Foundation for Alcohol Research & Education

30 November 2021

Mr Karl Holden
Committee Secretary
Community Support and Services Committee
Parliament House
George Street Brisbane Qld 4000
CSSC@parliament.qld.gov.au

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

Dear Mr Holden,

Thank you for the opportunity to provide a written submission to the Committee's Inquiry into the above Bill.

The Foundation for Alcohol Research and Education (FARE) is the leading not-for-profit organisation working towards an Australia free from alcohol harms. We approach this through developing evidence-informed policy, enabling people-powered advocacy and delivering health promotion programs. FARE has been working with communities across the country to improve the health and wellbeing of Australians for 20 years.

Alcohol harm in Queensland is significant. More than 1,000 people in Queensland die each year of alcohol-attributable disease and injury, and more than 30,000 Queensland hospitalisations are attributable to alcohol.[1] Cancers were responsible for the largest proportion of alcohol-attributable deaths, and neuropsychiatric conditions accounted for largest proportion of all alcohol-attributable hospitalisations.

Recently, the Queensland State Development and Regional Industries Committee asserted, that the Queensland Human Rights Act (HRA) requires public policy to address alcohol harm:

> *"Alcohol remains a significant cause of family and domestic violence in Australia: the use of alcohol and other drugs accompanies around half of all family and domestic violence incidents. Legislative measures which increase accessibility to alcohol, and especially alcohol usage in private homes, may therefore limit the rights of children and families and the right to security and liberty of the person. HRA s 26 emphasises the importance of the family, imposes an obligation on the State to protect the interests of children. Easy access to alcohol threatens not only children and families of alcohol consumers, but also the mental and physical health and security of consumers themselves."*[2]

FARE supports raising the Minimum Age of Criminal Responsibility (MACR) to at least 14 years old. FARE's particular interest in the MACR is due to the high prevalence of people detained in the criminal justice system, (including children), with Fetal Alcohol Spectrum Disorder (FASD).

FASD is a diagnostic term describing a range of neurodevelopmental impairments that impact on the brain and body of individuals prenatally exposed to alcohol.[3] FASD is a lifelong disability. Research at the Banksia Hill Youth Detention Centre in Western Australia identified that more than a third of the young people screened in detention were diagnosed with FASD.[4]

Aboriginal and Torres Strait Islander children are significantly overrepresented in Queensland's youth justice system. Queensland has the greatest proportion of First Nations children aged 10-14 held in detention of any Australian State or territory, with on average 84% of children aged 10-13 in a Queensland detention centre on any given day in 2019-20 identifying as Aboriginal or Torres Strait Islander.[5] First Nations children account for around 60% of all children aged 10 and 11 in contact with the Queensland Police Service, and their overrepresentation increases with each contact with the justice system.[6]

This submission covers the following areas:

- FASD and the alternative model;
- Victims' rights and supports;
- Threshold issues and transitional provisions and
- Electronic monitoring.

Each of these are explored in more detail below.

Evidence Briefs on MACR, FASD and Electronic Monitoring

The three evidence briefs attached along with this letter form part of this submission; they address:

- Raising the Minimum Age of Criminal Responsibility (MACR) (Attachment 1)
- Fetal Alcohol Spectrum Disorder (FASD), criminal justice and government responses (Attachment 2)
- Electronic Monitoring (including for Alcohol-Related Offences) (Attachment 3)

Summary of Recommendations

FARE recommends:

Recommendation 1: Raise the MACR to at least 14. All Australian State and Territory governments should raise the Minimum Age of Criminal Responsibility in their jurisdictions to at least 14 years old.

Recommendation 2: Educate relevant professionals about children with disabilities and cognitive impairment. This is essential for a better understanding by police, lawyers and the judiciary of how FASD and other impairments impacts on decision-making.

Recommendation 3: Include FASD in alternate pathway model design. Develop and fund appropriate alternative pathways for children suspected of having FASD or other neurological disorders that include adequate screening, diagnosis and ongoing support.

Recommendation 4: Develop FASD professional capacity. Invest in professional workforce development to establish adequate capacity in Queensland for FASD screening, diagnosis and support. Allocate resources to educating professionals in recognising FASD.

Recommendation 5: Include restorative justice processes in the new model. Consider voluntary restorative justice processes or elements, where appropriate, in designing the new model.

Recommendation 6: Use trauma-informed care. Implement an approach to care that is trauma-informed when engaging with children who are also victims of crime and survivors of trauma.

Recommendation 7: End Doli incapax for 10 to 14-year-olds. Replace *Doli incapax* by raising the MACR to at least 14 years old, but retain *Doli incapax* for people older than the MACR.

Recommendation 8: No exceptions. The MACR must be raised to at least 14 years old, with no exceptions and no exemptions.

Recommendation 9: Avoid net-widening. Ensure that any broader cohort accessing the new supports and services are not criminalised by any compliance consequences.

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Recommendation 10: Share essential only information about children. Limit the sharing of information related to children 10 to 14 years old, to relating to their release, or for child protection, case management, and investigation of suspected adult exploitation of children.

Recommendation 11. Discontinue the use of Electronic Monitoring (EM) with children. Re-assess the purpose, lived experience impact, human rights implications, costs and effectiveness of any trials and planned implementations of Electronic Monitoring (EM) programs.

Raising the Minimum Age of Criminal Responsibility (MACR)

This reform is based on neuro-developmental research and human rights obligations:

1. **Medical and social research on child development.** Research evidence on developmental psychology and brain development shows that children are not sufficiently able to reflect before acting or to comprehend the consequences of a criminal action.[7]
2. **International human rights obligations.** Australia has human rights obligations under the United Nations Convention on the Rights of the Child. These obligations state that the MACR should be at least 14 years old. [8]

In addition, the criminalisation of children is expensive and does not work.

- **Criminalising children is expensive**. It costs more than $1,600 for Queensland to keep one young person in detention each day.[9]
- **Criminalising children does not work.** Neurobiological research on early childhood trauma shows that criminalising children under 14 years old leads to a lifetime of harmful consequences, including sustained contact with the justice system.[10]

See the FARE evidence brief on Raising the Minimum Age of Criminal Responsibility (MACR) as Attachment 1.

Recommendation 1: Raise the MACR to at least 14. All Australian State and Territory governments should raise the Minimum Age of Criminal Responsibility in their jurisdictions to at least 14 years old.

Fetal Alcohol Spectrum Disorder (FASD) and the alternative model

FARE has a particular interest in MACR being raised due to the high prevalence of people detained in the criminal justice system, (including children), with Fetal Alcohol Spectrum Disorder (FASD).

Alcohol consumption in pregnancy increases the risk of children being born with FASD.[11] Alcohol passes across the placenta during pregnancy and the fetus has minimal ability to metabolise it due to its size and development. There is no safe time, no safe amount, and no safe type of alcohol that can be consumed during pregnancy. Other risks of alcohol consumption in pregnancy include miscarriage, stillbirth, low birth weight and pre-term birth.[12,13,14]

FASD is a diagnostic term describing a range of neurodevelopmental impairments[15]. It describes impacts on the brain and body of individuals prenatally exposed to alcohol. FASD is a lifelong disability. People with FASD experience challenges in their daily living and need support with motor skills, physical health, learning, memory, attention, communication, emotional regulation, and social skills to reach their full potential. Each person with FASD is unique and has areas of both strengths and challenges.[16]

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.[17] Despite the lack of intent, this can place them at increased risk of early contact with the criminal justice system.[18]

Recent research at the Banksia Hill Youth Detention Centre in Western Australia identified that more than a third of the young people screened in detention were diagnosed with FASD. Researchers

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suggested this may be an under-estimate due to, for example, the lack of confirmation of prenatal alcohol exposure, suspecting that almost half of these young people may have FASD.[19]

Given the higher prevalence of FASD currently present within youth justice settings, appropriate screening, diagnosis and ongoing support is critical to improving the lives of these children and to establishing an alternate pathway when the MACR is raised.

Submissions to the Senate Inquiry on FASD support a multi-disciplinary and community-based approach responding to the needs, (including cultural needs), of people with FASD who come into contact with the justice system. [20] International research and best practice indicate that this will address the inadequate accommodation of FASD-associated impairments within the criminal justice system and help maximise the therapeutic outcomes for people with FASD.

Additional funding and resourcing are needed for screening, diagnosis, assessment and support services. FASD diagnosis is complex, time-consuming and expensive and so it becomes difficult to access and many people miss out on the treatment and support that a diagnosis facilitates.

There is an urgent and critical need to educate health practitioners as many are not aware of the signs of FASD.[21] This can lead to children being misdiagnosed with Attention Deficit Hyperactivity Disorder (ADHD) or other disorders.[22] Children with FASD are likely to come in contact with General Practitioners, paediatricians, educators and social service providers. Each of these professions should be trained in recognising FASD to ensure that where suspected these children can be referred to appropriate diagnostic services and relevant support are identified as early as possible.

Another pathway for identifying and responding to children with FASD is through the school system. As the FASD Senate Inquiry recommended, Governments should ensure all schools can deploy and resource FASD-specific strategies and assistance to support educators and to support students with FASD and suspected FASD, irrespective of IQ level.[23]

Receiving a diagnosis is critical to children being supported appropriately and managing their disability to get the most from their lives. Referral for a FASD diagnostic assessment should occur when any of the following are identified:

- Prenatal alcohol exposure is at high risk levels
- Neurodevelopmental impairment and/or distinctive facial features and confirmed or suspected prenatal alcohol exposure
- The individual, their parent or caregiver is concerned that there was prenatal alcohol exposure and/or may be a FASD diagnosis

To ensure that this can occur, it is important that there are enough trained health professionals with the expertise required to undertake a FASD diagnosis in Queensland.

FASD is a frequently misunderstood and misdiagnosed disability. Given that approximately half the children who currently come into contact with the justice system have FASD, it is especially crucial that police, lawyers and the judiciary improve their understanding of how FASD impacts decision-making. Justice and legal professionals need multidisciplinary, trauma-informed, culturally-appropriate training about children with disabilities and cognitive impairment (including FASD) and the medical, social and legal implications[24]. This can help them identify and support young people suspected of having FASD or other neurological disorders.

See the FARE evidence brief on FASD, criminal justice and government responses as Attachment 2.

Recommendation 2: Educate relevant professionals about children with disabilities and cognitive impairment. This is essential for a better understanding by police, lawyers and the judiciary of how FASD and other impairments impacts on decision-making.

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Recommendation 3: Include FASD in alternate pathway model design. Develop and fund appropriate alternative pathways for children suspected of having FASD or other neurological disorders that include adequate screening, diagnosis and ongoing support.

Recommendation 4: Develop FASD professional capacity. Invest in professional workforce development to establish adequate capacity in Queensland for FASD screening, diagnosis and support. Allocate resources to educating professionals in recognising FASD.

Victims' rights and supports

Children who come into contact with the justice system are almost invariably themselves victims of significant abuse and traumatic experiences.[25] In many cases, this abuse has occurred while children are in state care. It is important to acknowledge the broader systems failures which have often occurred in these children's lives, and to avoid binary understandings of who is and is not a 'victim'.[26] This means that by better responding to children with these behaviours (in providing supports and services, instead of engaging with the justice system), the Queensland Government will also be better addressing the rights of these victims of crime.

For community members who have been harmed by the actions of children aged under 14, there are many ways in which the Queensland Government can recognise and redress that harm, outside of criminalising children. For example, there are victims of crime compensation mechanisms through which community members can access both financial compensation and other supports, without charges being laid nor convictions being sought. Other alternative approaches include no-fault schemes which are focused on meeting the needs of all people who have experienced harm.

The rights of victims can also be considered through restorative justice practices which are well established throughout the justice systems in Australia. The appropriateness of restorative justice would be dependent upon the cognitive capacity of the individual. Restorative justice programs that involve victims in justice processes have been found to increase victim and community satisfaction with the criminal justice system[27]. They are also found to be a cost-effective way to reduce imprisonment and reoffending.

Some elements of restorative justice programs may be able to be incorporated into the design of new supports and services. This could include mediated restitution processes where appropriate.[28] Currently, participation in restorative justice conferences in Queensland occurs on a voluntary basis.[29] As stated above, 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.

Recommendation 5: Include restorative justice processes in the new model. Consider voluntary restorative justice processes or elements, where appropriate, in designing the new model.

Recommendation 6: Use trauma-informed care. Implement an approach to care that is trauma-informed when engaging with children who are also victims of crime and survivors of trauma.

Threshold issues and transitional provisions

There should not be any exemptions or exceptions to the new MACR. The evidence regarding brain development, and neurological disorders such as FASD, is the same regardless of the severity of behaviours. Effective supports and services implemented as alternatives to the justice system will address the causes and consequences of behaviours that would have brought children into contact with the justice system.

Community safety remains important in raising the MACR, but must be maintained without criminalising children. To improve community safety, children with serious problematic and harmful behaviour, should be referred for clinical assessment to assess their needs and identify causal factors such as

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trauma and potential neurological disorders, (including FASD). Assessment can help identify causal factors, triggers and appropriate behavioural strategies and approaches.

FARE welcomes the alternative model in the Bill to protect community safety that is decoupled from the criminal justice system. This includes prevention, early intervention and referral of children with problematic behaviour into alternative pathways to address their needs with evidence-based, restorative and therapeutic interventions. (See further detailed recommendations regarding the alternative model in the next section below.)

The current *Doli incapax* (deemed incapable of forming an intent to commit a crime), legal presumption is not an adequate alternative to raising MACR. *Doli incapax* does not take into account the scientific evidence on child and adolescent brain development. *Doli incapax*, which requires it to be proven that a child under 14 understands their criminal intent, is complex and legally opaque.

Raising the age of criminal responsibility to 14 years old is therefore a fairer, more consistent and more effective approach than the application of *Doli incapax*. However, 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. Thus, it must be understood that 14 is the absolute minimum age at which a child may be held criminally responsible – and for many children, especially children with FASD, they will not have reached a stage in their development where criminal intent can be formed. This is why many countries have raised the minimum age above 14 – including Sweden where it is 15, Portugal where it is 16 and Luxembourg where it is 18.

Early interaction with the criminal justice system does significant harm to children, especially if children are imprisoned. For children with disabilities, particularly disabilities like FASD, this harm is profound. When these children are criminalised or imprisoned early in their lives, they are significantly more likely to experience long-term mental illness, death by suicide, homelessness, repeated imprisonment and other adverse effects throughout the rest of their lives. For children with disabilities, who lose access to universal healthcare systems such as Medicare and the National Disability Insurance Scheme if they are imprisoned, their interaction with the criminal justice system can be deeply disruptive to their ability to receive the supports that they need.[30]

Often this disruption takes many years to be remedied, even after release from prison. In this sense, the criminal justice system can be an intervention which removes children and young people with FASD and other disabilities from access to any of the supports which enable improvements in future behaviour and wellbeing.

In the case of young adults with FASD or other neurodevelopmental disabilities, the Queensland Government should also consider dual track sentencing option. This allows adult courts to sentence young offenders (up to 21 years of age) to serve custodial sentences in youth detention instead of in adult prison. This is suitable for young people who are particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison. This system is in place in Victoria.[31]

Any mandatory elements in the new system, (such as intensive supervision for serious problematic and harmful behaviour), need to be carefully considered to avoid net-widening. This is especially in regards to any consequences of breaching mandatory compliance. The ACT MACR Discussion Paper suggests that there are likely to be more children and young people who can benefit from the additional support, but who would not have been subject to justice supervision orders.[32] Access to these supports and services for this broader cohort is welcomed, but they should be able to access them without risking any punitive compliance consequences.

FARE welcomes the Bill's transitional provisions that include extinguishing historical convictions and criminal records, destroying all related evidence and the restricted sharing of relevant information.

All historical convictions of children who were 10 to 14 years old at the time of the offence must be automatically extinguished on commencement of the Bill. Any evidence of behaviour from before

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children were 14 years old must not be used in future prosecutions. Police and courts must not be able to use / rely on behaviour that occurred before a child was 14 years old in future prosecutions.

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.

Recommendation 7: End Doli incapax for 10 to 14-year-olds. Replace *Doli incapax* by raising the MACR to at least 14 years old, but retain *Doli incapax* for people older than the MACR.

Recommendation 8: No exceptions. The MACR must be raised to at least 14 years old, with no exceptions and no exemptions.

Recommendation 9: Avoid net-widening. Ensure that any broader cohort accessing the new supports and services are not criminalised by any punitive compliance consequences.

Recommendation 10: Share essential only information about children. Limit the sharing of information related to children 10 to 14 years old, to relating to their release, or for child protection, case management, and investigation of suspected adult exploitation of children.

Electronic Monitoring (including ankle bracelets for children)

The Queensland and Northern Territory Governments both recently passed Youth Justice laws[33,34] that ignored expert evidence and increased the use of ankle bracelet Electronic Monitoring (EM) on children as young as ten years old.

Current evidence suggests that Electronic Monitoring (EM) in the criminal justice system is stigmatising, breaches human rights, is expensive and ineffective. The technology is unreliable, it does not reduce re-offending, does not reduce prison populations, it increases incarceration and does not treat problematic alcohol use. Electronic monitoring contributes to the criminalisation of children, First Nations peoples, people on low incomes and people with problematic alcohol and other drug use.

The Queensland Human Rights Commission states that EM breaches the human rights of privacy (lack of controls in how information gathered is being used by governments) and freedom of movement.[35] For human rights breaches to be acceptable and tolerated, the specific activity must have both a legitimate purpose and a rational connection to that purpose. Community safety through reducing crime or alcohol harm is a legitimate purpose. However, as the attached evidence brief demonstrates, EM does not have a rational connection to this purpose. The Queensland Human Rights Commission, and other EM evaluations, warn that this impacts social interactions, leads to stigmatisation, serious mental health consequences and the possibility of vigilantism.[36, 37,38]

See the FARE evidence brief on Electronic Monitoring as Attachment 3.

Recommendation 11. Discontinue the use of Electronic Monitoring (EM) with children. Re-assess the purpose, lived experience impact, human rights implications, costs and effectiveness of any trials and planned implementations of Electronic Monitoring (EM) programs.

Thank you for the opportunity to provide a submission to this Inquiry.

Yours sincerely,

CATERINA GIORGI
CHIEF EXECUTIVE OFFICER

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PO BOX 19 DEAKIN WEST ACT 2600 :: 02 61228600 :: INFO@FARE.ORG.AU :: WWW.FARE.ORG.AU :: ABN 91 096 854 385