

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

Statement of Compatibility

Prepared in accordance with Part 3 of the Human Rights Act 2019

In accordance with section 38 of the Human Rights Act 2019, I, Michael Berkman, Member for Maiwar, make this statement of compatibility with respect to the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (the Bill)*.

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019 (HR Act)*. I base my opinion on the reasons outlined in this statement. It limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.

Overview of the Bill

The Bill seeks to amend the Criminal Code and the *Youth Justice Act 1992* to ensure children under 14 years of age are not incarcerated or otherwise punished under the criminal legal system in Queensland.

The Bill amends Section 29 of the Criminal Code ('Immature age') to raise the minimum age at which a person is criminally responsible for any act or omission from 10 to 14 years old. It also amends *Youth Justice Act 1992* to:

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

- Expunge the criminal history (including the record of convictions or finding of guilt with no conviction recorded) and other relevant records of any child who had a finding of guilt against them prior to commencement in relation to an offence committed when they were under the age of 14.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 Human Rights Act 2019)

The Bill is almost exclusively relevant to the human rights of the 10 to 13 year old children who would no longer be held criminally responsible for their actions if the Bill is enacted.

The Bill removes existing unreasonable and unjustified limitations on the human rights of 10 to 13 year old children that exist as a result of the minimum age of criminal responsibility currently being set at 10.

The Bill would enhance rather than limit the rights of 10 to 13 year old children in respect of each of the below human rights under the HR Act:

- The protection of families and children (s26)
- Cultural rights of Aboriginal peoples and Torres Strait Islander peoples (s28)
- Children's rights in criminal proceedings (s32(3)) and children in the criminal process (s33)
- Right to life (s16)
- Right to Privacy (s25)
- Recognition and equality before the law (s15)

In my opinion, the Bill does not limit any human rights under the HR Act aside from to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act. It is acknowledged that the following rights are engaged by the Bill:

- Property rights (s24(2))
- Right to privacy (s25)
- Right to security of person (s29(1))

These rights may be limited for victims of problematic behaviour by young people aged 10 to 13. This limitation is created by the core purpose of the Bill which is ensuring that children aged 10 to 13 are not subjected to the criminal legal system and are instead supported as part of a better approach to youth justice involving the widespread implementation of an alternative model for children who display problematic behaviour.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 Human Rights Act 2019)

(a) the nature of the right

The right of a person not to be arbitrarily deprived of their property (s(24(2))) is protected by the HR Act and by civil and criminal law in Queensland. The Bill would not explicitly limit or directly interfere with property rights.

Any person wrongfully deprived of their property by a young person aged 10 to 13 would still be able to seek the return of that property under the law, and their rights of ownership over it would not be modified by the Bill's reforms to the age of criminal responsibility.

The right of a person not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered (s25(a)) is protected by the HR Act. The Bill would not explicitly limit or directly interfere with this right.

The right to security of person (s29(1)) is protected by the HR Act. The Bill would not explicitly limit or directly interfere with this right.

While the above rights (property, privacy and security of person) are not explicitly limited or directly interfered with by the Bill, clause 3 of the Bill (Replacement of Criminal Code s29 (Immature age)) does withdraw criminal sanction against children aged 10 to 13 who may interfere with the above rights. Similarly, the transitional provisions in clause 5 would effectively annul any criminal charges, convictions, and consequential sanctions and records in relation to the conduct of 10 to 13 year old children before commencement. Any limitation on the above rights created by this withdrawal of criminal sanction is minor.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purposes of the limitation, if any, imposed on human rights, as elaborated further in sections (c) and (e) below, are to:

- Protect and enhance the human rights of children aged 10 to 13; and
- Improve community safety by reducing the occurrence of problematic behaviour by children aged 10 to 13 and by reducing the rate of reoffending as those young people grow up.

It is considered that these are proper purposes.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The purpose of protecting and enhancing the human rights of children aged 10 to 13 will be achieved by removing those children from the criminal legal system, thus eliminating the practice of imprisoning them in detention centres and adult police watch-houses.

The purpose of improving community safety will be achieved by increasing the age of criminal responsibility, because this will delay the point at which a child can become involved with the criminal legal system or spend time in detention, support their wellbeing¹ and reduce their likelihood of reoffending.²

Community members who are affected by harmful behaviour of children aged 10 to 13 should also continue to have access to the same support as current victims of crime, including restorative justice mechanisms, assistance with recovery, financial support via Victim Assist Queensland and access to de-identified information regarding the steps taken in relation to the child in response to their harmful behaviour.

Governments have sought to protect the rights of community members who are affected by harmful behaviour of children aged 10 to 13 by using police, the criminal law and the carceral system of prisons and youth detention facilities.

The evidence in Queensland is that, for children aged 10 to 13, these means are not effective at preventing reoffending, and ultimately increase the likelihood of a child committing more serious offences in the future. Police, the criminal law and prisons have also had serious impacts upon the rights and wellbeing of young people subject to the criminal legal system.

This Bill underpins an alternative approach to protect the rights of community members affected by problematic behaviour, which is based on strong evidence and a strong commitment to human rights.

Importantly, this Bill to raise the minimum age of criminal responsibility would be only one part of a better approach to youth justice, and must be accompanied by the widespread implementation of an alternative model for young people aged 10-13 who display problematic behaviour. This is consistent with several of the recommended immediate actions in the Atkinson Report, including:

- supporting coordinated, multi-government agency approaches to high-risk children and families;
- improving service availability at times of need (including night-time and weekends);
- a focus on school and training attendance;
- increased options for diversion from prosecution and detention; and

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

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

- increased options for children to remain in the community rather than be remanded in custody.³

As the Northern Territory Royal Commission stated:

The reality of this cohort's developmental status; the harsh consequences of separation of younger children from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth detention can interrupt the normal pattern of 'aging out' of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism.⁴

Similarly, the Atkinson Report stated:

For children, even a short episode of remand has been associated with future remand episodes. The seriousness and numbers of charges also tended to escalate following the first remand episode, presumably in part due to the criminogenic nature of custody. This is consistent with research from the Pathways to Desistance studies in the United States that found that for some youth incarceration may actually raise the level of offending.⁵

Research suggests that diverting more children away from the criminal legal system and providing support to address their individual needs will mean these children are less likely to continue to engage in criminal behaviours throughout their lifetime.⁶ Ensuring children under 14 are not placed in detention will also improve their likelihood of finishing school, tertiary education and other training, and their chances of securing a job.⁷ While the current age of criminal responsibility may temporarily limit some immediate risks to the community while some children are in detention, diversion, particularly for children under 14, is likely to be far more effective in improving community safety.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no reasonably available ways to achieve the purpose of the Bill which are less restrictive on human rights.

³ Atkinson, B. (2018). [Report on Youth Justice](#).

⁴ Northern Territory (2017). [Royal Commission into the Protection and Detention of Children in the Northern Territory. Final Report](#).

⁵ Atkinson, B. (2018). [Report on Youth Justice](#).

⁶ Allard, T. et al. (2010). *Police diversion of young offenders and Indigenous over-representation*. Trends & issues in crime and criminal justice, no.390

⁷ Qld Family and Child Commission (2017). [The Age of Criminal Responsibility in Queensland](#).

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Any minor limitation on the rights of community members affected by problematic behaviour to property, privacy and security of person (as identified in section (a) above) must be weighed against the absolute importance of the purposes of the Bill which are to:

- Protect and enhance the human rights of children aged 10 to 13; and
- Improve community safety by reducing the rate of problematic behaviour by children aged 10 to 13 and by reducing the rate of reoffending as those young people grow up.

The Bill would protect and enhance the rights of 10 to 13 year old children in respect of each of the below human rights under the HR Act.

Protection of Families and Children (s26)

The HR Act provides that every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.

Criminal sanctions are clearly not in the best interests of any child, and removing the legal basis for incarceration and criminalisation of children will protect these children from harm.

The evidence referred to above and in the explanatory notes for the Bill make clear that incarceration and exposure to the criminal legal system are harmful to children and increase recidivism. The criminogenic effects of the criminal justice system on very young children diminish their chances of rehabilitating, reintegrating and making a positive contribution to the broader society as adults.⁸

This right recognises the special protection that must be afforded to children based on their particular vulnerability. Where children and young people have ongoing contact with the legal system, this is largely linked to environmental and social factors, and recognised disadvantage and vulnerabilities, such as family dysfunction, abuse, neglect, exposure to violence, socio-economic disadvantage, mental health issues and intellectual disability. Incarceration and criminalisation of children aged 10-13 compounds this vulnerability and denies them the protection it demands.

Early contact with the criminal justice system leads to negative long-term health outcomes, and the Australian Medical Association has stated that the effects of youth detention in particular "contribute to, and exacerbate, the poor health of Aboriginal and Torres Strait

⁸ Qld Family and Child Commission (2017). [*The Age of Criminal Responsibility in Queensland*](#).

Islander peoples”.⁹ Youth detention and incarceration is associated with higher risks of psychiatric disorders, depression, substance use, and suicide.¹⁰

Current statistics indicate systemic discrimination in our existing criminal legal system against Indigenous children,¹¹ children with a substance misuse disorder, FASD¹² or intellectual disability,¹³ children with a mental health or behavioural disorder, children living with poverty and homelessness,¹⁴ and children in contact with the child protection system.¹⁵ Early contact with police and detention compounds existing social inequalities; by raising the age of criminal responsibility and eliminating a substantial amount of that early contact, this Bill will afford greater equality of protection and opportunity to all children.

The HR Act also recognises that families are the fundamental group unit of society and are entitled to be protected by society and the State.

Importantly, given the disproportionate representation of Indigenous children in the criminal legal system, ‘family’ in this context is understood broadly and extends to different cultural understandings of family, such as the kinship structures that connect Indigenous children to their broader community.

The Bill will protect and act in the best interests of children and families by allowing children under 14 who display problematic behaviours to be diverted from the criminal justice system and into tailored, culturally appropriate therapeutic programs in family and community environments. Such programs are more likely to address, and not aggravate, the underlying causes of their behaviours, and result in better long-term health and social outcomes both for the child, their family and the community. While the current age of criminal responsibility may temporarily limit risks to the community while some children are in detention, diversion,

⁹ Australian Medical Association (2012) “The justice system and public health”, available at <https://ama.com.au/position-statement/health-and-criminal-justice-system-2012>.

¹⁰ Holman, B. & Ziedenberg, J. (2006) *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, Washington DC.

¹¹ Qld Family and Child Commission (2021) [Changing the Sentence: Overseeing Queensland’s youth justice reforms](#); Little, S., Allard, T., Chrzanowski, A & Stewart, A (2011). [Diverting young Indigenous people from the Queensland Youth Justice System: The use and impact of police diversionary practices and alternatives for reducing Indigenous over-representation](#). ; Australian Institute of Health and Welfare (2021). [Queensland Fact Sheet](#). Youth justice in Australia 2019-20.

¹² Bower C, Watkins RE, Mutch RC, et al. (2018) [Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia](#).

¹³ Hughes W. et al. (2012). [Nobody Made the Connection: Neurodisability in the youth justice system](#).

¹⁴ The State of Queensland (Department of Youth Justice) 2019. [Working Together. Changing the Story: 2019-2021 Youth Justice Strategy](#)

¹⁵ Atkinson, B. (2018). [Report on Youth Justice](#)

particularly for children under 14, is likely to be far more effective in improving community safety and potentially in preserving the right to life in the broader community.¹⁶

The Bill improves the protection of families and children, consistent with the objectives of the HR Act.

Cultural rights—Aboriginal peoples and Torres Strait Islander peoples (s28)

Section 28 of the HR Act recognises and protects the distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples as Australia's first people. In light of the well documented overrepresentation of Indigenous children in the criminal legal system, including children under 14, the Bill would protect and enhance the rights of these children whose connection to community, culture and country can be broken by incarceration and criminalisation at a very young age.

The Bill will effectively prevent very young Aboriginal children from having significant contact with culturally damaging criminal justice procedures and youth detention. It is intended that as a result of this bill, Indigenous children aged under 14 whose behaviour would otherwise have led to engagement with the criminal legal system would be diverted into well-resourced community organisations to deliver culturally appropriate programs for children and families to address behavioural problems.

Children in the criminal process (s33) and Children's rights in criminal proceedings (s32(3))

Section 33 of the HR Act provides for special protections for children involved in criminal processes. It provides that an accused child must not be detained with adults and must be brought to trial as quickly as possible. Critically important to the Bill is the requirement at s33(3) that a convicted child be treated in a way that is appropriate for their age.

Additionally, subsection 32(3) of the HR Act provides 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

In 2019, the United Nations Committee on the Rights of the Child benchmarked 14 years as the absolute minimum age limit for criminal responsibility. The UN cited evidence in the fields of child development and neuroscience indicating that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years, because their frontal cortex is still developing. Signatories to the UN Convention on the Rights of the Child, including Australia, were encouraged to increase their minimum age accordingly.

The law in Queensland currently allows for the incarceration of children as young as 10 years old in youth detention centres as well as adult police watch-houses. From 1 July 2020 to 30 June 2021 the Department of Youth Justice identified 68 alleged instances of potential human rights breaches in youth detention centres that related to children being abused or unfairly punished. Human rights organisation Amnesty International criticised Queensland's

¹⁶ Allard, T. et al. (2010). *Police diversion of young offenders and Indigenous over-representation*. Trends & issues in crime and criminal justice, no.390

use of watch-houses for children due to a lack of protections (as watch-houses are not regulated under the *Youth Justice Act*, like youth detention centres are), insufficient resources to adequately care for children, and concerns associated with children being kept with or in the eye-line of adult inmates.¹⁷ This latter concern directly relates to the right of children in the criminal process to be segregated from all detained adults, protected under subsection 33(1) of the HR Act.

In addition to removing the potential for children under 14 to be held in a watch-house, the Bill will reduce the numbers of children held in youth detention centres in Queensland, alleviating some overcrowding and ultimately reducing the likelihood that children of any age will be held in watch-houses.

Right to life (s16)

Section 16 of the HR Act provides that every person has the right to life and the right not to be arbitrarily deprived of life.

The criminal justice system negatively impacts young children's immediate and future health and mortality, and hence their right to life under the HR Act. This is especially true for children facing systemic discrimination, particularly First Nations children. The Bill will promote the right to life by preventing the damage to the health and wellbeing to children, and ultimately the wider community by reducing the likelihood of recidivism and more serious reoffending that is linked to children's early engagement with the criminal legal system.

Privacy and reputation (s25)

The right to privacy under s25 of the HR Act is very broad. It protects against interference with an individual's physical and mental integrity, and is directly relevant, for example, to the surveillance and gathering of data in relation to children in the criminal legal system. The Bill will protect this right by preventing the child's exposure to the criminal legal system before the age of 14.

More specifically, the transitional provisions in the Bill would enhance the right to privacy of children aged 10 to 13 who have been engaged in the criminal legal system by ensuring that relevant identifying particulars, DNA samples, or results of DNA analysis or other forensic procedures are destroyed.

Recognition and equality before the law (Section s15)

Section 15 of the HR Act provides for recognition and equality before the law. Laws, policies and programs should not be discriminatory, and people have the right to exercise your human rights without discrimination. This means that people cannot be treated unfavourably because of your personal characteristics protected by the law. 'Discrimination' for the purposes of this right is defined under section 7 of the *Anti-Discrimination Act 1991* to include direct or indirect discrimination on the basis of an attribute, including a person's age.

¹⁷ Amnesty International (2019). [Kids in watch-houses: Exposing the Truth](#)

It could be argued that this Bill limits the right to equality before the law on the basis of age, or discriminates against children aged 14 and over, in that it would protect only children under the age of 14 from being subject to criminal proceedings. However, this position fails to account for the fact that the Bill is fundamentally only shifting an existing threshold for criminal responsibility from 10 to 14. To the extent that the Bill does engage this human right by creating inequality or discriminating on the basis of age, these conditions currently exist, albeit with a lower age threshold.

In fact, to uphold equality before the law, the legal system is required to recognise the different attributes of young children and adults. As outlined in the explanatory notes for the Bill, evidence in the fields of child development and neuroscience indicates that the frontal cortex of children under 14 is still developing. This means that these children are more likely to act impulsively and with less regard for consequences than adults.

The current minimum age of criminal responsibility does not recognise the relevant developmental attributes and personal characteristics of children under 14 relative to older children or adults, and subjecting these children to criminal charges and justice procedures and sanctions represents inequality before the law. Therefore, rather than limiting the right to equality before the law, the Bill will promote the right by limiting the application of criminal law to persons only of an age where they possess the necessary maturity and neurodevelopmental attributes to understand and adhere to the law.

To the extent that the Bill does limit equality before the law, I believe this limitation is reasonable and necessary to achieve the purpose of the Bill, and justified on the basis that it is consistent with recommendations of the UN Convention on the Rights of the Child and necessary to ensure the preservation of other human rights, as detailed above.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021* is compatible with human rights under the Human Rights Act 2019 because it enhances rather than limits human rights for a vulnerable group of Queenslanders, children aged 10 to 13. It limits human rights only to the extent that is reasonable and demonstrably justifiable, in accordance with section 13 of the Act.