

24 April 2020

Our ref: LP-MC

Hon Yvette D'Ath  
Attorney-General and Minister for Justice  
Leader of the House  
GPO Box 149  
BRISBANE QLD 4001

By email: [REDACTED]

Dear Attorney-General

**Raising the minimum age of criminal responsibility**

We are aware that the Council of Attorneys-General Age of Criminal Responsibility Working Group is reviewing the minimum age of criminal responsibility.

This response has been compiled by members of the QLS' First Nations Legal Policy, Children's Law, Human Rights and Public Law and Criminal Law Committees whose members have substantial expertise in this area.

The Society strongly supports raising the minimum age of criminal responsibility to at least 14 years.

**1. Other stakeholders**

Key stakeholders have called for an increase to the minimum age of criminal responsibility. The stakeholder's views are cogent, evidence based and take into account the medical, behavioural, social and rights-based approaches to dealing with children and young people in the youth justice system. We refer in particular, to the published views of the following bodies:

- Anglicare Southern Queensland;<sup>1</sup>
- Australian Human Rights Commission;<sup>2</sup>
- Australian Medical Association;<sup>3</sup>
- Human Rights Law Centre;<sup>4</sup>

<sup>1</sup> <https://anglicaresq.org.au/news/new-youth-justice-department-must-raise-minimum-age-of-criminal-responsibility/>

<sup>2</sup> <https://www.humanrights.gov.au/about/news/raising-age-criminal-responsibility>

<sup>3</sup> <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>

<sup>4</sup> [https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age#\\_ftn2](https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age#_ftn2)

- National Children's Commissioner;
- NSW Advocate for Children and Young People;<sup>5</sup>
- Queensland Family and Child Commission;<sup>6</sup>
- Royal Australian and New Zealand College of Psychiatrists.<sup>7</sup>

All of the various publications, submissions and media statements have expressed strong support for increasing the minimum age of criminal responsibility.

## **2. The prevalence of neurodevelopmental disorders amongst youth offenders**

There is a significant body of research documenting links between incarceration and mental health. This has been reiterated by a recent submission made by the Royal Australian & New Zealand College of Psychiatrists. Young people within the justice system have higher rates of mental health disorders and cognitive disabilities when compared with general youth populations. These conditions are exacerbated by exposure to youth detention and incarceration with increased risks of suicidality, depression, substance use and other behavioural disorders.

Research into the prevalence of foetal alcohol spectrum disorder (FASD) amongst young people in detention in Western Australia found that 36% of the 99 young people aged 13-17 were diagnosed with FASD. The report states, "This is the highest reported prevalence of FASD in a youth justice setting worldwide" (the Western Australian study).<sup>8</sup>

People with disabilities (cognitive and/or psychosocial) are overrepresented in the justice system and particularly in the prison population. The Western Australian study identified that 89% of the 99 youths in detention assessed, were severely impaired in at least one area of functioning.<sup>9</sup> Understanding the impact of these conditions on offending (and re-offending) and the importance of early assessment, diagnosis and treatment is an essential aspect of this Review.

It is imperative upon governments to ensure that all children who encounter the criminal justice system are adequately supported and that opportunities for diversion, early intervention and diagnosis are not missed. Where Aboriginal and Torres Strait Islander children encounter the justice system, regard must also be given to the intersection of disability and cultural factors.

Positive and preventative justice reforms should also be considered, for example ensuring that the NDIS is appropriately resourced and staffed to deliver services in

<sup>5</sup> <https://cdn2.hubspot.net/hubfs/522228/docs/ACYP-Juvenile-justice-report-2019.pdf>

<sup>6</sup> Queensland Family and Child Commission report, "The age of criminal responsibility in Queensland" <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/policy/minimum-age-criminal-responsibility.pdf>

<sup>7</sup> The Royal Australian and New Zealand College of Psychiatrists in their submission on the Youth Justice and other Legislation Amendment Bill 2019 stated, "the RANZCP QLD Branch believes that serious consideration should be given to raising the age of criminal responsibility to at least 14 years."

<https://www.parliament.qld.gov.au/documents/committees/LACSC/2019/YouthJustice2019/submissions/004.pdf>

<sup>8</sup> Bower C, Watkins RE, Mutch RC, *et al*

Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia *BMJ Open* 2018;8:e019605. doi: 10.1136/bmjopen-2017-019605 at Page 7.

<sup>9</sup> <https://theconversation.com/almost-every-young-person-in-wa-detention-has-a-severe-brain-impairment-90695>



regional and remote regions. Access to services is an essential element to improving longer term outcomes for communities. Notably, the Western Australian study reported that their research was the first time that many of the young people had received a comprehensive assessment.

Whole of government approaches including Departments of Health and Youth Justice Services must collaborate to ensure that the diagnosis of young people can occur at the earliest of opportunities to support rehabilitation and reduce recidivism. Schedule 1 to the *Youth Justice Act 1992 (Qld)* (YJA) also sets out the Charter of youth justice principles in Queensland which includes that “the youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing”.

### **3. Institutional discrimination against Aboriginal and Torres Strait Islander young people**

It is widely understood that Aboriginal and Torres Strait Islander people are overrepresented in the justice system, the same can unfortunately be said with regard to young people. The Society, as the peak legal body for Queensland is committed to reducing the high rates of Aboriginal and Torres Strait Islander men, women and children in jails and considers that increasing of the age of criminal responsibility, is an important step in this regard.

The United Nations Committee on the Rights of the Child highlighted in their November 2019 report titled ‘Concluding observations on the combined fifth and sixth periodic reports of Australia’, serious concerns about the very low age of criminal responsibility and the “enduring overrepresentation of Aboriginal and Torres Strait Islander children and their parents and carers in the justice system”<sup>10</sup>. The Committee recommended immediate implementation of the 2018 recommendations of the Australian Law Reform Commission to reduce the high rate of incarceration among Aboriginal and Torres Strait Islander peoples.

According to the Department of Child Safety, Youth and Women, 72% of young people in detention in Queensland identified as Aboriginal or Torres Strait Islander. The Western Australian study identifies the prevalence of FASD in Aboriginal and Torres Strait Islander youth and importantly, also acknowledges the role of colonial policies in contributing to the high rates of Aboriginal and Torres Strait Islander youth incarceration.<sup>11</sup>

The recent release of the Closing the Gap Report 2020 is a significant and timely reminder that urgent change is needed. Policy approaches must be premised and developed in accordance with the principles of self-determination.

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<sup>10</sup>[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f5-6&Lang=en) at Page 14.

<sup>11</sup> Bower C, Watkins RE, Mutch RC, *et al*

Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia *BMJ Open* 2018;8:e019605. doi: 10.1136/bmjopen-2017-019605 at Page 7.



QLS has previously provided submissions to the Australian Law Reform Commission in response to the issue of "Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84)" which called for:

- Initiatives that align with community cultural connectedness and which present opportunities for community outcomes to be implemented and resourced adequately.
- The need for culturally appropriate options to be available for recommendation to the court by legal practitioners and support workers.
- Authority and remit to be placed with key Aboriginal and Torres Strait Islander leaders and Elders in all relevant communities to set up and facilitate cultural healing approaches and for these approaches to be resourced sufficiently and adequately by allied health services.
- Implement programs to build awareness and knowledge for culturally responsive, culturally safe and culturally competent understandings designed, developed and delivered by Aboriginal and Torres Strait Islander people and professionals.
- Increase in programs including holistic healing and cultural practices to encourage returning to country initiatives for offenders as part of diversionary, preventative and rehabilitative measures for Aboriginal and Torres Strait Islander men, women and especially children.
- Increase in the provision of language and communication supports including interpreters for Aboriginal and Torres Strait Islander people to ensure the demand is met adequately to enable equitable representations.

We support the recommendations made in the Change the Record Blueprint for Change including Principle 10 that "Young people don't belong in prison"<sup>12</sup> and in particular, *"all appropriate supports are provided to enable Aboriginal and Torres Strait Islander children and young people to succeed at school. This should include the provision of restorative justice initiatives and healing programmes within school to enable the early resolution of issues"*. QLS also acknowledges the steps being taken to promote an Aboriginal and Torres Strait Islander led education system.

#### **4. Detention as a last resort**

Young people occupy a vulnerable place in our society. They are still undergoing important brain development, and both behavioural psychology and neuroscience attests that adolescents are less able to control their impulses, plan ahead, and weigh the consequences of their decisions before acting.<sup>13</sup> This, in addition to their susceptibility to peer influence, means that young people are attracted to novel and risky activities and may become involved in criminal behaviour.<sup>14</sup> However, the impressionability of young people also means that they are receptive to positive

<sup>12</sup> <https://drive.google.com/file/d/0B3OI0caEOuaFU3BNc3Zrbl9wa0U/view>

<sup>13</sup> Richard J Bonnie and Elizabeth S Scott, 'The Teenage Brain: Adolescent Brain Research and the Law.' 2013 (22) *Current Directions in Psychological Science* 158, 159

<sup>14</sup> Ibid; Kelly Richards. "What makes juvenile offenders different from adult offenders?" 2011 (409) Australian Institute of Criminology. *Trends and Issues in Crime and Criminal Justice*. 4.



interventions and can be guided to a better path. Diverting young people from formal court processes and from prison environments is most important.

The principle of detention as a last resort is a fundamental principle of juvenile justice and is contained in numerous instruments of international law. The *United Nations Convention on the Rights of the Child 1989* ("the CRC") states that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."<sup>15</sup> Similarly, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* ("The Beijing Rules") state that "[t]he placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."<sup>16</sup>

The Queensland Productivity Commission's Inquiry into Imprisonment and Recidivism final report was publicly released on 31 January 2020<sup>17</sup> (**the PC Report**). The PC Report emphasised the causal factors behind offending such as "cognitive impairments, mental health issues, exposure to trauma and childhood maltreatment"<sup>18</sup> and the essential role of targeting prevention and early intervention to achieve long term outcomes in reducing prison populations. This necessarily requires the prioritising of investment in "community-led prevention and early intervention in communities" with justice reinvestment projects to assist in crime reduction and prevention through early intervention.<sup>19</sup>

The PC Report identified that diversionary programs continue to be underutilised for low harm or minor offences – with long terms impacts including escalation of interactions with the criminal justice system.<sup>20</sup> Multiple reports continue to emphasise the importance of therapeutic and restorative justice approaches in the youth justice system at the earliest stage and the Society has long advocated for the paramountcy of detention orders for children as a last resort. This principle is also legislatively endorsed in the Queensland YJA which states in Schedule 1 that:

*A child should be dealt with under this Act in a way that allows the child—*

*(a) to be reintegrated into the community; and*

*(b) to continue the child's education, training or employment without interruption or disturbance, if practicable; and*

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<sup>15</sup> Article 37(b).

<sup>16</sup> Rule 19.

<sup>17</sup> <https://www.qpc.qld.gov.au/inquiries/imprisonment/>

<sup>18</sup> Queensland Productivity Commission, Inquiry into imprisonment and recidivism, Summary Report to Final Report Imprisonment at page 30 <https://qpc.blob.core.windows.net/wordpress/2020/01/SUMMARY-REPORT-Imprisonment-.pdf>.

<sup>19</sup> Queensland Productivity Commission, Inquiry into imprisonment and recidivism, Summary Report to Final Report Imprisonment at page 30 <https://qpc.blob.core.windows.net/wordpress/2020/01/SUMMARY-REPORT-Imprisonment-.pdf>

<sup>20</sup> Queensland Productivity Commission, Inquiry into imprisonment and recidivism, Summary Report to Final Report Imprisonment at page 32 <https://qpc.blob.core.windows.net/wordpress/2020/01/SUMMARY-REPORT-Imprisonment-.pdf>



*(c) to continue to reside in the child's home, if practicable.*

Where the research is clear that a period of detention can be harmful to children (and adults), a whole of government approach is essential to ensuring that evidence-based polices support communities and education and health service providers to improve outcomes for at-risk children and their families. Increasing the minimum age to at least 14 years, will also mean children are less entrenched into the criminal system, particularly where only minor offences have been committed.

## **5. Children from child protection backgrounds and the criminal justice system**

Consideration should also be given to the contribution of child protection in children's outcomes and their subsequent interaction with the criminal justice system. It is well known that there is an over-representation of children from the child protection system within the youth justice system.

The Australian Institute of Criminology in their report of December 2019<sup>21</sup> highlight the importance of preventing, diverting and responding to the "crossover" children's contact with the criminal justice system. Children within the child protection system must be adequately supported in circumstances where they have been found at most risk of serious offending.

Children in child protection settings should not be criminalised to divert social responsibility for welfare and other support responses. We strongly support measures to decriminalise children in residential care facilities, particularly when subjected to minor offences which would not be criminalised in a home setting. For example, children being charged with wilful damage or property offences for breaking crockery in residential care facilities.

## **6. Human Rights Act 2019 (Qld) (HRA)**

The Society notes that the Queensland Parliament recently passed the *HRA*. This legislation protects the rights of children and young people. Section 32(3) of the *HRA* states that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. The *HRA* further provides in, section 33(3), that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age. These rights are to be read in conjunction with other rights protected by the *HRA*, including the protection of children in their best interests and without discrimination (section 26), cultural rights generally (section 27) and the particular cultural rights of Aboriginal and Torres Strait Islander peoples which include the rights to enjoy and maintain kinship ties, relationship with land and to not be subjected to forced assimilation (section 28).

For a long time, international human rights law has also promoted the establishment of separate juvenile justice systems which treats young offenders differently to adult offenders. The United Nations Committee on the Rights of the Child in its commentary

<sup>21</sup> <https://aic.gov.au/publications/tandi/tandi582>



on the *Convention on the Rights of the Child* has noted that “the protection of the best interests of the child means ... that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”<sup>22</sup>

In our view, in conjunction with the medical scholarship on the issue, the detention of children and young people under 14-years of age does not take into account the mental, physical and emotional needs of a child of that age.

Early intervention and diversionary programs as an alternative to incarceration improve a child's life trajectory including their physical and mental health, and education and employment helps to reduce their level of social and economic disadvantage.

Raising the age of criminal responsibility would allow the government to ensure compliance with the *HRA* and allow the opportunity for the government to implement more community-based programs to support disadvantaged young people in Queensland as an alternative to punitive forms of justice.

## **7. Alignment with international legal standards**

There are several international human rights instruments that support raising the minimum age of criminal responsibility, including the:

- Convention on the Rights of the Child;
- International Convention on the Elimination of All Forms of Racial Discrimination; and
- Declaration on the Rights of Indigenous Peoples.

All Australian States and Territories have enshrined the minimum age of criminal responsibility as age 10. Such a low age does not accord with international human rights standards. In fact, the median age for most international jurisdictions is 14 years of age.<sup>23</sup>

The United Nations Committee on the Rights of the Child has maintained that States should be working towards a minimum age of 14 years or older.<sup>24</sup> Australia has received repeated criticism by the United Nations for a failure to reform the minimum age of criminal responsibility.

The Committee on the Rights of the Child in their concluding observations on the combined fifth and sixth periodic reports of Australia stated:

*The Committee again regrets that its previous recommendations have not been implemented and remains seriously concerned about:*

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<sup>22</sup> Committee on the Rights of the Child, “General Comment No 10: Children's rights in juvenile justice.” Forty-fourth session, Geneva, 15 January-2 February 2007, paragraph 10.

<sup>23</sup> Australian Human Rights Commission, National Children's Commissioner, Children's Rights Report 2016, 187.

<sup>24</sup> Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, 44th sess, UN Doc CRC/C/ GC/10 (25 April 2007), paras 32–33.

(a) *The very low age of criminal responsibility*<sup>25</sup>

The Committee on the Elimination of Racial Discrimination in its concluding observations on the eighteenth to twentieth periodic reports of Australia raised concerns with the high proportion of indigenous children interacting with the criminal justice system. Among other recommendations, they recommended raising the minimum age of criminal liability.

Children occupy a very vulnerable space in our society. They are often voiceless, and even invisible, when arguments are fought over them. In our view, the inappropriate incarceration of children and young people should be addressed as a matter of priority. To this end, the society believes that the age of criminal responsibility must be increased to at least 14 years.

We have written in similar terms to the Shadow Attorney-General.

Yours faithfully

  
**Luke Murphy**  
**President**

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<sup>25</sup> Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Australia, Recommendation 47.