justice system. Mr Bartholomew told the Committee:

Of course when we have legislation we have to ensure that we have the capacity to respond to it. The Law Society also was a great advocate for the incorporation of 17-year-olds into our youth justice system. We saw that legislation being passed in the early 1990s but nothing happening until very recent years because people were saying, 'We're not ready; we don't have the resources.' Unfortunately, we do not put those resources in place. Even in relation to that, the experience of the Law Society, of our practitioners, was that many of the supports that were necessary for that to happen did not actually happen until we ripped the bandaid off and had the 17-year-olds in the system, and then we could see what the issues were. In much the same way, yes, we have to be as prepared as we can be but we should not allow children to be criminalised simply because as a community we do not have the appropriate procedures in place.<sup>16</sup>

Professor Hutchinson said:

I think we have had experience recently with bringing 17-year-olds into the youth justice system. It was 1993 when the provisions were made in the Juvenile Justice Act at that point for this step to happen. ... I think you need to make a stand and the rest will follow. There are services there, but we need to get them into position. Until we make a stand and make a change, nothing will happen.<sup>17</sup>

Mr McDougall from the QHRC also used this example to directly push back on the suggestion that this reform needs to wait for other 'solutions':

Mr BENNETT: As I have tried to articulate, are we jumping ahead with something that might be seen as an easy thing to do in this piece of legislation as opposed to really advocating for those solutions to fix the problems before we jump to this?

Mr McDougall: Obviously there is a need to have programs in place. We need to learn the lesson from the 17-year-old moving out of adults. We need to learn that lesson, but that does not mean that this needs to be delayed. It is a very small cohort of the overall children in detention, so it should be able to be addressed without having to delay things too far.<sup>18</sup>

This experience and the long delay in moving 17 year old children into the youth justice demonstrates the real risk of delaying reform until all the pieces are perfectly in place. This reform must happen now to prevent the ongoing harm done while we continue to criminalise children under the age of 14.

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<sup>16</sup> Public hearing transcript, Brisbane, 14 February 2022, p 56.

<sup>17</sup> Public hearing transcript, Brisbane, 14 February 2022, p 32.

<sup>18</sup> Public hearing transcript, Brisbane, 14 February 2022, p 25.

### 3. Community safety will be best enhanced by raising the age

The Report relies on and perpetuates the false narrative that community safety relies on maintaining a criminal response to problematic behaviour of young children.

It dishonestly minimises the clear evidence - evidence presented by DCYJMA representatives at the committee hearing<sup>19</sup> - that earlier contact or longer contact with the criminal legal system will negatively affect a child's trajectory, and increase the likelihood that they will reoffend.

It should be a simple and uncontroversial truth that children come into contact with the criminal legal system **after** engaging in behaviour that puts themselves or the community at risk. The key policy question for Governments is how we respond to very young children at this point. The evidence is clear: criminalising young children will make them more likely to reoffend and enter a cycle of criminalisation that makes our communities less safe.

At the public hearing Queensland Human Rights Commissioner, Scott McDougall, addressed the relationship between detaining young people and rates of recidivism:

Raising the age of criminal responsibility to 14 would at least take some of the pressure off youth detention capacity, as about seven per cent of children in detention are in this bracket. Moreover, if diversion of young offenders is effective in reducing recidivism, it will have a downstream impact on numbers of not only children but adults in detention. The evidence shows that children first detained in the criminal justice system aged 14 or younger are more than three times as likely to return to detention than those first detained at the age of 15 or above.<sup>20</sup>

Notions like 'balancing the welfare of children with community safety', as we heard from the Department in the hearing,<sup>21</sup> imply that these two things are in opposition. But, in fact, keeping young children away from the criminal legal system and improving their welfare is the clearest pathway to improving community safety.

Commissioner Natalie Lewis from the QFCC gave evidence that directly challenges the notion that criminal responses are essential to community safety, stating that criminal justice responses will not reduce crime, increase safety or create an effective youth justice system:

In conclusion, let me be clear that we share the community's interest in reducing crime, increasing safety and creating an effective youth justice system that is safe for children, young people and staff. The evidence is clear that criminal justice responses will not deliver these results. We are firmly committed to reform that enables a just and age appropriate system. I believe that raising the age of criminal responsibility to 14 will contribute to that goal.<sup>22</sup>

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<sup>19</sup> Public hearing transcript, Brisbane, 14 February 2022, pp 3 and 5.

<sup>20</sup> Public hearing transcript, Brisbane, 14 February 2022, p 22.

<sup>21</sup> Public hearing transcript, Brisbane, 14 February 2022, pp 5.

<sup>22</sup> Public hearing transcript, Brisbane, 14 February 2022, p 3.

Volumes of evidence from other submitters acknowledge that the legal facility for young children to face criminal sanction increases the likelihood of them reoffending, which will in fact increase the threat to community safety.

### **3.1. *Misrepresentation of evidence***

I have grave concerns that the Report misrepresents the evidence of witnesses at the public hearing and includes a misleading account of evidence from the QLS and the Queensland Human Rights Commissioner regarding community safety.

At Section 2.1.1.1, the Report makes the following statement, which the footnote indicates is supported by evidence given by QLS and QHRC at the public hearing:

“Concerns from some stakeholders over the consequences of amendment to the Criminal Code to raise the age of criminal responsibility were expressed during the public hearing, and may be summarised as follows:

- community safety may be threatened, leading to a loss of community confidence”

The written submissions and oral testimony of both QLS and QHRC both explicitly support raising the age of criminal responsibility to 14, and neither can reasonably be said to have expressed concerns that raising the age of criminal responsibility may threaten community safety or lead to a loss of community confidence.

#### **3.1.1. QHRC evidence on community safety**

The following evidence from the Queensland Human Rights Commissioner, Mr Scott McDougall, appears to be the one relied on to support the above passage:

Finally, to return to the issue of community safety, the rights of victims of youth offending must be properly considered. Children breaking into homes and stealing cars pose serious risk of endangering the lives of themselves and the public. This underscores the need for significant investment of government resources and attention to establish an effective therapeutic response to this complex yet solvable problem.<sup>23</sup>

Mr McDougall does not express concern that community safety could be threatened by raising the age, rather he simply says it needs to be considered and goes on to emphasise the importance of the alternative therapeutic responses that accompany proposals to raise the age.

When asked later in the hearing about “community safety and confidence”, Mr McDougall expressed the view that community confidence is important, but in no way did he suggest that raising the age of criminal responsibility would threaten this, and he again supported an alternative approach consistent with raising the age:

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<sup>23</sup> Public hearing transcript, Brisbane, 14 February 2022, p 22.

I think it is absolutely fundamental that the community has confidence in the response. I do not think there is any question about children having to face consequences for any offending behaviour; it is a question of what those consequences are. What we want is effective responses. At the moment we have a criminal justice response. What we really need is a youth wellbeing response.<sup>24</sup>

### 3.1.2. QLS evidence on community safety

Ms Kara Thompson, president of the QLS, made the following statement regarding community safety that the Report appears to reference in support of its assertion:

We recognise community safety as a significant concern. The Law Society recognises the importance of Queenslanders being and feeling safe within their community. As part of raising the age of criminal responsibility from 10 to 14, it is our view that the triage and treatment of the underlying causes of crime—including social and family dysfunction, disadvantage and education—will in fact provide greater protection for the community because therapeutic and diversion programs will ultimately reduce youth crime. Evidence suggests that the earlier the contact with the youth justice system the more likely young people will become recidivist offenders who are then entrenched in the criminal justice system. The raising of the minimum age will prevent this, resulting in fewer recidivist offenders, and will prevent the entrenchment of our young children in the youth justice and criminal justice systems.<sup>25</sup>

Not only does this evidence from QLS not support the Committee's assertion that raising the age of criminal responsibility may threaten community safety, it says the exact opposite. Ms Thompson's evidence explicitly acknowledges, in line with the evidence, that raising the age will reduce reoffending, prevent criminalisation of young people, and provide greater protection for the community.

Community safety is a concern, and is something that must be considered. Acknowledging this is a drastically different position from saying that community safety is threatened by the proposal to raise the age of criminal responsibility. To suggest that either Mr McDougall's or Ms Thompson's evidence supports the Committee's assertion made under 2.1.1.1 is disingenuous at best, and deliberately misleading at worst.

Rather than relying on my defense of their evidence against this misrepresentation, I would encourage both the QHRC and QLS to contact the Committee and seek to have the report corrected.

## **4. Opposition to the Bill is scarce, primarily from Police, and based on no credible evidence**

The Committee Report quite drastically and in my view dishonestly understates the level of support for the Bill's fundamental proposition, observing in s 1.5.2 that "the majority" of submissions support raising the age to at least 14.

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<sup>24</sup> Public hearing transcript, Brisbane, 14 February 2022, p 27.

<sup>25</sup> Public hearing transcript, Brisbane, 14 February 2022, p 53. (*Emphasis added*)

In fact, there were no written submissions that didn't support raising the minimum age of criminal responsibility to at least 14, until the Committee rallied the Queensland Police Union to appear at the public hearing - perhaps an attempt at bringing 'balance' to the hearing by introducing an organisation known to vocally oppose any change to the age of criminal responsibility.

Aside from the QPU, former Police Commissioner Bob Atkinson was the only witness to support raising the age to less than 14, taking the same position as in his 2019 report that the minimum age of criminal responsibility should be raised to only 12 years old.

#### **4.1. *Unreliability of the QPU's evidence***

QPU has a clear interest in maintaining or increasing police powers. Mr Leavers, who appeared as General President and CEO of the QPU, told the Committee he could not recall any occasion on which he or the QPU had ever advocated for a reduction in police powers.<sup>26</sup>

I have concerns about the reliability of Mr Leavers' evidence. His written statement was provided to the Committee only minutes before he appeared at the hearing, which left very little opportunity for scrutiny, but it nonetheless proved to contain a number of unsupported assertions. For example, the submission notes the irrefutable evidence that links early contact with the criminal justice system and recidivism, but goes on to claim that "On the other hand there, is not publicly available information that suggests children who have contact with non-youth justice interventions before the age of ten are successful." With all due respect, Mr Leavers simply mustn't be paying attention.

Mr Leavers was challenged on one such assertion - that "It is well documented in the media that organised criminals are using gangs to recruit young people into their organisations to groom them into a life of crime." This statement references a single article from 2014<sup>27</sup> that contained no information relevant to children under 14 and a single reference to one gang having "members as young as 16" - certainly nothing sufficient to substantiate the assertion that this phenomenon was "well documented in the media" or in any way relevant to raising the age to 14. When asked how the article supported his assertion that it was "well documented", Mr Leavers completely contradicted his statement, saying "Sadly, that is the article that is available. There is not a lot which is publicly available."

Mr Leavers' evidence in his written statement and in the hearing cannot both be true - one or the other is plainly incorrect. I remain concerned that Mr Leavers has since made no attempt to correct the record or provide any more documentary evidence to support that statement, despite indicating in the hearing that he would.

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<sup>26</sup> Public hearing transcript, Brisbane, 14 February 2022, p 16.

<sup>27</sup> Koubaridis, A (2014) "Australian feeder gangs 'flying under radar', expert warns" published online on 9 May 2014 at <https://www.news.com.au/national/australian-feeder-gangs-flying-under-radar-expert-warns/newsstory/c80a87968dd5f9977085db45f61b7c1e>

## 5. Conclusion

The time for this reform is long overdue. When considering the reluctance of this Committee and the Government to adopt a policy position and pursue law reform consistent with the evidence, it's instructive to consider what came before.

The minimum age of criminal responsibility has not always been 10. As difficult as this may be to accept today, Mr Atkinson reminded the Committee that when he joined the QPS in the 1970s, the age of criminal responsibility was 7 years old.

At some point in the future, when this reform is many years behind us, we will reflect on how inconceivable it is that children as young as 10 were once held criminally responsible for their actions and locked up as a result. We can only hope that this Government has the common sense and compassion to take these steps now, before any more young children are unnecessarily harmed.

A handwritten signature in black ink, appearing to read 'M Berkman', with a long horizontal flourish extending to the right.

Michael Berkman MP

Member for Maiwar