Human
Rights
Law
Centre

Raising the age in Queensland

A submission on the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*

November 2021

Prepared by Amala Ramarathinam and Adrianne Walters at the Human Rights Law Centre.

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

E: ruth.barson@hrlc.org.au
W: www.hrlc.org.au

Follow us at http://twitter.com/rightsagenda

Join us at www.facebook.com/HumanRightsLawCentreHRLC/

Contents

1. Summary **4**

2. Stop locking up children **4**

Neurologically, there can be no exceptions to raising the age 4

Exceptions are discouraged by International Human Rights law 4

Doli Inapax is an insufficient protection for children 5

3. Recommendations regarding the Bill **6**

Section 29 of the Criminal Code - a new age of criminal responsibility 6

Section 407 - Application of this Division 6

Section 408 - Ending proceedings and punishment 7

Section 409 - Release from watch-house 7

Section 410 - Ending Detention 7

Section 411 - Destruction of things collected by forensic procedures 8

Section 412 - Records of convictions and related actions 8

Setting a minimum age of detention 8

1. Summary

The minimum age of criminal responsibility in Queensland is just 10 years of age. This means that children as young as 10 are being arrested, charged with an offence, hauled before a court, locked away in detention and deprived of their liberty and ultimately their wellbeing.

No child belongs in prison. By investing in alternative programs, health and education services and support for children, we can build stronger and safer communities for us all.

The Human Rights Law Centre recommends that the minimum age of criminal responsibility should be raised to at least 14 years of age, with no exceptions.

The *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* (the **Bill**) was introduced in September 2021 to raise the age of criminal responsibility (**MACR**) from 10 to 14 years old in Queensland and ensure children under 14 years are released from prisons and watch houses.

The Human Rights Law Centre (**HRLC**) welcomes the purpose and intention of this Bill and thanks the Committee for the opportunity to provide this submission.

The HRLC supports the Bill but recommends the following amendments:

1. Proposed new section 407(1) of the *Youth Justice Act 1992* (**Youth Justice Act**) be amended to to clarify that it applies to a person who is alleged to have committed an offence when the person was under the age of 14 years;
2. In proposed new section 410(2)(b), amend '1 month' to '3 days' so children in detention must be released within 3 days after commencement of the Act;
3. 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; and
4. A new section be added that sets a minimum age of detention of 16 years, in recognition of the fact that locking children up in detention creates a vicious cycle of disadvantage and traps children in the quicksand of the criminal legal system.

2. Stop locking up children

The Human Rights Law Centre supports this Bill. We welcome provisions for the minimum age of criminal responsibility to be raised to 14 years of age in Queensland, with no 'carve outs' or exceptions for certain offences.

2.1 Neurologically, there can be no exceptions to raising the age

Children under the age of 14 years are undergoing significant growth and development, particularly in terms of neurocognitive development. For children this young, the areas of their brain responsible for executive functions including controlling impulses, judgement, planning and foreseeing the consequences of their actions will not have fully developed and will not be fully mature until they have reached their 20s.[1] Medical experts, child offending experts, psychologists and criminologists agree that children under the age of 14 years have not developed the social, emotional and intellectual maturity necessary for criminal responsibility.[2]

Accordingly, the minimum age should be consistent across all offences and no category of offending warrants any departure from this minimum age threshold for criminal responsibility. The prevailing neuroscientific consensus as to the still-developing ability of children to understand and discern right and wrong (especially in emotional circumstances, peer settings or where overlaid by complex needs) does not distinguish between particular crimes. Insofar as any exemptions to the MACR would limit the rights of

---

[1] Sentencing Advisory Council of Victoria, Sentencing Children and Young People in Victoria (2012), 11.

[2] Jesuit Social Services, Too much too young: Raise the age of criminal responsibility to 12 (October 2015), 4.

children and their right to liberty, such exemptions are not rationally connected to the protection of the community by deterring that child or others in future.[3]

2.2 Exceptions are discouraged by international human rights law

The median age of criminal responsibility worldwide is 14 years old. The UN Committee on the Convention of the Rights of the Child (**UNCRC**) has confirmed that countries like Australia should set a minimum age no lower than 14 years and that laws should ensure children under 16 years may not be legally deprived of their liberty.[4]

As such, the UNCRC has expressed concern about exempting certain offences from the MACR and, in General Comment 24, strongly recommends that State parties set a MACR that does not allow, by way of exception, the use of a lower age.[5] In this vein, exemptions to the MACR for specific offences are rare among other countries, with exemptions legislated only in New Zealand and Ireland (at 12 years), Hungary (at 14 years) and Belgium (at 18 years).[6] These exceptions have been criticised because they "bring children into an arena where there exists a great potential for them to be given harsher punishment, without inquiry into any circumstances," aligning principally with the aim of retribution.[7]

In 2019, the UN Committee again called on the Australian Government to raise the age of criminal responsibility and recommended that the age be set no lower than 14 years.[8] Most recently at Australia's third Universal Periodic Review, 30 countries including Sweden, Norway, Chile and Canada, recommended that Australia raise the age of criminal responsibility to at least 14 years.

Raising the age to just 12 or including any exceptions to a minimum threshold age of criminal responsibility, would put Queensland out of step with global standards.

2.3 Doli Incapax is an insufficient protection for children

When a child is over the age of 10 but under 14, there is an old, common law presumption that the child lacks the capacity to be criminally responsible for their actions, known as doli incapax (incapable of crime). Unlike in other jurisdictions, in Queensland the presumption has been codified and is contained in s 29(2) of the *Criminal Code 2002* (ACT) (**Criminal Code**). Section 29 theoretically creates the presumption that children aged 10-13 are unable to form criminal intent.

However the 2018 Report on Youth Justice prepared by Bob Atkinson AO, APM notes that this presumption is rebuttable and is "rarely a barrier to prosecution".[9]

The UNCRC and the Australian Law Reform Commission (**ALRC**) have both criticised doli incapax for its failure to protect children as it is intended because of its confusing and inconsistent application.[10]

The ALRC noted that:

> *Doli incapax can be problematic for a number of reasons. For example, 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.*[11]

---

[3] ACT Human Rights Commission, S*ubmission to Council of Attorneys-General review on age of criminal responsibility* (200), 3.
[4] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
[5] Ibid, General Comment 24, [35].
[6] John Muncie, *Youth and Crime* (Sage Publications, 2nd ed, 2004) 251.
[7] Francine Chye, 'When children kill: the age of criminal responsibility and criminal procedure in New Zealand' (2012) 8 New Zealand Law Students Journal, quoting David Matza, Delinquency and Drift (Wiley, New York, 1964).
[8] Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Australia, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [47-48].
[9] Atkinson, B. (2018). Report on Youth Justice
[10] United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,* CRC/C/AUS/CO/5-6 (30 September 2019) 13.
[11] Australian Law Reform Commission, Seen and Heard: Priority for Children in the Legal Process, Report 84 (1997) [18.19].

The UNCRC has also expressed concern as to inconsistency in the operation and discrimination in the application of such a system. It stated that:

> *Initially devised as a protective system, it has not proved so in practice. Although there is some support for the idea of individualized assessment of criminal responsibility, the Committee has observed that this leaves much to the discretion of the court and results in discriminatory practices.*[12]

In the rare cases where doli incapax is asserted by a child aged 10-13, a trial or summary hearing must be held for the court to determine conclusively whether a child was doli incapax at the time of the offence. The trial to determine capacity and guilt could take months or longer depending on court lists, case management processes and the availability of experts and other witnesses relevant to proof of knowledge and maturity. In the meantime, 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. 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. These by-products of early criminal legal contact for a young child can lead to victimisation (by adults and other children), stigmatisation and negative peer contagion.[13]

Doli incapax fails to safeguard children aged 10 to 13 years, is applied inconsistently and results in discriminatory practices.

3. Recommendations regarding the Bill

3.1 Section 29 of the Criminal Code - a new age of criminal responsibility

The HRLC welcomes the proposed amendments to section 29 of the Criminal Code to raise the age of criminal responsibility from 10 to 14 years and repeal the codified presumption of doli incapax.

3.2 Section 407 - Application of this Division

The HRLC welcomes the scope of the Bill, which seeks to apply to all children and persons who were alleged to have committed an offence whilst under the age of 14.

However we are concerned that the current wording of proposed new section 407(1) may not make it apparent that new Division 20 of the Youth Justice Act is intended to apply to children or people who have not actually committed, but are alleged to have committed, an offence when they were under 14 years of age.

Regarding this issue, the Explanatory Notes for the Bill states:

> *"This Division [20] refers to an offence which was "committed", it also applies to a person who is alleged to have committed an offence while under the age of 14 years old, before the commencement of the Bill. This is because, in use as a condition precedent in legislation, a person has committed an offence if they have engaged in the conduct that constitutes the offences, whether or not the person was charged or convicted for the offence."*[14]

In its current form, section 407(1) could be interpreted as not applying to a child or person who in fact "did not commit an offence" because they did not engage in the conduct that constitutes an offence, or are contesting charges alleged to have been committed when they were under the age of 14. There is a risk that new Division 20 could be interpreted to only apply in instances where a child or person has committed the conduct constituting an offence, has admitted guilt or been found guilty of committing an offence.

---

[12] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019), [26].
[13] Kelly Richards, Australian Institute of Criminology, Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders? (2011), 7.
[14] *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*, Explanatory Notes, page 15-16, retrieved 30.11.21 at https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/2021/5721T1399.pdf

For clarity and the avoidance of doubt, we recommend amending section 407. Section 407(1) could be amended to read:

> "(1) This division applies to a person who, before the commencement, committed *or was alleged to have committed an offence* when the person was under the age of 14 years."

Alternatively, an additional sub-section could be added under section 407(4) which reads:

> "*(5) To remove any doubt, this division applies to a person who was alleged to have committed an offence when the person was under the age of 14 years*."

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;
- 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.

In order for this Division to have the application and scope that is intended, we recommend amending section 407.

3.3 Section 408 - Ending proceedings and punishment

We welcome the inclusion of a list in proposed new section 408(2) of the Youth Justice Act that specifies which proceedings, police and court orders and alternative actions will cease on commencement of the Act.

Whilst it should rationally follow that once the age is raised, that criminal proceedings against a child and associated orders would end, we consider there is a need for specificity due to the likelihood of administrative errors in ceasing certain types of orders, such as bail orders. It is not uncommon for police and court systems to record the continuation of bail orders even when the originating offence no longer exists, and for children to be arrested for breaching bail orders that may remain recorded in the police system. Confirming the end of certain proceedings, orders and associated actions in legislation is a necessary protection for children caught in the criminal legal system.

3.4 Section 409 - Release from watch-house

HRLC considers the wording of proposed new section 409 of the Youth Justice Act as sufficient to achieve its intended purpose. It is 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. These enquiries should be conducted in a timely and efficient manner without any delay to ensure that children are released as quickly as possible. However 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, so the 3 day limit in section 409(2)(b) is appropriate.

3.5 Section 410 - Ending detention

Proposed new section 410 intends to provide a framework for the safe and timely release of children in detention, who are being held on remand or pursuant to detention orders for offences committed under 14 years of age.

We recommend amending proposed new section 410(2)(b) to a 3 day limit, instead of a 1 month limit as currently drafted. Consistent with the reasoning above, the maximum amount of time a child can be held in prisons before being released should be consistent throughout the Bill.

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.

There is only a small cohort of children under 14 years who are serving a sentence of detention solely for an offence committed while they were under 14. If this Bill is passed, and prior to it's commencement, it is reasonable to expect that Youth Justice are able to do pre-emptive work to identify the small number of children serving sentences of detention to whom section 410 will apply. For such a small cohort of children, the enquiries envisioned in section 410(3) regarding a child's welfare should be conducted before the commencement of the Act.

As above, the lack of timely enquiries or the absence of certain supports should not be a barrier to the release of children who should never have been locked up in the first place.

3.6 Section 411 - Destruction of things collected by forensic procedures

The HRLC agrees with the scope and purpose of proposed new section 411 as drafted. The destruction of DNA and identifying particulars is 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.

3.7 Section 412 - Records of convictions and related actions

The intention of this section to expunge convictions and findings of guilt for offences committed under the age of 14, is welcomed. Part of raising the age of criminal responsibility must also be ensuring that childrens' future prospects are not adversely affected by the recording of offending or related conduct that may have occurred when under the age of 14 years.

We recommend amending proposed new section 412 to ensure that other relevant records are removed from criminal records and bail reports. Specifically, provisions should be included in the Bill requiring the removal of any entries relating to offences alleged to have occurred when a person was under 14 that were subsequently withdrawn, that diversionary processes may have applied to, or for which there was a finding of "not guilty".

Additionally, if police or prosecution services in Queensland produce a "bail report" for the purposes of a bail hearing, then provisions should be included to remove any reference to bail orders a person may have been subject to for offences committed while they were under the age of 14. This includes references to breaches of bail, bail orders or bail conditions. 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.

3.8 Setting a minimum age of detention

Locking children up in detention creates a vicious cycle of disadvantage and traps children in the quicksand of the criminal justice system. The UNCRC has stated that laws should be changed to ensure that children under the age of 16 years are not deprived of their liberty.

When a child is incarcerated, they are removed from their home, family and other social supports. According to the Royal Australian and New Zealand College of Psychiatrists submission to the Northern Territory Royal Commission, the loss of liberty, personal identity and protective factors that may have been available in the community can place great stress on a child, impair adolescent development and compound mental illness and trauma.[15] In these circumstances, children in detention are particularly susceptible to victimisation (by adults and other children), stigmatisation by the criminal legal system and negative peer contagion.[16]

We recommend adding provisions in the Bill to set a minimum age of detention of 16 years old. This should be implemented alongside building up and creating programs, interventions and supports that focus on supporting rather than punishing children.

---

[15] Royal Australian and New Zealand College of Psychiatrists submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017). Victorian Government, Justice and Community Safety, Peggy Armytage and Professor James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending*, (July 2017), 51.
[16] Kelly Richards, Australian Institute of Criminology, Trends & issues in crime and criminal justice No.409, What makes juvenile offenders different from adult offenders? (2011), 7.