MINIMUM AGE OF CRIMINAL RESPONSIBILITY SUBMISSIONS

Table of Contents Page No.

Submission 1 – GermDefence Indigenous Australia 3

Submission 2 – Anonymous 4

Submission 6 – Anonymous 5

Submission 7 – Royal Australia College of General Practitioners (RACOGP) 6

Submission 8 – Australian Childhood Foundation 7

Submission 10.a – Cover Letter National Health Leadership Forum (NHLF) 23

Submission 10.b – National Health Leadership Forum (NHLF) 24

Submission 11 – Civil Liberties Australia – CLA) 42

Submission 12 – National Centre for Epidemiology for Population Health 46

Submission 13 – Anonymous 51

Submission 16 – Youth Law Australia 52

Submission 17 – ACT Policing 62

Submission 18 – Relationships Australia Canberra Region, & Relationships Australia National (RACR, & RAN) 76

Submission 19 – Legal Aid ACT 80

Submission 20 – Australian Association of Social Workers (AASW) 89

Submission 21 – Australian National University (ANU) 97

Submission 22 – Australians for Native Title and Reconciliation (ANTaR) 102

Submission 23 – Royal Australian College of Physicians (RACP) 111

Submission 24 – Lowitja Institute 117

Submission 25 – Families ACT 122

Submission 26 – Change the Record 129

Submission 27 – Conflict Resolution Service (CRS) 138

Submission 28 – Marque Lawyers 140

Submission 29 – Northside Community Service 153

Submission 30 – ACT Human Rights Commission (ACTHRC) 155

Submission 31 – Australian National University (ANU) Justice Reform initiative 184

Submission 32 – ACT Law Society 189

Submission 33 – Foundation for Alcohol Research & Education (FARE) 194

Submission 34 – Australian Child Rights Taskforce 204

Submission 35 – Australian Council of Social Service Inc (ACTCOSS) 216

Submission 36 – Save the Children 227

Submission 37 – Australian National University LRSJ Indigenous Reconciliation Project (ANU LRSJ IRP) 234

Submission 38 – Australian Research Alliance for Children and Youth (ARACY) 269

Submission 39 – Canberra Restorative Community Network 280

Submission 40 – Advocacy for Inclusion (AFI) 295

Submission 41 – South Australian Council of Social Service (SACOSS) 314

Submission 42 – The University of Sydney – Hamer/Crofts 325

Submission 43 – Canberra Community Law (CCL) 330

Submission 44 – Aboriginal Legal Service (ALS) 341

Submission 45 – The Royal Australian & New Zealand College of Psychiatrists (RANZCP) 347

Submission 46 – Frances Rose - OAM/Ross Dunn – OAM 358

Submission 47 – CREAT Foundation 367

Submission 48 – ACT Disability Aged and Carer Advocacy Service Inc (ADACAS) 375

Submission 49 – Barnardos Australia 385

Submission 50 – Human Rights Law Centre 393

Submission 51 – Anonymous Service Provider 407

From: Keith Gregory [redacted]
Sent: Monday, 28 June 2021 1:29 PM
To: Minimum Age of Criminal Responsibility
Subject: Raise the Age Discussion Paper

CAUTION: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Having worked in developing community led frameworks to address the disparity with the community for over a decade, I would like to be involved in the above discussion paper

I have submitted an Aboriginal led solution that was presented at the 9th National Indigenous Health Research Showcase last year.

At the time of the Presentation Prof Tom Calma's comment was that a longitudinal study should be undertaken.

https://drive.google.com/file/d/1ERMYIh5pRmBZFIeeDyBswa69BHd4_RYc/view?usp=sharing

Kind regards

Keith Gregory

CEO
GOE Kids Club
GermDefence Indigenous Australia.
[redacted]

From: [redacted]
Sent: Saturday, 26 June 2021 4:32 PM
To: Minimum Age of Criminal Responsibility
Subject: Submission

CAUTION: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear Justice and Community Safety Directorate

Thank you for the opportunity to make a submission regarding raising the minimum age of criminal responsibility.

I agree with some of the concerns raised by Sydney barrister Emmanuel Kerkyasharian (see https://twitter.com/EKerkyasharian/status/1408332134557753346) that the rights and freedoms of children should not be solely in the hands of a non-judicial panel and especially not one that has no fact-finding role.

I note that the Discussion Paper only mentions fact-finding twice, and leaves open the question of a model that has no fact-finding processes. Furthermore, it mentions absolutely nothing about oversight or appeal mechanisms for a potential non-judicial alternative model. It is not acceptable for anyone in a liberal democratic society to be subjected to restrictions designed to prevent or deter harmful behaviour without the right to test the facts of the government's case to the requisite legal standard, and to appeal when decision-makers make adverse findings. I realise that the existing system, in actual practice for many disadvantaged people, does not fully deliver on this either, but it would be absolutely unacceptable for any new system to formally deny these rights.

I think diverting 10-13 year old children away from the criminal justice system is a noble goal, but any alternative model must ensure that a child who has been falsely or inaccurately accused of conduct that would ordinarily constitute a crime has the right to put forward their case and have the government's case tested in an appropriate manner. This might require continuing involvement of the courts in a fact-finding or review/appeal capacity of some sort.

I have no opinion about the other matters raised in the Discussion Paper.

I have no objection to my submission being made public.

Yours sincerely

[redacted]

-----Original Message-----
From: [redacted]
Sent: Tuesday, 13 July 2021 1:59 PM
To: Minimum Age of Criminal Responsibility <macr@act.gov.au>
Subject: MACR - support for reform

CAUTION: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good afternoon
I wish to lend my support to raising the age of criminal responsibility. I do not wish my name to be published with my hurried submission.

We know that incarcerating children cements their identity as troublemakers, rather than helping them to grow into well-adjusted adults.
I urge you to draw on advice from social research.
Additional support should be provided as an alternative to incarceration, but unless there is empirical evidence to the contrary, we shouldn't let delays in providing support prevent us from raising the age as soon as possible.
Kind regards
[redacted]

RACGP
Royal Australian College of General Practitioners

Healthy Profession.
Healthy Australia.

26 July 2021

Shane Rattenbury MLA
Attorney-General
Australian Capital Territory

macr@act.gov.au

Dear Attorney-General

Raising the criminal age of criminal responsibility

We write in response to the Australian Capital Territory (ACT) Government discussion paper *Raising the minimum age of criminal responsibility* (MACR) and to express our full support for raising the age from 10 to 14 years of age as a matter of urgency.

The Royal Australian College of General Practitioners (RACGP) represents over 41 000 members working in or towards a career in general practice. Alongside numerous Aboriginal and Torres Strait Islander organisations, service providers, and other health experts, we support the campaign to raise the age of criminal responsibility in Australia.

As GPs, we support good health across the life course and play a role in helping to break the cycle of repeated incarcerations by ensuring our patients get the healthcare they need. However, when children as young as 10 years of age are forced through criminal legal processes during their formative developmental phases, they suffer immense physical and psychological harm. This early exposure negatively impacts their future potential.

We are particularly concerned for the disproportionate effect this policy has on Aboriginal and Torres Strait Islander children. The low age of criminal responsibility is a key driver of contact with police and the justice system. At a time when all governments are re-committing to *Closing the Gap* in health inequalities, this policy continues to undermine progress towards generational change.

An extensive body of evidence exists to support raising the age. Submissions provided to the Council of Attorneys-General (CAG) over 12 months ago clearly demonstrate the urgent need for reform. For more information visit: https://www.raisetheage.org.au/cag-submissions

We have a duty to society to protect our children and to address inequities that disproportionately affect Aboriginal and Torres Strait Islander peoples. We encourage you to consider the evidence, look at the available alternatives and take immediate action.

Should you wish to discuss this matter further, please contact Anne Davis, NSW&ACT State Manager at anne.davis@racgp.org.au.

Yours faithfully

Associate Professor Charlotte Hespe
NSW&ACT FACULTY CHAIR

Anne Davis
NSW&ACT STATE MANAGER

The Royal Australian College of General Practitioners Ltd
Level 7, 12 Mount Street, North Sydney NSW 2060 | PO Box 534, North Sydney NSW 2060
Tel (02) 9886 4700 Fax (02) 9886 4790 Email nswact.faculty@racgp.org.au
racgp.org.au ACN 000 223 807 ABN 34 000 223 807

Submission to the ACT Attorney-General: Minimum Age of Criminal Responsibility

July 2021

Australian Childhood Foundation

Submission to the ACT Attorney-General: Minimum Age of Criminal Responsibility

We thank the ACT Minimum Age of Criminal Responsibility (MACR) Working Group for the opportunity to provide a submission on this topic and we are pleased that that the MACR explicitly recognises the importance of the views, knowledge and expertise of interested stakeholders and individuals.

The Australian Childhood Foundation (ACF) is a leading specialist provider of therapeutic programs for children who have experienced abuse related trauma. It currently runs these programs in Victoria, Tasmania, South Australia, the Australian Capital Territory, Northern Territory and Western Australia. At any one time, there are more than 1000 children and young people and their carers or families engaged in therapeutic intervention with the Foundation. ACF holds the statewide service for therapeutic services for children and young people affected by family violence in Tasmania as well family violence specialist therapeutic services across Victoria. The Foundation has established more than 25 partnerships with other non-government organisations to support direct trauma based therapeutic programs for children and young people, including Oz Child (VIC and ACT), Gippsland and East Gippsland Aboriginal Cooperative (VIC), Barnados (ACT), Uniting (VIC), Anglicare (NT and VIC), NPY Womens Council (NT) and Karla Kuliny (WA). It has established the Centre for Excellence in Therapeutic Care, a statewide intermediary to support the reform of Residential Care in NSW towards it being more therapeutic in its intent and focus. ACF is working partnership with the NT Government to build and implement a new therapeutic model of residential care in its jurisdiction.

This submission addresses the question of whether the age of criminal responsibility (MACR) should be increased and submits that the age should be raised from 10 years old to a minimum of 14 years old in the Australian Capital Territory.

An overview of the key points raised within our submission is outlined within the summary of recommendations. Our responses to the questions, and other relevant material, are then presented.

Summary of Recommendations

The Australian Childhood Foundation (ACF) recommends that the minimum age of criminal responsibility (MACR) in the Australian Capital Territory be reformed in line with the following principles:

1. That the minimum age of criminal responsibility is raised to at least 14 years.

2. The increased minimum age of criminal responsibility should be universal, with no exemptions due to extenuating circumstances, including for serious offences.

3. That the minimum age of detention be set at 16 years to decrease the likelihood of reoffending and provide greater opportunities for young people aged 10 to 15 years to achieve positive life-long outcomes with a view of detention as a matter of last resort for any young person under the age of 18.

4. Children and young people in the youth justice system have high rates of cognitive impairment, mental illness and trauma. A therapeutic and supportive response to these children and their families outside of the youth justice system is urgently needed to provide protection, not further harm for those in need.

5. Should the minimum age of criminal responsibility be raised to age 14, the principle of doli incapax ceases to be relevant and should be abolished. However, young people aged 14–17 must still be provided safeguards in their contact with the justice system to ensure it is responsive and supportive of their individual circumstances and that treatment and proceedings are appropriate to their individual needs.

6. That the Australian Capital Territory further develop and implement a Justice Reinvestment Strategy in partnership with community services, with the aim to shift the emphasis of youth justice from punishment to rehabilitation.

7. That funds previously allocated for the criminalisation and detention of children under 14 be re-allocated to prevention, early intervention, and diversionary responses linked to culturally safe and trauma-responsive services for this age-range.

8. That universal services in areas such as education, health, employment, and other community services be integrated into the youth justice system as key drivers of early intervention.

9. Aboriginal Community Controlled Organisations (ACCOs) should be prioritised and funded to deliver the planning, design and implementation of prevention, early intervention and diversionary responses for Aboriginal and Torres Strait Islander children and young people.

Question: Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

International Comparisons

The MACR at 10, is well below the age of 12 which the UN declares an 'absolute minimum' (UN CRC, 2007: para. 32). Also, the ACT's MACR is out of step with much of the rest of the developed world. For example:

- 12 years: Belgium, Canada, Israel, Netherlands, Scotland
- 13 years: Greece
- 14 years: France, Austria, Germany, Italy, Japan, Spain, Iceland, Russia, Norway
- 15 years: Denmark, Finland, Iceland, Norway, Sweden
- 16 years: Portugal, Japan
- 18 years: Brazil, Luxembourg, Peru, Uruguay

Human Rights Compliance

Australia is a signatory to the Conventions on the Rights of the Child (CRC) and through this has committed to ensuring children enjoy the rights enshrined in the CRC. However, the United

Nations Conventions of the Rights of the Child (UNCRC) has maintained a longstanding criticism of the low age of criminal responsibility in Australia (UNCRC 1997: [11, 29]; UNCRC 2005: [73]; UNCRC 2012: [82(a)]).

The UN's Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

While the Beijing Rules and the Riyadh Guidelines, both products of the United Nations (UN) deliberations, address the minimum standards for youth justice and the maturational and development issues relating to children's criminal capacity (United Nations, 1985; 1990) they stopped short of stipulating a MACR. However, almost two decades later the UN Convention on the Rights of the Child (2007) went a step further, noting that a MACR below 12 years is not acceptable, and advised member states that a minimum age of around 14 to 16 years is encouraged. The UNCRC also argued that a higher minimum age of criminal responsibility of 14 or 16 years contributes 'to a juvenile justice system which deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected' (UNCRC 2007: para 33).

Children and young people in the child protection and out of home care system

The behaviours of children and young people in OOHC, including minor offences and trauma-related behaviours, are more likely to have been reported to police and therefore to attract a criminalising state response than other children. Research highlights that children and young people in residential childcare continue to be criminalised for behaviours (trashing rooms, taking food, throwing items) that in other family settings would not be met with a formal justice response, which then has significant implications for the child (Nolan & Moodie, 2016). Therefore, we need to be very careful to see the distress behind behaviour, respond with a broader lens rather than simply focusing on the child's actions, and ensure we do not punish or criminalise need and vulnerability. We need to be very cautious of labelling children and young people who are experiencing distress as 'offending' or 'criminal' as this has the potential to further traumatise, blame and exclude these children.

Children and young people in the child protection and out of home care systems (OOHC) have almost by default experienced some form of physical or mental health trauma (State of Victoria, Sentencing Advisory Council, 2019). The State of Victoria, Sentencing Advisory Council (2019) also found that there was a significant over-representation of children and young people in the child protection/OOHC in the youth justice system. Of relevance to the issue of raising the MACR, the report clearly highlights that the younger children are at first sentence, the more likely they are to be known to Child Protection (i.e., to have experienced trauma).

Of the 438 children aged 10 to 13 years at age of first sentence or diversion:

- 1 in 2 were the subject to a child protection report
- 1 in 3 were the subject of a child protection order
- 1 in 3 experienced OOHC
- 1 in 4 experienced residential care

Children who had lived in OOHC were four times more likely to have contact with youth justice system than those who had not lived in out-of-home care (Alltucker, Bullis, Close & Yovanoff, 2006). They were also 15 times more likely to have been in youth detention than children who had not been in OOHC (Cashmore, 2011).

Children and young people who have experienced trauma can exhibit a range of problematic behaviours, for many reasons including being in a persistent heightened state, or dissociation due to misreading cues and being quickly triggered into a fear response. This often presents with aggression and behaviours that challenge.

Aboriginal and Torres Strait Islander children

There is also the issue of the high rate of incarceration of Indigenous youth. Just over half of all Australian children imprisoned on any given night are Indigenous. Criminalising children from 10 years old has a significant impact on Aboriginal and Torres Strait Islander children and young people. The tendency to over-sentence Aboriginal and Torres Strait Islander children at an earlier age further entrenches cycles of indigenous disadvantage caused by poverty, intergenerational trauma and systemic discrimination. The outcome of an accumulation of prior convictions which often begins with a minor offence at an early age can be debilitating for education and employment prospects as well as the overall health and wellbeing of Aboriginal and Torres Strait Islander young people later in life.

An increased MACR supports Australia's efforts to Close the Gap in outcomes between Aboriginal young people and non-Aboriginal young people, across a variety of domains not limited to youth justice.

International comparisons alone do not provide an argument for increasing the MACR in the ACT. However, they do demonstrate the feasibility of raising the minimum age and doing so without adverse effects on crime rates.

Child development and neurobiology

A growing research literature, deriving especially from developmental psychology and neuroscience, continues to extend knowledge with regard to a complex range of social and physiological factors that might impact upon children's and young people's maturation, cognitive functioning and human development (Bateman, 2012; Coleman, 2011; Prior et al., 2011).

In the last two decades, a growing body of longitudinal neuroimaging research has demonstrated that adolescence is a period of continued brain growth and change, challenging longstanding assumptions that the brain was largely finished maturing by puberty (Johnson, Blum & Giedd, 2009). As Steinberg (2012) states: 'There is now incontrovertible evidence that adolescence is a period of significant changes in the brain structure and function.'

When considering criminal behaviour, it is necessary to consider the cognitive precursors to the offending behaviours. Criminal capacity is dependent on mature decision-making, problem-solving, planning, response inhibition, as well as the abilities to pause long enough to assess a situation, contemplate the options, evaluate possible consequences, and plan and execute a course of action (Pillay & Willows, 2015). The typical, unimpaired adult possesses these capabilities, which is why adults are considered to have criminal responsibility unless proven otherwise.

It is now known that adolescents are unlike adults in a number of ways, especially in decision making, judgment, impulse control and effective planning, with the neurodevelopment and cognitive neuroscience research showing that the adolescent brain is not a fully developed and functional organ, but rather a work in progress (Weinberger, Elvevag, & Giedd, 2005).

Neurobiological evidence clearly demonstrates that children aged 10 to 14 years lack the emotional, mental and intellectual maturity necessary to reflect before acting. The capacity for abstract reasoning matures throughout adolescence and is significantly underdeveloped in children aged 10–13 by comparison with 14–15-year-olds, who are, in turn, outperformed by older adolescents. Research suggests that children and young people's brains are still developing till at least the age of 25.3 This means that the age of criminal responsibility should be lifted to at least 14, if not higher. According to the Sentencing Advisory Council (2012):

"…This [neurological immaturity] is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy 'discounting' of the future costs of this behaviour, also contribute. Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes…."

Higher function, like planning, reasoning, judgement, and impulse control, is only fully developed in a person's third decade (their 20s). Brain development research has been instrumental in court cases that have limited the culpability of young people. Children in grades four, five and six do not have the cognitive development to be held criminally responsible for their actions. Children under the age of 14 years have not yet developed the social, emotional, and intellectual maturity necessary for criminal responsibility. Therefore, children and adults are treated differently by the legal system and afforded different legal rights and capacities at different stages of development.

At present the significant developmental issues raised above can only be dealt with for those young people between the ages of 10 and 14 through doli incapax (see below).

Bower, Watkins & Mutch (2018) found that of 99 children in detention in Western Australia, 89% had at least one severe neurodevelopmental impairment. These impairments included:

- Foetal Alcohol Spectrum Disorder
- Intellectual Disability
- ADHD
- Trauma / Attachment Depression
- Anxiety
- Learning Difficulties
- Speech and Language Disorders

In light of the preceding issues, ACF makes the following recommendations.

Recommendation 1. That the minimum age of criminal responsibility is raised to at least 14 years.

Recommendation 2. The increased minimum age of criminal responsibility should be universal, with no exemptions due to extenuating circumstances, including for serious offences.

Recommendation 3. Children and young people in the youth justice system have high rates of cognitive impairment, mental illness and trauma. A therapeutic and supportive response to these children and their families outside of the youth justice system is urgently needed to provide protection, not further harm for those in need.

Criminogenic Effect of the MACR

Early induction to the youth justice system is itself criminogenic. Contact with the criminal justice system has a hugely detrimental and destructive impact on children and young people (McAra & McVie, 2005). As Malvaso & Delfabbro (2015) state:

"…Correctional involvement is recognised as a life outcome that often has significant long-term detrimental consequences for individuals. Juvenile offending is often predictive of adult offending and therefore is a significant risk factor for poorer employment, financial and educational outcomes, p.3562)…."

Those young people who come into contact with the criminal justice system are as troubled as they have been troublesome. How the ACT responds to them can significantly change the course of their life. Being drawn into the justice system can stigmatise and label young people and therefore socially marginalise them as they find it more difficult to re-enter life with their peers. Moreover, contact with the criminal justice system at an early age can actually reduce the likelihood that a young person will desist, making future criminal transgressions more likely (McAra & McVie, 2005).

The Victorian Sentencing Advisory Council (2019) found that the younger children are when they receive their first sentence, the more likely they are to reoffend overall, and the more likely they are to receive a sentence for violent offending before the age of 22. The value of deterrence in charging, convicting, and incarcerating is overstated and not effective. Kelly Richards writing for the Australian Institute of Criminology (2009) puts it this way:

"…It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are 'universities of crime' that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks…."

Huizinga, Schumann, Ehret, & Elliott in their 2004 study of the similarities and differences in juvenile justice systems at two sites in different countries (Denver, Colorado, a more severe, punishment-oriented system and Bremen, Germany a more lenient, diversion-oriented system) to determine the effects of distinct features of these systems on subsequent delinquency found that:

'…the analyses were quite consistent across both sites…there was very little effect of arrest on subsequent delinquent behavior, and when there was a significant effect, arrest had the effect of either maintaining the previous level of delinquency (persistence) or resulted in an increase in subsequent delinquent behavior. In general, there was essentially no indication at the individual level at either site that arrest resulted in a decrease in delinquent behavior, p137…"

They also found:

'…it was those individuals given more severe sanctions that tended to persist in or have higher levels of future delinquent/criminal involvement…p.138".

Children and young people are more likely to reoffend than adults, and the rates of young people who reoffend after receiving a non-custodial sentence is about 44% compared to 64% of those who reoffend after receiving a custodial sentence (Victorian Sentencing Advisory Council, 2019).

Children sentenced between the ages of 10 and 13 had particularly high reoffending rates, with over 80% reoffending overall, and over 60% reoffending by committing an offence against the person (NSW Bureau of Crime Statistics and Research Reoffending, 2019).

The Queensland Productivity Commission's (2019) survey of adult prisoners indicated that a quarter had been in formal contact with police by the age of 14.

The criminal legal system disproportionately affects Aboriginal and Torres Strait Islander children. Among those aged 10–13 that are in detention or supervision, 65% are Aboriginal and Torres Strait Islander children. Aboriginal and Torres Strait Islander young people (aged 10 to 17 years) are imprisoned at 17 times the rate of their non-Indigenous peers.

There has been extensive research in Australia, and around the world, into the impacts of incarcerating children on future offending. Both national and international evidence demonstrates that locking children up does not keep the community safe or reduce future offending by the child.

Cunneen (2017) explains how:

"…A small number of offenders commit a large proportion of detected offences, and these tend to be those young people who first appeared in court at an early age. For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending, p.17…".

Removing these (relatively small number of) children from their communities and placing them in youth detention increases their risk of criminal offending and negative peer influence. Richards (2011) states:

"…It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are 'universities of crime' that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks, p. 6…"

The Armytage and Ogloff Review (2017) of Victoria's legal system confirmed that it is counter-productive to incarcerate a child, saying that:

"…depriving a child or young person of their liberty is detrimental to adolescent development, dislocates young people from any protective factors they may have, and must only be an option of last resort. No evidence shows that a custodial order reduces offending – in fact, the Sentence Advisory Council (2016) found that more than 80 per cent of young people on a custodial order reoffended, reflecting among the highest rates of recidivism of all young offenders, p,232..."

Research shows that contact with the youth justice system is the biggest factor in whether a child or young person will continue to 'offend' (McAra & McVie, 2010). Wherever possible, the best course of action is to refrain from intervening as a 'justice' service, but to provide support via universal services (health, education, welfare) and focus on building relationships, strength, skills, opportunities and hope (CYCJ, 2016). This care and protection-focused approach helps reduce the likelihood of further 'offending behaviour' (McAra & McVie, 2010) by focusing on the root causes (for example abuse, neglect, lack of support) rather than considering harmful conduct in isolation. Children and young people dealt with through non-criminalised approaches are more likely to engage with processes designed to help and support them. As

such, by increasing the minimum age of criminal responsibility the ACT will increase the health, wealth and happiness of young people and contribute to reducing crime.

In light of the preceding analysis, ACF makes the following recommendation.

Recommendation 4. That the minimum age of detention be set at 16 years to decrease the likelihood of reoffending and provide greater opportunities for young people aged 10 to 15 years to achieve positive life-long outcomes with a view of detention as a matter of last resort for any young person under the age of 18.

Doli Incapax

Should doli incapax have any role if the MACR is raised?

Australia and its States and Territories have sought to counter criticism of its low minimum age of criminal responsibility by arguing that 10 is not an unmitigated minimum, as the common law principle of doli incapax applies to children aged 10–13 and provides a gradual transition to full criminal responsibility. The rebuttable principle of doli incapax holds that children lack the capacity to know that an act is criminal or seriously wrong and, where engaged, this principle has the potential to offer a partial safeguard for children aged 10–13.

The UN Committee on the Rights of the Child has cautioned against systems such as doli incapax that set a low MACR but have a higher age below which sufficient maturity must be demonstrated. It points out:

"…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. States are urged to set one appropriate minimum age and to ensure that such legal reform does not result in a retrogressive position regarding the minimum age of criminal responsibility…."

The Australian Law Reform Commission (2010) states 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.
- The presumption of doli incapax currently fails to protect many young children but would be superseded by raising the age of criminal responsibility to 14. The presumption should apply for those between the ages of 14–17 years.
- Assessing and producing evidence to determine whether a child has criminal capacity is not a straightforward task – it is far more complex than may be apparent to those outside the field of mental health or child development. Costs, availability of expert witnesses (O'Brien & Fitz-Gibbon, 2017), and adequacy of measuring instruments are some of the barriers (Crofts, 2016). Apart from not being a simple exercise, the most critical issue is that the determination of children's criminal capacity is not an exact science. It is questionable

whether mental health examinations to determine criminal capacity are capable of producing unequivocal results whose reliability and validity can withstand the rigorous tests of the courtroom, and which can irrefutably distinguish children who have criminal capacity from those who do not possess such capacity (Pillay, 2015).

- Moreover, this competency must have been present at the time of the alleged offence, which could have been a considerable time before the assessment. This implies that the assessment is always a retrospective process, which immediately raises concern about its reliability and validity.

Children should not be expected to graduate to full criminal responsibility on the day of their twelfth birthday. As highlighted in the literature, adolescent brain development continues between the ages of 14 and 17 years. Not only do children mature at different rates to one another, but factors that contribute to disadvantaged circumstances also affect a child's growth. During this important period of development, children must be protected by the law when necessary. The doli incapax principle offers protection to those children who are not developmentally ready to face the full force of the law. Ensuring the doli incapax principle remains for children aged 15, 16 and 17 years would ensure a graduated response to full criminal responsibility which is reflective of their developmental stages.

In light of the preceding analysis, ACF makes the following recommendation.

Recommendation 5. Should the minimum age of criminal responsibility be raised to age 14, the principle of doli incapax ceases to be relevant and should be abolished. However, young people aged 14–17 must still be provided safeguards in their contact with the justice system to ensure it is responsive and supportive of their individual circumstances and that treatment and proceedings are appropriate to their individual needs.

Social Need and the MACR

Children and young people involved with the justice system experience multiple layers of complex disadvantage in circumstances beyond their control. Many have had contact with child protection services, have mental health problems, or experience cognitive difficulties. Most young people in the justice system are themselves victims of trauma, abuse, or neglect (Mendes, Johnson & Moslehuddin 2011).

There is a proven link between socioeconomic disadvantage and youth criminality. Goldson (2009) argues that 'the corollaries between child poverty, social and economic inequality, youth crime and processes of criminalisation are undeniable'. (p. 515). The Australian Institute of Health and Welfare (2016) found that 10- to 17-year-olds with the lowest socioeconomic status were six times more likely to be under youth justice supervision than those with the highest socioeconomic status.

Problematic behaviour of children is most often linked with social or environmental factors outside of their control, such as family violence, neglect, socio-economic disadvantage, racism or stigma. Bateman & Pitts, 2005, for example, note: 'those factors which appear to be most closely associated with persistent and serious youth crime … are those which are least amenable to intervention by agents of the youth justice system' (p.257).

One of the most significant reasons to raise the MACR is that children and young people who come into contact with the youth justice system prior to 15 years are less likely to complete

their school education, undertake further education or training, or gain employment (Goldson & Scraton, 1997).

A response that supports young people below 14 years must address the underlying causes of their behaviour by promoting positive social and emotional wellbeing, connection with community, family and culture, and engendering safety.

Investing in support for young people through prevention and early intervention will create better outcomes for children, families, and communities. Early intervention initiatives are also significantly more cost effective than detention. Place-based approaches are most successful in properly supporting young people and keeping communities safe. The Atkinson Report on Youth Justice in Queensland and the Productivity Commission's Draft Report on Expenditure on Children in the Northern Territory both support approaches that are community driven and underpinned by meaningful partnerships between community members, non-government organisations and government agencies, including those responsible for policing, welfare, health, and education.25

In Victoria, the Roadmap to Reform (2016) details how the government will improve lives of vulnerable children, young people, and families through reforming the services that work with them. The strategy aims to improve access to universal services and provide holistic supports, targeted interventions and better outcomes for children in out-of-home care.

The Northern Territory government is rolling out Back on Track (2019), which provides early intervention for young people at risk of entering the youth justice system. The program involves case management, bush camps, education and training and improves cultural connectedness, sense of self and wellbeing. The program includes ways for children to take responsibility for their actions through restorative justice conferences with victims, undertaking community service or participating in a supportive boot camp.

Consideration of the expansion of the Justice Reinvestment (JR) movement. The idea of JR originated in the US in the early 2000s (Tucker & Cadora 2003) JR has been recommended as a potential strategic option for effective practice in the management of juvenile offending in two reports prepared for the NSW Minister of Juvenile Justice (McGinness 2010; McGinness & Dermott 2010). By redirecting funds identified for building juvenile justice centres towards evidence-based prevention and early intervention options, long-term benefits for local communities could be achieved.

Social Reinvestment WA (SRWA) is a coalition of twenty-five not-for-profits, who prioritise healthy families, implementing smart justice, and creating safe communities. A trial site in Halls Creek managed by all key stakeholders has dramatically reduced offending by employing Youth Engagement Night Officers, guaranteeing traineeships for every high school graduate, and delivering youth rehabilitation and alternative, culturally safe education models.

Similar jurisdictions around the world demonstrate that there are effective ways to address anti-social or harmful behaviour, using welfare-based interventions as the primary response for children in trouble. Some elements of overseas systems can be utilised in a model suitable for the ACT context.

Reducing the number of children facing disadvantage in the ACT

What universal or secondary services should be introduced and what existing services should be expanded - or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

Reducing the number of children facing disadvantage: This reduces their risk of justice-involvement in the first place. Whilst some children commit an offence at some point in their childhood, there is a group of children who regularly commit offences, or who are involved in more serious offending. For these children, there is a need to manage the risk they pose to others and address the underlying reasons for their behaviour. However, criminal responsibility is a blunt tool, because there is only one person, in this case a child, being held to account. Approaching the harm caused by children through a criminal lens therefore can miss the reasons for behaviour, hold the wrong person accountable, prevent issues from being addressed, and introduce additional barriers to them living happy and positive lives.

A place-based approach to addressing entrenched disadvantage: This would involve a whole-of-government justice reinvestment approach, particularly investing in areas of locational disadvantage.

Holding universal systems of support to account: There would need to be a reinvestment of the justice budget with a focus on universal services, holding them to account to ensure some children and families do not continue to fall through the cracks. Maternal-child health (with emphasis on the first 1000 days) – strengthening assertive outreach for vulnerable parents with a 'step-up/step-down' model of service delivery to recognise and respond to the needs of parents in the early days of a child's life.

Create community hubs in schools, where services are centralised: This includes allied health personnel (social workers, speech pathologists, occupational therapists) who can support families when problems are identified. Equip teachers and schools to identify warning signs (such as neglect), indications of violent behaviours, and impacts of trauma, and provide them with better options for working with children. Target specific programs and services for children and families to keep children engaged in school as a protective factor.

Strengthen universal systems of housing, health, and mental health support: It is critical that support is offered to parents to provide a safe environment for their children.

Adopt a cultural strengthening approach: It is critical that ownership over intervention is transferred to Aboriginal communities and Aboriginal Community Controlled Organisations, e.g., the Barreng Moorop model.

Strengthen Police responses: A range of options should be made available to police, such as, specially trained police readily available in each unit to respond to call outs where children are involved, with social workers working alongside police. Also, upskilling police more generally to respond to the behaviour of young children.

Strengthen Child Protection and out of home care services: Given that a significant number of children are involved in both the child protection and the youth justice systems, before they turn 14, there needs to be specific attention and support given to education, trauma-informed care, access to therapeutic services, and restorative approaches to conflict resolution between children and carers/peers who are adequately resourced. There is also a need to better equip OOHC care staff to work with children in trauma-informed ways. Specialist youth justice consultancy and advice should be available to residential care providers to minimise children's risk of offending or reoffending; and having dedicated dual order children's workers (Bowles 2015; Mendes, Snow & Baidawi 2014).

In light of the preceding analysis, ACF makes the following recommendations.

Recommendation 6. That the Australian Capital Territory further develop and implement a Justice Reinvestment Strategy in partnership with community services, with the aim to shift the emphasis of youth justice from punishment to rehabilitation.

Recommendation 7. That funds previously allocated for the criminalisation and detention of children under 14 be re-allocated to prevention, early intervention, and diversionary responses linked to culturally safe and trauma-responsive services for this age-range.

Recommendation 8. That universal services in areas such as education, health, employment, and other community services be integrated into the youth justice system as key drivers of early intervention.

Recommendation 9. Aboriginal Community Controlled Organisations (ACCOs) should be prioritised and funded to deliver the planning, design and implementation of prevention, early intervention and diversionary responses for Aboriginal and Torres Strait Islander children and young people.

Conclusion

The MACR in the ACT at 10 years is one of the lowest in the world. This contravenes international standards and is out of line with other domestic legal minimum ages and the evidence base provided by neurobiology and developmental psychology. The children and young people who commit criminal offences are a highly vulnerable group. These children and young people are typically exposed to complex experiences including intergenerational disadvantage, poverty, homelessness, abuse and neglect, mental illness and the child protection system. Remembering that children in conflict with the law are significantly more likely to have experienced compounding forms of childhood adversity, and that childhood trauma of this kind interferes with a child's cognitive development (van der Kolk, 2003), there is

greater utility, and greater humanity, in a systems response that prioritises welfare rather than punishment.

The children and young people who come into contact with the youth justice system at an early age are more likely than other children to become chronic adult offenders. They are also less likely to complete their education or undertake further training or studies. Children and young people's behaviour must be met with restorative, not punitive responses. Their needs should be prioritised over their deeds. The best place for a child is within their family, extended family, or community.

There is a need to shift the focus from responding to consequences of juvenile crime to addressing the underlying causes, behaviours, experiences and trauma of young offenders. Rather than sentencing these children and young people, we should be directing focus and resources to diversionary programs, restorative justice principles, prevention and early intervention models for them and their families.

To achieve positive outcomes for these children we need to apply appropriate interventions rather than sentencing them to youth detention. Given the profound impact contact with the youth justice system has on a child's long-term prospects, it makes sense to keep children under 14 years out of the youth justice system. Raising the MACR, lifting impoverished children out of the youth justice system, decriminalising social need and providing improved 'children focused' services accessible at the point of need, begins to define the contours of a more agreeable and effective approach to children and the crimes they commit.

References

Armytage, P & Ogloff J. (2017) Meeting needs and reducing offending Youth justice review and strategy. Victorian Government.

Australian Institute of Health and Welfare (2016). 'Youth Justice in Australia 2014–15,' Bulletin 133, p.9.

Australian Law Reform Commission (2010) Seen and heard: priority for children in the legal process (ALRC Report 84). Australian Commonwealth Government.

Bateman T (2012) Criminalising children for no good purpose: The age of criminal responsibility in England and Wales, National Association for Youth Justice Campaign Paper. Available at: http://thenayj.org.uk/ wp-content/files_mf/criminalisingchildrennov12.pdf (accessed 12 February 2013).

Bateman, T. & Pitts, J. (2005) 'Conclusion: what the evidence tells us', in: T. Bateman and J. Pitts (Eds.), The RHP Companion to Youth Justice, Lyme Regis: Russell House.

Bowles J 2015. What can be done? Residential therapeutic treatment options for young people suffering substance abuse/mental illness. Winston Churchill Memorial Trust of Australia.

Coleman J (2011) The Nature of Adolescence. London: Routledge.

Crofts, T. (2016). Reforming the age of criminal responsibility. South African Journal of Psychology, 46(4), 436–448.

Cunneen, C. (2017) Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report, Comparative Youth Penality Project, University of New South Wales, Sydney.

Delmage E. (2013). The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective. *Youth Justice*. P. 102-110.

Dvir, Y., Ford, J. D., Hill, M., & Frazier, J. A. (2014). Childhood maltreatment, emotional dysregulation, and psychiatric comorbidities. *Harvard review of psychiatry*, *22*(3), 149–161.

Goldson, B., 2009. 'Counterblast: 'Difficult to Understand or Defend: A Reasoned Case for Raising the Age of Responsibility,' The Howard Journal, Vol. 48 No. 5, pp.514–521, p.123.

Johansson, Susanna & Stefansen, Kari & Bakketeig, Elisiv & Kaldal, Anna. (2017). Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model. 10.1007/978-3-319-58388-4.

Johnson, S. B., Blum, R. W., & Giedd, J. N. (2009). Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy. *The Journal of adolescent health: official publication of the Society for Adolescent Medicine*, *45* (3), 216–221.

Malvaso, C.G., Delfabbro, P. (2015). Offending Behaviour Among Young People with Complex Needs in the Australian Out-of-Home Care System. *J Child Fam Stud* 24, 3561–3569 (2015).

McAra, L., & McVie, S. (2005). The Usual Suspects? Street-life, Young People and the Police. Criminal Justice, 5(1), 5-36.

McGinness A 2010. A strategic review of the New South Wales juvenile justice system: Report for the Minister for Juvenile Justice. Canberra: Noetic Solutions. http://www.juvenile.justice.nsw.gov.au/ Documents/Juvenile%20Justice%20Review%20Report%20FINAL.pdf

McGinness A & Dermott T 2010. Effective practice in juvenile justice: Report for the Minister for Juvenile Justice. Canberra; Noetic Solutions. http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20 Justice%20Effective%20Practice%20Review%20FINAL.pdf

Mendes P, Baidawi S & Snow P (2014). Transitioning from out-of-home care in Victoria: Strengthening support services for dual clients of child protection and youth justice. Australian Social Work 67(1): 6–23

Murray, D. W., Rosanbalm, K., Christopoulos, C., & Hamoudi, A. (2015) Self-Regulation and Toxic Stress: Foundations for Understanding Self-Regulation from an Applied Developmental Perspective. (OPRE Report 2015-21). Washington, DC: Office of Planning, Research and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

National Aboriginal and Torres Strait Islander Legal Services (2020). Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group.

Nolan, D., & Moodie, K. (2016). "Between a rock and a hard place": Responses to Offending in Residential Childcare. Retrieved from http://www.cycj.org.uk/wp-/uploads/2016/10/Responses-toOffending-in-Residential-Childcare.pdf

NSW Bureau of Crime Statistics and Research Reoffending (2019). Re-Offending Statistics NSW.

O'Brien, W. & Fitz-Gibbon, K. (2017). The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform.

Prior D, Farrow K, Hughes N, Kelly G, Manders G, White S and Wilkinson B (2011) Maturity, Young Adults and Criminal Justice: A Literature Review. Birmingham: University of Birmingham Institute of Applied Social Studies.

Pillay, A.L. (2015). Deliberating the minimum age of criminal responsibility. South African Journal of Psychology, 45(2), 143–146.

Richards, K. (2009). Juvenile Contact with the criminal Justice system in Australia. Monitoring reports no. 7. Canberra Australian Institute of Criminology.

Richards, K. (2011). What makes a juvenile offenders different? Trends & Issues in crime and criminal justice No. 409. Canberra: Australian Institute of Criminology.

State of Victoria, Department of Health and Human Services. (2016). Road Map for Reform: Strong Families, Safe Children. Victorian Government.

Steinberg, L., (2012). 'Should the Science of Adolescent Brain Development Inform Public Policy,' Issues in Science and Technology, Vol. 28, No. 3, pp.67–78, p.67.

Tucker SB & Cadora E 2003. Justice reinvestment. Ideas for an Open Society 3(3). New York: Open Society Institute
https://www.opensocietyfoundations.org/sites/default/files/ideas_reinvestment.pdf

Victorian Sentencing Advisory Council (2019)

Queensland Productivity Commission (2019). Inquiry into Imprisonment and Recidivism,

Weinberger, D. R., Elvevag, B., & Giedd, J. N. (2005). The adolescent brain: A work in progress.

NHLF
National Health Leadership Forum

Leading Aboriginal and Torres Strait Islander healthcare

29 July 2021

Shane Rattenbury MLA
Attorney-General

Rachel Stephen-Smith MLA
Minister for Families and Community Services

Emma Davidson MLA
Assistant Minister for Seniors, Veterans, Families and Community Services

Email: macr@act.gov.au.

Dear Ministers

I am writing to you in my capacity as Chair of the National Health Leadership Forum (NHLF). The NHLF supports your review regarding raising the minimum age of criminal responsibility and welcomes the opportunity to make a submission. Raising the minimum age of criminal responsibility is critical to recalibrating the way the ACT's justice system places children onto a path of criminal behaviour rather than addressing the underlying causes and to prevent further interactions with the justice system.

We submit for your consideration the NHLF submission to the Council of Attorneys General Review of the Age of Criminal Responsibility. Our previous submission is relevant to your review, and we particularly want to emphasise the contradictions and inconsistencies within our judicial and social services system, and within the general community regarding what is or is not appropriate behaviour or actions and who is and is not punished.

We reaffirm the need to raising the minimum age of criminal responsibility, as well as moving from a place of punishment to one of prevention and intervention within our justice system. Without addressing the systemic issue of racism within our society we will not address the underlying social determinants of health that are key influences in why Aboriginal and Torres Strait Islander children interact with the out of home care and youth justice systems.

Yours sincerely

Donna Murray

Chair, National Health Leadership Forum
CEO, Indigenous Allied Health Australia

Attachment: - NHLF Submission Council of Attorneys Generals Age of Criminal Responsibility February 2020

ALIA House
Ground Floor, 9–11 Napier Close
Deakin West, ACT 2600
PO Box 323, Deakin ACT 2600

Email:
admin@nhlf.org.au
Phone:
+61 2 6285 1010

nhlf.org.au

NHLF
National Health Leadership Forum

Leading Aboriginal and Torres Strait Islander healthcare

Submission

Council of Attorneys-General

Review of Age of Criminal Responsibility

2020

ALIA House
Ground Floor, 9–11 Napier Close
Deakin West, ACT 2600
PO Box 323, Deakin ACT 2600

Email:
admin@nhlf.org.au
Phone:
+61 2 6285 1010

nhlf.org.au

NHLF
National Health
Leadership Forum

About the NHLF

The National Health Leadership Forum (NHLF) was established in 2011. The NHLF is a collective partnership of 12 national organisations who represent a united voice on Aboriginal and Torres Strait Islander health and wellbeing with expertise across service delivery, workforce, research, healing and mental health and social and emotional wellbeing. We provide a range of advice and direction to the Australian Government on the development and implementation of policies, programs or services that contribute to improved and equitable health and life outcomes, and the cultural wellbeing of Aboriginal and Torres Strait Islander people.

The NHLF was instrumental in the formation of the Close the Gap Campaign and continues to lead the Campaign as the senior collective of Aboriginal and Torres Strait Islander health leadership. Committed to achieving health equality, the NHLF draws strength from cultural integrity, the evidence base and community. The NHLF provides advice and direction to the Australian Government on the development and implementation of informed policy and program objectives that contribute to improved and equitable health and life outcomes, and the cultural wellbeing of Aboriginal and Torres Strait Islander people.

The NHLF shares a collective responsibility for the future generations of Aboriginal and Torres Strait Islander people and we pay our respect to our Elders who came before us.

Health is a noted human right, it is an underpinning to everyday life, and key factor in economic (and environmental) sustainability. Our vision is for the Australian health system is free of racism and inequality and all Aboriginal and Torres Strait Islander people have access to health services that are effective, high quality, appropriate and affordable.

The NHLF Membership

- Aboriginal and Torres Strait Islander Healing Foundation
- Australian Indigenous Doctors' Association
- Australian Indigenous Psychologists' Association
- Congress of Aboriginal and Torres Strait Islander Nurses and Midwives
- Indigenous Allied Health Australia
- Indigenous Dentists' Association of Australia
- The Lowitja Institute
- National Aboriginal and Torres Strait Islander Health Workers' Association
- National Aboriginal and Torres Strait Islander Leadership in Mental Health
- National Aboriginal Community Controlled Health Organisation
- National Association of Aboriginal and Torres Strait Islander Physiotherapists
- Torres Strait Regional Authority

NHLF
National Health
Leadership Forum

Introduction

The NHLF welcomes the opportunity to respond to the request for submission by the Council of Attorneys-General Review of age of criminal responsibility. This Review is critical to recalibrating how our justices' systems deal with children whose behaviour is attracting responses from law enforcement and justice systems which is placing children onto the path of criminal behaviour rather than addressing the underlying causes and prevent further interactions with the justice system.

Systemic racism is a factor in the overrepresentation of Aboriginal and Torres Strait Islander peoples in our justice systems. Without addressing the systemic issue of racism within our society we will not improve the social determinants of health which are key influences in why Aboriginal and Torres Strait Islander children are in out of home care and youth justice.

The NHLF support the work by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). These Legal Services provide legal advice; assistance; representation; community legal education; advocacy; law reform activities, and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system is vital in delivering effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples.

Response to the Inquiry's Questions

Question 1: Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.

1. The NHLF calls on the Attorneys-General to the prevent the criminalisation of children between 10 and 13 years of age by: raising the minimum age of criminal responsibility in all Australian jurisdictions to at least 14 years of age.

2. The NHLF believes is important to note that consideration of this issue encompasses both youth in detention as well as those on community-based supervision orders, both forms of supervision result from interaction with the criminal justice system.

3. The disproportionate impact that the minimum age of criminal responsibility has on Indigenous young people is well known.[1] The Australian Institute of Health and Welfare Youth Justice in Australia report 2017-18 presents some very disturbing statistics concerning the representation of Indigenous children in the youth justice system. The report states that a total of 5513 young

[1] AMA and LCA Statement on the Minimum Age of Criminal Responsibility, 2019 https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-ea11-9403-005056be13b5

people aged 10 and over were under youth justice supervision on an average day in 2017-18. Of these, almost half (49%) were Indigenous.[2] This is despite Indigenous youth comprising just 5% of young people aged 10-17 in Australia.[3] In 2017-18, the rate of Indigenous young people aged 10-17 under supervision on an average day was 187 per 10,000, compared with 11 per 10,000 for non-Indigenous young people.[4] The level of Indigenous over-representation was higher in detention (23 times more likely) that in community-based supervision (17 times as likely).[5]

4. The common law presumption of *doli incapax* is often argued to be a sufficient safeguard for young children (aged 10-14) who come into contact with the criminal justice system despite there being significant evidence to the contrary. This issue is further addressed under the response to question 3.

5. It is widely acknowledged internationally and within Australia that responses to youth offending must reflect the unique circumstances of young people, including:
    - the developmental nature of adolescence and its link to offending;
    - the criminogenic effect of imprisonment; and
    - the public interest rehabilitation of young people.[6]

6. The Parliamentary Library and Information Service within the Department of Parliamentary Services, Victoria highlights the 'criminogenic effect of custody on a young person whose brain is still developing: findings from several studies indicate that a young offender who participates in a diversion program is far less likely to reoffend than a young person whose case is determined in court and who is subsequently incarcerated. This includes controlling for various factors likely to influence recidivism.'[7]

7. The Human Rights Law Centre (HRLC) state that: "Children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children's brains are still developing throughout these formative years where they have limited capacity for reflection before action. Children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of criminalisation."[8]

---

[2] Australian Institute of Health and Welfare 2019. Youth Justice in Australia 2017-18. Cat. No. JUV 129. Canberra: AIHW.
[3] Ibid
[4] Ibid at page 9.
[5] Ibid at page 9.
[6] Parliamentary Library and Information Service, Department of Parliamentary Services, Parliament of Victoria, Grover, C 2017. Youth Justice in Victoria: https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13806-youth-justice-in-victoria
[7] Ibid
[8] HRLC. 2019. Our Youth, Our Way. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice. 31 October. https://www.hrlc.org.au/submissions.

8. Australia's laws concerning the age of criminal responsibility are in conflict with global human rights standards. The *Convention on the Rights of the Child* (CROC), to which Australia is a signatory, requires that states establish 'a minimum age below which children shall be presumed not to have the capacity to infringe penal law'[9] and that States should 'whenever appropriate and desirable, [develop] measures for dealing with such children without resorting to judicial proceedings…'.[10]

9. The Committee on the Rights of the Child provides more specific guidance, stating that a minimum below 12 years of age is unacceptable and that while 12 is the absolute minimum, states should 'continue to increase this to a higher age level'.[11]

10. Raising the minimum age of criminal responsibility requires a principled decision to align Australian state and territory criminal laws with international legal norms that balance the child's best interests with the broader interests of crime prevention and community safety.[12]

11. In addition, there is a well-recognised link between the overrepresentation of Aboriginal and Torres Strait Islander children in the Child Protection System and the overrepresentation of children in the Justice system. As NATSILS[13] note that young people placed in out of home care (OOHC) are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year. For young people in OOHC, there is also a recognised increased risk of involvement with the criminal justice system after leaving OOHC.

12. The majority of children in detention, around 60%, are on remand waiting for their trial or sentence. These statistics reveal a system that is geared towards imprisoning children, rather than addressing the underlying causes of 'problematic' behaviour, particularly through prevention and early intervention programs and services that are therapeutic, rehabilitative and youth specific.[14] Raising the age would break the cycle of early entry into, and entanglement within, the criminal justice system. Children arrested before 14 years of age are three times more likely than those arrested after 14, to reoffend as adults.[15]

---

[9] Article 40(3)(a)
[10] Article 40(3)(b)
[11] CRC/C/GC/10 para. 32
[12] O'Brien, Wendy and Fitz-Gibbon, Kate 2017, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform, Youth Justice, vol. 17, no. 2 pp. 158.
[13] NATSILS 2017 Submission to the Law Council of Australia's National Justice Project. October. Sydney. See also the Australian Institute of Health and Welfare 2017. Youth justice in Australia 2015–16. Bulletin 139. Cat. no. AUS 211. Canberra: AIHW; and Baidawi s. and Sheehan, R. 2019. 'Crossover Kids': Offending by child protection-involved youth. Australian Institute of Criminology: Trends & Issues in crime and criminal justice. No. 582. December. Canberra.
[14] The Human Rights Law Centre. 2019. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice.
[15] Croft T. 2019. A new bill keeping 10 years old out of jail is a good start, but it needs to go further. The Conversation. Australia retrieved from https://theconversation.com/a-new-bill-keeping-10-year-olds-out-of-jail.

13. The inconsistency between the view that children aged 10 are capable to be held criminally responsible for their actions yet young people at 16 years of age are deemed to lack the requisite capacity to be empowered to vote. At the age of 18 years, a person can sign contracts, get married without parental consent, be held criminally responsible for one's actions and serve a sentence in adult jails and vote. 18 years of age marks the developmental stage of sentience and therefore responsibility is assumed.[16] These perspectives on age and capability illustrate the contradictions based on social/cultural values rather than use of evidence in the designing of laws and their application.

14. Within the criminal justice system, like any other system, its management is dependent on the attitude of those working within the system and as noted by the Human Rights Law Centre[17] the "massive inequality exists not because Aboriginal children commit more crimes, but because of the operation of discriminatory laws and policies that result in Aboriginal children being targeted by police, stigmatised and harmed by contact with the system and subsequently denied culturally relevant and community based support."

15. It is not just the aforementioned contradiction that is concerning, more importantly it is the longer term impact on the mental health of children and the setting up of a lifetime of disadvantage resulting from early interactions with the criminal justice system. Children's brains and patterns of behaviour are still developing until their late teens. Locking up children during their developmental years affects this development. It increases the risks of depression, suicide, self-harm, leads to poor emotional development, poor education outcomes and further fractures family relationships.[18] Furthermore, children in incarceration are more likely to exhibit developmental disorders. Developmental and cognitive disabilities, evident through communication difficulties, cognitive delay, learning disabilities, emotional and behavioural problems and lack of inhibition, are more prevalent in the juvenile justice sector than in the general population. [19]

[16] Chapman, S. 2016. When is a smoker an adult? Why we shouldn't raise the legal smoking age to 21. The Conversation: https://theconversation.com/when-is-a-smoker-an-adult-why-we-shouldnt-raise-the-legal-smoking-age-to-21-56985
[17] Human Rights Law Centre. 2019. Our Youth, Our Way – submission to the inquiry into the overrepresentation of Aboriginal children and young people in your justice. https://www.hrlc.org.au/submissions/2019/11/1/our-youth-our-way
[18] Baldry E. Cunneen C. 2019. Locking up kids damages their mental health and sets them up for more disadvantage. Is this what we want? The Conversation: https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674; and Hughes, N. 2014. Neglecting neuroscience has criminal consequences for youth. The Conversation: https://theconversation.com/neglecting-neuroscience-has-criminal-consequences-for-youth-34872.
[19] Croft T. 2019. A new bill keeping 10 years old out of jail is a good start, but it needs to go further. The Conversation. Australia retrieved from https://theconversation.com/a-new-bill-keeping-10-year-olds-out-of-jail

16. The Baidawi and Sheehan Study for the Criminal Research Advisory Council and the Victorian Department of Justice and Regulation[20] found that "children with Child Protection involvement are disadvantaged at several stages of criminal justice system contact. Systemic disadvantage in this context can be understood as crossover children's disproportionate exposure to criminogenic environments and the criminal justice system, compared to peers residing with family or a responsive guardian, coupled with a lack of Youth Justice system responsivity to the unique needs of this group." This study concluded that it was more important to provide better support for "cross-over" children as they are overall younger, more violent, offend persistently more than their peers. This group of young people have a level of complexity of needs that reinforces the necessity for a whole-of-government response to avert the care to custody trajectory.

17. There are many underpinning issues that drive children to crime and an established link between poor out of home care, residential care system and children going into the justice system. Much of this is due to a poor welfare social support system creating a criminal environment rather than preventing.[21] Having a low age of criminal responsibility means that we are responding to welfare issues with criminal justice responses and potentially damaging the prospects of young people and their potential future contribution to society[22] and their community. The Police should not be the front line and covering over the faults within our protection and community services systems.[23]

Question 2: If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.

18. The NHLF call for the age of criminal responsibility to be increased to 14 years of age in all jurisdictions across all types of offences.

19. Currently the age of criminal responsibility across Australia is 10 years old. Children as young as 10 and 11 have been detained by police for alleged crimes as petty as breaching bail by missing school and arriving home moments after a bailed imposed curfew. The Committee on the

[20] Baidawi s. and Sheehan, R. 2019. 'Crossover Kids': Offending by child protection-involved youth. Australian Institute of Criminology: Trends & Issues in crime and criminal justice. No. 582. December. Canberra.
[21] McFarlane, K. 2017. The faulty child welfare system is the real issue behind our youth justice crisis. The Conversation: https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217
[22] Little, R. 2018. Congratulations, you're ten! Now you can be arrested. The Conversation: https://theconversation.com/congratulations-youre-ten-now-you-can-be-arrested-106115
[23] HRLC. 2019. Our Youth, Our Way. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice. 31 October. https://www.hrlc.org.au/submissions.

Rights of the Child[24] and the National Children's Rights Commissioner[25] consider the age of criminal responsibility as unacceptably low. The low age of criminal responsibility impacts disproportionately on Indigenous children because of their over-representation in the criminal justice system[26].

20. On the whole, juveniles are more frequently apprehended by police in relation to offences against property than offences against the person. Certain types of offences (such as graffiti, vandalism, shoplifting and fare evasion) are committed disproportionately by young people. Conversely, very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles. In addition, offences such as white-collar crimes are committed infrequently by juveniles, as they are incompatible with juveniles' developmental characteristics and life circumstances.[27]

21. As previously mentioned in the introduction, the AIHW[28] have reported on the overrepresentation Aboriginal and Torres Strait Islander young people in the youth/criminal justice system compared to non-Indigenous children, and the fact that non-Indigenous children are more likely to go into diversionary programs than Aboriginal and Torres Strait Islander Children. The AIHW also point out that Aboriginal and Torres Strait Islander children in the child protection system are more likely to end up in the youth justice system. Child protection is becoming a pipeline to the justice system and prison, particularly for Aboriginal and Torres Strait Islander children and youth. Australia needs to move away from traditional 'tough on crime' approach and take an approach that wants to prevent crime by assisting young people in need and taking the view that their behaviour or actions is a call for help and an opportunity for early intervention to prevent re-offending later in life.

22. Accordingly increasing the age to which a child will come into the justice system along with having a thoroughly implemented diversionary process will help to reduce contact with police and the legal system. "Diversion is an essential ingredient of an effective youth justice system. The philosophy of diversion recognises the negative consequences of exposing young people to the criminal justice system, and offers young people a pathway out of crime, without exposing

[24] UN Committee on the rights of the Child. 2019. Committee Eon the rights of the Child review the report of Australia. 10 September: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24974&LangID=E

[25] Australian Human Rights Commission. 2018. Submission to the Committee on the Rights of the Child: Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict. Pp60-61.

[26] NATSILS and Amnesty International Written Statement: The Crisis of Indigenous Youth Detained in Australia, Item 3: Interactive Dialogue with the Special Rapporteur on the Rights of Indigenous Peoples, UN Human rights Council Thirty-Six Session September 2017.

[27] K. Richards (2011) 'What makes juvenile offenders different from adult offenders?', Trends & Issues in Crime and Criminal Justice, No. 409, Australian Institute of Criminology, Canberra, p. 3.

[28] Australian Institute of Health and Welfare 2019. Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018. Data linkage series no. 25. Cat. no. CSI 27. Canberra: AIHW.

them to the stigma and alienation of the criminal justice system. Diversion also recognises the reality that most young people 'grow out of crime' when exposed to positive interventions."[29]

Question 3: If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of doli incapax (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained? Does the operation of doli incapax differ across jurisdictions and, if so, how might this affect prosecutions? Could the principle of doli incapax be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.

23. As previously mentioned, it is contradictory to argue that a child between the ages of 10 to 14 years can be held accountable in criminal law for their actions as if they are adults, yet no such allowance is made for children under 18 years to prove their competence for the purpose of voting. These two legislative decisions illustrate inconsistency in the application of evidence concerning the cognitive capacity of persons aged under 18 years. This inconsistency is compounded by research which suggests the application of the presumption *doli incapax* is perhaps not being implemented as intended and often fails to safeguard children.[30]

24. A study conducted by O'Brien and Fitz-Gibbon in 2017 revealed that the common law principle of *doli incapax* is, in Victoria at least, incorrectly applied in practice. The onus is ordinarily on the prosecution to rebut the presumption of *doli incapax* however that study found that 'the onus for *doli incapax* now falls, informally to the defence, who must initiate (and bear the cost of) psychological assessments of a child's capacity in instances where they think this is appropriate.'[31] This presents a number of problems in practice including funding for such assessments, the availability of appropriate psychologists and the fact that 'children are vulnerable to the discretion of legal counsel, who, after all, are trained in law rather than developmental psychology'.[32]

25. This study demonstrates significant erosion of the principle of *doli incapax* in practice in the criminal justice system in Victoria and raises concerns about whether the principle is effectively applied in other Australian jurisdictions. This common law principle should be enshrined in legislation, to avoid confusion regarding its application in practice.

---

[29] Satya, S. and Barson, Ruth B. 2011. A contemporary snapshot of two issues upon which the RCIADIC Report commented: Youth Justice and the over-incarceration of Aboriginal young people, and alcohol-related offences and offending. Australian Indigenous Law Review. Vol. 15. No 1. 87-92

[30] Baidawi and Sheehan. Op cit.

[31] O'Brien, Wendy and Fitz-Gibbon, Kate 2017, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform, Youth Justice, vol. 17, no. 2 pp. 134-152.

[32] Ibid pp. 148.

26. The Human Rights Law Centre (HRLC) state that: "Children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children's brains are still developing throughout these formative years where they have limited capacity for reflection before action. Children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of criminalisation."[33]

27. Therefore, the NHLF calls for the presumption of *doli incapax* to be retained, but that the age to which it is applied is changed to include children aged 14 years and over.

Question 4: Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (e.g. to 12) should a higher minimum age of detention be introduced (e.g. to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

28. The NHLF does not support the imprisonment of children and therefore calls for a higher minimum age of detention of 16 years.

29. Addressing the driving factors that lead young people to behave in ways that could lead them to imprisonment then differentiating between age for criminal responsibility and imprisonment becomes irrelevant. The focus becomes one of prevention and interventions through increase welfare and social supports rather than a 'law and order' approach.

30. The Australian Law Reform Commission recommends that all jurisdictions repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.[34]

Question 5: What programs and frameworks (e.g. social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

31. The overrepresentation of Indigenous people in Australian prisons was the focus of the Australian Law Reform Commission report *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.*[35] Two of the key

[33] HRLC. 2019. Our Youth, Our Way. Submission to the inquiry into the overrepresentation of Aboriginal children and young people in youth justice. 31 October. https://www.hrlc.org.au/submissions.
[34] Australian Law Reform Commission. 2018. Pathways to Justice-Inquiry into the Incarceration Rate of Aboriginal and Torres Strait islander Peoples. Final Report 133 (2017)
[35] Ibid

recommendations of that report involved "justice reinvestment". Justice reinvestment is a strategy for reducing the number of people in prison (and the numbers coming into contact with the criminal justice system) by investing funds drawn from the corrections budget into early intervention, prevention and diversionary solutions in communities where many prisoners come from and return to.[36] The enquiry went so far as to suggest that a justice reinvestment body be set up to provide 'technical expertise and promote the reinvestment of resources from the criminal justice system into community-based initiatives'.[37]

32. Justice Reinvestment is not a new concept and was advocated by the Australian Human Rights Commission, in their Social Justice Report of 2009[38] which focused on *justice reinvestment as a solution to* reduce Indigenous over-representation in the criminal justice system. Tom Calma,[39] the Aboriginal and Torres Strait Islander Social Justice Commissioner from 2004–2010, who oversaw the 2009 Report, recently noted the ALRC Pathways to Justice Report recommendations and advocates for their implementation particularly justice reinvestment.

33. An example of justice reinvestment in action is the Maranguka Justice Reinvestment project in Bourke, New South Wales. As a result of the project, from 2016 to 2017, the Bourke community experienced a:
    - 23% reduction in police-recorded incidents of domestic violence
    - 14% reduction in bail breaches for adults
    - 42% reduction in days spent in custody for adults
    - 31% increase in year 12 student retention rates
    - 38% reduction in charges across the top five juvenile offence categories.[40]

34. Arguably, what has made the Maranguka project so successful, is that is a community-led, 'place-based model of justice reinvestment.'[41] Mick Gooda, also a former Aboriginal and Torres Strait Islander Social Justice Commissioner, has supported a justice reinvestment approach as it enables communities to take back local control…to not only take some ownership of the problem but also own the solution.[42] The characteristics of justice reinvestment align well with

[36] Russel, S and Cunneen, C. 2018. As Indigenous incarceration rates keep rising, justice reinvestment offers a solution. The Conversation. Australia retrieved from https://theconversation.com/as-indigenous-incarceration-rates-keep-rising-justice-reinvestment-offers-a-solution-107610
[37] ALRC. Op. cit.
[38] AHRC. 2009. Social Justice Report. Sydney.
[39] Calma, T. 2019. Justice reinvestment: key to reducing Indigenous incarceration. 6 June. Opinion: Australian Lawyers Alliance: https://www.lawyersalliance.com.au/opinion/justice-reinvestment-key-to-reducing-indigenous-incarceration
[40] ALRC Op. cit.
[41] KPMG. 2018. Maranguka Justice Reinvestment Project Impact Assessment: http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf
[42] Cited in the Senate Legal and Constitutional Affairs References Committee Report. 2013. Value of a justice reinvestment approach to criminal justice in Australia.

notions of self-determination in emphasising community ownership and responsiveness to local need.[43]

35. The NATSILS calls for actions aimed to tackle the behaviour of children and preventing the potential for lifelong interactions with the youth justice and criminal justice systems. Some of the actions called for are:[44]

    35.1. Establish greater flexibility in funding models to enable Aboriginal and Torres Strait Islander community controlled organisations to deliver holistic wrap-around services that are responsive to community needs.

    35.2. Provide adequate resources to Aboriginal and Torres Strait Islander community controlled organisations to enable greater collaboration with Commonwealth, State and Territory Governments to identify gaps and design appropriate infrastructure that will increase the availability of culturally appropriate community based sentencing options.

    35.3. Implementing alternative non-punitive sentencing responses that focus on rehabilitation and addressing the underlying causes of offending behaviour.

    35.4. Work with Aboriginal and Torres Strait Islander organisations to identify unmet need and develop culturally appropriate community based sentences, with a particular emphasis on the delivery of community based sentences in rural and remote locations.

    35.5. Invest in developing better infrastructure and support services to increase the availability of culturally appropriate community-based sentencing options.

    35.6. Invest in the design and implementation of culturally appropriate community-based sentencing options.

36. Likewise, the Change the Record Coalition have developed frameworks that outline actions that governments in partnership with Aboriginal and Torres Strait Islander communities to deliver programs and services to address the issues and assist children who are at risk of falling into the youth justice cycle. Their *National Plan of Action* and *Blueprint for Change* aim to end the overrepresentation of Aboriginal and Torres Strait Islander children in prison through reform of the youth justice system and address concerns of governments and the broader community regarding 'community safety'. These documents provide guidance to the policies and strategies required to address the underlying reasons why individuals come into contact with the justice system in the first place and provide alternative strategies than the current youth justice

[43] Ibid.
[44] NATSILs. Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples, September 2017. Pp 17, 35

approach. The fundamentals behind these two plans is that all levels of governments need to listen to and empower Aboriginal and Torres Strait Islander communities to create the change. Governments need to acknowledge and accept that all strategies must be grounded in a firm understanding of Aboriginal and Torres Strait Islander peoples' culture and identity. [45]

37. With the recognised crossover of Aboriginal and Torres Strait Islander children in child protection system into the youth justice system it is a must that the Aboriginal and Torres Strait Islander peak organisations are recognised to holding the solutions. As previously mention the Legal Services through NATSILS know the issues and solutions within the youth justice systems. Likewise, SNAICC, the peak body representing children and the secretariat for the Family Matters Campaign are leading the designing and implementing alternative approaches within the Out of Home Care system. This is the only way reduce the overrepresentation of Aboriginal and Torres Strait Islander children in youth justice system.

38. The Family Matters Campaign calls for action that aims to ensure Aboriginal and Torres Strait Islander children and young people grow up safe and cared for in family, community and culture. It aims to eliminate the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 2040. The Family Matters Report 2019[46] notes:

    38.1. The growing trend towards permanent placement away from their families and that Aboriginal and Torres Strait Islander children continue to experience high levels of disadvantage.

    38.2. That Aboriginal and Torres Strait Islander children are 37.3% of the total out-of-home care population, including foster care, but only 5.5% of the total population of children. Aboriginal and Torres Strait Islander children are now 10.2 times more likely to be removed from their families than non-Indigenous children.

    38.3. That poverty and homelessness have a profound impact on children being removed from their home. Nearly one in three Aboriginal and Torres Strait Islander people are living below the poverty line. Aboriginal and Torres Strait Islander householders are almost twice as likely to experience rental stress.

[45] Change the Record. Free to be Kids – National Action Plan: http://www.natsils.org.au/portals/natsils/Change%20The%20Record%20Free%20to%20be%20Kids%20National%20Plan%20of%20Action.pdf?ver=2018-06-27-120222-650; Policy Framework – Blueprint for Change: https://changetherecord.org.au/policy-framework-blueprint-for-change

[46] SNAICC, Family Matters Campaign, Griffith University, University of Melbourne and Monash University. 2019. Family Matters Report: https://www.familymatters.org.au/wp-content/uploads/2019/10/1097_F.M-2019_LR.%C6%92.pdf

Question 6: Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

39. The Council of Attorneys-General Review must recognise that along with the experience of poverty and disadvantage, involvement in the child protection system and family violence are two of the clearest indicators of people who are more likely to end up in the criminal justice system. Early intervention strategies to prevent crime must include measures to stop family violence and avoid exposure to the child protection system by supporting families and strengthening communities. These strategies will decrease imprisonment and violence rates.[47]

40. The focus should be on the above which is about acknowledging the systemic drivers including intergenerational trauma that drives the "anti-social" behaviour which is the responsibility of governments. Placing the focus on children taking responsibility for their behaviour relieves governments and their agencies from their actions which are part of the system issues.

41. Justice reinvestment approaches can include programs as diverse as investments in education, job training, health, parole support, housing or rehabilitation.[48] As outlined above, the justice reinvestment approach being utilised in Bourke, NSW is having an overwhelmingly positive impact on the community owing to its community-led, place based approach.

42. Justice reinvestment approaches can be employed at all critical points along the criminal justice path: in prevention of offending, diversion from custody at the point of remand or conviction and in lowering the numbers returning to custody via breaches of parole or reoffending.[49]

43. Justice reinvestment clearly offers the potential for the development of strategies to deal with children who are too young to be charged or where a diversionary strategy is employed to deal with the behaviours.

---

[47] Ibid

[48] Schwartz, M *Australian Indigenous Law Review* vol 14 No 1, 2010 "Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment" p.3.

[49] Schwartz, M *Australian Indigenous Law Review* vol 14 No 1, 2010 "Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment" p.1.

Question 7: If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system?

Question 8: If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold?

Response to Questions 7 and 8 Combined

44. The NHLF does not accept the statements of anti-social behaviour and social norms when it is linked to children. The placing of adult expectations on children takes away the ability of children to learn, develop and grow with the help of adult and community guidance. Additionally, there is a lack of acknowledgement that many Aboriginal and Torres Strait Islander children and young people with a disability are over-represented in the youth justice system.[50] There needs to be an acknowledgement that many in youth justice system have a cognitive impairment or disability which may mean they are unable to behave 'normally' and/or understand the implications of their behaviour.

45. More investment to strengthen the welfare and social support systems is required to address the issues that lead children to behave in ways that are anti-social and bring them into contact with the youth justice system. Such investment would also assist to address the concerns the Attorneys-General may have regarding any gaps that may result from an increase in the age for criminal responsibility. The reference to investment is not just in a funding sense, but also enabling communities to design and implement solutions and find alternatives to the current youth justice approach.

46. The NHLF supports the advocacy call by the NATSILS[51] to improve the interaction and experience by Aboriginal and Torres Strait Islander peoples with the criminal justice system and particularly to prevent the formation of criminals of children:

    46.1. Ensure culturally appropriate and safe community based sentences are readily available to enable a child to stay connected to family and community, particularly in regional and remote areas,

    46.2. Co-locate disability support workers within Aboriginal and Torres Strait Islander Legal Services and community controlled disability organisations,

[50] Law Council of Australia. The Justice Project Final Report – Part 1: Aboriginal and Torres Strait Islander People. August 2018.
[51] NATSILS' Submission to the Law Council of Australia's National Justice Project, October 2017,

46.3. Increase the availability of culturally appropriate health care services in detention,

46.4. Increase investment in community controlled early intervention and family support services,

46.5. Increase funding for Aboriginal and Torres Strait Islander Legal Services, and

46.6. Increase Police Accountability.

47. The NHLF also calls for more accountability of health services within correctional systems to prevents further deaths and to ensure the health status of a child or adult does not worsen but instead improves.

Question 9: Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered doli incapax) to participate in activities or behaviours which may otherwise attract a criminal offence?

48. The NHLF makes no comment against this question.

Question 10: Are there issues specific to states or territories (e.g. operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

49. This question is a concern to the NHLF, particularly given the pattern across the jurisdictions where the normal operational procedure is for Aboriginal and Torres Strait islander children to incur some form of detention which is causing them more long term harm through ongoing interactions with the criminal justice system. Rather, the current operational issues within the states and territories need to be improved as it the application of the law which is unfairly applied to Aboriginal and Torres strait Islander children compared to non-Indigenous children.

50. As this submission has noted, it is the application of the states and territories' current laws, policies and procedures that are detrimental to children that need reform rather than maintaining the status quo. Increasing the age of criminal responsibility is but one reform measure others include the following to address over-imprisonment:

50.1. include and commit to Justice Targets, as part of the COAG National Agreement on Closing the Gap,

50.2. all jurisdictions should resource and expand justice reinvestment trials,

50.3. states and territories should abolish mandatory sentencing regimes which disproportionately incarcerate Aboriginal and Torres Strait Islander people,

50.4. Make available culturally sensitive non-custodial sentencing options, co-designed by Aboriginal and Torres Strait Islander community-controlled organisations and run by them or in partnership with them, in all jurisdictions and rural and remote locations, underpinned by sufficient culturally appropriate, trauma-informed services,

50.5. all jurisdictions should legislate to implement custody notification services,

50.6. police protocols and guidelines should, where appropriate and community safety is not at risk, prioritise warnings and diversion over arrest,[52]

50.7. legislate and embed strong, culturally responsive mechanisms and child inclusive decision making/dispute resolution processes, particularly in family law, child protection and youth justice,

50.8. commit to improving police–youth interactions by educating police in contemporary youth engagement strategies, through the Australia New Zealand Policing Advisory Agency, and

50.9. ensuring the availability of age appropriate, therapeutic, family strengthening, and evidence based programs to prevent and address identifiable risk factors and anti-social behaviour for children between ten and 13 years of age; with priority for funding given to community controlled programs and services for Aboriginal and Torres Strait Islander children.[53]

51. The Family Matters Roadmap released in 2015, provides a framework for what needs to be done to address the over-representation of children in the child protection systems and consequently from crossing over into the justice system. The 2019 Family Matters Report states that places that have implemented the Roadmap as a blueprint for reform is working. The NHLF implores governments to take up and implement the building blocks outlined in the Family Matters Roadmap.

[52] Law Council of Australia. Op. cit.
[53] Australian Child Rights Taskforce. 2018. The Children's Report: Australia's NGO coalition report to the United Nations Committee on the Rights of the Child. UNICEF Australia.

Question 11: Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

52. Australia should stop the ongoing social political and cultural hangover from the UK whose harshness in criminal justice led to the formation of the penal colonies. Their attitude towards children should no longer be the blueprint for Australia. Our civil society, human rights and our political/legal systems need to be in alignment otherwise we provide more cause for "anti-social" behaviour than otherwise be the case.[54]

53. As the Australia Law Reform Commission's Pathways to Justice Report notes to reduce the disproportionate rates of incarceration, the following is required:

    53.1. "promote substantive equality before the law for Aboriginal and Torres Strait Islander peoples,

    53.2. promote fairer enforcement of the law and fairer application of legal frameworks, and

    53.3. ensure Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of strategies and programs for Aboriginal and Torres Strait Islander people in contact with the criminal justice system"[55].

54. Finally, the NHLF affirms the leadership shown the NATSILS, SNAICC and the Change the Record Coalition who have made various submissions over the years, which have highlighted the systemic issues and the solutions to address the overrepresentation in our child protection and youth just systems. Lifting the age of criminal responsibility is just one action area that could lead to much improvement but without Government working with this leadership and communities the fundamentals will remain and we will continue to see children without opportunities to be healthy, safe and able to participate fully in society.

[54] Gordon F. and Peleg, N. 2019. The Australian government is not listening': how our country is failing to protect its children. The Conversation: https://theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779

[55] Australian Law Reform Commission. Op. cit.

CLA

Civil Liberties Australia Inc. A04043
Box 3080 Weston Creek ACT 2611
Email: secretary[at]cla.asn.au

1 August 2021

Shane Rattenbury MLA
Attorney-General
ACT

Via email: macr@act.gov.au

Dear Attorney-General

RE: Raising the minimum age of criminal responsibility

Thank you for your letter inviting submissions on the issue of raising the minimum age of criminal responsibility (MACR) in the ACT and inviting responses to the discussion paper.

As you know, Civil Liberties Australia (CLA) is a strong supporter of urgent action to raise the MACR in all Australian jurisdictions. The weight of scientific evidence and expert advice from medical and child welfare bodies, legal experts and Indigenous advocacy groups makes this a 'no brainer'. They all agree that ten-year-old children need help, support, guidance, and medical and psychological care. Being subject to the criminal justice system does nothing to help them or to keep the rest of the community safe. In fact, a wealth of evidence shows that the younger children are when they first encounter the youth justice system, the more likely they are to reoffend.

I am therefore very pleased to see the ACT Government showing leadership on this issue.

For the record, I would like to add that CLA supports raising the MACR to <u>at least</u> 14 years of age. The scientific and medical evidence strongly indicates that young people's brains continue to be developing for many years after the age of 14. Added to this is the frequency of developmental and other co-factors encountered in young offenders. As well as raising the MACR, the focus needs to be on interventions designed to divert young people away from offending behaviour and rehabilitation if such behaviour occurs. That is the best way to keep the community safe and give these young people the best chance for a happy and productive life.

Set out below are CLA's responses to the questions posed in the discussion paper.

Question 1. Should there be exceptions to an increased MACR?

No. Our position on MACR is based on the scientific and medical evidence on the psychological development of children. To make exceptions to the MACR based on the nature of the act would defy this evidence. We support the statement by the UN Committee on the Rights of the Child that such exceptions "are not based on a rational understanding of children's development".

Question 2. Should *doli incapax* have any role if the MACR is raised?

Since we don't support exceptions to the MACR, we don't see a role in the future for *doli incapax*. We are open to the argument that a *doli incapax* could apply, for example, to children between the age of

14 and 18. However, our experience is that *doli incapax* has not worked well in the past and that other approaches should be considered to determine whether a young person should be held criminally responsible for an offence.

Question 3. Are the principles set out in paragraph 41 of the Discussion Paper the appropriate design principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

CLA supports the principles listed in the Discussion Paper. However, see our comments below in relation to Question 4.

Question 4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed – to better support this cohort?

CLA supports the letter to you of 7 March 2021 from the Youth Coalition of the ACT which set out the key service gaps and needs that should be addressed to support raising the MACR:

- The lack of a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse (CLA notes that a model for a multidisciplinary panel is also canvassed in the discussion paper)
- The absence of Functional Family Therapy – Youth Justice and/or other evidence-based programs targeted to this cohort of children
- The limited availability of psycho-social services for young people, particularly those with disabilities
- The lack of services and accommodation for children under the age of 16 who are homeless or at risk of homelessness
- A broad need for greater education across services to improve the identification of, and response to, disability support needs.

<u>However</u>, having said that, CLA strongly believes that raising the age of MACR should not be held hostage to addressing all service gaps. Nor should it be held back pending the design of a brand new youth justice model based on the principles referred to in Question 3. In moving forward with raising the MACR, the analysis needs to focus on what changes – if any – need to be made in advance of raising the MACR and what reforms can follow in a future work program.

Questions 5–8

On these questions, CLA defers to experts in the areas of child psychology and community services. In this context, we welcome the independent review, led by Professor Morag McArthur, on the service system changes needed to better support children and young people when the MACR is raised.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?'

Again, on this question, CLA defers to experts in the areas of child psychology and community services. In principle, however, CLA's position is that any such deprivation of liberty of children under the MACR should only be as a last resort and always with the aim of promoting the best interests of the child. It should not be done to punish the child or to appease ill-informed public reaction.

Questions 10–12

CLA considers that an emphasis on victims' rights – while often well-intentioned – can have unintended, counter-productive and discriminatory outcomes. We believe the best way to safeguard the interests of victims is to adopt evidence-based policies and programs that divert young people away from offending and towards more productive lives.

Regarding Question 12, if the evidence shows that requiring children and young people to be accountable for their behaviour – whatever form that may take – should be part of the strategy for achieving these outcomes, then CLA would support that approach.

Regarding Question 11, we don't believe people should be able to access information about a child. Instead, the best way to maintain public support is to make data against key evaluation criteria freely available to demonstrate the success or otherwise of the strategies and interventions being implemented. The data could be supported by de-identified case studies.

Questions 13–20

On these questions, we will be interested in seeing any counter-arguments put forward, but we offer the following preliminary views.

Question 13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

Yes, it seems logical that the police powers that currently apply to the arresting of children under the age of 10 should be extended to cover children and young people under the revised MACR.

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?

The existing police powers in relation to children under the current MACR should apply. We are not aware of arguments in support of additional police powers.

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

We are not aware of any evidence to suggest that the existing offence provisions are insufficient or would be insufficient under a revised MACR.

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

Yes, there would be no reason to persist with a criminal justice model for children under the age of 14 once the revised MACR is implemented. We defer to others on how this transition should be managed.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

We don't see any barriers, but we defer to others on how this should best be implemented.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

All such historical convictions for offences committed by children when they were younger than the revised MACR should be 'spent' and this should be done automatically.

We go further than this, however. CLA supports the recommendations of the Australian Law Reform Commission (see recommendations 253 and 254 of ALRC 84 *'Seen and heard: priority for children in the legal process'*) that the records of all young people (i.e. those above the revised MACR) should be expunged after a period of two years or when the young person attains the age of eighteen years, whichever is earlier. The current exemptions to the rules for spent convictions for children and young people should be removed.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

We defer to expertise of others on this question.

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

The use of any information gathered about a child under the MACR in investigating acts committed by the child after they are over the MACR should be very limited. We are not aware of any argument that the rules that currently apply to children under the age of 10 should be any different under the revised MACR.

Yours sincerely

Bill Rowlings OAM
President CLA

Lead author: Rajan Venkataraman

Note: Civil Liberties Australia is a non-party-political organisation.

Australian National University

30 July 2021
Dr Jill Guthrie AM
Professor Michael Levy AM
College of Health and Medicine
+61 2 6125 0782
jill.guthrie@anu.edu.au

Mr Shane Rattenbury MLA
Attorney-General; Minister for Consumer Affairs;
Minister for Water, Energy and Emissions Reduction;
Minister for Gaming

Ms Rachel Stephen-Smith MLA
Minister for Health;
Minister for Families and Community Services;
Minister for Aboriginal and Torres Strait Islander Affairs

Ms Emma Davidson MLA
Assistant Minister for Seniors, Veterans, Families and Community Services;
Minister for Disability; Minister for Justice Health;
Minister for Mental Health

Dear Ministers

ACT Government Discussion Paper: Raising the Minimum Age of Criminal Responsibility (MACR)

Thank you for the opportunity to make a submission to the MACR Discussion Paper.

AUTHORS
Dr Jill Guthrie AM is a Senior Research Fellow at the Research School of Population Health at the Australian National University. Her work is on health-related research projects with a particular focus on the relationship between health and criminal justice, and family and community safety in Aboriginal and Torres Strait Islander communities.

Professor Michael Levy AM is a Public Health Physician with over 24 years professional practice (up to 2019) in adult and juvenile custodial medicine. He currently serves on the Northern Territory Government's Family and Community Services Clinical Governance Committee, with remit over that jurisdiction's juvenile justice system.

We support the ACT Government's intention to raise the MACR to 14 years.

Our specific interest in MACR is as a direct consequence of our work in the broader domain of Justice Reinvestment. Additionally, we believe strongly that the ACT Government can lead the nation in developing model legislation on ground-breaking issues – there are some examples which make us proud Territorians – notably the ACT *Human Rights Act* 2004.

- But we note with dismay the ACT data reported in the recent Australian Institute of Health and Welfare report (AIHW 2021), *Youth justice in Australia 2019–20. Cat. No. JUV 134. Canberra: AIHW*. The ACT's juvenile detention rate is higher than the national average, while community supervision rates mirror closely the national average rate. Notably, the average number of juveniles in detention in the ACT on any night has risen from seven in 2016 to 15 in 2020.

- As the absolute "number" is small, we believe that this actually guides the Territory in a different way to deal with young people in contact with the criminal justice system. We believe that that way is to embrace wholeheartedly the principles and processes of Justice Reinvestment. Those data highlight another aspect of an already failing juvenile justice system – namely the increase in the proportion of young people in custody who remain unsentenced – a rise from 47% (2016) to 72% (2020).

We do not feel that we can provide informed responses to each and every question, however, we will provide specific comments to some of the 20 questions posed in the Discussion Paper.

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

Response: The principle of MACR should be embraced fully, without exception.

2. Should *doli incapax* have any role if the MACR is raised?

Response: We do not have formal legal expertise, so 'no comment'.

Section two: An alternative model to the youth justice system

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

Response: Necessary principles, yes; but not sufficient, as we would like the principles of Justice Reinvestment included in this initiative. See https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/13-justice-reinvestment/justice-reinvestment/ (page 223)

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

Response: Two agencies need to be reformed, so as to better support young people in contact with the criminal justice system, namely ACT Policing and the ACT Courts. Cautionary and diversionary services need to be enhanced, and matters before the Courts need to be expedited, especially in those cases where the young person is serving time as an unsentenced youth detainee.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

Response: Through social services and human services agencies – and not through criminal justice services.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

Response: Through social services and human services agencies – and not through criminal justice services.

7. How should children and young people under the MACR be supported after crisis points?

Response: Through social services and human services agencies – and not through criminal justice services.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

Response: Yes they **could**, but not necessarily **should** they be mandated to engage with specific services. The sole responsibility cannot be on the individual young person nor their family.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?
Response: No

Section three: Victims' rights and supports

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?
Response: The principle of MACR is integral to the rights of the child, and accordingly the 'best interests of the child' must always prevail. Victim support mechanisms already exist, and are not annulled by the 'rights of the child'.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?
Response: People affected should be excluded from subsequent deliberations, unless and until the child can participate meaningfully in age-appropriate restorative justice processes. Once again the 'best interests of the child' should prevail.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?
Response: Victim support mechanisms already exist - and are not annulled by the 'rights of the child'.

Section four: Additional legal and technical considerations

13. Should police powers that apply to the arresting of children currently under the age of 10 years be extended to cover children and young people under the revised MACR? If no, what should be different?
Response: The term 'arrest' should not be able to be applied to police interventions directed at children under the age of 14 years. There can be degrees of 'referral' to human services agencies under differing supervisory arrangements. They should never involve detention in a youth detention centre.

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?
Response: No additional powers should be granted to police.

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?
Response: We are certain that there should be consideration of new offence provisions, but as stated previously, we do not have formal legal expertise.

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?
Response: After this consultation is completed there will still be a transition period before the model legislation is considered by the ACT Legislative Assembly. If the legislation is passed, then there should be no further transition period.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?
Response: No

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?
Response: Yes they should be 'spent' immediately and without application for all young people currently on remand or in detention. Historical charges could be 'spent' on application.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act* 2008 and the *Information Privacy Act* 2014 sufficient?
Response: We do not have formal legal expertise, so 'no comment'.

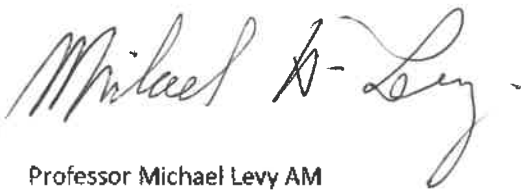
20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?
Response: No

CONCLUSION

We support the ACT Government's endeavours to raise the minimum age of criminal responsibility to 14 years of age. This will be a necessary, but not yet sufficient, step for national implementation. This will place Australia in a far better position when we report through to the United Nations due to our new obligations under the Optional Protocol to the Convention Against Torture (OPCAT). Raising the minimum age of criminal responsibility can be expected to have a disproportionately beneficial effect on Aboriginal and Torres Strait Islander communities.

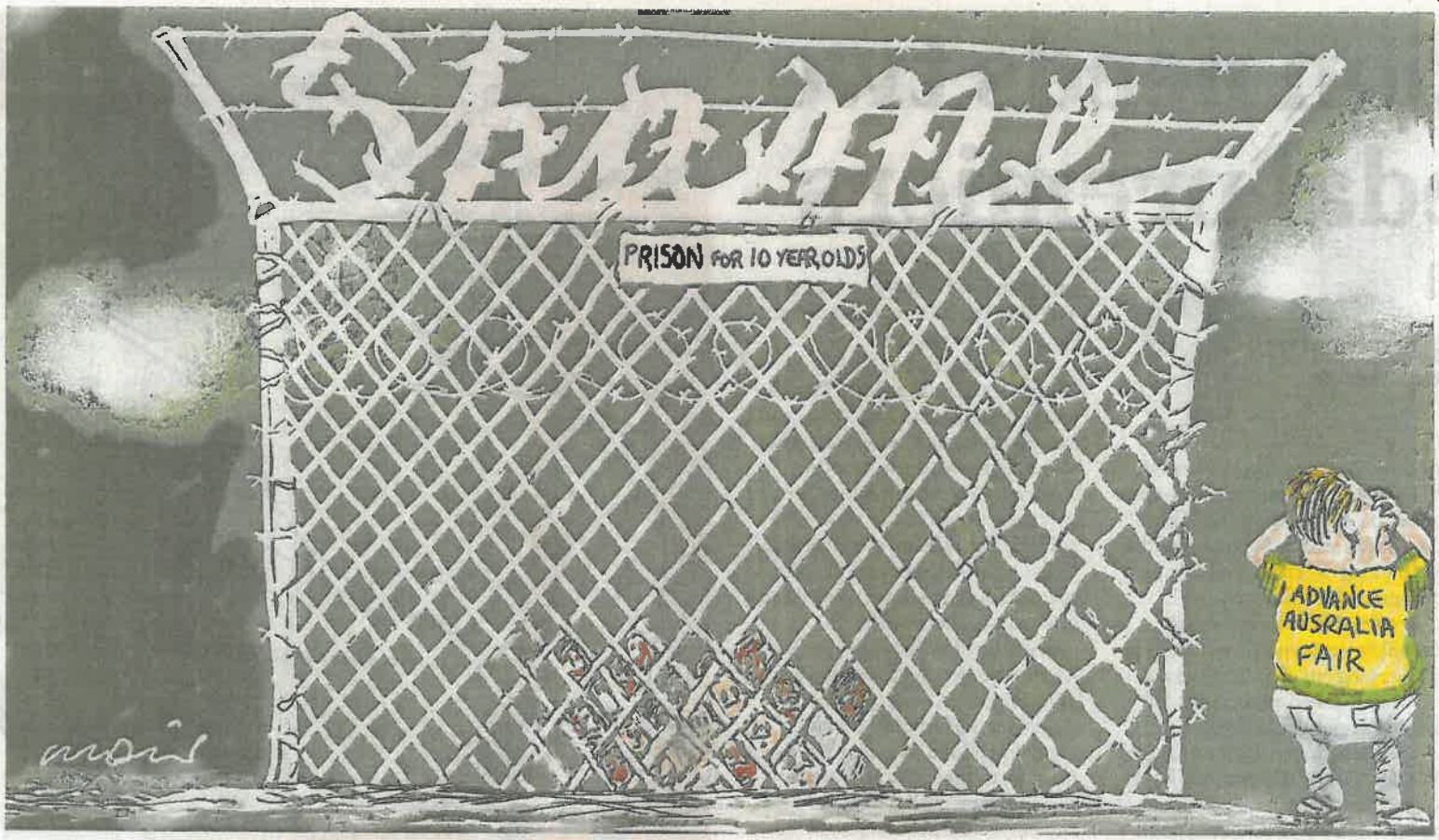
Finally, we look forward to a flow-on in community development initiatives under the policy-umbrella of Justice Reinvestment, as fewer young people are torn away from their communities, and communities are given the skills to nurture their young people within the community.

Yours sincerely



Dr Jill Guthrie AM

Professor Michael Levy AM


PRISON FOR 10 YEAR OLDS
ADVANCE AUSRALIA FAIR

Raising the MACR

MP [redacted]

To Minimum Age of Criminal Responsibility

Reply | Reply All | Forward | ...

Mon 02/08/2021 10:46 AM

Follow up. Start by Monday, 2 August 2021. Due by Monday, 2 August 2021.
If there are problems with how this message is displayed, click here to view it in a web browser.

CAUTION: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good morning.

It's a tragedy that any child is conducting themselves in this way and I concede that it's a very unfortunate set of circumstances, but youth can't be a carte blanche excuse for poor behaviour. That's a ridiculous assertion that most parents and yourselves should and would decry.

[redacted]

One quick point to my submission that's less about the MACR and more about the approach to this. I find it very, very disappointing (unsurprisingly) that the Attorney General's foreword in the discussion paper basically mandates the way forward. [redacted]

Unfortunately, in the AG's determination to accommodate the poor behaviour of the groups identified by him, the foreword fails to recognise the general acceptance that, the difference between right and wrong, legal and illegal, social and anti-social is well understood from secondary school onward (if not well before). That a cohort, [redacted] don't conform to the more acceptable of these behaviours should hardly warrant an acceptance of their conduct by the broader community. [redacted]

Appreciating the media loves to promote with hyperbole as do politicians of every persuasion, we nonetheless regularly hear - even here in sleepy Canberra - of assaults by 12, 13 & 14yos. Of sexual assault, of murder, of use of weapons. Does the ACT Legislative Assembly, in its atypical chest beating fashion, believe that a 12, 13 or 14yo in this enlightened age, not understand that it is not in keeping with the most basic tenets of human existence not to rape and murder?

From my perspective, legislating a one size fits all for this subject does not work nor does it consider severity or public expectation. I'd suggest that to mandate youths in this age group cannot be criminally prosecuted for the sort of crimes I've mentioned above, flies in the face of the community expectations of law and order. That said, prosecuting or incarcerating an 11yo for shoplifting doesn't fit either.

So how about looking at this in a more reasonable and less 'reactive' light. Rather than legislate that 10-14yo's can't be prosecuted because they're below the Minimum Age of Criminal Responsibility, why not recognise that the vast majority of secondary school children well know the difference between right and wrong. Then we can start a reasonable discussion around guidelines rather than legislation to assure the most appropriate response.

Another by-product of the proposed change is the effect on law enforcement. Already on a hiding to nothing when trying to maintain public order, the disenchanted, disenfranchised and poorly supported Police Force are unlikely to waste their time on crime committed by these age groups if the government and their courts don't allow them to do anything about it (forget the suggestion of separation of power - that's a myth of the past). Why would they?

[redacted] I think most of us would prefer that the adjective 'child' not be used to describe someone who takes to another human being with a knife or other weapon and causes serious bodily harm. Nor the urchin that breaks into my house and ransacks, vandalises and steals. These criminal acts and anyone - man, woman or child who perpetrates them against another should face a consequence.

I write this completely confident that it's reasonable and that it will fall on the deaf ears of the self-interested but feel compelled to do so anyway. At least I can say I resisted in some form.

Regards,

[redacted]

Youth Law Australia, Law Building
UNSW Sydney NSW 2206
Email: admin@yla.org.au
Phone: (02) 9067 6510

Submission of Youth Law Australia to the ACT Government Minimum Age of Criminal Responsibility (MACR) Discussion Paper

Acknowledgment of Country

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation as the custodians of the land on which we work. Youth Law Australia also acknowledges the Ngunnawal people as the original and ongoing custodians of the land now known as Canberra. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

Introduction

Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time and receive free and confidential legal advice and help. We are also dedicated to addressing the human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

We welcome the work of the ACT Government on the important issue of raising the minimum age of criminal responsibility. We are delighted to have the opportunity to respond to the questions raised in the Discussion Paper.

Raising the minimum age of criminal responsibility is not only consistent with international human rights law, it also has the potential to result in a new approach to dealing with children and young people who engage in problematic behaviour in a way that is focused on their welfare.[1] Such an approach has the potential to deliver great benefits not only to young people and their families, but to society more generally.

In this submission, we have responded to seven of the twenty discussion questions. However, we would like to note at the outset that despite the detailed questions raised in the Discussion Paper, there is no question that relates specifically to Aboriginal and Torres Strait Islander children and young people. This is disappointing, particularly given that Aboriginal and Torres

[1] This is foreshadowed in paragraph 16 of the Discussion Paper.

Strait Islander children and young people are disproportionately represented in the ACT youth justice system. We have included some additional observations about this at the conclusion of this submission.

Raising the MACR to 14 years

We note that the Discussion Paper refers to the decision in Scotland to raise the minimum age of criminal responsibility to 12, instead of 14. The Discussion Paper doesn't appear to suggest that this approach should be adopted in the ACT, although it does note that preliminary evidence suggests that young people who currently interact with the justice system require the most support when they are over the age of 13.[2]

We acknowledge that raising the minimum age to 14 will require significant reform and expansion to the services and interventions available to young people. However, we consider that as a society, we owe it to our young people to provide these supports. We encourage the ACT Government to be courageous, and to raise the minimum age to 14.

We note also that the Discussion Paper refers to various challenges that arise from the ACT having a different MACR to other states and territories, and to that under Commonwealth legislation.[3] We strongly encourage all other jurisdictions to follow the ACT's lead and raise the MACR to at least 14 as a matter of the highest priority.

Question 1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

Youth Law Australia considers the minimum age of criminal responsibility should be raised to 14 for all behaviour that constitutes a criminal offence. There should be no exceptions.

The reasons which support raising the minimum age apply equally to serious offences.[4] It should be noted that the offences commonly raised in support of creating this 'exception' are things like murder, manslaughter, and sexual assault. However, existing research and publicly available data suggest it is extremely rare that a young person under the age of 14 commits a very serious offence such as murder.[5]

---

[2] Discussion Paper, paragraphs 23-24.
[3] See for example paragraphs 91-94 and 104-105 of the Discussion Paper.
[4] *United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system,* paragraph 25. See also paragraphs 7-10 of the Discussion Paper.
[5] Kelly Richards, '*What makes juvenile offenders different from adult offenders?*',
Trends & issues in crime and criminal justice no. 409, Australian

Harmful sexual behaviour by children and young people, such as a sexual assault, is a complex issue. Unsurprisingly, research suggests that many (but not all) children who engage in harmful sexual behaviours have experienced prior trauma or abuse.[6] Such behaviour should be viewed as a health and welfare issue for children and young people under 14, with social services rather than legal institutions determining the appropriate response.

Youth Law Australia agrees with the observations of the United Nations Committee on the Rights of the Child that:

> *The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.*[7]

The Royal Commission into Institutional Responses to Child Sexual Abuse considered how to respond to children with harmful sexual behaviours in its final report. The Commissioners were of the view that the public health approach – encompassing three tiers of intervention – can be applied to preventing these behaviours.[8] It noted that research suggests that therapeutic interventions can reduce or eliminate children's harmful sexual behaviours. The best practice principles developed by that Royal Commission provide a useful guide to addressing this behaviour.

In very serious cases, there are already existing legal frameworks in place for protecting young people and the community (including child protection and mental health frameworks). While these could undoubtedly be reformed and improved, additional frameworks should only be added when supported by a strong evidence base. With reference to paragraph 29 of the Discussion Paper, there may be ways in which a court could mandate involvement in therapeutic interventions if this was considered necessary in exceptional circumstances, other

---

Institute of Criminology February 2011) 409, Canberra: Australian Institute of Criminology. See also paragraph 24 of the Discussion Paper.

[6] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 20.

[7] See research into brain development and maturity of children, and capacity to engage with the criminal justice system. For example: Elly Farmer, *'The age of criminal responsibility: developmental science and human rights perspectives'* (2011) 6(2) Journal of Children's Services, pages 86-87.

[8] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 13.

than through the criminal justice system. We do not however consider this to be a sufficient justification for creating exceptions to the MACR.

Question 2. Should *doli incapax* have any role if the MACR is raised?

In our view, *doli incapax* has no role in the youth justice system, even if the MACR is raised.

The problems with the presumption of *doli incapax* (including its statutory manifestations) have been well-documented, and were the subject of a submission by Youth Law Australia to the Australian Council of Attorneys-General in February 2020.

In practice *doli incapax* operates unevenly, inconsistently and results in children remaining remanded in detention for longer periods of time. In our view, the impact of the intractable practice issues in applying *doli incapax*, is that the principle is an inadequate justification for refusing to increase the minimum age of criminal responsibility in Australia. For the same reasons, we also don't consider that *doli incapax* should play a role if the MACR is raised.

In addition, one of the insurmountable problems with this principle, however formulated, is that it does not prevent children from becoming involved in the criminal justice system in the first place. Commentators note that: 'while the presumption is in itself designed to remove children who lack the necessary capacity from the justice system, for this to be an effective safeguard such a response must occur at the earliest point and without requiring the child to spend prolonged periods of time within the bounds of the criminogenic justice system institutions'.[9]

We note also the comments of the United Nations Committee on the Rights of the Child that *doli incapax* and similar presumptions:

1. were initially devised as a protective system, but have not proved so in practice
2. leave much to the discretion of the court, and can result in discriminatory practices
3. risk becoming a retrogressive position regarding the minimum age of criminal responsibility.[10]

[9] Wendy O'Brien and Lauren Renshaw, *'Bail and remand for young people in Australia: A national research project'*, Research and public policy series no. 125, Canberra: Australian Institute of Criminology.
[10] United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, paragraph 25.

Question 3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

In general, Youth Law Australia considers the principles outlined in paragraph 41 of the Discussion Paper to be appropriate. However, we consider that these principles appear to adopt a child welfare approach. We consider that a child rights approach should also be reflected in the principles underpinning an alternative model.

A child welfare approach does not guarantee that an individual child will not have very poor outcomes. Nor does it provide a remedy when they do. Child rights bring a focus on minimum standards and the justification for a violation of a young person's rights. They also provide a mechanism for holding duty-bearers accountable for individual violations.[11]

Importantly, a child rights-based approach 'demands that the views of children have an impact on decisions regarding matters affecting them'.[12] We consider that the right to participation, reflected in article 12 of the United Nations *Convention on the Rights of the Child*, in particular, should be given prominence in these principles. Free and accessible independent advocacy services for children and young people who are exhibiting harmful behaviours will be an important aspect of ensuring the effective implementation of these rights.[13]

Question 9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

Youth Law Australia considers that no children under 14 should *ever* be deprived of their liberty for criminal justice purposes as a result of serious harmful behaviour. As previously stated, very few young people in the ACT, and in Australia more broadly commit serious harmful behaviour and our view is that these behaviours are better addressed by therapeutic (encompassing health, education and wellbeing aspects) rather than legal means.

It is not clear from the Discussion Paper whether this question contemplates a deprivation of liberty in situations other than criminal justice (for example, under mental health legislation). In

---

[11] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017).

[12] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017), pages 48-49.

[13] See for example United Nations Committee on the Rights of the Child, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child.

any event, consistent with human rights law, any deprivation of liberty should be as a last resort, and for the shortest period of time possible.[14]

International research confirms that 'the particular circumstances of detention are directly harmful to the mental and physical health of children across all situations of deprivation of liberty'.[15] It is also worth repeating the comments of the *Global study on children deprived of liberty* that:

> *Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.*[16]

We do not consider that criminal justice responses are required as a means of escalating the response to underlying needs that have led to repeated harmful behaviours.

Question 10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

Youth Law Australia considers it important that the rights of victims of harmful behaviours by children and young people who are under the MACR be protected. We do not consider that raising the minimum age removes the reasons for the application of victims' rights. Clearly, a victim has no say in the age (or indeed the mental capacity) of a person who harms them.

We consider it particularly important that support, including financial assistance, provided to victims of crime remain accessible to victims of harmful behaviours by young people. Such a change would not appear to require complex legislative reform. Indeed existing measures could be applied to victims of behaviour that would, but for the age of the perpetrator, constitute an offence.

Question 18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent' or 'extinguished'? If yes, should such

[14] See for example United Nations Convention on the Rights of the Child, article 37(b).
[15] United Nations, Global study on children deprived of liberty, United Nations General Assembly, 74th session, 11 July 2019 at paragraph 26.
[16] United Nations, Global study on children deprived of liberty, United Nations General Assembly, 74th session, 11 July 2019 at paragraph 3.

convictions be spent/extinguished automatically and universally, or should they be spent only under application? How should the approach differ if there are exceptions to the MACR?

Currently in the ACT, not all convictions against children and young people are automatically spent, and some never become spent.[17]

Youth Law Australia considers that historical convictions for offences committed by children when they were under the revised MACR should be automatically and universally extinguished. This is primarily for reasons of fairness, as well as to give all young people under the revised MACR who have been in contact with the criminal justice system the opportunity to avoid the prospect of being treated differently on account of their record.[18]

We do not see any justification for a system whereby people should have to apply to have these convictions extinguished (or spent). Such a process is likely to introduce unnecessary bureaucracy, and to disadvantage those who are already most disadvantaged (including because of disruption in education and a consequent lack of functional literacy). We consider that it should be a relatively straightforward administrative process to identify those convictions that should be extinguished. This situation is very different to the introduction of the scheme for extinguishing convictions for historical homosexual offences, which inevitably requires an assessment to be made of individual circumstances.[19]

As previously stated, Youth Law Australia does not consider that there should be exceptions to the MACR. The difficulties that are likely to arise from the introduction of such exceptions, which are flagged in the Discussion Paper,[20] provide a further reason why this approach should not be adopted.

However, we note that records of offences committed against children (particularly but not limited to sexual offences) should be considered as part of a person's working with vulnerable people (or equivalent) check.[21]

Question 19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including

---

[17] *Spent Convictions Act 2000* (ACT), Part 2.

[18] Although discrimination on the basis of irrelevant criminal record is protected in certain areas under section 7 of the *Discrimination Act 1991* (ACT), discrimination cases can be notoriously difficult to prove, particularly in areas such as employment.

[19] See *Spent Convictions Act 2000* (ACT), Part 3A and Explanatory Statement, Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015 (ACT).

[20] See paragraphs 101-103 of the Discussion Paper.

[21] See *Working with Vulnerable People (Background Checking) Act 2011* (ACT). It appears that the provisions of this Act are already broad enough to encompass information that may be held by agencies about behaviour that may not have been the subject of a conviction - see for example section 18(2) of the Act.

for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act 2008* and the *Information Privacy Act 2014* sufficient?

Information sharing laws that enable relevant agencies to share information about the safety and wellbeing of children and young people within the ACT, and between the ACT and other jurisdictions, are required:

- to ensure risk factors for children and young people are identified early, and that they are connected with appropriate early intervention services
- to ensure services for children and young people who exhibit harmful behaviours or who may be at risk work collaboratively and effectively[22]
- to protect children and young people from those who may pose a risk (including children and young people exhibiting harmful sexual behaviours).[23]

For these reasons, we consider that nationally consistent information sharing laws will be an important component of the effectiveness of MACR reforms, as well as other child protection-related schemes.[24]

The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that the Commonwealth and state and territory governments make nationally consistent arrangements for sharing information about the safety and wellbeing of children, which can operate in and across all Australian jurisdictions. It also recommended that governments work together to support the implementation of this recommendation with education, training and guidelines.[25]

These recommendations were accepted in principle by the ACT Government.[26] In its second annual report in December 2019, the ACT Government noted it was part of a national Working

---

[22] See for example Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, pages 221-222.

[23] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, pages 219-221.

[24] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, page 140.

[25] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, recommendations 8.6-8.8. We note the ACT's information sharing arrangements in the *Children and Young People Act 2008* (ACT) appear to be more limited than those recommended by the Royal Commission - see for example page 163 of Vol 8 of the Final Report.

[26] The ACT Government Response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, pages 34-35.

Group that is responsible for promoting consistent national approaches to four focus areas, including information sharing.[27]

Over three years have passed since the Royal Commission's recommendations were handed down, and there does not appear to have been any notable publicly reported progress in implementing the information sharing recommendations through this forum, or otherwise.[28]

We assume the ACT Government continues to participate in the interjurisdictional working group that is considering these reforms. We encourage the ACT Government to work with other jurisdictions through this forum, as well as other available channels, to progress information sharing reforms as recommended by the Royal Commission.

Aboriginal and Torres Strait Islander children and young people

As the Discussion Paper acknowledges, Aboriginal and Torres Strait Islander children and young people are disproportionately represented in the ACT youth justice system. The paper states that on an average day in 2019-20, 22 per cent of the youth population under youth justice supervision were Aboriginal or Torres Strait Islander, despite only representing three per cent of the general population of the same age.[29] We note also that Indigenous Australians who are involved with the criminal justice system experience poorer outcomes than Indigenous Australians outside the justice system and non-Indigenous people in the justice system.[30]

The minimum age of criminal responsibility should be raised for these reasons alone.

The overrepresentation of Aboriginal and Torres Strait Islander children and young people in the justice and care and protection systems in the ACT points to the need to give specific and careful consideration to the response to Aboriginal and Torres Strait Islander children and young people who may be at risk or who exhibit harmful behaviour.

We are pleased to read that the independent review will work in partnership with an Aboriginal consultancy and in consultation with Aboriginal and Torres Strait Islander representatives.[31] We are also pleased to see that the self-determination of Aboriginal and Torres Strait Islander communities in service design and delivery was identified as one of the principles that should

---

[27] The ACT Government Second Annual Progress Report Responding to the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, December 2019, page 5.
[28] We note that The ACT Government Third Annual Progress Report Responding to the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (March 2021) does not mention this work.
[29] Discussion Paper, paragraph 13.
[30] Australian Institute of Health and Wellbeing, *Improving mental health outcomes for Indigenous Australians in the criminal justice system*, 2021, at page 38.
[31] Discussion Paper, paragraphs 18-19.

underpin the development of an alternative model to responding to harmful behaviours by children and young people.[32]

We note the importance that Aboriginal and Torres Strait Islander communities are at the centre of the design and delivery of interventions and services, and that these should be tailored to the specific social and cultural circumstances of that community. The implementation of approaches imposed by external decision-makers or that have been implemented effectively in another community which may have different circumstances, should be avoided.[33] This is consistent with a child rights-based approach, which is one that is 'culturally sensitive and locally owned'.[34]

We consider that these principles, and the disproportionate impact of criminalisation on Aboriginal and Torres Strait Islander children and young people, should inform each of the reform questions raised in the Discussion Paper. That is, these principles should underpin not only the approach to service design and delivery, but extend to the legal and administrative frameworks developed as part of the raising the minimum age reforms.

---

[32] Discussion Paper, paragraph 41.

[33] Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation*, commissioned by the Bugmy Bar Book 2021.

[34] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017), pages 51-52.

AFP
AUSTRALIAN FEDERAL POLICE

Raising the Minimum Age of Criminal Responsibility in the ACT

August, 2021

Submission by ACT Policing

Contents

Executive Summary 3
Current Models for Youth Offenders 5
Diversion Programs 5
Youth Alcohol Diversion Program 5
Illicit Drug Diversion Program 6
Restorative Justice Conferencing 7
Community Engagement Team – Youth Engagement/Liaison Officers 7
Raising the MACR 7
Alternative Police Response Model 8
Requirement for Appropriate Support Services 9
Exceptions to Raising the MACR 10
Victim's Rights 10
Police Powers and Operational Considerations 11
Current Police Powers for Children under the Age of 10 11
Intersection with Commonwealth Legislation 11
Exploitation by Adults 12
Extradition Requests 12
Historical Convictions 13
Information Use and Sharing 13
Conclusion 14

Executive Summary

ACT Policing appreciates the opportunity to provide a submission to the ACT Government in response to the recent Discussion Paper on Raising the Minimum Age of Criminal Responsibility (MACR). ACT Policing's preference would be to raise the MACR to 12 years of age rather than to 14 years of age, and for MACR to be nationally consistent. ACT Policing is committed to initiatives that improve community safety and continue to support the wellbeing of children and young people. ACT Policing remains focused on diverting youth from engagement with the criminal justice system.

The intent of this submission by ACT Policing is to raise operational issues that require consideration prior to any alteration of the MACR. ACT Policing will continue to work closely with the ACT Government and community sector to ensure young people have access to the appropriate services to support their needs and that police have the relevant powers and resources to respond to any changes to the MACR.

ACT Policing's current approach towards engagement with young people has focused on diversionary practices and therapeutic interventions, as guided by evidence-based best practice. Current evidence suggests that children and young people who display harmful, risky, unsafe and sometimes violent behaviour often do so as a result of trauma, mental health issues, abuse, and/or disability. Early involvement with the criminal justice system can lead children and young people to further offending. ACT Policing continues to support approaches involving diversion and therapeutic interventions as a key form of primary prevention.

ACT Policing's main concern in raising the MACR is to ensure there are appropriate health and social support services available and adequately resourced for young people to access. Other key operational and implementation issues include:

- The requirement for support services to be available 24/7 to provide a therapeutic response to the underlying, complex needs of youth who engage in harmful behaviours, including temporary and long-term accommodation for children and young people in after-hours or crisis situations where they are unable to return home;
- Further clarity regarding ACT Policing's role in supporting a new therapeutic response model and ensuring this role does not extend to the supervision of children in crisis or after-hours situations, particularly noting that there is no legislative authority for police to detain child or young person under the MACR;
- Consideration of a tiered or triaged approach for responding to children and young people who repetitively engage in serious or violent harmful behaviours and in instances where they are not participating in diversionary interventions or other support processes; and
- Ensuring ACT Policing have the relevant powers and resources to respond to serious or violent harmful behaviours under a revised MACR framework in order to best protect the ACT community.

It is important to also consider the effect of removing or limiting the scope of the existing diversion options and the impact this will have on community safety. Where there is no criminal offence committed by a child or young person due to the raised MACR, police are

limited in their ability to divert the individual to existing therapeutic response models as an alternative to the criminal justice system. Any alternate approaches need to be supported by firm and robust intervention responses to ensure youth are engaging in therapeutic responses to address their harmful behaviours and provide sufficient protections for the ACT community.

ACT Policing will continue to support the Government in implementing its approach and corresponding safety policies, including collaborative consultation with ACT Government partners, the community sector, and other key stakeholders to identify solutions for the way forward.

Current Models for Youth Offenders

Currently, ACT Policing's management of youth offenders focuses on a diversion approach in order to follow evidence-based best practice. The *Child and Young Persons Act of 2008* (ACT), the ACT Children's *Human Rights Charter*, *The ACT Young Peoples Plan 2009-2014 Blueprint for Youth Justice in the ACT 2012-2022*[1] and ACT Policing's Police Services Model (PSM), provide the legislative and governance framework for engaging with children who commit certain offences through the use of appropriate prosecutions, warnings, cautions and restorative justice conferences as an alternative to the usual justice responses of arrest, summons and courts proceedings. This is reflected by the various models utilised by ACT Policing, including those outlined below. It is ACT Policing's preference that the below models and initiatives continue to be implemented if the MACR is raised, further promoting inter-agency collaboration to address the specialist needs of children and young offenders.

Diversion Programs

Police Cautions

ACT Policing exercise formal police cautions as a discretionary power conferred by common law. The vast majority of criminal offences are cleared via a police caution and they are often used as a diversion method for children and young people who are suspected of committing a relevant criminal or traffic offence. This early intervention approach minimises a young persons' engagement with the criminal justice system and deter them from engaging in further harmful and/or criminal behaviours.

To issue a formal police caution, the alleged offender must have not previously been charged with an offence. It is used as an appropriate alternative to criminally charging a person for an offence in certain circumstances, which may include when:

- the alleged offender has not previously been charged with an offence;
- the circumstances of the incident are considered suitable for resolving without referring charges to the courts; and
- if there are more appropriate services available for the child or young person.

A formal police caution involves the investigating member having to be satisfied that there is sufficient admissible evidence to establish a prima facie case with a reasonable prospect of prosecution. When issuing a formal police caution, as per ACT Policing guidelines and Youth Justice Principles derived from s 94 of the *Children and Young People Act 2008* (ACT) the preferred option in order to do so would include the child or young person showing remorse and/or an admission of guilt for the suspected offence. There are numerous factors to consider for issuing a caution, including the seriousness of the alleged offence, available alternatives to prosecutions and sentencing, previous cautions given, and the age, maturity and developmental capacity of the offender. Serious or indictable criminal and traffic offences under ACT and Commonwealth legislation are generally not suitable for clearance by way of caution.

[1] The ACT Government. 2012. Blueprint for Youth Justice in the ACT 2012-2022: Improving outcomes for young people over the next 10 years. Canberra, ACT <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0009/337590/Blueprint_for_Youth_Justice_in_the_ACT_2012-22.pdf>

Police cautions will no longer be available for those under the MACR if it is raised, as the young person will no longer be criminally liable for an offence. This will remove a significant diversionary and early intervention method available to police to divert young people from the criminal justice system and/or deter them from further engaging in criminal or harmful behaviours.

Youth Alcohol Diversion Program

The ACT's Youth Alcohol Diversion Program provides an intervention for young people engaged in underage drinking with a focus on reducing harm, excessive consumption of alcohol (binge drinking), and the various associated social and health problems. Eligibility requires the child or young person to have committed an offence under the *Liquor Act 2010* (ACT) and consent to participate in the diversion program (including parents/guardians consent). Young people who are involved in violent crimes are ineligible. When considering diversion as an option, police will also consider public interest, the interests of the individual involved, and the interests of their immediate family.

The program is a partnership between ACT Policing and ACT's Health Directorate and aligns with the *Blueprint for Youth Justice in the ACT 2012-2022* and the *National Drug Strategy 2017-2026*[2]. These efforts include a three-tiered diversionary prevention approach with varying levels of support and transition programs to link young people back into education, training, employment, or independent living in the community. This ensures that there are a range of services available for young people that may be required for their health and wellbeing. Children and young people who have no prior involvement with the criminal justice system will benefit the most from the program, with an opportunity of being referred to an education session and alternative treatment options. ACT Policing receive regular reports of compliance and non-compliance.

Illicit Drug Diversion Program

The Illicit Drug Diversion Program provides intervention and education to children and young people who engage in illicit drug consumption, with a view to reducing harm and associated social and health problems in the community. The program includes data collection on drug consumption and incentives for offenders to access additional health support services in this space. This program is also a partnership between ACT Policing and ACT's Health Directorate and aligns with the *Blueprint for Youth Justice in the ACT 2012-2022* and the *National Drug Strategy 2017-2026*. The program provides the necessary support services for children and young people for ACT Policing to re-direct offenders towards as an alternative and minimise their engagement with the criminal justice system.

[2] Commonwealth of Australia. 2017. Drug Strategy 2017-2026. Canberra, ACT 2601
< https://www.health.gov.au/sites/default/files/national-drug-strategy-2017-2026_1.pdf >

Restorative Justice Conferencing

Restorative Justice Conferencing is a form of diversion which provides advantages for both the offender (including children and young people) and victims. Restorative Justice Conferencing provides a platform to discuss how an offence has affected each party and allows offenders an opportunity to accept responsibility for their actions and take steps towards repairing the harm that has occurred. This can be quite beneficial for young people who have offended, as it diverts them from traditional criminal justice responses. Ordinarily, if the offender participates in the conference and completes the terms of their agreement, the matter will not be taken any further by police and will not go to court. However, police and prosecutors retain the discretion to progress a matter that has been subject to restorative justice through the court, if appropriate in the circumstances. If the incident goes to court after Restorative Justice Conferencing, the court may consider whether the offender has accepted responsibility for the offence and reduce the sentence (but is not required to do so). The court may also use restorative justice as part of the offender's sentencing and suspend final sentencing until the conference has been finalised.

Community Engagement Team – Youth Engagement/Liaison Officers

ACT Policing's Community Engagement Team work closely with vulnerable communities, including youths, primarily through Community Engagement Liaison Officers. The team's primary purpose is to strengthen ties between police and the community by proactively engaging with vulnerable groups on a range of community and policing matters. Active engagement allows ACT Policing to more fully address any potential tensions arising from overt police activity; builds trust between the police and community members; and assists in the development and building of social cohesion and resilience of affected communities. This level of engagement also ties in extensively with the aforementioned models in various forms through continuously focusing upon young people and children's wellbeing.

Youth Engagement Officers (YEO) undertake a wide variety of tasks including developing and maintaining a network of contacts between police, government agencies and youth in the community in order to strengthen cooperation and communication. YEOs provide support and encourage positive role models to enhance police-youth relationships as an effective crime prevention strategy. This helps direct youth to the appropriate services for both young people and their corresponding support systems (and/or families) to assist in addressing problematic behaviours. The role of YEO is primarily to assist 'at-risk' youth from further heading down the pathway towards the criminal justice system, and re-direct them further where possible.

Raising the MACR

ACT Policing provides in-principle support for raising the MACR in the ACT, with a preference for the age to be raised to 12 years old instead of 14 years old, and for MACR to be nationally consistent. ACT Policing continue to observe a cohort of 13-14 year olds engaging in serious and violent offending. This includes aggravated burglary, assault (common and occasioning actual bodily harm), property damage, theft, trespass and weapon offences. Whilst this cohort is small, these are often repeat offenders who continue to engage in such behaviours

despite ongoing diversionary criminal justice responses. ACT Policing is concerned if the MACR is raised to 14 years old, this cohort will continue to engage in serious, violent behaviours and in some circumstances may increasingly do so without fear of repercussions through the criminal justice system.

In comparison to other Australian jurisdictions, ACT remains the most progressive in raising the MACR. At present, there is no national consistency. The Victorian Greens Party introduced a Bill in March 2021 to raise the MACR to 14 years of age, however the Bill was not supported by the Parliament. In 2020, the Queensland Government made an election commitment not to raise the minimum age, whilst the Northern Territory has committed to raising the MACR to 12 years of age and ban the detention of those under 14 years of age (with the exception of serious crimes). A nationally consistent approach would be beneficial in order to streamline the appropriate support services efficiently and ensure a tailored approach to complex needs of children and young people who engage in harmful behaviours.

If the MACR is raised to 12 years of age, ACT Policing will continue to focus on diversionary responses for young people, including the 13-14 year old cohort, who commit criminal offences. The benefit of this approach is utilising the criminal justice system as the mechanism for mandated therapeutic interventions to support young people who engage in harmful behaviour.

Alternative Police Response Model

Raising the MACR will require a collaborative and considered approach across Government and non-Government support services. Police will continue to play an incredibly important role in protecting the community from harm, with the support of appropriately resourced and skilled support services to best improve the outcomes when youth have engaged in harmful behaviours or have been involved in unsafe situations. ACT Policing supports the development of an alternate model for responding to harmful behaviour involving children and young people if the MACR is raised and a criminal justice response is no longer relevant. The alternate model should involve a multi-disciplinary approach with support from relevant ACT Government and non-Government services.

An alternative model for ACT Policing's engagement with youth under the MACR could reflect the Police, Ambulance, and Clinical Early Response (PACER) model which operates 24/7 to provide effective care to the wider ACT community. The PACER model was implemented in 2019 and involves a tri-service approach to mental health call-outs. The model aims to provide a more holistic mental health response to the wider ACT community through a focus on inter-agency cooperation. The PACER model is underpinned by ACT Policing's ongoing collaborative efforts with ACT Ambulance Service, ACT Mental Health, Canberra Hospital and Calvary Public Hospital Bruce, which was initiated in 2011 with the launch of the Mental Health, Emergency, Ambulance and Police Collaboration (MHEAPC).

Similar to PACER, an alternate model would bring together ACT Policing and youth services to respond to young people acting in an unsafe, harmful manner or who themselves are unsafe in the circumstances. Where ACT Policing is called to respond to an incidence involving youths, officers would jointly attend with youth services. This multi-disciplinary approach will assist in establishing rapport with the young person and breaking down

barriers to better understand their needs and ensure a holistic, therapeutic response for those under the MACR. ACT Policing and youth services will be able to support youths by referring them to appropriate service providers in the health, housing, education, family and community sectors, to address their underlying, complex needs and reduce harmful behaviours.

Requirement for Appropriate Support Services

ACT Policing's key concern for implementation is that children and young people have access to the relevant support services they need, when they need it. It is critical that the system which replaces criminalisation ensures that therapeutic interventions successfully divert youth away from harmful behaviours, improve their overall wellbeing and result in positive holistic outcomes for community safety in the ACT. Services should reflect the complex needs and risk factors for children and young people who are either 'at-risk' of or have already engaged with the criminal justice system, recognising that some of these factors may include health, homelessness, education, substance misuse, family violence and necessary child protection mechanisms.

This is due to police often coming across youth on the street or being called out in circumstances involving harmful or unsafe behaviour and requiring some form of response or action. In these situations, particularly where a criminal offence has not been committed, police will attempt to support the individual and facilitate access to relevant services, but this relies on consent and cooperation from the offender. If an offence has been committed, police are able to utilise criminal justice actions to arrest, restrain, caution, charge or divert the offender. If the MACR is raised, these traditional police or criminal justice responses would not be available for police to use on youths under the MACR and alternative responses would need to be employed. It is imperative that there are mechanisms available for police to connect children and young people with services that are appropriately resourced and readily available.

Notably, there are currently limited services for children and young people to access after-hours, particularly in terms of temporary or crisis accommodation. The current options include placing a young person in police custody, or Bimberi, to securely 'hold' individuals and young people who have committed a criminal offence until alternative arrangements can be made or the relevant services open during normal business hours. These options would not be available for youth under the MACR if it is raised. In crisis or after-hours circumstances, safe and secure accommodation options are critical to support young people who cannot return to their usual residences or must be secured as they are at risk of substantial or immediate risk of harm to themselves or to others. Within these facilities, young people may be able to access the relevant health and social support services to address underlying, complex needs (if available after-hours) or wait in a safe, secure location until these services are available. Further clarity is required regarding the extent of ACT Policing's role in this space and the expectation of police officers in responding to unsafe, violent or harmful behaviours involving youths, particularly where there is no or a limited legislative basis to direct or hold youths until appropriate services can be accessed.

Exceptions to Raising the MACR

By removing criminal justice interventions as an avenue to address the harmful behaviour of children and young people, it is important to recognise that the consequences for harmful behaviours are not being removed, particularly where they may be serious, violent or repetitive. Appropriate models should be implemented to manage these individuals and their behaviours, ensuring responses balance the need to support youth in accessing relevant services whilst safeguarding community safety. ACT Policing supports a tiered or triaged approach for responding to children and young people who repetitively engage in serious or violent harmful behaviours, particularly in instances where they are not participating in diversion or other support processes. It is expected that appropriate therapeutic support responses will address underlying needs and risk factors for harmful behaviour and as a result reduce repetitive harmful behaviours. However, this must be balanced against the safety and security of the broader ACT community. Serious, violent or repetitive behaviours cause significant harm to the community and there is a community expectation that individuals will be held accountable for engaging in such behaviours.

A tiered approach would reflect that voluntary youth engagement with therapeutic services model is preferred and undertaken in consultation with relevant service providers, community groups and (if appropriate) parents/guardians. This approach would also implement appropriate mechanisms for mandated engagement in these or alternate approaches for serious, violent or repeated harmful behaviours. ACT Policing understands the need for young people to have ease of access to relevant services in order to effectively address complex underlying needs through therapeutic approaches, however, recognises that sustained violent behaviours must be addressed to protect the wider community from harms, ensure victim safety, and safeguard community expectations.

This type of approach could be managed through creating exceptions for serious offences (as is the case in New Zealand) for which a young person under the MACR could be prosecuted. The benefit of this approach is allowing the courts to have the discretion to mandate an individual's engagement in therapeutic interventions. ACT Policing supports the ability to mandate the young person's involvement in therapeutic interventions in serious circumstances – whether this is through the courts or another mechanism. This approach will also benefit young people who engage in repetitive harmful behaviours, either as a result of not having access to the relevant services or not participating in therapeutic interventions resulting from earlier behaviours. A robust governance framework would need to be developed to support such a model, including clear guidelines for what would constitute serious or repetitive behaviours, when mandated approaches would be utilised and the authority basis for mandating engagement. ACT Policing will continue to work with the ACT Government and relevant stakeholders in consideration of a tiered approach to raising the MACR.

Victim's Rights

ACT Policing notes the importance of ensuring a clear and consistent narrative regarding raising the MACR. It is important to consider the impacts this will have on the broader community, particularly for victims of harmful behaviour caused by individuals under the

MACR. ACT Policing advocates for additional support services to be available for victims who may be harmed in these instances and accountability mechanisms for youths.

There should be additional considerations, particularly for serious or violent offences against a person or their property, as to how to manage community expectations. The approaches which replace traditional criminal justice practices should include therapeutic interventions where the victim's rights are also considered. ACT Policing suggests any alternate models include a restorative justice approach which would allow the young person to take responsibility for their harmful behaviours and acknowledge the impact on the victim, who also has the opportunity to engage in the process. These practices will greatly assist in ensuring harmful behaviours are addressed and where relevant, are managed by appropriate accountability mechanisms.

Police Powers and Operational Considerations

Current Police Powers for Children under the Age of 10

ACT Policing's current powers relating to children under the age of 10 are outlined in s252A of the *Crimes Act 1900* (ACT). Currently, a warrant for the arrest of a child under 10 years old may be issued if a judicial officer believes on reasonable grounds that the child has carried out conduct that makes up the physical elements of an offence and poses a risk to the safety of either the child or the community. Under s228, police may also arrest a child without a warrant in certain circumstances, but must only do the minimum necessary to stop or prevent the child's conduct. Once the child has been arrested, the police officer must either take the child to a person with responsibility for the child or another person or agency agreed in consultation with the Director-General of the Community Services Directorate. Children under the age of 10 years also cannot be subject to a strip search or an identification parade.

ACT Policing's preference is to retain these powers for engaging with children and young people under a raised MACR to ensure there are preventative steps to protect younger people and the broader community from harm. In instances where police members have attended an incident where a child or young person is considered under the MACR, police will be expected to intervene to prevent foreseeable harm. Where the individual's age cannot be determined (either due to lack of identification or lack of cooperation from the individual), police may be required undertake specific actions, including the arrest of a young person, to prevent imminent harm or injury as a result of their conduct. There is a significant risk to the safety of young people and the broader community if police officers are unable to intervene in such situations. Maintaining these powers are critical to ensuring ACT Policing has the appropriate legislative framework to manage serious or violent harmful behaviours. ACT Policing will continue to manage incidents involving young people with a diversionary, therapeutic focus, and only utilise relevant powers or provisions where there is a substantial or imminent risk to the safety of the young person or broader community.

Intersection with Commonwealth Legislation

All Australian police officers, be they federal, state or territory, are empowered to enforce Commonwealth criminal law. Individual Constables are accountable for their own decisions

regarding the exercise of their powers on becoming are of the occurrence of an offence. As noted in the Discussion Paper, it is not anticipated a revised MACR will apply to individuals who commit a Commonwealth offence in the ACT, unless Commonwealth legislation is amended also. For example, a number of cyber-crime related offences are found in Commonwealth legislation. Whilst this risk can be mitigated to some extent by introducing new governance encouraging utilisation of ACT laws, the legislative ambiguity remains. Due to the independent office of constable, officers cannot be directed whether or not to utilise particular offences.

ACT Policing's internal governance on the MACR will make clear that whilst the Commonwealth law remains available for ACT Policing officers, they are encouraged to give effect to the ACT Government's policy intent. Where a Commonwealth crime has occurred, ACT Policing will investigate the offence in line with current internal policies and in consultation with the Australian Federal Police. As detailed in this Submission, ACT Policing's internal policies will continue to focus on diverting youth from the criminal justice system and engaging in diversion or restorative justice programs where appropriate.

Exploitation by Adults

If the MACR is raised, a concern for ACT Policing is the potential manipulation or exploitation of youths by adults to engage in criminal behaviours in order to avoid law enforcement and/or prosecution. This could see ACT evolve into hotspot jurisdiction for youths to become involved in criminal activity without fear of consequences through the justice system. The *Criminal Code 2002* (ACT) outlines existing offences to criminalise behaviour that induces or incites another person (inclusive of children and young people) to engage in forms of criminal activity, as detailed within sections 47 (incitement) and 655 (recruiting people to engage in criminal activity). Notably, neither offence relies on the relevant offence itself being committed but does rely on an identifiable offence.

ACT Policing supports amendments to the incitement and recruitment offences to specifically note that these provisions still apply for when the young person is under the MACR but the relevant activity would be considered criminal if the individual was over the MACR. This ensures young people are protected from exploitation and the adults seeking to exploit them are held criminally accountable. These amendments will provide appropriate mechanisms to assist in the protection of the ACT from becoming a jurisdiction involved in criminal activity committed by young people at the direction of adults or criminal entities.

Extradition Requests

Section 82-83 of the *Service and Execution of Process Act 1992* (Cth) details current extradition measures between the ACT and other Australian jurisdictions, which applies to all states and territories. ACT Policing does and will continue to support and reciprocate extradition requests under these legislative provisions.

As detailed in the Discussion Paper, if a valid interstate warrant is produced, ACT Courts cannot interfere with the extradition process other than to decide whether the accused person should be transferred to the other jurisdiction in custody or on bail. If the MACR is raised in the ACT, this may preclude young people being prosecuted for alleged offences in the ACT, but does not necessarily preclude them from being held accountable for the

offences/warrants they may be subject to in other Australian jurisdictions. Although there remains inconsistencies across Australian state and territory legislation, the Commonwealth legislation governs the extradition proceedings and ACT Policing will continue to work with state and territory partners on extradition requests in line with this legislative framework.

Historical Convictions

ACT Policing supports that historical convictions for offences committed by children when they were younger than the revised MACR be treated in accordance with existing spent conviction laws. This would provide ACT Policing, ACT Courts and additional bodies with an accurate criminal history for young people when considering bail and sentencing options if the individual was to continue to offend when they are older. If convictions are spent or extinguished as a result of the raised MACR, ACT Policing's position is that this should be on a case by case basis through application by the young person outlining why their previous offences should be removed. In reviewing these applications, consideration should be given to the seriousness of the offences, extent of criminal history and the offenders engagement with the sentencing imposed (including imprisonment, good behaviour bond and diversionary or restorative justice approaches). ACT Policing also expresses concern and suggests that any victims of crime should also be consulted to ensure that their rights are considered and addressed.

Information Use and Sharing

ACT Policing will continue to promote inter-agency cooperation and collaboration when engaging with young people who have offended or engaged in harmful behaviour. As outlined in the Discussion Paper, there are a number of legislative frameworks which enable police to collect the personal information of young people. ACT Policing notes the importance of robust rules and procedures to govern the management and use of personal information for young people and the complexities associated with the MACR in relation to this.

ACT Policing supports consideration of a model similar to Scotland's Independent Reviewer to determine the appropriate use of personal information relevant to young people, including harmful or criminal behaviour which occurred when they were under the MACR. An accurate understanding of previous behaviours will greatly assist police and other service providers to understand the complex needs of an individual to ensure they have access to appropriate services. If the individual continues to offender after they have passed the MACR, this information may also be critical to supporting ACT Policing and the criminal justice system in pursuing appropriate response options to address the ongoing offending. A model similar to Scotland will ensure an independent review of applications to use such information, with a focus on weighing the personal privacy of the individual against the need to use or share the information.

ACT Policing will continue to engage with the ACT Government to ensure the use and sharing of personal information is safeguarded by appropriate frameworks which focus on personal privacy rights and supporting ACT Policing in protecting the community from harmful and criminal behaviours.

Conclusion

Increasing the MACR will provide an opportunity to strengthen preventative and therapeutic programs to keep children and young people from engaging with the criminal justice system and break the cycle of crime. ACT Policing supports raising the MACR in the ACT, although prefer this to be raised to 12 years of age rather than 14 years of age. There remains key issues for police in the implementation of the policy's intent, including:

- Ensuring children and young people have access to the social and health support services to address underlying, complex issues which lead to harmful behaviours. These services need to be adequately resourced and available 24/7 to respond after-hours and crisis situations;
- Clarifying the extent of ACT Policing's role and powers to support therapeutic mechanisms to respond to and treat harmful behaviours; and
- Whether a tiered response can be introduced to respond to more serious, violent behaviours and support compliance with therapeutic interventions.

ACT Policing will continue to work closely with the ACT Government and partners in the social and health support sectors to provide a holistic response to criminal offending by young people, ensuring that the often complex, underlying issues are addressed.

Deputy Commissioner Neil Gaughan APM
Chief Police Officer for the ACT

4 August 2021
Justice and Community Safety Directorate and Community Services Directorate
By email: macr@act.gov.au

Raising the minimum age of criminal responsibility – Response to discussion paper

Relationships Australia Canberra and Region and Relationships Australia (National Office) welcome the work of the ACT government in raising the minimum age of criminal responsibility (MACR) as a crucial step in ensuring the safety and wellbeing of all Canberrans. We thank you for the opportunity to contribute to the development of parameters that will support development of a restorative and therapeutic policies. We believe that this reform provides an important opportunity to invest in the community programs and family services that will keep our children safe, healthy and strong. This submission is a joint submission from Relationships Australia Canberra and Region and Relationships Australia (National Office).

The work of Relationships Australia

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, cultural background or economic circumstances.

Relationships Australia provides a range of relationships services to Australians, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to live with healthy and respectful relationships. Relationships Australia has provided family relationships services for more than 70 years.

Relationships Australia is committed to:

- Collaboration. We work collectively with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with elders, men, women, young people and children. We recognise that often a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling services, and public housing) is needed by people affected by family violence and other complexities in relationships.
- Enriching family relationships, including providing support to parents, and encouraging good and respectful communication.
- Ensuring that social and financial disadvantage is not a barrier to accessing services.
- Contributing its practice evidence and skills to research projects, to the development of public policy and to the provision of effective supports to families.
- Working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres.

Relationships Australia and its work with the justice system

This submission draws upon our experience in delivering, and continually refining, evidence-based programs in a range of family and community settings, including for:

- Children and young people
- People affected by complex grief and trauma, intersecting disadvantage and polyvictimisation
- People living with intergenerational trauma
- Survivors of all forms of abuse, including institutional abuse
- People who come from culturally and linguistically diverse backgrounds
- Aboriginal and Torres Strait Islander people
- People with disability, and
- People who identify as members of the LGBTIQ+ communities.

We recognise that these cohorts are more likely to display harmful, risky, unsafe or violent behaviour in response to abuse, trauma, marginalisation and discrimination (Farmer 2011). This leads to greater representation in the criminal justice system.

In particular, this submission draws on RACR's work embedding restorative practice into our services. Restorative justice focuses on the relationship at the centre of the harmful behaviour. It provides an alternative to punitive responses to crime and we believe it should be integral to an alternative model to the youth justice system. Restorative practice is the application of this concept in the wider community, a process that seeks to repair and restore relationships to create stronger communities.

Questions:

Section two: An alternative model to the youth justice system

What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

Restorative practices are relational and aim to build, maintain and repair relationships. Predominantly, restorative practice involves building social capital, creating healthy and positive cultures, trust, mutual understanding, shared values and behaviours that bind communities together and make cooperative action possible, while only a small amount of the work is focused on the 'pointy end' of repairing harm. As such, RACR have been able to embed their restorative practice theory into their work with the community, especially in family and domestic violence and family therapy. Family group conferencing offers a way to expand a coordinated community response to stopping violence against women and their children, recognising that violence cannot be stopped without the concerted and cooperative effort of families, communities, and state institutions (Pennell and Burford 1995).

Restorative approaches are associated with:

- Improved social skills, reduced aggression and reduced exclusion of students in education settings (Weber & Vereenooghe 2020);
- A reduction in the number of children in out of home care, as well as the number of families with a child protection plan and children at risk in social care environments (Victoria Legal Aid 2016);
- Reductions in re-offending in youth justice across different offence types and regardless of the gender, criminal history, age or cultural background of the offenders (Daly & Hayes 2001); and
- Improved health outcomes and reduced dependence on the health system (O'Brien, Welsh & Barnable 2016).

As the discussion paper has noted, raising the age of criminal responsibility has particular importance for Aboriginal and Torres Strait Islander communities, who are disproportionately represented in the criminal justice system in the ACT. Restorative approaches draw from Indigenous practices and provides a culturally specific, safe and appropriate response for Aboriginal young people, based on the principles of reparation and self-determination.

RACR has developed an active community partnership with Restorative Justice- Galambany Circle sentencing panel which provides effective and restorative processes to Aboriginal and Torres Strait Islander defendants through community involvement in sentencing. Additionally, Canberra has been declared a 'restorative city'. This recognises that relationships are central to our wellbeing, community and society, and places Canberra in the perfect position to adopt more restorative practices and expand restorative services, to provide non-criminalised mechanisms and pathways for children, young people and their families.

Section three: Victims' rights and supports

How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

RACR have found that supporting families to pursue respectful relationships in a more holistic manner leads to better long-term outcomes. Holistic support should also include support for victims of crime. The Relationships Australia federation has significant experience in providing support for victims of crime. These counselling and support services address responses to trauma which can have widespread ramifications. Reactions may be experienced not only by people who experience the trauma first-hand, but by those who have witnessed or heard about the incident, or been involved with those immediately affected. As such, in order to ensure a more holistic response to harmful behaviour, services should be made available for:

- Anyone directly harmed by the harm

- Anyone harmed as a result of bearing witness
- Parents or care givers who have been harmed as a result of a harm against their child, or perpetrated by their child
- Relatives of a person who has died or suffered as a result of a harm.

These services are underpinned by restorative practice and as such, accountability for actions is embedded in the service. By engaging in a more holistic practice which addresses the whole community affected by the behaviour, individual needs are addressed, resulting in fewer children and young people continuing to engage in harmful behaviours throughout their lifetime. This promotes safer communities.

RACR and RA National welcome this reform. Our experience in providing restorative support and therapeutic services for victims/survivors, as well as the large evidence-base supporting the efficacy of this work, bolsters our confidence in restorative practices. We recognise their ability to ensure safety and wellbeing for the whole community and provide an alternative to punitive justice. We look forward to the decriminalisation of harmful behaviour for a larger cohort of children and young people, and the accompanying service model which will provide a continuum of community and Government-based services.

Concluding remarks

Should you require any clarification of any aspect of this submission, or would like more information on the services that Relationships Australia provides, please contact either of the signatories to this letter.

Yours sincerely,

Ms Alison Brook
Chief Executive Officer
Relationships Australia Canberra and Region
Alison.Brook@racr.relationships.org.au
02 6122 7133

Mr Nick Tebbey
National Executive Officer
Relationships Australia (National Office)
ntebbey@relationships.org.au
02 6162 9300

References:

Daly, K & Hayes, H (2001). Restorative justice and conferencing in Australia *Trends & issues in crime and criminal just*ice no 186, Australian Institute of Criminology.
Farmer, E. (2011) 'The age of criminal responsibility: developmental science and human rights perspectives' Journal of Children's Services 6(2).
Pennell, J. & Burford, G. (1994). Widening the circle: The family group decision making project. *Journal of Child & Youth Care* , 9: 1-12.
O'Brien, K, Welsh, D, Barnable, A (2016).The Impact of Introducing Restorative Care on Client Outcomes and Health System Effectiveness in in an Integrated Health Authority, *Home Health Care Management & Practice*, 29(1): 13-19.

Legal Aid ACT

Mr Shane Rattenbury MLA
Attorney-General
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

By email: Rattenbury@act.gov.au

4 August 2021

Dear Attorney General Rattenbury,

Thank you for the opportunity to participate in the Minimum Age of Criminal Responsibility Reference Group and make submissions regarding the proposed increase to the minimum age of criminal responsibility ('MACR') in the ACT. Legal Aid ACT provides vital services to the ACT's most vulnerable young people involved with the justice and welfare systems.

These services include non-legal support by way of the Community Liaison Unit and legal assistance in relation to criminal law and care and protection matters.

Legal Aid ACT witnesses firsthand the effect early contact with the criminal justice and welfare systems has on vulnerable and disadvantaged young people and as such, we strongly support the ACT Government's commitment to raise the age of criminal responsibility from 10 to 14.

Challenges of Increasing the Minimum Age of Criminal Responsibility in the ACT

The successful implementation of an increased MACR will not be without significant challenges.

International experience supports a change to the MACR following systematic and extensive pilot programs, rather than implementation from the top-down.[1] Further, the focus must be on both an increased age associated with criminal responsibility and broader infrastructural reform to enact meaningful change.[2] As such, increasing the MACR in the ACT, with infrastructural reform would likely be an optimal approach.

[1] Fireder Dunkel, 'Juvenile Justice Systems in Europe – Reform Developments between justice, welfare and 'new punitiveness'' (2014) *Kriminologijos Studios* 40.

[2] Laura S. Abrams, Sid P. Jordan and Laura A. Montero, 'What is a Juvenile? A Cross-National Comparison of Youth Justice Systems' (2018) 18(2) *Youth Justice* 1.

Legal Aid ACT is fundamentally concerned that the human rights of children under the age of 14 in conflict with the law will be breached by way of imposing conditions upon (or even depriving them of) their liberty without natural justice and procedural fairness and that decisions pertaining to these children will not be capable of review.[3]

In response to the 'Raising the minimum age of criminal responsibility' discussion paper, we can provide the following submissions.

Response to the Discussion Paper

Exceptions to the MACR for serious offences

Legal Aid ACT acknowledges the attraction of exempting some criminal offences from the increased MACR due to the capacity this may have to ensure children under the age of 14 in conflict with the law engage with appropriate support services.

Our primary position is that any increase to the MACR must be applied to all offences, regardless of the objective seriousness of the offence. The use of exceptions to the MACR fails to recognise the complex needs of children under the age of 14 in conflict with the law (regardless of the severity of the behaviour).[4]

Legal Aid ACT submits that catering to the needs of children under the age of 14 in conflict with the law, ensuring they are accountable for their conduct and respecting the views of victims and the community are not mutually exclusive. In lieu of exceptions to the MACR, Legal Aid ACT strongly supports the utilisation of evidence-based intervention programs, facilitated by an interdisciplinary approach and founded on the Human Rights compliant and natural justice processes for each child.

Where children under the age of 14 in conflict with the law have demonstrated a robust reluctance to engage with intervention programs, Legal Aid ACT acknowledges that it may be necessary to deprive or place conditions on their liberty. The gravity of this decision should be reflected by the exhaustion of all other intervention measures and children aged 10-13 should never be held at Bimberi Youth Detention Centre (Bimberi) alongside children above the age of 14.

In the unlikely event that a child under the age of 14 is deprived of their liberty, efforts to provide interdisciplinary support must persist.

Design Principles

[3] *Human Rights Act 2004* (ACT) s 18 ('*HRA*').

[4] Other nations that have increased the MACR have generally done so following systematic and extensive pilot programs. For example, after empirically verifying the practicability of necessary support mechanisms throughout the 1980s, Germany increased the MACR to 14 in 1990.

Legal Aid ACT is supportive of the design principles set out in the discussion paper. However, any alternative model must also recognise the value of mechanisms of appeal and administrative review. The rights of review to an independent tribunal or court is fundamental to ensuring human rights compliance and natural justice within the processes to which children are subject.

It should be strongly noted that administrative processes are capable of review through the Supreme Court. This could lead to costly and counterproductive litigation. It would be preferable, therefore, that the design principles provide a clear pathway for judicial or tribunal review.

Legal Aid ACT recognises that there is a significant intersection between children under the age of 14 that are in conflict with the law and those currently under the care of CYPS. Additionally, it must be recognised that a child being in conflict with the law is not, in and of itself, sufficient to warrant their removal from the home environment.

Whilst we acknowledge CYPS' efforts to implement internal review mechanisms, Legal Aid ACT maintains its position that more must be done to ensure that CYPS decisions relating to vulnerable children are subject to independent review. It is for this reason that we are apprehensive that the response to children under the age of 14 in conflict with the law will be managed by CYPS without an independent process for appeal/review.

Noting the intersection with CYPS' role, the response to children under the age of 14 in conflict with the law must remain within the alternative model.

The arbitrary and unaccountable application of any alternative model has the capacity to nullify any benefit associated with an increased MACR. Regardless of the model adopted, the powers to respond to children under the age of 14 in conflict with the law must not be managed by CYPS without external and independent oversight.

Composition of a Multidisciplinary Panel

In keeping with earlier submissions in relation to a potential alternative model to manage children under the age of 14 in conflict with the law, Legal Aid ACT is supportive of the creation of a Multidisciplinary Panel.

The MACR and overrepresentation of Aboriginal and Torres Strait Islander individuals in the justice system are inextricably linked. To ensure that ATSI children in conflict with the law are managed in a culturally sensitive manner, Legal Aid ACT submits that an elder from the community occupies a permanent position on the panel. This would mean that ATSI children have their matters heard where an elder of the community is involved in decision-making; we hope this will also encourage ATSI children to engage with the multidisciplinary panel.

Should an identified member of the ATSI community not occupy a permanent position on the panel, Legal Aid ÀCT submits that any matter involving an ATSI child in conflict with the law must be heard by a panel that would co-opt at least one elder of the ATSI community. The involvement of the ATSI community in hearing matters involving ATSI children must not be on a discretionary basis.

Further, Legal Aid ACT strongly submits that the panel should have at least one individual with legal expertise. Processes need to maintain natural justice, procedural fairness and human rights, particularly where a person's liberty is at stake. An individual with legal expertise is well placed to ensure that these cornerstones of justice are observed, and this type of role is well established in a range of tribunals for this very reason.

Capacity to review decisions

Legal Aid ACT supports the introduction of a multidisciplinary panel to determine appropriate outcomes for children under the age of 14 that are in conflict with the law. However, decisions relating to the management of children under 14 in conflict with the law should be accountable to appellate review.

Decisions should be subject to review where they are contested by a child, their parent/s or legal guardian. Perhaps, decisions could also be subject to review where a child has failed to engage with intervention programs.

Where outcomes require long-term commitments from the child, their parents or other support persons/services (such as the placing on conditions or the deprivation of liberty), decisions should be subject to periodic and independent review to ensure that the best interests of the child continue to be served.

The ACT Supreme Court's supervisory jurisdiction means that it may be capable of reviewing decisions made by the multidisciplinary panel under the *Administrative Decisions (Judicial Review) Act 1989*.[5] This review could be based on breaches of natural justice and/or procedural fairness or the merits of the decision made by the panel.[6]

However, review by way of the Supreme Court would be a costly exercise and would subject children under the age of 14 to contact with the criminal justice system despite an increased MACR. Review mechanisms for decisions pertaining to the management of children under the age of 14 in conflict with the law should be simple, inexpensive and capable of resolving issues in a timely manner.[7]

---

[5] (ACT) s 5(1).

[6] *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 5(1), (2) and (3).

[7] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 6.

Therefore, as we have argued elsewhere in relation to the role of CYPS, appeals and review could be adjudicated by the ACAT to ensure that review is accessible and expedient and children under the age of 14 are not subject to unnecessary contact with the Courts.

Alternatively, a clear pathway to the children's Court could be entrenched.

Supports for children in conflict with the law at crisis points

Legal Aid ACT is aware that increasing the MACR will not prevent the commission of all serious and harmful acts by children aged 10-13. As such, extensive modelling must be completed to determine the appropriate response to children in conflict with the law at crisis point. This is why a limited pilot may be more viable first step in moving to full implementation of the MACR.

At crisis point, children aged 10-13 should not be held at Police Watchouses unless absolutely necessary. Therefore, appropriate accommodation arrangements for children in conflict with the law at crisis point, where their home environment is not safe, may need to be established.

Similarly, children under the age of 14 in conflict with the law must have access to legal support services, regardless of whether crisis point occurs during business hours. Appropriate briefing of ACT Policing may be necessary to ensure that legal support services for children under 14 are utilised appropriately.

Distinguishable to the legal support offered to criminal offenders above the MACR, legal support services offered to children under 14 at crisis point would focus heavily on ensuring their rights are observed and Police (and other services) are operating within a human rights framework.

Mandated engagement and the deprivation of liberty

Rather than being solely correlated to the objective seriousness of the behaviour, Legal Aid ACT submits that engagement with intervention programs should only be mandated where the child has engaged in objectively serious conduct and demonstrated a steadfast unwillingness to engage with such programs.

A child's unwillingness to engage with intervention programs should primarily be viewed as an opportunity to review the suitability of any decision made by way of an alternative model.

The deprivation of liberty should be treated as a last resort, only exercisable where a child has continually refused to engage with intervention programs and continues to pose a significant risk to the community. Depending on the term of deprived liberty, the decision to deprive a child under the age of 14 of their liberty should also be subject to periodic review.

In the event that a child is deprived of their liberty, they should not be held at Bimberi alongside individuals above the MACR. As above, the provision of interdisciplinary support programs should remain the priority for children, even when deprived of their liberty.

The ultimate goal of increasing the MACR should be to provide sufficient support to at-risk children aged 10-14 to ensure that there is never a need to remove them from the community. As will be discussed below, Legal Aid ACT is nevertheless concerned that the liberty of these children will be arbitrarily encroached upon by way of intervention programs, and that the processes would be non-compliant with precepts of Human Rights and natural Justice.

Minimal Police Intervention and human rights compliant policing

ACT Police contact with children in conflict with the law should be based on a model of minimum intervention and human rights compliant processes. Legal protections for children must not be compromised for the sake of expedience. Should the MACR be increased to the age of 14, retention of models of law enforcement that continue to significantly engage children aged 10-13 will mean that, although not subject to Court proceedings, some children's contact with the justice system will remain unchanged.

Legal Aid ACT acknowledges that Police investigation may be necessary to identify the child responsible for the unlawful behaviour and therefore, they should be entitled to investigate where the child, their parents/carers and all other relevant bodies have been notified of the investigation in writing.

However, any investigation should be limited to the ascertainment of the individual responsible for the unlawful behaviour. Similarly, children aged 10-13 should not be liable to arrest and any questioning of these individuals should be in the presence of their parent/s (or legal guardian) and/or any other trusted individual the child deems appropriate.

Should they be engaging in behaviour that presents a risk of danger to themselves or others, Police could be entitled to take children to a place of safety.

Only where Police can demonstrate that they have engaged in unlawful conduct should a child under the age of 14 be directed to engage with the alternative model. To ensure that intervention is not exercised arbitrarily, clear thresholds must be identified and referrals to the alternative model must be monitored closely.

Intervention Programs and the *HRA*

One of Legal Aid ACT's primary concerns about the implementation of intervention programs in for children under the age of 14 in conflict with the law is the effect this has on a child's liberty without being convicted of criminal charges.

Legal Aid ACT agrees that children under the age of 14 should be dealt with via an alternative model, rather than subjected to the criminal justice system. However, it must be acknowledged that any conditions imposed upon a child by way of any alternative model represent an encroachment of their liberty, and risk breaching the Human rights protections offered in the ACT.

Legal Aid ACT is of the position that children under the age of 14 should not be subject to excessive police intervention or criminal conviction or records. The expectation that children who have not been convicted of a criminal offence engage with intervention programs and therefore, be subject to conditional liberty may abrogate their right to liberty and security.[8]

Unlike the criminal justice system where children may be compelled to engage with support services in response to criminal conviction, there is the real risk that the liberty of children under the age of 14 in conflict with the law will be encroached upon without the observance of natural justice and procedural fairness.

Responding to children under the age of 14 already in contact with the criminal justice system

Legal Aid ACT submits that any child under the age of 14 awaiting sentencing at the time the MACR is raised, should be transitioned to the alternative model. It seems uncontentious to suggest that this transition should involve the child engaging with the alternative model, rather than attending a Court for sentencing.

As per s 25(2) of the *HRA*, if a penalty is reduced after anyone commits an offence, they benefit from the reduced penalty. So far as it is possible to do so, Territory laws must be interpreted in a manner compatible with human rights.[9]

Accordingly, Legal Aid ACT submits that any child under the age of 14 who was sentenced prior to the MACR being increased should be transitioned to the alternative model. This should occur whether the child is in detention or on a community order.

Legal Aid ACT acknowledges that there may be some difficulty encountered when transitioning children under the age of 14 who have already been in contact with the criminal justice system to the alternative model. However, these difficulties should not preclude children under the age of 14 from accessing the benefits derived from the increased MACR.

Non-Punitive and No Criminal Records

Legal Aid ACT submits that no records of a young person's unlawful behaviour, nor any record of engagement with the alternative model prior to the age of 14 should be kept for the purpose of being used in subsequent court proceedings. In the event that information is collated in the course

[8] *HRA* s 18.
[9] *HRA* s 30.

of an investigation involving a child under the age of 14, the information should be sealed as soon as practicable once the investigation has ceased.

Should the MACR be increased but ACT Police retain information in relation to children under the age of 14 in conflict with the law, it seems the likelihood of these children coming into contact with the criminal justice system at the age of 14 would exponentially increase; this type of intelligence is utilised now to identify and track offenders.

Legal Aid ACT also submits that criminal convictions accrued by children when they were younger than the revised MACR should be automatically extinguished. This could be done under an amendment to the *Spent Convictions Act 2000* (ACT). Given the vulnerability of children under the age of 14, it seems likely that they would rarely utilise an application process to extinguish their offences.

Criminal convictions automatically becoming extinguished rather than spent is preferable as it would ensure that this information cannot be used as evidence against a child when they reach the age of 14.

Restoratively Based

To ensure the rights of victims are respected, where possible, the alternative model should involve restorative justice mechanisms. For example, the return of property to the lawful owner after it has been stolen.

Restorative justice conferencing with the young person and the victim may ensure the young person is held responsible for their actions whilst potentially increasing empathy for the victim. Conversely, the victim's interaction with the young person may increase their sense of natural justice and satisfaction with the alternative model used to manage unlawful behaviour perpetrated by young people below the age of 14.

The implementation of restorative justice conferencing could also be utilised for violent or other more serious offences that cannot be remedied by the restoration of property or payment of damages, at the discretion of the victim.

As with the alternative model more generally, the difficulty of implementing restorative justice mechanisms will be ensuring the child is willing to participate in the absence of a Court order compelling them to do so.

Victims of crimes perpetrated by children under the age of 14 should also have access to the Victim Services Scheme.

Fundamentally, meaningful change by way of an increased MACR will only be obtained by ensuring any alternative model is centred on openness and transparency, with a focus on supporting the unique needs of at risk children aged 10-13 and their families.

Should you have any questions in relation to the above submissions, please do not hesitate to contact me on (02) 6243 3496 or at john.boersig@legalaidact.org.au.

Yours sincerely

Dr John Boersig PSM
Chief Executive Officer
Legal Aid ACT

Submission to Discussion Paper: Raising the minimum age of criminal responsibility

ACT Justice and Community Safety Directorate and Community Services Directorate

AUGUST 2021

AASW
Australian Association of Social Workers

About the Australian Association of Social Workers

The Australian Association of Social Workers (AASW) is the national professional body representing more than 15,000 social workers throughout Australia. The AASW works to promote the profession of social work including setting the benchmark for professional education and practice in social work, while also advocating on matters of human rights to advance social justice.

Acknowledgements

This submission has been developed in consultation with community organisations in the ACT and the national Raise the Age campaign.

For further information or questions relating to this submission, please contact:

Author(s) of the Submission

Angela Scarfe

Senior Policy Advisor

Angela.scarfe@aasw.asn.au

Manager, Social Policy and Advocacy

Rachel Reilly

Rachel.reilly@aasw.asn.au

Executive Summary

The AASW supports the campaign to raise the age of criminal responsibility to at least 14 years old which has been undertaken by the Youth Coalition of the ACT. We ascribe to the belief that a child's best interest should be the first and foremost in all decision-making pertaining to themselves. The submission strongly advocates for a human rights-based approach which acknowledges existing harm and abuse which may have contributed to the harmful behaviours. Rather than criminalising those behaviours, we support the development and implementation of programs which address the underlying causes of offending and promote recovery. In this submission, we will address the following key questions:

- Should there be any exemptions or exceptions to the new MACR for children and young people that engage in repeated or very serious harmful behaviours?
- What services should be introduced, reoriented or expanded to support children and young people who demonstrate harmful behaviours?
- How should children and young people under the MACR be supported before, during and after crisis points?
- How should this reform consider the rights of victims?

Recommendations

The AASW recommends:

- That the ACT government raise the age of criminal responsibility from 10 to 14 with no exception for children and young people that engage in repeated or very serious harmful behaviour
- That the ACT government develop and expand holistic therapeutic support programs for young people who exhibit harmful behaivous to prevent them from entering the criminal justice system
- That the ACT government further invest into youth outreach and crisis services that meet the basic housing and health needs of vulnerable children
- That the ACT government develop a multi-disciplinary panel to identify the whole-of-person needs of young people who exhibit harmful behaviours and develop individualised plans to improve and monitor their health outcomes.

Context for this submission

AASW's work is informed by the Convention on the Rights of the child and the core values of Respect for Persons, Social Justice and Professional Excellence. The AASW considers the well-being of children and young people in its broadest social and political context. Social workers address the diversity and complexity of the issues facing children and young people, informed by their understanding of issues such as poverty, domestic violence, drug and alcohol misuse, disability, colonisation and the intergenerational impacts of the Stolen Generation, homelessness, education, health and mental health.

Responses to discussion questions

Should there be any exemptions or exceptions to the new MACR for children and young people that engage in repeated or very serious harmful behaviours?

Recommendation(s):

- That the ACT government raise the age of criminal responsibility from 10 to 14 with no exception for children and young people who engage in repeated or very serious harmful behaviours

The AASW's position is that there should be no exceptions to the higher age of criminal responsibility. The arguments in favour of an older age derive from updated medical, neurological and developmental evidence which has clear implications in terms of children's cognitive capacity. [1] It is this updated knowledge about a child's developmental trajectory which drives the case for older age of criminal responsibility. The same knowledge about neurological development has led to improved understanding of the harmful effects of stress and deprivation on children's neurological and biological growth, and its implications in terms of cognitive capacity and psychological well-being.[2] That evidence demonstrates that interaction with the justice system has the potential to cause long term harm to children.

[1] Cunneen, C., 2017. Arguments for raising the minimum age of criminal responsibility. Comparative Youth Penality Project, University of New South Wales.

[2] Richards, K., 2011. What makes juvenile offenders different from adult offenders?. Trends and issues in crime and criminal justice, (409), pp.1-8.

What services should be introduced, reoriented or expanded to support children and young people who demonstrate harmful behaviours?

Recommendation(s):

- That the ACT government develop and expand holistic therapeutic support programs for young people who exhibit harmful behaivous to avoid their engagement with the criminal justice system
- That the ACT government further invest into youth outreach and crisis services that meet the basic housing and health needs of vulnerable children

Social workers who work with vulnerable children and young people observe that children and young people who exhibit harmful behaviours have a range of factors in their background that have likely led them to these behaviours. For example, many members of the AASW who work with children and young people in Out-of-Home care report that the trauma that these young people have experienced leaves them with attitudes, behaviours and coping mechanisms which make them more likely to end up in the Youth Justice system.[3] The AASW submission to the Inquiry of Youth Justice Centre suggests that that in some cases, it is the trauma of their early experiences of neglect or abuse, which generated the involvement of child protection, compounded by the trauma of removal from their home and community which leaves them in this situation. Therefore, criminal justice response is a wholly inadequate framework to respond to children who have exhibited harmful behaviours, which are likely the outcome of trauma and potentially abuse. In many instances, the vulnerabilities within the child's original family were related to family violence, mental illness, disability or alcohol and/or drug related harm, and the young people themselves may be experiencing these vulnerabilities. Further, social workers report that many young people in the youth justice system have an undiagnosed cognitive impairment or mental illness. [4]

In addition to this, children in out-of-home-care are likely to encounter the police for behaviours that would not have this consequence for children who live with their parents.[5] This means that young people leave out-of-home-care with a record of contact with the police, further stigmising their challenging behaviours as a problem that needs to be solved by incarceration. A human rights based approach to children exhibiting behaviours that are challenging, dangerous or harmful is a trauma-informed, therapeutic and oriented towards care, rather than the potentially negative and/or detrimental experience of contact with the criminal justice system.

---

[3] Australian Association of Social Workers, Submission to the Inquiry Into Youth Justice Centres, Victoria, March 2017 https://www.aasw.asn.au/social-policy-advocacy/by-year/2017
[4] ibid
[5] ibid

The AASW endorses the position of the ACT youth Coalition that there should be greater service investment for these young people, commencing with therapeutic work to strengthen the functioning of their family and locate extended family or community supports. These should be supplemented by supported housing, and outreach by appropriate health, and drug and alcohol services and supported engagement with education and training.

How should children and young people under the MACR be supported before, during and after crisis points

Recommendation(s):

- That the ACT government establish a multi-disciplinary panel to identify the whole-of-person needs of young people who exhibit harmful behaviours and develop individualised plans to improve and monitor their health outcomes.

Social workers strongly support that the approach to young people who are at risk of entering the justice system needs to be reviewed. Further, social workers who work with young people in the justice system are concerned that the current system ignores the complexities of the young person's history. The current treatment of these young people is neither just nor effective. Given the evidence of the high number of young people in the youth justice and adult criminal justice systems who have come from out-of-home-care backgrounds, the responses to them must be informed by therapeutic, diversionary and re-investment approaches.[6]

One member has expressed it as: "criminalising their response to previous trauma is compounding the harm to those young people. Nor is it effective in reducing crime."[7]

To circumvent this problem, the AASW endorses the recommendation of the Youth Coalition of the ACT that there should be a multi-disciplinary panel to identify the full range of the young person's health, education and well-being needs and refer them to services. Please refer to their submission to this inquiry. The AASW recommends a stronger model than the one proposed by the coalition: an outcomes-oriented, therapeutic care plan should be developed for the young person outlining health and education goals. The AASW also believes that monitoring and accountability are key features of this strategy and recommends that this panel should also review the young person's progress and hold services accountable for the young person's outcomes.

[6] Ibid
[7] Ibid

How should this reform consider the rights of victims?

As has already been described, many of the children in the justice system have experience of the child protection system. In many cases, they were in this system because they were either the victims of criminal abuse and violence, or because they witnessed violence and were exposed to criminality. The government which removed them from their original families retains parental responsibility for these children and young people, and therefore holds responsibility to respond to their previous trauma related to those crimes. This submission has already outlined the AASW's vision for the trauma informed therapeutic approach that these young people deserve. If the ACT government's response falls short of this vision, the AASW believes that the age of criminal responsibility should be raised to prevent the further abuse of this group of victims of crime. The children who would otherwise be deemed to be criminally responsible are an important group of victims whose rights need to be recognised.

Conclusion

The AASW strongly recommends that the ACT government raise the age of criminal responsbility from 10 to 14. In addition to this, a reimagining of the way in which these intersecting systems respond to and support the needs of children who are exhibiting harmful behaviours needs to be undertaken. This includes an implementation of a de-stigmatising and human rights based approach to children and young people that addresses childhood trauma associated with social vulnerabilities, preventing their engagement with the criminal justice system.

© Australian Association of Social Workers

Level 7, 14-20 Blackwood Street
NORTH MELBOURNE VIC 3051

PO Box 2008
ROYAL MELBOURNE HOSPITAL VIC 3050

P: 03 9320 1027
E: socialpolicy@aasw.asn.au
www.aasw.asn.au

ACN 008 576 010
ABN 93 008 576 010

AASW
Australian Association of Social Workers

www.aasw.asn.au

Australian National University

Dr Gregor Urbas
Adjunct Associate Professor of Law
ANU College of Law
+61 2 6125 4634
Gregor.Urbas@anu.edu.au

5 August 2021

Justice & Community Safety
macr@act.gov.au
Canberra ACT 2601

Raising the Minimum Age of Criminal Responsibility

Dear Justice & Community Safety Directorate

Please find attached my comments on the Discussion Paper aimed at raising the minimum age of criminal responsibility in the Australian Capital Territory (ACT).

I write as an academic lawyer with over twenty years' experience in teaching Criminal Law and Procedure, Evidence Law and related subjects in Australian and overseas universities. My research specialisation is in cybercrime, and I am also a barrister in the ACT.

While working as a Research Analyst at the Australian Institute of Criminology (AIC) in the early 2000s, I wrote a brief report entitled 'The Age of Criminal Responsibility' which has been downloaded and cited widely.[1] In 2005, an update was published by the AIC with a reference table linking to Australian Commonwealth, State and Territory legislation.[2]

At that time, all Australian jurisdictions had reached uniformity as to the minimum age of criminal responsibility at 10 years of age, the last two to act being the ACT and Tasmania. For the reasons outlined in the Discussion paper, the ACT has committed to raising the minimum age to as high as 14 years. As this decision appears unlikely to be reversed, my comments will not be directed to debating the merits of the general proposal to increase the minimum age, but will instead highlight some problematic legal consequences.

[1] Gregor Urbas, 'The Age of Criminal Responsibility' -- *Trends & Issues In Crime and Criminal Justice* no. 181 (November 2000): https://www.aic.gov.au/publications/tandi/tandi181

[2] Australian Institute of Criminology, 'The Age of Criminal Responsibility' -- *Crime Facts Info* no. 106 (September 2005): https://www.aic.gov.au/publications/cfi/cfi106

Loss of uniformity across jurisdictions

If only the ACT raises its minimum age of criminal responsibility, there will obviously be a loss of uniformity across Australian jurisdictions. As noted, uniformity was achieved with all of the Commonwealth, State and Territory jurisdictions setting the minimum age at 10 years only at the end of the last century, and no other Australian jurisdiction has to date made a similarly firm commitment to change the age of criminal responsibility.

Variation across Australian jurisdictions is not by itself either unusual, though it does add complexity. The substantive and procedural laws applying in the criminal justice system already vary significantly across jurisdictions, even for central and longstanding offences such as murder.[3] However, the trend of recent decades has been towards more uniformity where achievable, as exemplified by the *Model Criminal Code* project leading to the Criminal Codes of the Commonwealth and the ACT, and the *Uniform Evidence Law* that applies in Commonwealth, ACT, NSW, NT, Tasmanian and Victorian courts.

If the minimum age is raised to 14 years in the ACT but not elsewhere, then a child under this age but over 10 years and who is resident in Canberra will face criminal liability for a range of conduct e.g. assault or stealing, if he or she happens to be visiting Queanbeyan or the South Coast at the time of the conduct, but not if the same conduct occurs in the ACT. Legally accurate information imparted to ACT children about what conduct is criminally prohibited will have to specify the applicable age parameters for each jurisdiction.

For example, in schools teaching about the dangers of sexting, it would need to be explained that a teenager under 14 years old who distributes intimate images without consent would not be liable under s 72C of the *Crimes Act 1900* (ACT), but may be liable if a victim or recipient is located in NSW, under s 91Q of the *Crimes Act 1900* (NSW). Further, even if an ACT child in these circumstances is not liable for the ACT offence, this does not preclude liability under Commonwealth law for the s 474.17 offence of using a carriage service to menace, harass or cause offence, or s 474.17A where this involves intimate images.[4]

---

[3] Gregor Urbas, 'Homicide' in *Halsbury's Laws of Australia* (last updated 2019): https://www.lexisnexis.com.au/en/products-and-services/legal-research/major-reference-works/halsburys-laws-of-australia

[4] Gregor Urbas, *Cybercrime: Legislation, Cases and Commentary*, 2nd ed. (2020), LexisNexis.

Loss of graduated criminal responsibility

An important counterpart to the minimum age of criminal responsibility[5] is the rebuttable presumption against criminal capacity that applies between the ages of 10 and 14 years, known in common law as *doli incapax* and statutorily codified in the ACT.[6] This provides a graduated form of attributing criminal responsibility, whereby the presumption against capacity can only be overcome if the prosecution can prove beyond reasonable doubt that the child facing a charge understood at the time of the alleged act that it was wrong. The nature of this understanding has traditionally been explained as requiring comprehension on the part of the child that what he or she did was "not merely wrong but seriously wrong".[7]

The operation of this mechanism allows for an individualised and graduated approach:[8]

> The cases seem to show, logically enough, that the older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge. The surrounding circumstances are of course relevant and what the defendant said or did before or after the act may go to prove his guilty mind.

The High Court has considered *doli incapax*, noting that it directs attention to both the particular child and the allegation and that there is no assumed correlation between age and intellectual development:[9]

> What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. … Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

---

[5] *Criminal Code 2002* (ACT), s 25 (Children under 10).

[6] *Criminal Code 2002* (ACT), s 26 (Children 10 and over but under 14).

[7] *R v JA* [2007] ACTSC 51 (12 July 2007) at [70], citing *R (a child) v Whitty* (1993) 66 A Crim R 462.

[8] *C (a minor) v DPP* [1966] AC 1, as cited in *R v JA* [2007] ACTSC 51 (12 July 2007) at [75]. In this ACT case, as 11-year-old was found not to be criminally responsible in relation to an alleged sexual offence. In the later ACT case of *Williams v IM* [2019] ACTSC 234 (28 August 2019), it was held that the prosecution requirement to rebut the presumption against criminal capacity in s 26 was not displaced even by a guilty plea.

[9] *RP v The Queen* [2016] HCA 53 (21 December 2016) at [12], noted omitted.

If the minimum age of criminal responsibility in the ACT is raised to 14 years, than unless further modifications are made to the law governing criminal responsibility above this age, the effect will be to abrogate the *doli incapax* presumption entirely. As a consequence, there will be no graduated treatment of criminal responsibility according to the individual development and circumstances of an accused child, but a sharp cut-off based only on age, so that a child one day short of his or her 14th birthday cannot be held liable but faces full criminal liability a day later. This would be an unsatisfactorily regressive reform.

Additionally, it should be noted that some ACT laws already incorporate a graduated response to criminal liability based on age, or age difference. To return to the example of teenage sexting discussed earlier, a child who is accused of distributing an intimate image of another child aged at least 10 years but no more than 2 years younger than the accused child e.g. a 14 year-old accused of distributing an image of a 13-year old, has a statutory defence to a charge under s 72D of the *Crimes Act 1900* (ACT). This provides something of a "buffer zone" and is in line with a similar age-related defence for contact sexual offences.[10]

Recommendations

Given that the ACT has already committed to raising the minimum age of criminal responsibility, but has not specified a particular age to which it should be raised, the following recommendations would achieve the legislative aim while minimising the degree of loss of uniformity with other jurisdictions and also preserving the graduated approach to criminal responsibility developed at common law and reflected in the ACT's legislation.

Recommendation 1: The minimum age of criminal responsibility in the ACT should be raised to 12 years, by amending s 25 of the *Criminal Code 2002* (ACT) as follows:

> **Children under 12**
> A child under 12 years old is not criminally responsible for an offence.

This would only affect criminal liability for children aged 10 years or more but under 12 years, which constitute a small number of cases dealt with in any Australian jurisdiction.[11]

[10] See ss 55, 61 and 72D of the *Crimes Act 1900* (ACT), with the age-based defence for the latter in sub (2)(a).

[11] Noting also that the Discussion Paper presents the Scottish model of a 12-year minimum age as an option.

Recommendation 2: The further age of criminal responsibility in the ACT should be dealt with by amending s 26 of the *Criminal Code 2002* (ACT) as follows:

> **Children 12 and over but under 14**
>
> (1) A child aged 12 years or older, but under 14 years old, can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
>
> (2) The question whether a child knows that his or her conduct is wrong is a question of fact.
>
> (3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.

This reform would preserve the graduated approach between the minimum age of criminal responsibility and the age of 14 years, on which there is already ACT caselaw.[12]

Thank you for the opportunity to comment on this proposed legislative reform. I consent to my comments being referenced or quoted in any further public consultation documents.

Sincerely

Dr Gregor Urbas

Adjunct Associate Professor of Law

ANU College of Law

Australian National University

Gregor.Urbas@anu.edu.au

[12] *R v JA* [2007] ACTSC 51 (12 July 2007) and *Williams v IM* [2019] ACTSC 234 (28 August 2019), discussed above.

Submission: Raising the minimum age of criminal responsibility (ACT)

August 2021

Paul Wright
National Director

Email: paul@antar.org.au
Phone: 02 9280 0060

PO Box 77
Strawberry Hills NSW 2012

With thanks:

This submission was authored by Mr Paul Wright, ANTaR National Director.

About ANTaR

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

Introduction

Thank you for the opportunity to provide some comments to inform the consideration of the proposed ***raising the minimum age of criminal responsibility (MACR) in the ACT***. ANTaR also commends the ACT Government for being the leading jurisdiction in Australia to pursue this legislative change. We appreciate the need to weigh up the best way to protect young children from adverse and damaging interaction with the justice system, and particularly incarceration and the need to continue serving and protecting the wider community.

As a national advocacy organisation, solely focused on justice, rights and respect of First Nations People in Australia, we have seen a large public response to the calls for raising the age of criminal responsibility across Australia.

ANTaR is a founding member of the Change the Record Campaign (which we also auspice) and an active member of the Raise the Age Campaign. We are also organisational members of Just Reinvest NSW and work closely with First Nations communities to achieve some fundamental reforms in the Justice systems in each jurisdiction across Australia.

As the ACT Government has recognised in its decision to pursue a raising of the minimum age of criminal responsibility, this type of reform is essential to reducing the alarmingly high rates of incarceration, recidivism and damage to First Nations communities. It is our hope that the other State and Territory governments soon follow this example and pursue this reform without delay. As the NATSILs chair, Ms Priscilla Atkins said recently:

> *"This is an unjust and dangerous matter of political will. Ongoing inaction means a horrifying number of our young people continue to be trapped in the quicksand of the so called justice system. Now is a critical opportunity for the Australian Government to reimagine the justice system and commit to ending the over-incarceration of our children by raising the age of criminal responsibility to at least 14."*

ANTaR's submission is informed by our work with the Campaigns and coalitions already mentioned and the input of our ANTaR ACT colleagues. We are keen to continue engaging with the process the ACT Government has laid out.

We have attempted to respond to most of the questions posed in the ACT Government's Discussion Paper.

1. Section One: Threshold issues for raising the MACR

Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

Based on the evidence and expert advice, ANTaR firmly believes that there should be no exceptions to raising the MACR.

As many of our partner organisations have argued, on rare occasions that a child under the age of 14 does something seriously wrong, it speaks more to the failures and under-resourcing of support for them. As your Discussion Paper already outlines, the medical evidence shows that children under the age of 14 years are undergoing significant growth and development:

> "Research suggests that children under the age of 14 have not developed the maturity necessary to form the intent for full criminal responsibility. This developmental immaturity relates to multiple areas of cognitive functioning, including impulse control, reasoning and consequential thinking." It also refers to "a window of potential vulnerability in the early- to mid-adolescent period during which the likelihood of impulsivity, sensation-seeking and risk-taking behaviours is raised." (p12)

We know that interaction with the criminal justice system can cause life-long harm and trauma for children.

The ACT Government should rather redirect the monies spent on incarcerating children and invest in the programs that support children and their families, by providing safe housing, culturally safe and accessible health care and the wrap-round supports to help children thrive at school.

Should doli incapax have any role if the MACR is raised?

ANTaR National does not think 'doli incapax' should play a role, or be relevant for children under the age of 14 years.

Nothing dramatic changes in a child's development at 14 years old, and many countries have raised the age to *above* 14 years old. Rather,14 years is really the minimum age that you could expect a child to have sufficient neurological development to be held criminally responsible.

The recognition that children under 14 years old are *not sufficiently mature* to have this capacity is well established in Australian law - it is reflected in the *doli incapax* doctrine. This is the legal presumption that children under 14 years old do not have the cognitive capacity to form criminal intent. The problem is that the *doli incapax* presumption does not work in practice and does not protect the rights of children. Children are regularly remanded and held in prison cells while they wait for court hearings to debate matters of *doli incapax.*

2. Section two: An alternative model to the youth justice system

Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

ANTaR supports the principles. However, as our colleagues at the Change the Record Campaign have noted, the ACT Government policies, programs and funding arrangements will all need to be reviewed to make sure they live up to the principles.

What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

The ACT Government needs to engage with the Aboriginal community organisations in Canberra to identify what support they would need to enable them to support and rehabilitate young people under 14 who come into contact with the Law.

Aboriginal community organisations have indicated a need for greater funding for Functional Family Therapy, and a need for the Healing Farm to be fully operational as originally intended by the Ngunnawal Elders, to support families who need therapeutic healing.

Our Campaign colleagues have identified five key gaps in the service delivery landscape in the ACT:

- The lack of a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse
- The absence of Function Family Therapy - Youth Justice and/or other evidence-based programs targeted to this cohort of children
- The limited availability of psycho-social services for young people, particularly those with disabilities
- The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness
- A broad need for greater education across services to improve the identification of, and response to, disability support needs

These are key areas of need which should be addressed by the ACT Government in its development of an alternative system to the criminal justice system.

We understand that the ACT Government has committed to pursuing Justice Reinvestment as a concept priority, this needs to be followed through with a wholesale pursuit of reinvestment away from incarceration and the significant resources sucked up by building and maintaining prisons. The ACT has reportedly paid the most to lock up children in Australia with costs exceeding $500,000 per annum.[1]

[1]https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fnation%2Fdetention-costs-rise-as-fewer-youths-are-incarcerated%2Fnews-story%2F9391b6f1e28f1de1ba324da10456bd45&memtype=anonymous&mode=premium

Raising MACR and a comprehensive approach to Justice Reinvestment should be hand in hand policies with complementary strategies.

> *How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?*

As noted above.

Multidisciplinary Panels should be established to assist with early identification and response to the needs of vulnerable young people as a key preventative measure for more acute issues. Government needs to consider the social determinants of health as key building blocks.

> *How should children and young people under the MACR be supported after crisis points?*

The services and systems that comprise the human services sector in the ACT (and that are likely to be called upon to facilitate access to the necessary supports) must be authorised to apply flexibility in respect of eligibility restrictions, and must be empowered to intervene early with adequately funded service responses that focus on both the child themselves as well as the environment within which the child is situated to best support children and young people to move through periods of crisis and have their needs met.

> *Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?*

Like our ANTaR ACT colleagues, we propose that the first option should always be voluntary participation in services or restorative programs, however, we accept that there may be cases or occasions when mandatory participation in therapeutic services/ programs could in the long term benefit a young person.

On the very rare occasion that a child does something seriously wrong, they will often need interventions and support. These can be delivered through a range of non-criminal avenues. In the most serious cases, there are civil law provisions that already exist in the ACT, Victoria and NSW (for example) which allow for a judge to compel a child to participate in a program, reside in a facility or undergo various forms of health, cognitive or psychological assessment.

3. Section three: Victims' rights and supports

In relation to this section, ANTaR believes that victims of acts which harm, made by a child under 14 should still have the rights of other victims as indicated in paragraph 63 of the Discussion Paper. The Government needs to lead community education about the importance of an appropriate MACR and help victims to understand that children under 14 years are not fully capable of having criminal intent, which is why they will not be charged.

However, as our ANTaR ACT colleagues have noted, there could be value in a voluntary process of restorative justice when no formal offence has occurred, but a victim has been harmed.

> *How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?*

The needs of children and protecting the rights of victims to safety and recovery are complementary. Reforms should recognise that community safety is predicated on the needs of community members being met. This includes children.

Additionally, getting the policy right on raising the MACR along with improving supports promotes community safety, prevents recidivism and ultimately protects the wellbeing of all members of the community. The earlier a child comes into contact with the criminal legal system, the more likely it is that they will have further engagements with the youth and adult justice systems.

4. Section four: Additional legal and technical considerations

> *Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?*

ANTaR believes that overall, the same police powers that apply now to children under 10 years old should apply to those under 14 years.

Any engagement with the criminal justice system can cause harm to a child - from police contact right through to the deprivation of liberty. Consideration should be given to minimise and make as safe as possible, any engagement with police.

> *What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?*

As above.

> *Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children*

under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

We reiterate what our colleagues at Change the Record have stated - crimes committed by children under the influence, coercion or aided and abetted by adults are already appropriately dealt with under the criminal law, with the responsibility correctly lying with the adult involved. 'Children should be provided with appropriate protection and the adults responsible prosecuted'.[2] Minor legislative amendments may need to be made to capture activities that are not criminal offences due to the age of the child but otherwise would be.

Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

Yes they should be transitioned to the new alternative model.

Priority should be given to assessing each individual child's needs, what supports are required for them and their families, ensuring they have adequate accommodation and supports in place to minimise disruption and promote continuity of services.

Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

All children should be transitioned to the new alternative model in line with a human rights approach.

Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

All convictions for children under 14 should be 'spent' automatically as some young people may not become aware that they can request this if an 'on request' system is instituted, and they may be disadvantaged in job applications etc. as a result.

Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

---

[2] Penal Reform International, 'The minimum age of criminal responsibility' (Justice for Children Briefing no 4, 2013) 4 <https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf>; Queensland Family and Child Commission, *The age of criminal responsibility in Queensland* (2017) <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/policy/minimum-age-criminal-responsibility.pdf>.

The process of an Independent Reviewer (Para 110 of Discussion Paper) as used in Scotland seems to be a sensible approach to this question.

Reflecting the principles that underpin raising the MACR, the privacy of a child under the age of 14 should be protected and information regarding their behaviour should not be used for the purposes of criminal prosecution at a later time. This includes for children who have already been sentenced prior to the MACR being raised.

> *Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?*

No.

The medical evidence is clear - a child under the age of 14 does not have the cognitive capacity to engage in criminal activity and therefore cannot be held criminally responsible for their actions. It therefore is inconsistent (and harmful) for the behaviour of a child who is insufficiently mature to commit a criminal act, to be used at a later date against them.

Conclusion

Thank you again for the opportunity to provide a submission on this important consideration.

ANTaR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples in the ACT and we would also welcome the opportunity to meet with the ACT Government, to discuss any of the points raised in this submission.

Sincerely

Paul Wright
National Director, ANTaR

RACP
Specialists. Together
EDUCATE ADVOCATE INNOVATE

Raising the minimum age of criminal responsibility

RACP submission to the ACT government discussion paper on raising the minimum age of criminal responsibility

August 2021

About The Royal Australasian College of Physicians (RACP)

The RACP trains, educates and advocates on behalf of over 18,863 physicians and 8,830 trainee physicians, across Australia and New Zealand, including 327 and 144 in the ACT. The RACP represents a broad range of medical specialties including general medicine, paediatrics and child health, cardiology, respiratory medicine, neurology, oncology, public health medicine, infectious diseases medicine, occupational and environmental medicine, palliative medicine, sexual health medicine, rehabilitation medicine, geriatric medicine, and addiction medicine. Beyond the drive for medical excellence, the RACP is committed to developing health and social policies which bring vital improvements to the wellbeing of patients.

RACP response to ACT government's Minimum Age of Criminal Responsibility discussion paper

Introduction

The Royal Australasian College of Physicians (RACP) welcomes the opportunity to respond to the Australian Capital Territory (ACT) Government's Discussion Paper regarding the age of criminal responsibility. The RACP is pleased to provide feedback that will inform the ACT Government's approach to the complex legal and system-level questions that lie at the heart of this important reform.

This submission will respond to Section 1: 'Threshold issues for raising the Minimum Age of Criminal Responsibility' and Section 2: 'An alternative model to the youth justice system' of the discussion paper. As the RACP is a medical organisation, we will not be responding to the sections focused on the legal implications of changing the minimum age of criminal responsibility (MACR).

The RACP strongly supports raising the minimum age of criminal responsibility to 14 years of age. Children aged 10-13 years in contact with the criminal justice system are physically and neurodevelopmentally vulnerable and the majority have experienced trauma, abuse or neglect. They need appropriate and wholistic healthcare, education and protection from further harm. Incarceration adds to their trauma and increases the risk of reoffending and poorer outcomes.

General comments

Children who interact with the criminal justice system and the child protection system have complex health and social needs. Many inequities start at, or before, conception, continue in early childhood and increase along a clear social gradient. The greater a child's disadvantage, the worse their health, development and well-being. These gaps widen as children progress across the life trajectory resulting in adverse adult health, educational and vocational outcomes, with increased subsequent premature mortality and morbidity. This can have an intergenerational effect with inequity passed on to the next generation.[1] A child's health and wellbeing can also be impacted by historical trauma from earlier generations. Poor access to services compounds inequities. Intensive early support and interventions are needed to prevent inequities rather than responding to crises as they happen.

Article 24 of the United Nations Convention on the Rights of the Child (CROC), calls for the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.[2] This inalienable right applies to all children, including those at risk of contact with the criminal justice system.

RACP feedback on Section 1: Threshold issues for raising the Minimum Age of Criminal Responsibility

The RACP strongly supports raising the minimum age of criminal responsibility to 14 years of age. A range of problematic behaviours in 10 to 13 year old age children that are currently criminal under existing Australian law are better understood as behaviours within the expected range in the typical neurodevelopment of 10 to 13 year olds (typically actions that reflect poor impulse control, poorly developed capacity to plan and foresee consequences such as minor shoplifting or accepting transport in a stolen vehicle)[3]. Young children with problematic behaviour, and their families, need appropriate healthcare and protection. Involvement in the youth justice system is not an appropriate response to problematic behaviour. It further damages and disadvantages already traumatised and vulnerable children. It is inappropriate for 10 to 13 year olds to be in the youth justice system. Alternative approaches to managing problematic behaviour are likely to be less

[1] The Royal Australasian College of Physicians. Inequities in Child Health statement, 2018 https://www.racp.edu.au/docs/default-source/advocacy-library/racp-inequities-in-child-health-position-statement.pdf?sfvrsn=6ceb0b1a_6

[2] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577

[3] Johnson, Sara B. et al. Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy Journal of Adolescent Health, Volume 45, Issue 3, 216 - 221

damaging to young children, and evidence shows incarceration in this age group does not deter future offending[4].

The brain of 10-13 year olds is still immature and many executive functions have not yet developed. Functional neuro-imaging indicates that the pre-frontal cortex of the brain, the part of the brain that controls "executive functions" (that is impulse control, planning and weighing up long term consequences of one's actions), is not fully developed until around 25 years of age[5]. Impulse control, the ability to plan and foresee the consequences of one's actions is vastly less developed in a 10 year old than an adult[6]. As such, when faced with a choice of jumping into a stolen car with peers, or being left on the side of the road alone, it is highly conceivable that a 10 year old may jump into the stolen car, and thus become an accessory to a crime, without having planned this or thought through the consequences.

There are many examples of policies to recognise the physical, neurocognitive and emotional vulnerabilities of children between the ages to 10 to 13 years and to protect children physically and emotionally. People under 18 generally cannot marry in Australia, exemptions to this age limit can be sought (by judicial hearing) for one person under 18 but not, in any circumstance, under 16. Facebook requires users to be 13 years of age, Qantas considers children travelling under 12 years of age as unaccompanied minors. Current Australian laws that allow 10 year old children to be incarcerated seem to be incongruous in this regard.

RACP feedback on Section 2: An alternative model to the youth justice system

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

The RACP is broadly supportive of the outlined principles that underpin the development of an alternative model to a youth justice approach. As Aboriginal and Torres Strait Islander children currently have higher rates of interaction with the youth justice system, culturally appropriate models of care and principles should underpin any systems and programs.[7]

The RACP recommends considering the principles on which the Medical Specialist Access Framework is based when developing the health elements of an alternative model for youth justice. These principles in practice align with the discussion paper's principles. The Principles in Practice include: Indigenous Leadership, Culturally Safe and Equitable, Person-Centred and Family Orientated, Flexibility, Sustainable and Feasible, Integration and Continuity of Care, Quality and Accountability. The key principles identified by the Indigenous Health sector can be used to underpin an alternative model of youth justice. The principles should be considered as both a guide and a standard for service delivery organisations and providers.[8]
The RACP recommends the principle of self-determination as an underpinning principle: provide opportunities for children and young people to have a voice and contribute to the development of policies and services for their benefit.[9]

Other principles that we recommend be considered include;

1. Interagency collaboration- particularly involving health, education, disability and child protection systems and characterised by supportive governance and funding models.
2. Provision of sustained, comprehensive, flexible and culturally sensitive case management or coordination is essential to support engagement and collaboration.
3. Meaningful outcomes should be identified, measured and reported that might include educational attainments/engagement, identification and treatment of health, developmental or cognitive conditions.

---

[4] Specifically, "the imposition of a custodial sentence had no effect on the risk of reoffending." McGrath, A., & Weatherburn, D. (2012). The effect of custodial penalties on juvenile reoffending. Australian & New Zealand Journal of Criminology, 45(1), 26–44. https://doi.org/10.1177/0004865811432585.

[5] Johnson, Sara B. et al. Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy Journal of Adolescent Health, Volume 45, Issue 3, 216 - 221

[6] Ibid.

[7] Child, Family and Community Institute Australia, Child protection and Aboriginal and Torres Strait Islander Children 2020 https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children#footnote-001

[8] The Royal Australasian College of Physicians, Medical Specialist Access Framework 2018 www.racp.edu.au/msaf

[9] The Royal Australasian College of Physicians, The role of paediatricians in the provision of mental health services to children and young people, 2016 https://www.racp.edu.au/docs/default-source/advocacy-library/racp---the-role-of-paediatricians-in-the-provision-of-mental-health-services-to-children-and-young-people.pdf

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

The RACP recommends increasing access to preventative, early intervention, trauma informed and integrated multidisciplinary programs. It is crucial that programs are wraparound services, not delivered in silos. The RACP statement on the role of paediatricians in the provision of mental health services to children and young people recommends ensuring that models of care effectively integrate paediatric and young people's health services with mental health services for those at risk or diagnosed with mental health problems. Wraparound programs may include access to primary care health professionals, specialist paediatric services, mental health services, social workers, school support and family support. All programs must be culturally safe for children and their families.

There is an established link between children in Out of Home Care (OoHC) and juvenile incarceration, the younger children are incarcerated, the more likely they are to be known to child protection (e.g. to have experienced psycho-social trauma).[10] For this reason, the RACP recommends preventative health focused solutions for children who have interreacted with the child protection system and children with complex health and social issues. Children who experience or are at risk of trauma, mental health issues, developmental issues, interaction with the child protection system and incarceration have greater need for health services. Addressing health inequities using a strengths based approach can both prevent long term health issues and potentially reduce interaction with the criminal justice system.

In other words priority support should be provided to children who have been in out of home care, or who have experienced trauma, mental health or developmental issues to prevent later interactions with the justice system.

In addition, access to preventative, integrated multidisciplinary programs should be available to all children regardless of location, socio-economic status or living circumstances. There is now clear evidence that children in the youth justice system in Australia (both above and below 14) have high rates of additional neurocognitive impairment, trauma and mental health issues.[11][11] These issues markedly increase their vulnerability. Additionally, these children are much more likely to be disengaged from the education system.

Providing access to multidisciplinary health care to children who are in the child protection system or are at risk of coming into contact with the child protection system, aims to reduce the number of children in the justice system. This aligns with the discussion paper comment on the need to improve access to early supports and options for therapeutic care. Comprehensive health services are needed to address child health inequities and potentially reduce the number of children coming into contact with the criminal justice system. In response to the ACT increase in the age of criminal responsible, age specific programs for 10–13-year-olds will be necessary whilst acknowledging that the developmental age may be lower than the chronological age of this cohort. Access to appropriate health care is just one domain required to provide support to children with complex needs. Other domains that should be considered include providing appropriate housing, education and family supports.

The RACP recommends increasing health service capacity through providing strong and truly universal child health and education services that deliver the right care to children for their health and development.[12]

To provide the best possible care, we recommend that services that care for children take an evidence-based approach to addressing child health inequity through:

- Use of programs that have been proven to be effective by high quality research and that have a clear evidence base in promotion of resilience in high risk young people.
- Regular evaluation of services to ensure that program implementation is of high quality and appropriately targeted, and results in increased access, quality and affordability; and

[10] Abram KM, Teplin LA, et al. Posttraumatic Stress Disorder and trauma in youth in juvenile detention. Archives of General Psychiatry, 2004. 61. 403–410

[11] 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

[12] The Royal Australasian College of Physicians. Inequities in Child Health statement, 2018 https://www.racp.edu.au/docs/default-source/advocacy-library/racp-inequities-in-child-health-position-statement.pdf?sfvrsn=6ceb0b1a_6

- Providing adequate funding for high-quality evaluations of the evidence used to design service provision.[13]

Services can be supported by developing and implementing equitable health, education, employment, housing, early childhood and welfare policies.[14]

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/crisis occurs?

As per the response to question 4, the RACP recommends providing multidisciplinary support to children in and at risk of entering the child protection system, as children in child protection system may be at a higher risk of entering the criminal justice system.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

Access to culturally safe paediatric and mental health services is vital for children experiencing crisis. For more information regarding paediatricians providing mental health care to children, please access the RACP statement on the role of paediatricians in the provision of mental health services to children and young people.[15]

7. How should children and young people under the MACR be supported after crisis points?

After crisis, the RACP recommends ongoing access to both multidisciplinary and interagency care. Additional support should be provided as needed. Sustained involvement of key members of the treating team and other members of the multidisciplinary team is vital to retain the approach on prevention and early intervention. Many of the risk factors experienced by these children and their families are long standing and may require long term intervention to effectively support the child. Anticipation of such crisis points should be included in the treatment plan, with appropriate strategies to reduce their impact and consequence identified.

Identifying the strengths in the child, in their family and in their community can serve to build resilience for these crises and for the day to day challenges the child may experience. This may be specific talents, a caring and committed member of the extended family or a deeper connection with their culture and history,

[13] Ibid
[14] Ibid
[15] The Royal Australasian College of Physicians, The role of paediatricians in the provision of mental health services to children and young people, 2016 https://www.racp.edu.au/docs/default-source/advocacy-library/racp---the-role-of-paediatricians-in-the-provision-of-mental-health-services-to-children-and-young-people.pdf

LOWITJA INSTITUTE

Australia's National Institute for Aboriginal and Torres Strait Islander Health Research

Thursday, 5 August 2021

Email: macr@act.gov.au

Dear Attorney-General

Discussion Paper: Raising the minimum age of criminal responsibility

The Lowitja Institute writes to state our support for the ACT Government's commitment to raise the Minimum Age of Criminal Responsibility in the ACT – and provide feedback on the Discussion Paper, for your consideration. Our response puts forward suggested findings and recommendations from various reports that have been led and informed by Aboriginal and Torres Strait Islander people involved in the youth justice sector.

The Lowitja Institute is Australia's National Institute for Aboriginal and Torres Strait Islander health research. The Institute is an Aboriginal and Torres Strait Islander organisation working for the health and wellbeing of Australia's First Peoples through high impact quality research, knowledge translation, and by supporting Aboriginal and Torres Strait Islander health researchers.

For the past 3 years the Lowitja Institute has authored the Close the Gap Report on behalf of the Close the Gap Campaign Steering Committee. The 2021 report includes the following recommendations that are specifically related to incarceration of Aboriginal and Torres Strait Islander youth and adults:

- Recommendation 3 – We call on governments to take a preventative and rehabilitative approach through justice reinvestment to child and adult incarceration, in order to address the continued over-incarceration of Aboriginal and Torres Strait Islander children and adults. This is a source of ongoing trauma and a long term health concern.

- Recommendation 4 - We call on governments to Raise the age of criminal responsibility immediately and nationally, from 10 years old to 14 years old, to be in line with international conventions and empirical evidence regarding childhood development. No children of any age belong in prison[i].

Additionally, we are members of the Partnership for Justice in Health. The partnership is an alliance of self-determining Aboriginal and Torres Strait Islander academics, legal experts, and national peak health and justice organisations committed to working together to improve Aboriginal and Torres Strait Islander health and justice outcomes. As leaders operating at the interface of the health and justice systems, we are harnessing our leadership, influence, and networks towards realising our vision that 'Aboriginal and Torres Strait Islander people enjoy health and wellbeing that is free of racism in the health and justice systems'.

Based on this experience we offer the following general comments and responses to some of the questions put forward in the discussion paper.

www.lowitja.org.au
ABN: 70 138 780 695

Suite 1, Level 2, 100 Drummond St
Carlton VIC 3053
Australia

PO Box 650
Carlton South, VIC 3053
Australia

t: +61 3 8421 5555
f: +61 3 8341 5599
e: admin@lowitja.org.au

We are pleased that Curijo are involved in the review and anticipate that you have, or will be, engaging with the Ngunnawal Elders Council and the ACT Aboriginal and Torres Strait Islander Elected Body throughout the consultation process. It is critical that local Aboriginal and Torres Strait Islander voices are involved. Services designed, controlled and delivered by the Aboriginal community have the greatest potential to produce the best outcomes for Aboriginal children and young people[ii]. This includes allowing them to be actively involved in determining appropriate responses, interventions and programs at key decision-making points throughout the process.

Section One: Threshold issues for raising the MACR

Q1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

No, we support the UN Committee recommendation that a single standardised age below which children cannot be held criminally responsible for harmful behaviours, without exceptions. There must be no 'carve outs' to this legislation, even for serious offences.

Q2. Should *doli incapax* have any role if the MACR is raised?

No, doli incapax fails to safeguard children, is applied inconsistently and results in discriminatory practices. Once the age of criminal responsibility is raised to 14 years, doli incapax would cease to be relevant and therefore be redundant.

Section two: An alternative model to the youth justice system

Q3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

Yes, the principles are appropriate. Also suggest that a strengths-based approach should be considered as another principle. A focus on success and understanding the crucial role that Aboriginal and Torres Strait Islander community-led solutions are the most effective way to improve outcomes.

Further, the example of the alternative model, we suggest it should always include an Aboriginal and Torres Strait Islander representative, not only when required, as that is a loose term that could potentially be applied inconsistently. Particularly important to have that representation considering the current disproportionately representation rates of Aboriginal and Torres Strait Islander children and youth.

Q4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

Existing services for Aboriginal and Torres Strait Islander children and communities should be expanded and adequately resourced (for example, the Gugan Gulwan Youth Aboriginal Corporation). Other community led, strengths-based programs that are accessible to Aboriginal and Torres Strait Islander children and families should be established. Having services that are culturally appropriate and provide opportunities and extra curricula activities for children under the age of 14, and to address the factors contributing to the anti-social behaviour, would support this cohort.

The best way to prevent future offending, to make our communities safer and to provide children the best chance of a good life, is to support and build the capacity of families, engage and

support kids to stay in school, address family violence and housing instability, and identify and respond to health and disability needs[iii].

Further, the establishment of a culturally based, multi-service, accessible youth hub to coordinate and provide holistic supports for Aboriginal and Torres Strait Islander children and young people. Youth hubs should be designed and developed in partnership and managed by Aboriginal communities and organisations[iv].

Q5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

The needs of Aboriginal and Torres Strait Islander children and youth should be identified by Aboriginal and Torres Strait Islander families and communities. They should also be involved in the design, control and delivery of related programs and services.

Shift the focus away from late, crisis-driven, punitive responses to offending behaviours and invest in effective, prevention, early interventions and supports that meet the individual needs and reflect the unique experiences of Aboriginal and Torres Strait Islander children and young people to keep them in the community and out of the system.

A recent report also found that most Aboriginal children and young people in contact with the youth justice system have experienced disengagement and exclusion from education. Ensuring targeted educational support that is connected with culture as well as strengthening efforts to eliminate racism in schools would benefit potential young offenders[v].

Q6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

It is critical that children have access to housing or a safe place to go or stay. Having access to services that can step in to support children and youth during times of crisis should be introduced, access to crisis accommodation services would assist in keeping youth off the streets and out of the youth justice system.

Q7. How should children and young people under the MACR be supported after crisis points?

Aboriginal and Torres Strait Islander children and young people under the MACR should be supported through community-designed and led services and youth support systems that are sustainably resourced and specialise in first response or crisis management[vi].

Suggest the government fund holistic family support programs, including through services delivering multi-systemic therapies, to address disadvantage experienced by the families of Aboriginal and Torres Strait Islander young people. Understanding that Connection to culture can be transformative and instrumental in supporting Aboriginal and Torres Strait Islander young people to avoid contact with the justice system[vii].

Many Aboriginal and Torres Strait Islander children in youth justice supervision have experienced child protection involvement and / or out-of-home care. This factor should be taken into consideration in designing support services or sentencing.

Section four: Additional legal and technical considerations

Q13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

No, many concerns have been found in regard to police systems including the mistreatment by police during arrest and other contact, excessive detention and mistreatment during detention in police cells, as well as a lack of faith in the police complaints process. Police responses should be culturally safe and nurturing when children are involved.

Q14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?
Thorough examination of police powers should be reviewed, in general but particularly when dealing with children. Wrongful encounters with police could cause further trauma and have damaging impacts on children. All police responses should be culturally safe and nurturing when children are involved.

Q15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?
Yes, this should be reviewed and revised accordingly.

Q16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?
Yes, they should be supported with relevant legal support and through culturally appropriate services, with the understanding that culture is an important healing factor for health and well-being of Aboriginal and Torres Strait Islander people.

Thank you for the consideration of the matters raised in our response, please email Phoebe.Dent@lowitja.org.au, if there is any further information we can provide on this matter to assist the work of the ACT Government.

Kind regards

Dr Janine Mohamed
CEO, Lowitja Institute

[i] Lowitja Institute, *Leadership and Legacy Through Crises: Keeping our Mob safe, Close the Gap Campaign Report 2021*

[ii] Commission for Children and Young People, *Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, Commission for Children and Young People, Melbourne, 2021

[iii] https://www.raisetheage.org.au/about

[iv] Commission for Children and Young People, *Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, Commission for Children and Young People, Melbourne, 2021

[v] Ibid

[vi] Koorie Youth Council, *Ngaga-dji (hear me) young voices creating change for justice*

[vii] Commission for Children and Young People, *Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, Commission for Children and Young People, Melbourne, 2021

youth coalition of the ACT

families ACT

Minister Rattenbury MLA
Minister Stephen-Smith MLA
Minister Davidson MLA
ACT Government
220 London Circuit
CANBERRA ACT 2601
Email: macr@act.gov.au

05 August 2021

Dear Shane, Rachel and Emma,

Thank you for inviting comments and feedback on the draft *ACT Government discussion paper: Raising the minimum age of criminal responsibility.* The Youth Coalition of the ACT and Families ACT welcome this opportunity and are providing a joint response.

Both organisations have long been advocating that the minimum age of criminal responsibility should be raised to at least 14 years of age and are members of a working group consisting of legal, community and academic stakeholders led by *Change the Record*. We have also previously met with yourselves, your officers as well as directorate staff to discuss this matter.

We have responded to the questions in the discussion paper relating to our expertise. If a question lies outside our expertise, we have referred to the stakeholder or organisations we believe might be appropriate to respond.

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

No, we propose that the minimum age of criminal responsibility (MACR) be raised to at least 14 years in all circumstances with no 'carve-outs' to this legislation, even for serious offences. We argue that the treatment of young people should not solely focus on the young person's type of offence, but instead centre on identifying and treating the underlying causes of their offending behaviour (McCausland & Baldry 2017, McLaren 2000), the 'needs vs. deeds' approach.

2. Should doli incapax have any role if the MACR is raised?

We argue that there is no reason to retain the presumption of doli incapax when raising the MACR to 14. Raising the MACR to 14 would remove the need for courts to consider this confusing and complex presumption.

Our position on this issue is informed by research which asserts doli incapax is harmful and problematic for the following reasons:

- Its highly discretionary nature
- Its capacity to neglect specific psychosocial factors which impact on a young person's decision-making processes and understanding of moral responsibility
- A young person's chronological and mental age may differ
- The test of understanding under the doctrine of doli incapax may be subjective and unreliable
- Doli incapax can involve the inclusion of unfair prejudicial evidence
- Racial bias can be embedded in the process
- Doli incapax has been criticised by both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission (Australian Law Reform Commission 1997, Fitz-Gibbon & O'Brien 2019, Johnson 2006, Lennings & Lennings 2014, UN 2019).

For more evidence demonstrating the limitations of doli incapax and how its application differs across jurisdictions refer to barrister Matthew Johnston's response to the Children's Magistrates' Conference (Johnston 2006). Moreover, the case study of a 15-year-old male "M" outlined in *Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study* provides a detailed example that illustrates the incongruencies and ineffectiveness of implementing doli incapax in practice (Lennings & Lennings 2014, p. 795-796).

We are also concerned that some members of the judiciary seem to be making decisions in a vacuum without considering the expertise of community service workers and health professionals when assessing a child's need. Judges are experts in legislation and the law, but not in child and adolescent development and wellbeing.

Section two: An alternative model to the youth justice system

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

Yes, we generally agree with the design principles listed on page 20 to underpin the development of an alternative model to a youth justice response in the ACT. However, we recommend also including the following principles:

- Child-centred considering their health and wellbeing including neurodevelopmental stage or any cognitive impairment
- Family-focused
- Strengths-based
- Trauma-informed.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

We welcome the consideration of an alternative model and agree with the idea of establishing a multidisciplinary panel as outlined on page 20 of the discussion paper.

However, we believe that such a panel needs to be legislated and complemented by some additional mechanisms facilitating the access to and engagement with specialist support services for children, young people and their families.

We recommend that the **multidisciplinary panel** be complemented by a **wraparound therapeutic response 'program'[1] consisting of a wraparound coordinator, an embedded youth outreach worke**r working with the police force and 4-6 **therapeutic care coordinators** who are assigned to work closely with the child/young person and their families. This wraparound therapeutic response requires **a well-trained and skilled team** of wraparound coordinator and therapeutic care coordinators.

The **multidisciplinary panel** will be able to provide specific advice on an individual case, supporting the assessment of the child's needs and therapeutic care coordination undertaken by the wraparound coordinator. The panel will be regularly updated by the wraparound coordinator about the child/young person's progress, allowing the panel to assess if the treatment plan is working or needs to be adjusted.

The **wraparound coordinator** conducts needs assessments and is available 24/7, allowing police and other first responders to refer a child or young person displaying harmful behaviour anytime day or night. Being available 24/7, the wraparound coordinator can be either contacted during a crisis, after a crisis, or when crisis continues to occur. Based on the outcome of the needs assessment, the wraparound coordinator will be responsible to assign the case to a **therapeutic care coordinator** who works closely with the child and family, supporting them to access the identified supports and services.

The wraparound therapeutic response should be overseen by a **statutory governance board** or committee consisting of community-based and government members, as well as Aboriginal and Torres Strait Islander representatives. Being independent and sitting outside Government directorates, the Board will have an **oversight function** identifying patterns, trends and emerging needs in the new service system. The Board needs to also be responsible for **workforce issues** within the existing support system allowing it to mandate prescriptive models of practice, workforce training and support requirements, as well as making workforce related recommendations. The Board will also provide **systemic advocacy** relating to all elements of the reformed service system.

We need to emphasise that this new model will not achieve its desired outcomes for the child and the wider community if there are no specialty secondary services available in the ACT to refer to. Any new service support system will be impacted by the ACT's ongoing problem of scale. To address this, existing enhanced specialist services need to be appropriately funded to allow them to be drawn together by the wraparound therapeutic response into a coordinated care response comprising universal as well as specialist services.

The ACT government need to also consider if new specialist services need to be introduced in the ACT. Emeritus Professor McArthur's review should provide enough detail as to whether there are currently any services operating in the ACT capable of providing the

[1] Programs similar to service models such as the PACER (Police, Ambulance and Clinical Early Response) model and the Embedded Youth Outreach Model (EYOM) which have a robust evidence base.

necessary specialist support or if new specialist providers from other Australian jurisdictions need to be invited to tender.

We recommend that any new service model be implemented during a **transition period** of six to twelve months, where any gaps and needs can be identified and responded to. This **transition period** should not delay the introduction and passing of legislation to raise the MACR, but could accompany a period of six to twelve months where the legislation is introduced but not yet enacted. This transition period should be overseen by the governance board providing some early indication on what works and what doesn't in the new system. The Board will need the authority to demand systemic changes to the new model based on its observations and feedback from participants. The transition period needs to also be evaluated by an external stakeholder/ organisation similar to the Safe and Connected Youth program's **developmental evaluation**. The evaluation should focus on the adequacy of the service landscape and whole of government response, rather than the lasting impacts of raising the MACR which will take some time to come to fruition.

We strongly recommend that this alternative service system be embedded into the legislation supporting the new MACR, allowing it enough time to establish itself and achieve the desired outcomes, without its existence being threatened by any future change in the political landscape in the ACT. This new approach will need sufficient resources, buy-in from all stakeholders involved, as well as adequate transition time. ACT Government needs to accept that change will be gradual and staggered because of its scope and scale. Given that the ACT is the first Australian jurisdiction to attempt this important reform, its success is critical.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

We believe that all frontline service providers should be able to refer to the multidisciplinary panel as well as the wraparound coordinator when children and young people display harmful behaviour.

Families ACT and the Youth Coalition strongly believe that this expanded referral option should be further canvassed. The education sector at both primary and secondary school level needs to be included in such deliberations and encouraged to support this new model. The involvement of the whole education system is vital to the success of any alternative model as early intervention and prevention should occur when children and young people first show concerning and sometimes harmful behaviour in educational settings. We recommend that the Minister for Education, as well as the Education Directorate are required to support the new service model. Working holistically across all directorates is important to not only address any acute cases of harmful behaviour, but also to embed an early intervention and prevention approach under the new MACR.

We know that with the right early intervention programs, universal and secondary services provided to children and young people (aged 7-13) with concerning and/or harmful behaviours should prevent individuals from escalating. If the needs of a child or young person are being appropriately assessed and supported by universal and secondary supports as well as the education system, then this new model should be able to achieve real outcomes for children, young people and the community at large.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

The new model needs to allow for safe, therapeutic accommodation and emergency supports to which frontline responders such as the police can refer the child or young person any time of the day or night (2am test). The embedded youth worker and the wraparound coordinator will need to be alerted to the case at crisis point, allowing them to meet the child or young person at the accommodation facility and provide advice on what to do in the immediate aftermath of a crisis, as well as commencing the wraparound care of the child/young person.

However, we are concerned that any existing therapeutic accommodation services such as Ruby's for example might be unduly impacted by such a requirement. We therefore strongly recommend that a new accommodation alternative identified to avoid impacting on existing services which are often already stretched and at capacity without the MACR having yet been raised to 14. As an interim measure to fill this service gap, the ACT Government should consider providing the **multidisciplinary panel** with **access to brokerage funding** to source appropriate accommodation from existing providers.

We understand that some provisions in the Mental Health Act currently allow a child or young person to be restrained and admitted to a health facility if their behaviour warrants such action aiming to reduce any harm to themselves, others, and the wider community.

7. How should children and young people under the MACR be supported after crisis points?

As explained above, under the new wraparound therapeutic response 'program', children and young people will be supported by the wraparound coordinator and the therapeutic care coordinator as soon as possible after a crisis point. The wraparound coordinator needs to be alerted as soon as possible (preferable at crisis or soon after). They then meet with the child and their family for assessment and to explain the available support options. The multidisciplinary panel needs to be available to consult on the care plan design for the child or young person as well as provide specific expertise if required.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

We recommend voluntary engagement for children and young people in this new wraparound therapeutic response model, because we know that 'mandated' measures are often not effective and are not aligned with the therapeutic aims of the new model. We hope that providing wraparound services to the child and their family which are child-focused, family-centred and trauma-informed will be successful, especially as each case will have the support of its own therapeutic care coordinator.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

With the new wraparound therapeutic response 'program', we recommend that every child and young person displaying serious harmful behaviour should only be deprived of their liberty as a last resort and only until the wraparound coordinator and the therapeutic care coordinators are able to attend.

Section three: Victims' rights and supports

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

While we aren't experts on victims' rights and supports, we believe that the restoration and reconciliation aspect of a restorative justice approach isn't only valuable for the victim but also for the young perpetrator. Having the opportunity to apologise and reconcile with the victim, provides a valuable mechanism for both parties to heal and grow. We believe this aspect of allowing growth and healing of the young person should not be underestimated and therefore carefully considered in their treatment plan, as long as it is deemed therapeutically appropriate for their level of cognitive maturity.

We also believe that the reforms to the MACR need to recognise that children with harmful behaviours are also often victims themselves and therefore protecting the rights of those children is also protecting the rights of victims. As explained in our response to question 1, we argue that the system needs to respond to these children in a way that recognises their experiences (trauma) and their needs, working to support them and not to punish them.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

No comment.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

Community members affected by harmful behaviour should be supported after crisis points as considered appropriate by relevant experts. We believe that the child or young person's accountability for their behaviour should be assessed by the wraparound coordinator and therapeutic care coordinator when developing the child or young person's care plan. While not the most pressing issue, accountability for one's behaviour can be important to allow both parties to heal and grow in the longer term.

Section four: Additional legal and technical considerations

These legal and technical considerations are outside our area of expertise, and we therefore refer the ACT Government to the responses and advice given by *Change the Record*, Aboriginal and other legal services as well as the ACT Law Society.

However, we want to reiterate that raising the MACR is about protecting a child from the harms of the criminal justice system and providing opportunity for diversion and therapeutic intervention where needed. Raising the MACR **should not** be treated as simply delaying the criminal justice system's engagement with the child until they reach the age of 14. We need to revise and reshape our engagement with children to support them to learn from their mistakes, grow and thrive in our communities. These reforms are a unique opportunity to change our society's approach to supporting and improving outcomes for **all its children**.

In closing, we want to acknowledge that our submission to this discussion paper has been informed by the ongoing work of Emeritus Professor MacArthur, the *Change the Record* committee as well as our expertise. When Professor MacArthur's final report is complete, we trust that we will have another opportunity to provide feedback that is informed by detailed description of the proposed service model.

If you need further clarification, please don't hesitate to contact us.

Kind Regards

Will Mollison
Executive Officer
Families ACT

Dr Justin Barker
Executive Director
Youth Coalition of the ACT

Submission to the ACT Government: Raising the Age

About us

Change the Record is Australia's only national Aboriginal led justice coalition of legal, health and family violence prevention experts. Our mission is to end the incarceration of, and family violence against, Aboriginal and Torres Strait Islander people.

We are comprised of the following member organisations: ANTaR, Amnesty International, ACOSS, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Federation of Community Legal Centres (VIC), First Peoples Disability Network (Australia), Human Rights Law Centre, Law Council of Australia, National Aboriginal Community Controlled Health Organisations, National Aboriginal and Torres Strait Islander Legal Services, National Aboriginal and Torres Strait Islander Women's Alliance, National Association of Community Legal Centres, National Congress of Australia's First Peoples, National Family Violence Prevention Legal Services Forum, Oxfam Australia, Reconciliation Australia, SNAICC - National Voice for Our Children and Victorian Commissioner for Aboriginal Children and Young People.

The importance of Raising the Age

Every child should be free to go to school, have a safe home to live in and learn from their mistakes. Locking children away in prison can cause them lifelong harm, increase their risk of mental illness, disrupt their education and even increase their chance of premature death.

Canberrans are rightly concerned that children as young as ten years old can be locked away in prison. Change the Record and the Australia Institute research into attitudes towards raising the age, found that the majority of our community were appalled that very young children could be imprisoned and supported raising the age to at least 14 years old.

Change the Record applauds the ACT Government on its commitment to raise the age in line with the medical evidence to at least 14 years old. We strongly urge the government to fulfill this commitment and act on the best evidence we have available, which calls for:

- Raising the age to at least 14 years old
- Having *no* exemptions and *no* carve outs
- Prioritising voluntary, preventative, family-based, community-driven responses; and
- Investing in Aboriginal controlled community organisations and services

No exemptions and no carve outs

The best medical advice is very clear - governments should raise the minimum age of criminal responsibility with *no exceptions and no carve outs.* Children under the age of 14 years old do not have the capacity to form criminal intent or comprehend consequences of their action - this applies just as much to serious acts as it does to less serious behaviour.

It's important to note that the medical evidence says raise the age to **at least** 14 years old.[1] Nothing dramatic changes in a child's development at 14 years old, and many countries have raised the age to *above* 14 years old. But, what the evidence makes clear, is that 14 years old is the bare minimum that you could expect a child to have sufficient neurological development to be held criminally responsible. Other comparable countries have raised the age to 15, 16 and even 18.

As well as the evidence regarding neurological immaturity, there is also extensive evidence about the emotional and mental immaturity of children under the age of 14 years old and the long lasting harm that early exposure to the criminal justice system can inflict on very young children. There is evidence that early contact with the criminal justice system results in a higher prevalence of mental illness, unemployment, homelessness and premature death later in life.[2]

It is extremely rare that children under the age of 14 years old are arrested and charged with serious or violent offending. When they are, it is because something has gone seriously wrong in that child's life. A child who engages in serious physical or sexual behaviour, for example, will almost invariably be a child who has been exposed to trauma, violence and/or has serious mental health and behavioural needs. It is in the best interests of the child, and in the best interests of the whole community and promoting community safety, for the needs of the child to

---

[1] For example, see the Law Council and the Australian Medical Association joint statement on the medical basis for raising the age to 14 years: https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-ea11-9403-005056be13b5

[2] Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW; AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra; Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017)

be met in a therapeutic and rehabilitative manner, rather than the child being exposed to further harm through the criminal justice system.

The role of doli incapax

The recognition that children under 14 years old are *not sufficiently mature* to have the capacity to form criminal intent is well established in Australian law, and reflected in the *doli incapax* doctrine. However, it is our view, and the view of our legal member organisations, that the *doli incapax* presumption is ineffective in practice and fails to protect the rights of children. For example, children under the age of 14 years old are regularly remanded and held in prison cells while they wait for court hearings to debate matters of *doli incapax* even if they are then found not to have capacity and released.

If the MACR was raised with no exemptions or carve outs to at least 14 years old there would be no need for doli incapax.

Principles to underpin the development of an alternative model

The principles listed in the Discussion Paper are a strong foundation to support keeping children out of the criminal justice system, and instead responding to their needs within the community. Change the Record, as part of the ACT Raise the Age Coalition, have advocated for the establishment of a Multidisciplinary Panel which would bring together the key service providers to support the needs of children and their families in a therapeutic way.

Change the Record also supports the inclusion of principles that reflect the overrepresentation of First Nations children within the criminal justice system, and the specific changes and interventions that are required to reverse this trend. These include:

- Investing in Aboriginal controlled community organisations, programs and early intervention initiatives
- Investing in wrap-around family supports and services *separate to* the child protection system
- Supporting First Nations families to reduce child removals and provide culturally-safe services and supports
- Recognising the systemic failures that lead to the overrepresentation of First Nations children in the criminal justice and child protection system and developing a whole-of-government response to chronic housing shortages, improving educational participation and holistic health outcomes.

Given the number of children with disabilities who come into contact with the criminal justice system, it is crucial that any alternative model is underpinned by principles of universal design and universal access.

Gaps and needs

Change the Record refers the ACT Government to the ACT Raise the Age Coalition's Position Paper on gaps and needs within the Territory. We have identified five key gaps in the service delivery landscape in the ACT:

1. The lack of a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse
2. The absence of Function Family Therapy - Youth Justice and/or other evidence-based programs targeted to this cohort of children
3. The limited availability of psycho-social services for young people, particularly those with disabilities
4. The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness
5. A broad need for greater education across services to improve the identification of, and response to, disability support needs

These are key areas of need which should be addressed by the ACT Government in its development of an alternative system to the criminal justice system.

Any response should be culturally safe, family orientated, therapeutic and wherever possible, voluntary.

Identifying and responding to the needs of children and young people

The establishment of a Multidisciplinary Panel would allow for the early identification and response to the needs of vulnerable young people before crisis points are reached. This will require a whole-of-government response and for all departments to proactively engage with a process to provide consistent and early support to families who are identified as having particular vulnerabilities. For example, Education, Health and Housing are all likely to be instrumental in ensuring that a young person's ongoing needs for safety and stability are met.

It is critical that serious behaviour, or crisis, is not seen as a necessary trigger for the provision of support. That is how the criminal justice system currently operates and it fails our children and families by not responding adequately to individual and community needs until significant hardship has already occurred. The way government responds to, and funds, services needs to be reorientated to focus on prevention, early intervention and holistic responses rather than crisis response.

We have advocated for the establishment of a Multidisciplinary Pannel to respond to these questions in an individualised, therapeutic and needs-based framework. There will not be a 'one size fits all' solution to the needs of children and their families.

It is our view that the establishment of a multidisciplinary panel where children can be referred if they come into contact with police, or if their behaviour raises concerns within the home, community or school, is an essential part of both diverting a child away from the criminal justice

system and ensuring that the appropriate assessments, identification of needs and referrals to relevant services occurs. For this multidisciplinary panel to work effectively it is crucial that its primary role is to assist and strengthen families, and identify the needs of - and supports for - the child. The process should be confidential and limited to the service providers in the room (each of which must be there with the consent of the child and family) unless consent is given for further referrals, and must not involve referrals to the child protection system. To do so, risks alienating families and children who fear their engagement will result in removal.

The services and systems that comprise the human services sector in the ACT (and that are likely to be called upon to facilitate access to the necessary supports) must be authorised to apply flexibility in respect of eligibility restrictions, and must be empowered to intervene early with adequately funded service responses that focus on both the child themselves as well as the environment within which the child is situated to best support children and young people to move through periods of crisis and have their needs met.

One example of a specific need which we are aware is currently unmet is accommodation options (crisis, short and medium term) for 10 to 17 year olds. We have heard repeated concerns from police, for example, about the difficulty they face if they come into contact with a young person exhibiting challenging behaviours where that young person does not have a safe family environment they are able to return to, or where they do not have stable accommodation to which they are willing to return. Providing safe, supported accommodation for children and young people in this age bracket who may come into contact with law enforcement or other services, and require somewhere safe to stay, is essential.

We strongly urge the ACT Government to fully fund the Ruby's model to provide this crucially needed accommodation, 24/7 therapeutic support and to work with children, young people and their entire family to support the child/young person to stay out of the criminal justice system and avoid homelessness.

Wherever possible interventions should be voluntary

A key principle of moving to a therapeutic, needs-based system is that interventions and supports should be voluntary except as an absolute last resort. Fundamental to providing therapeutic care, is to engage with children and families in a way that is safe, meaningful and accessible to them - not coercive and punitive. It is our view that this principle should be adopted by the ACT Government and applied when designing alternative pathways to the criminal justice system.

On the very rare occasion that a child does something seriously wrong, they may need additional interventions and support. These can be delivered through a range of non-criminal avenues. In the most serious cases, there are civil law provisions that already exist in the ACT, Victoria and NSW (for example) which allow for a judge to compel a child to participate in a program, reside in a facility or undergo various forms of health, cognitive or psychological assessment. Similarly, in very serious cases, there are provisions under the Mental Health Act which allow for the involuntary detention and administration of therapeutic interventions. While

any form of coercive action, particularly on a child, should be an action of last resort - these types of interventions are more appropriate - and likely to be more beneficial to the child - than criminal interventions.

The medical evidence is clear, that depriving a child of their liberty, separating a child from their family and their community is too often extremely harmful to that child's development. Depriving a child of their liberty rarely supports the needs of the child, nor does it keep the community safe. It is this outdated model of responding to behaviour that has led to the cycles of offending that do create safety issues within our communities. As such, we urge the ACT Government to act on the clear evidence that children's needs should be met wherever possible in the community, with family and through therapeutic and voluntary mechanisms.

Supporting children means safer communities and support for victims

Responding to the needs of children and protecting the rights of victims to safety and recovery go hand in hand. As a first principle, reforms should recognise that community safety is predicated on the needs of community members being met. This includes children. Tragically, we know that due to the high cross over between children under the care and protection of the Department and those involved in the criminal legal system, that too often the needs of these children are not adequately met.

Secondly, reforms to the MACR should recognise that children are also often victims and so protecting the rights of children is also protecting the rights of victims. Children who are exposed to violence and have experienced trauma are far more likely to come into contact with the criminal justice system. Protecting the rights of victims means responding to these children in a way that recognises their experiences and their needs and works to support them, not punish them.

Thirdly, raising the MACR promotes community safety, prevents recidivism and ultimately protects the wellbeing of all members of the community. The earlier a child comes into contact with the criminal legal system, the more likely it is that they will have further engagements with the youth and adult justice systems. In this sense, the criminal justice system is 'criminogenic' that is, for very young children in particular it influences their behaviour and development in such a way that it entrenches criminal behaviour into the future.[3] This is antithetical to the promotion of community safety.

The Victorian Sentencing Advisory Council has found 'that the younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to imprisonment in an adult court

[3] Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW; AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra; Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017)

before their 22nd birthday'.[4] The likelihood of reoffending was substantially higher the younger a child was at first sentence, with an 86 percent reoffending rate for children aged 10-12 year olds, more than double that of those who were first sentenced aged 19–20 (33%). The Victorian Sentencing Advisory Council also found that with each one year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending.[5]

Supporting the whole community

Establishing criminal responsibility is not a necessary precondition for government support to those who have been affected by harmful behaviour. There are existing civil mechanisms through which community members can access compensation and other therapeutic support without any criminal convictions or even charges being laid. These mechanisms should be explored, as should no-fault based schemes, to ensure the needs of all people who have experienced harm, are met.

When considering alternative processes that involve victim engagement with children, it is important that the key principle of responding to a child's needs and acting in their best interests, is at the forefront of any pathways that are developed. The medical and legal basis for raising the MACR is that a child is not sufficiently cognitively mature to be held criminally responsible, and due to their cognitive immaturity the criminal justice system itself causes them harm. This immaturity and vulnerability must be reflected in any alternative processes involving the child. That means acting in the best interests of the child, protecting their privacy, and ensuring all interventions are age appropriate and therapeutic is paramount.

As such, a basic principle would be that any participation in conferencing or processes involving someone who has been affected by a child's behaviour should only be undertaken voluntarily, and if it is considered to be in the best interests of the child. If this is not the case, other mechanisms should be put in place to support community members who may have been affected by a child's behaviour and require additional support.

The role of police

The medical evidence is clear that *any* engagement with the criminal justice system causes harm to a child - from police contact right through to the deprivation of liberty. While it may be impossible to safeguard against any engagement with police, consideration should be given to ways in which police engagement could be made more therapeutic, deescalated and minimised. For example, there are a number of programs in operation around the country and internationally which rely on highly skilled youth workers engaging with young people as first responders either instead of police, or in collaboration with police. These options should be explored.

---

[4] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (December 2016), 26

[5] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (December 2016), 26

Change the Record shares the view of the Aboriginal Legal Service that current police to arrest children under the age of 10 are too broad and do not adequately or appropriately ensure the arrest of such children is a measure of last resort. It is our view, that any police interaction with children under the MACR should be limited to the exceptional circumstance where it is necessary to prevent an imminent risk of serious harm to another person or to the young person, or to prevent the imminent occurrence or continuance of a serious offence.

Serious activities that would otherwise be crimes committed by children under the influence, coercion or aided and abetted by adults are already appropriately dealt with under the criminal law, with the responsibility correctly lying with the adult involved. 'Children should be provided with appropriate protection and the adults responsible prosecuted'.[6] Minor legislative amendments may need to be made to capture activities that are not criminal offences due to the age of the child but otherwise would be.

With respect to how information on a child's behaviour can be collected and used by police, our position is that it is inconsistent (and harmful) for the behaviour of a child who is insufficiently mature to commit a criminal act, to be used at a later date against them. The privacy of a child under the age of 14 should be protected and information regarding their behaviour should not be used for the purposes of criminal prosecution at a later time. This includes for children who have already been sentenced prior to the MACR being raised.

Raising the MACR should protect a child under the age of 14 from the harms of the criminal justice system, and should provide the opportunity for diversion and therapeutic intervention where this is needed. It should *not* be treated as simply delaying the criminal justice system's engagement with the child until they reach the age of 14. This undermines the principles of revising and reshaping our engagement with children to support them to learn from their mistakes, grow and thrive in our communities.

Transitional arrangements

All children should be transitioned as soon as is practicable to an alternative model irrespective of whether they are in detention or in the community under orders. Priority should be given to assessing each individual child's needs, what supports are required for them and their families, ensuring they have adequate accommodation and supports in place to minimise disruption and promote continuity of services. Historical convictions under the old MACR should be spent automatically and universally as is consistent with the medical evidence underpinning the decision to raise the MACR.

---

[6] Penal Reform International, 'The minimum age of criminal responsibility' (Justice for Children Briefing no 4, 2013) 4 <https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf>; Queensland Family and Child Commission, *The age of criminal responsibility in Queensland* (2017) <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/policy/minimum-age-criminal-responsibility.pdf>.

CRS
CONFLICT RESOLUTION SERVICE

CONFLICT RESOLUTION SERVICE

SUMISSION: RAISE THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

AUGUST 2021

Conflict Resolution Service ("CRS") calls for the ACT Government to raise the minimum age of criminal responsibility to at least 14 years of age. CRS strongly believes that raising the minimum age of criminal responsibility will lead to children in Canberra feeling safer and having improved connections with family and community.

Since 2012, CRS has been providing support to children and young people across the ACT who are experiencing, or at risk of becoming homeless due to ongoing family conflict. Our firsthand experience of providing this service has highlighted the vulnerabilities that children under the age of 14 experience, including the adverse effects of contact with the criminal legal system.

The only acceptable outcome which is in accordance with the clear medical evidence is that the minimum age of criminal responsibility in the ACT must be raised to at least 14 years old with *no exceptions or carve outs.* The medical evidence and research into child and adolescent neurological development plainly states that children younger than 14 do not have sufficient neurological maturity to be held criminally responsible.

Raising the minimum age of criminal responsibility to 14 is not arbitrary, it is already well established in Australian law through the *doli incapax* doctrine; the legal presumption that children under 14 do not have the cognitive capacity to form criminal intent. The *doli incapax* doctrine does not always work in practice. Children under 14 are consistently remanded and held in custody while they await a court hearing to determine matters of *doli incapax*. If the ACT was to increase the minimum age of criminal responsibility to 14, there would be no need for *doli incapax* within the jurisdiction.

Not only are children under the age of 14 incapable of forming criminal intent, but this cohort is at particular risk of experiencing adverse effects from contact with the criminal legal system. Children who have contact with the criminal legal system are at increased risk of experiencing chronic issues such as mental illness, unemployment, homelessness, and early death. It is in the best interest of these children, and the broader community, that responses be therapeutic and rehabilitative rather than punitive.

There are five key gaps in service delivery which need to be addressed in the development of an alternative system to the criminal legal system:

A. The lack of a multidisciplinary panel or board that can identify, assist, and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse.
B. The absence of Function Family Therapy - Youth Justice and/or other evidence-based programs targeted to this cohort of children.

C. The limited availability of psycho-social services for young people, particularly those with disabilities.
D. The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness.
E. A broad need for greater education across services to improve the identification of, and response to, disability support needs.

It must be stressed that any alternate model should emphasise the principles of voluntary, non-punitive, trauma-informed, and be therapeutic to the needs of the child and broader community. These principles provide a strong foundation to support keeping children out of the criminal legal system, and instead respond to their needs within the community.

CRS is strong supporter of raising the minimum age of criminal responsibility to 14 years of age because of the improvements it will bring to the safety and connectedness of both children and the broader Canberra community.

Amnesty International Australia

Marque Lawyers

Raising the minimum age of criminal responsibility – potential ACT reform

Joint submission

1. This submission is made in response to the Discussion Paper (**Paper**) regarding the question of whether the minimum age of criminal responsibility (**MACR**) in the Australian Capital Territory (**ACT**) should be raised from 10 years of age to 14 years of age in accordance with the United Nations' (**UN**) recommendation, with no limitations for children under this age.

2. These submissions do not seek to address every issue raised in the Paper, however, will address the following issues.

   (a) That the MACR should be raised from 10 to 14 years of age, with no exceptions for young people this age.

   (b) That the presumption of *doli incapax* be abolished and alternatives, such as 'developmental immaturity' be enshrined in legislation.

   (c) The impact of the current MACR and Indigenous youth.

   (d) The policing of young people, including the powers afforded to police.

   (e) That alternatives to the criminal justice system (**CJS**) are appropriate and preferable when dealing with young people.

3. Further to the above is the policy makers' responsibility to ensure that the needs of young offenders are balanced with the public interest and, in particular, victims' entitlement to justice. For the reasons outlined below, preventing young people from coming into contact with the criminal justice system is beneficial for all stakeholders.

Raising the MACR

4. ACT's current MACR of 10 years of age is at odds with international standards.[1] The United Nations Committee on the Rights of the Child (UNCRC) has said that countries should be working towards a MACR of 14 years or older.[2] Over the past decade, the United Nations, and other international organisations, have called upon Australia to increase its MACR.

---

[1] Justice François Kunc (ed), 'Increasing the Minimum Age of Criminal Responsibility' (2018) 92 *Australian Law Journal* 71.
[2] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system; CRC/C/GC/24, 9.

5. By way of background, between 2018 and 2019, almost 8,353 young people between the ages of 10 and 13 came into contact with the CJS, with 573 young people under the age of 14 in detention.[3]

6. This is particularly concerning, in circumstances where:

   (a) around 50 percent of crimes committed by young offenders are theft, burglary and property related crimes;

   (b) just over 20 percent of crimes committed by young people are acts intended to cause injury; and

   (c) other crimes include public order offences, drug-related offences, traffic offences and fraud.[4]

7. We submit that the ACT's MACR contributes to this, permitting young people from the age of 10 to come into contact with the CJS, notwithstanding that these young people may lack the requisite intent for a finding of criminal culpability.

8. We have the benefit of extensive scientific research on young people and their neuropsychological and social development.[5] The research shows the following.

   (a) Young people, at least until around the age of 14, have immature frontal lobes of the brain,[6] meaning that they lack the requisite capacity to distinguish between right and wrong. However, this can vary depending on the individual young person.

   (b) Young people are more likely to act on impulse or emotion and therefore, may be unable to appreciate the likely consequences or impact of their actions.[7]

   (c) Young people are influenced and/or affected by environmental factors which can affect the development of their brains.[8] This can affect a young person's propensity to engage in antisocial behaviour.

9. Further, the statistics show that a great proportion of young people in contact with the CJS, have, for example:

---

[3] Australian Bureau of Statistics (ABS), Recorded Crime - Offenders, 2018-19, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra and 2020, Australian Institute of Health and Welfare (AIHW), Youth Justice in Australia 2018-19, 'Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2018–19'.
[4] Australian Bureau of Statistics, Criminal Courts Australian 2017-2018, 'Table 3 DEFENDANTS FINALISED by Sex and age by principal offence and court level', 2019, accessed 12 February 2020.
[5] Elly Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) Journal of Children's Services 86.
[6] Kate Fitzgibbon, 'Protections for children before the law: An empirical study of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales' (2016)16(4) *Criminology and Criminal Justice*, 391.
[7] Learning Potential- Australian Government, *'Learning and the teen brain'* (2017).
[8] Australian Early Development Census, '*Brain Development in Children'* (2019).

(a) mental health disorders;

(b) cognitive disabilities;[9]

(c) inhibition of emotional responses;[10]

(d) a higher likelihood of:

(i) falsely confessing to crimes than older offenders;[11] and

(ii) being in contact with the child protection system;[12] and

(e) poorer educational attendance and outcomes,[13]

and as such, are the very young people most in need of protection by the law. Further, we submit that the ACT's CJS is ill-equipped to adequately provide for the varying needs of young people (especially those that are high risk).[14]

10. The matters outlined in the preceding paragraphs are particularly concerning in circumstances where, once a young person comes into contact with the CJS, it is likely that they will have increased interaction with the CJS throughout their lifetime.[15] There are many reasons for this, for example, stigmatization and trauma.[16]

11. By reason of the matters articulated above, we submit that the current MACR is inappropriate and should be raised from 10 to 14 years of age. We further submit that no exceptions should exist to hold young people under the age of 14 criminally culpable, as to do so would be contrary to the purpose of raising the MACR.

12. Further, the increase in the MACR should be accompanied by an enhanced welfare-based regime which seeks to identify and/or address why young people under the age of 14 engage in antisocial behaviour, which would be beneficial to all stakeholders.

13. In addition to increasing the MACR, consideration should be given to sentencing alternatives, as well as reviewing police powers (detailed below), in order to ensure that young offenders above the age of 14 are not detained unless absolutely necessary (i.e. they are at risk to themselves and/or others).

---

[9] Above, n1.
[10] Above, n5, 87.
[11] Ibid; Lisa Bradley, 'Age of Criminal Responsibility Revisited' (2003) 8(1) *Deakin Law Review, 80.*
[12] *Margaret White,* 'YOUTH JUSTICE AND THE AGE OF CRIMINAL RESPONSIBILITY: SOME REFLECTIONS' (2019) 40 *Adelaide Law Review,* 260.
[13] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Comparative Youth Penalty Project Research Report, University of New South Wales, 2017), 5.
[14] Above, n1.
[15] Above, n5, 90; Thomas Crofts, 'Will Australia Raise the Minimum Age of Criminal Responsibility?' (2019) 43, *Criminal Law Journal,* 32.
[16] Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1), *Current Issues in Criminal Justice 123*, 127.

Reformation of doli incapax

14. *Doli incapax* is the rebuttable presumption that young offenders between the ages of 10 and 14 do not understand that their conduct is seriously wrong and not *"merely naughty or mischievous"*.[17] It serves to protect young people aged 10 – 14 from the full force of the CJS.[18]

15. In practice, however, it appears that more often than not the onus falls upon the defence to prove that the accused did not understand their conduct was wrong.[19] The defence is often required to prove that the accused young person lacked the requisite intention capable of being criminally culpable at the time of committing the alleged offence (usually by having a psychological assessment undertaken on the young person).

16. For many young people, particularly those who rely on public defenders, proving that a young person lacked the requisite understanding that their conduct was wrong is overly burdensome (and resource dependent).[20] As such, *doli incapax* fails to afford protection to young people consistently.

17. In circumstances where it has been accepted that the development of young people's brains can affect their ability to appreciate the outcome of their actions, the failure of *doli incapax* to protect young people is unsatisfactory.

18. Further, evidence suggests that the inconsistent application of the *doli incapax* principle can also result in highly prejudicial evidence being led against young people, in order for the prosecution to displace the presumption.[21] For example, the Courts have held that prior criminal history is admissible to rebut the presumption of doli incapax.[22] This adversely affects minorities, for example, Indigenous young people.

Other protections

19. In addition to raising the MACR to 14 years of age, it is our submission that there needs to be some form of safeguard for young people, aged 14 to 16, which replaces *doli incapax* and is enshrined in legislation.

20. The basis for this submission is simple. It would be against logic to submit that a young person, the day before they turn 14 lacks the requisite capacity to commit a criminal offence, however, the following day, on their fourteenth birthday, has the requisite capacity to be held criminally liable.

21. As stated above, the principle of *doli incapax* currently does little to ameliorate the low MACR in Australia.[23] As such, new defences and/or presumptions for young people, for example, a

---

[17] *RP v The Queen* [2016] HCA 53.
[18] Above, n16, 127.
[19] Above, n13; Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134.
[20] Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 140.
[21] Above, n13; Lisa Bradley, 'Age of Criminal Responsibility Revisited' (2003) 8(1) *Deakin Law Review,* 85.
[22] *R v M* [1977] 16 SASR 589; *Ivers v Griffiths* (NSW Supreme Court, 22 May 1998).
[23] Above, n13.

defence or presumption of 'developmental immaturity' could seek to replace the principle of *doli incapax*.

22. It is our submission that a new defence, with young offenders in mind (such as developmental immaturity), would be most appropriate (rather than making pre-existing defences, such as diminished responsibility, available to young offenders). This could assist with the CJS adapting to the nuances between young people and adults.

Disproportionate effect on First Nations' young people

23. Further to the matters above, a low MACR disproportionately affects Indigenous young people.[24]

24. Indigenous young people are more likely to experience trauma than their non-Indigenous peers because of the cumulative effect of historical and intergenerational trauma, which can be traced back to colonisation. This trauma can lead to some or all of the following.

    (a) Increased rates of drug and alcohol use and/or addiction.

    (b) Violence directed at themselves and others.

    (c) Antisocial and/or criminal behaviour and interaction in the justice system.

    (d) Gang membership.

    (e) Homelessness.

    (f) Early departure from school.[25]

25. The matters outlined in the preceding paragraph, in addition to those articulated above, put Indigenous young people at a very high risk of having ongoing contact with the CJS.

26. At present, just over 50% of young people in detention in Australia are Indigenous young people, notwithstanding that Indigenous young people make up only 6% of the Australian population aged 10-17.[26] That is, Indigenous young people are 18 times more likely than their non-Indigenous counterparts to be incarcerated and around 16 times more likely than their non-Indigenous counterparts to be under supervision.[27] There are a number of reasons for this. They are as follows.

    (a) Disproportionate imprisonment of Indigenous youth for fine default.[28]

---

[24] Justice François Kunc (ed), 'The Case for Adopting the Uluru Statement on its Second Anniversary – a Guest Contribution by Arthur Moses SC, President of the Law Council of Australia' (2019) *Australian Law Journal* 339, 340.

[25] Aboriginal and Torres Strait Islander Healing Foundation, 'Growing our children up strong and deadly: Healing children and young people', accessed 1 February 2020 2013.

[26] Australian Institute of Health and Welfare, *Youth justice in Australia 2019 - 2020* (Report, 2021).

[27] Ibid.

[28] Above, n1 249, 340.

(b) Over-policing in Indigenous communities and a lack of specialised training.[29]

(c) Indigenous young people may be less likely to receive a caution or diversionary option than their non-Indigenous counterparts and are more likely to be arrested (rather than receive a Court Attendance Notice).[30]

(d) Indigenous youth are more likely to have their bail refused and their matter determined in Court.[31]

27. In respect of the matters outlined at paragraph 26(c) above, the evidence suggests that the trend by Children's Courts is to impose custodial sentences for young offenders brought to Court by way of arrest as opposed to those who are summoned to Court by way of Court Attendance Notices or summons.[32] It is clear from the matters articulated above that this adversely affects Indigenous young people.

28. By reason of the matters articulated in the preceding paragraphs, it is evidence that the current MACR results in Indigenous young people being grossly overrepresented in the CJS.

29. Raising the MACR would greatly assist in curbing the mass incarceration of young Indigenous people, as it would prevent young Indigenous youth from coming into contact with the CJS, at least until the age of 14 and, therefore, diversionary methods or reinvestment projects (detailed below) could be adopted or implemented to understand and mitigate criminal behaviours.

Justice Reinvestment projects for Indigenous young people

30. Extensive research has been conducted on Indigenous young people and their responsiveness to alternatives to the CJS (for example, reinvestment projects). The research shows that for Indigenous people including children, early intervention and diversion programs run by Indigenous-led organisations and leaders are most effective.

31. Numerous reports have been authored, recommending that these programs:

(a) use a trauma informed therapeutic approach;

(b) be locally run place-based programs; and

(c) are run and controlled by Indigenous people,[33]

---

[29] Ibid, 341.

[30] Above, n13, 25; Allard et al, 'Police Diversion of Young Offenders and Indigenous Over-Representation' (Trends & Issues in Crime and Criminal Justice Research Paper No 390, Australian Institute of Criminology, March 2010), 2; Chris Cunneen, "Bringing them home and the contemporary criminalisation of Indigenous young people' (2008) 12(SE) *Australian Indigenous Law Review* 46, 49-50.

[31] Chris Cunneen, "Bringing them home and the contemporary criminalisation of Indigenous young people' (2008) 12(SE) *Australian Indigenous Law Review* 46, 49-50.

[32] Ibid; John Walker 'Prison Cells with Revolving Doors: A Judicial or Societal Problem' in Kayleen Hazlehurst (ed), Ivory Scales: Black Australians and the Law (1987) 106, 110–111.

[33] Royal Commission into the Protection and Detention of Children in the Northern Territory, Recommendations 7.1, 7.2, 7.3; Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, (2017) ALRC Report 133, 262, 333-336 and 368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1, accessed 11 February 2020.

to appropriately cater for the needs of Indigenous people and to increase effectiveness and engagement.

The Maranguka Justice Reinvestment Project

32. The Maranguka Justice Reinvestment Project is a grass-roots justice reinvestment project and one of the first of its kind (**Project**). The Project is partnered with JustReinvest NSW and aims to empower the Indigenous community in Bourke to assist with making positive change in the community. This is done by redirecting resources, which would ordinarily be allocated to incarceration, back into the community to address the underlying causes of antisocial behaviour and/or imprisonment and provide support to vulnerable young people and families.[34]

The Projects outcomes

33. In 2018, KPMG undertook an impact assessment of the Project, over the 2017 calendar year, and found that the Project resulted in the following outcomes.

    (a) A 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of re-offending.

    (b) A 31% increase in year 12 student retention rates.

    (c) A 38% reduction in charges across the top five juvenile offence categories.

    (d) A 14% reduction in bail breaches.

    (e) A 42% reduction in days spent in custody.

    Whilst the above statistics are for the Bourke Indigenous community, it is evident that the Project benefits young Indigenous people.

34. Further, KPMG estimated that the program had an economic impact of $3.1 million in 2017, with a forecasted economic impact exceeding $7 million (with low operational costs).[35]

35. By reason of the matters articulated above, it is evident that alternatives to the CJS, such as reinvestment programs are extremely effective in dealing with Indigenous young people.

36. As such, it is our submission that there be increased allocation of government funding to Indigenous community-led and controlled organisations, to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of Indigenous young people.[36] This would assist Indigenous-led organisations and programs in addressing the overrepresentation of Indigenous young people in the CJS.

---

[34] Australian Indigenous HealthInfoNet, 'Maranguka Justice Reinvestment Project', 2020.
[35] KPMG, *'Maranguka Justice Reinvestment Project Impact Assessment'*, (2018), 6.
[36] Amnesty International, 'From the Ground Up' (2018).

Police powers

37. The Paper foreshadows that the level of police investigation powers in dealing with young people may no longer be available for use by the police (if the MACR is raised to 14).

38. For the reasons set out below, our submission is that police powers ought to be revised for young people under the MACR and only deployed in exceptional circumstances (i.e. to protect personal and public safety). We outline the bases for this submission below.

39. Police officers are usually the first point of contact for young people exhibiting antisocial behaviours and have the ability to determine whether young offenders will come into contact with the CJS.[37] This is because police have broad discretion when dealing with young people, such that they are able to respond to antisocial behaviour by:

    (a) issuing cautions;

    (b) referring young people to restorative justice conferences;

    (c) issuing Court Attendance Notices;

    (d) issuing fines; and

    (e) arresting young offenders,

    which, as articulated above, can impact whether a young person will be convicted of an offence and can influence whether they will be held on remand or be granted bail.[38]

40. The broad discretion afforded to police in respect of policing young people is problematic. This is because a police officer has the discretion to either arrest a young person or issue a caution.

41. In the ACT, police have broad discretion to arrest young people (including young people under 10 years of age) without a warrant if they hold a reasonable belief of the following.

    (a) There has been conduct that makes up the physical elements of an offence, or a breach of the peace is being or <u>likely</u> to be carried out.

    (b) A person has suffered an injury by way of a child's conduct.

    (c) There is an imminent danger of injury to a person or serious damage to property.

    (d) That it is necessary to prevent the conduct or repetition of conduct or to protect life or property.[39]

42. In respect of the matters articulated at paragraph 41(a) above, the legislation does not provide any guidance about what needs to be satisfied for a police officer to hold a 'reasonable belief'

---

[37] Harry Blagg; Meredith Wilkie, 'Young People and Policing in Australia: The Relevance of the UN Convention on the Rights of the Child' (1997) *Australian Journal of Human Rights* 3(2) 134.
[38] Ibid.
[39] *Crimes Act 1900* (ACT), 252B.

that a breach of the peace is likely to be carried out. Could 'mere suspicion' satisfy the threshold of 'reasonable belief'? This uncertainty is problematic, particularly for young people in minorities who are more likely to be arrested than cautioned. [See: paragraphs 26 and 27 above]

43. Raising the MACR should reduce the chances of young people under the age of 14 being arrested, due to their inability to commit a crime until the age of 14, however, the *Crimes Act 1900* (ACT) should be revised to ensure that safeguards are implemented to ensure that police do not have broad discretion to arrest young people, particularly under the age of 14.

44. Further to the above, in the ACT, police can currently question a young person, with an adult unknown to them, if the police officer has taken reasonable steps to have that young person's:

    (a) family member;

    (b) guardian; or

    (c) lawyer,

    attend an interview, however, it was not practicable for that person to attend within 2 hours of the police officer's request.[40]

45. We submit that these powers could result in unethical practices such as intimidation and/or inappropriate questioning techniques being adopted when interviewing young people (and which could result in a young person falsely admitting to committing an offence).[41] This is particularly problematic given the current low MACR.

46. Our submission is that police officers should only be permitted to interview young people with a <u>known adult</u> present.

47. By reason of the matters articulated above, police powers should be revised to reflect the increased MACR, and police should be prevented from arresting young people under the age of 14 altogether (save for in the exceptional circumstances outlined above). Further, police officers should be adequately trained to identify problematic behaviours in young people and have resources available to them to deter antisocial behaviours and refer young people to diversion programs early.

Additional Recommendations

48. If the MACR is raised to 14, and young people between the ages of 10 and 13 no longer have the capacity to commit an offence, the government should undertake a review of the current demographic of young people in juvenile detention centres and remove young people under the age of 14 from detention. This could be managed by ensuring at-risk young people have access to therapeutic, age-appropriate health care services and prevention programs to address the issues faced by young people.

---

[40] *Crimes Act 1900* (ACT), 252GA.
[41] Above, n38.

49. Further to the above, the government could allocate funding to psychologists and other mental health professionals to assist with at risk young people who display behaviours that may result in future offending. Increased mental health support provided to young people at risk is recommended.

Conclusion

50. For the reasons articulated above, the MACR should be increased to 14 to ensure that young people, who lack the capacity to form criminal intent do not come into contact with the CJS. This should be accompanied by a reformation of *doli incapax* principle, by providing a statutory defence and/or rebuttable presumption of 'developmental immaturity' available for young people between the ages of 14 – 16 to ensure that young people are safeguarded from the full force of the CJS. Further, police powers should simultaneously be revised to ensure that the policing of young people is not contrary to raising the MACR. Finally, increased government funding is required to ensure that at-risk young people have the support required.

Addendum

Amnesty International Australia ACT and Southern NSW Committee

51. This addendum seeks to address section two in the Paper through the lens of local human rights advocates.

An alternative model to the youth justice system

52. Australia ACT and Southern NSW Committee represents the greater Amnesty International organisation in the ACT and Southern NSW region. At the local level we represent 400 active members.

53. The local network of Amnesty volunteers has been working within the ACT community for over 5-years specifically around the area of raising the age of criminal responsibility. This included forums highlighting the experiences of Aboriginal People, hundreds of discussions with the community, and large creative campaigns. The community has expressed a strong support for raising the age of criminal responsibility, justice reinvestment, restorative justice, including a focus on addressing core systemic issues that has led to vulnerable persons coming into contact with the criminal justice system.

54. Over the last 2-years 76,786 people have signed the Amnesty petition to raise the age of criminal responsibility in Australia, of these 2,012 signatories are residents of the ACT.

55. Noting the overrepresentation of Aboriginal and Torres Strait Islander children in detention, the Amnesty ACT and Southern NSW Committee supports the recommendations found in the *Our Booris, Our Way Final Report.*[42] Investing in justice reinvestment and support services will lower the amount of children coming into contact with the ACT CJS, and therefore lower the risk of offending into adulthood.[43]

Recommendations

Aboriginal and Torres Strait Islander (ATSIL) Children's Commissioner in the ACT

56. The appointment of an ATSIL Children's Commissioner would bring the ACT in line with other Australian jurisdictions who have such Commissioners in place

Targeted programs

57. Accessible and appropriate early support programs for drug and alcohol rehabilitation, family violence, mental health and trauma

Adequate and fully funded access to legal representation and advocacy

58. As it stands, access to legal representation is limited, placing pressure on Legal Aid and Women's Legal Service, whilst both organisations are underfunded to handle this workload.

---

[42] Our Booris, '*Our Way Final Report'* 2019.

[43] K Richards, 2011, 'What makes juvenile offenders different from adult offenders? Trends and issues in crime and criminal justice', No.409, February 2011, Australian Institute of Criminology, 7.

Conclusion

59. Local Ngambri-Ngunnawal Elder, Dr Matilda House helped to establish the Aboriginal Legal Service in Queanbeyan in the 1980s and has served as a member of the Aboriginal Justice Advisory Committee, is a strong supporter of the initiative to raise the age of criminal responsibility. Dr House shared her perspective that is founded in acknowledging the past in order to move forward, “people seem to think the atrocities of the past are behind us but they are still with us everyday nothing has changed. We live in this world and I am afraid it is not going to get any better if we do not acknowledge what is continuing to happen. Children and parents need to be supported in justice”. Any and all approaches to justice prevention and reinvestment must be culturally sensitive and inclusive.

NORTHSIDE
COMMUNITY SERVICE

5 August 2021

To: Shane Rattenbury MLA, ACT Attorney-General
Submission: Raising the minimum age of criminal responsibility

INTRODUCTION

Northside Community Service (Northside) is pleased to provide a submission to the ACT Government's current consideration of raising the minimum age of criminal responsibility (MACR) in the ACT from 10 years of age to 14 years of age.

Northside is a not-for-profit, community-based organisation. We've been supporting our community in North Canberra – and beyond – since 1976. We're a progressive and modern community organisation that embraces diversity, social justice and advocacy for those in our community whose voices are often unheard.

Northside supports young children through our high-quality early education services, children and young people through our youth programs and family support services, older citizens through our aged care services and support programs, and the wider community through our housing, community development, outreach and volunteer programs.

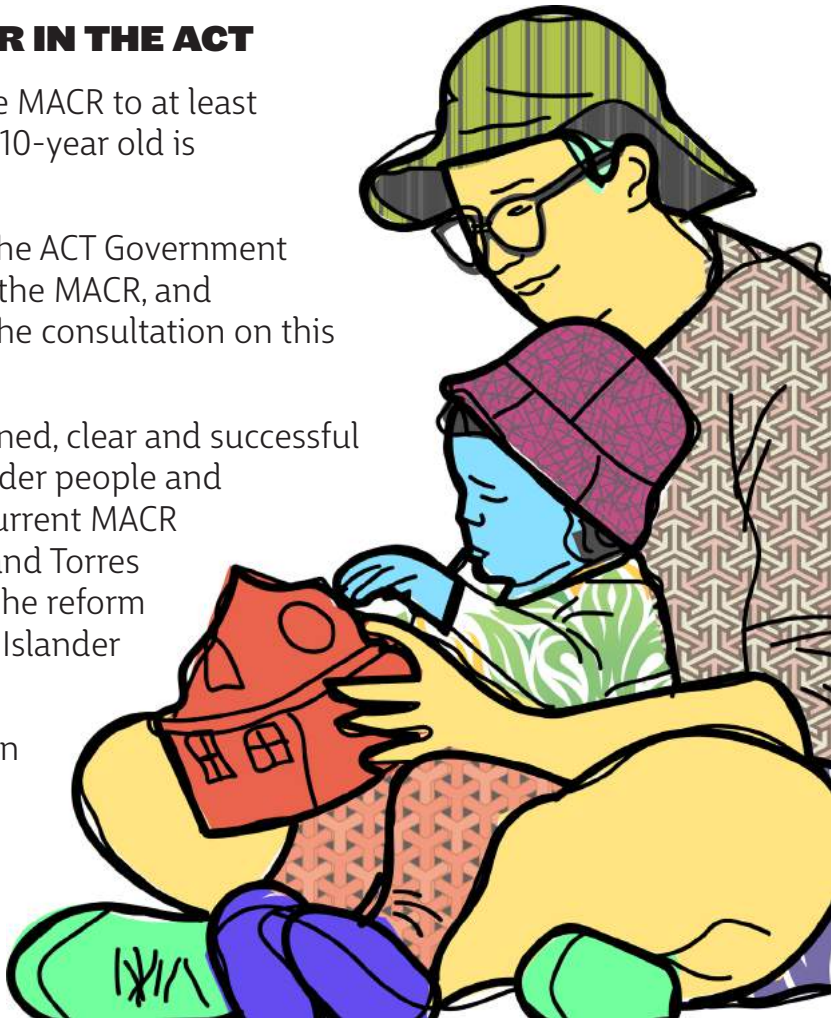
SUPPORT FOR RAISING THE MACR IN THE ACT

Northside strongly supports the raising of the MACR to at least 14, with no exceptions or carve-outs. When a 10-year old is imprisoned - we have all failed.

Northside acknowledges and congratulates the ACT Government in leading the national discussion on raising the MACR, and appreciate the opportunity to contribute to the consultation on this important and critical reform.

We also acknowledge and support the sustained, clear and successful advocacy of Aboriginal and Torres Strait Islander people and organisations in calling for this reform. The current MACR disproportionately affects young Aboriginal and Torres Strait Islander people, and the leadership of the reform call rightly comes from Aboriginal and Torres Islander people.

The research is clear that imprisoning children as young as 10 is detrimental to their health and wellbeing, creates lifelong trauma, and does not reflect an evidence-based understanding of children's development.



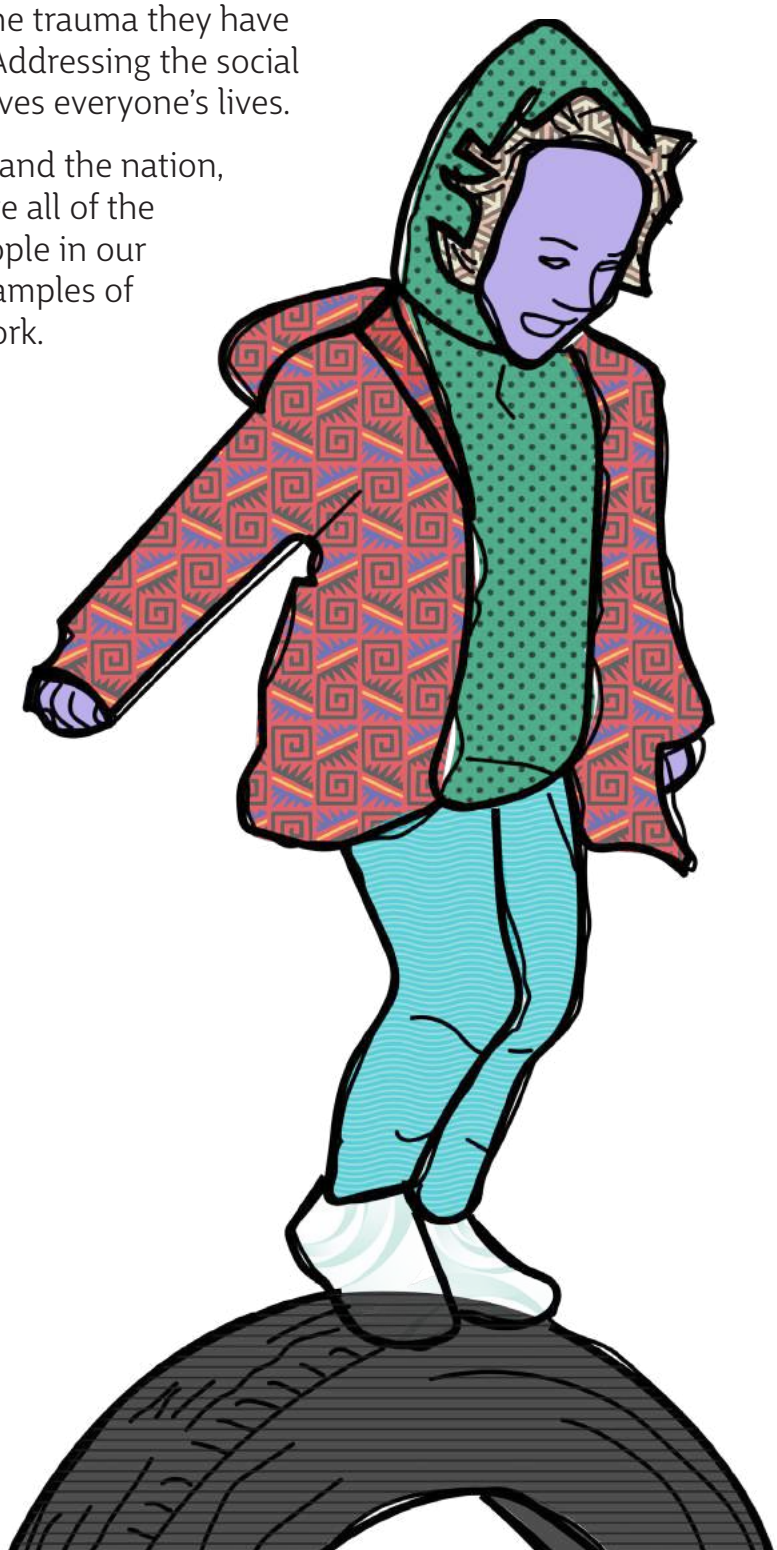
The current MACR is also in direct opposition to Australia's international obligations under the United Nations Convention on the Rights of the Child (UNCRC). At the recent Universal Periodic Review, the UN Human Rights Council called on Australia to meet its human rights obligations by raising the MACR to at least 14.

The current MACR disproportionately affects Aboriginal and Torres Strait Islander children and young people. It embeds and extends the continuing detrimental impacts of colonisation, and directly works against shared efforts to Close the Gap. The voices and lived experiences of Aboriginal and Torres Strait Islander people must be heard and acknowledged in this reform.

The imprisonment of children aged between 10 and 14 is evidence that social support systems must be improved and made more accessible. We know that early experiences of trauma and disadvantage can dramatically affect the life course, and we also know that Australia has the ability to ensure that every child grows up in a community that provides support and help when it is needed – from birth.

Locking up a child does nothing to address the trauma they have experienced, and in fact only perpetuates it. Addressing the social systems that keep our community safe improves everyone's lives.

Raising the MACR also provides the Territory, and the nation, with the opportunity to to review and improve all of the systems that support children and young people in our community. We know there are successful examples of community-owned and led initiatives that work.



SUMMARY

We call on the ACT Government to implement this critical reform as soon as possible, and with no exceptions or carve-outs. We also call on the ACT Government to continue advocating for the raising of the MACR in every jurisdiction in Australia.

Anna Whitty
Chief Executive Officer
Northside Community Service

northside.asn.au

ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Discussion ACT Justice and Community Safety Directorate
Via macr@act.gov.au

5 August 2021

Submission to ACT Government consultation on raising the minimum age of criminal responsibility

Thank you for the opportunity to make a submission to the above consultation.

The enclosed submission is made on a whole-of-Commission basis and reflects the unanimous position of the ACT Human Rights Commission. Our submission should not be considered confidential; please be aware that we intend to make this feedback publicly available on our website at the time that it is provided to government.

Yours sincerely

Dr Helen Watchirs OAM	Jodie Griffiths-Cook	Karen Toohey	Heidi Yates
President and Human Rights Commissioner	Public Advocate and Children and Young People Commissioner	Discrimination, Health Services, and Disability and Community Services Commissioner	Victims of Crime Commissioner

About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:

- The President and Human Rights Commissioner
- The Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
- The Public Advocate and Children and Young People Commissioner (PACYPC); and
- The Victims of Crime Commissioner (VOCC)

Until 6 April 2000, the minimum age of criminal responsibility (MACR) in the ACT was 8 years of age.[1] Section 25 of the *Criminal Code Act 2002* (ACT) (the Code) currently fixes the ACT's MACR at 10 years of age; in stark contrast to the worldwide median MACR of 14.[2] Section 26 of the Code presently reflects the common law presumption of *doli incapax*; that is, that the prosecution must establish, as a question of fact, that a child aged 10 years or older, but not yet 14, knew that their behaviour was seriously wrong before they may be held criminally responsible for that behaviour.

The Commission has, since 2005,[3] advocated for the MACR in the ACT to be further increased. In 2005, the Human Rights Commissioner audited the former Quamby Youth Justice Centre and recommended that the MACR be reviewed and raised to 12 years of age.[4] The Commission reiterated this view in July 2011 in its inquiry into the ACT Youth Justice System, including the Bimberi Youth Justice Centre,[5] and, recently, for the Australian Human Rights Commission's *Children's Rights Report 2019*.[6]

Raising the MACR in the ACT has, since 2019, been one of the Commission's key strategic priorities. On 21 November 2019, the Commission hosted a preview public screening of the documentary *In my blood it runs*. This was followed by a #Raisetheage forum on International Human Rights Day, 10 December 2019. In February 2020, the Commission made a submission to the Council of Attorneys-General's Age of Criminal Responsibility Working Group Review.[7] In May 2021, we joined with 76 other organisations as part of the national #RaiseTheAge campaign to call on all levels of Australian Government to raise the MACR as a matter of urgency.[8]

Increasing the MACR in the ACT is of shared interest to all Commissioners, with each observing different implications for their respective roles and functions under the HRC Act. The human rights implications of setting an appropriate MACR are relevant to both the ***President and Human Rights Commissioner's*** legal policy advisory and community education functions, and to the ***DHSDCS Commissioner's*** handling of complaints about services for children and young people, including Bimberi Youth Justice Centre, and complaints about alleged unlawful discrimination.

---

[1] *Children's Services Amendment Act 2000,* <https://www.legislation.act.gov.au/a/2000-10/>

[2] UNICEF, *Age Matters! Exploring age-related legislation affecting children, adolescents and youth* (Youth Policy Working Paper No 4, November 2016) 4.

[3] Then known as the ACT Human Rights Office.

[4] ACT Human Rights and Discrimination Commissioner, *Human Rights Audit of Quamby Youth Detention Centre* (Audit, 30 June 2005).

[5] ACT Human Rights Commission, 'The ACT Youth Justice System 2011: A report to the ACT Legislative Assembly by the ACT Human Rights Commission' (Report, 28 July 2011) 237.

[6] ACT Human Rights Commission, Submission No 97 to Australian Human Rights Commission, *Children's Rights Report 2019* (28 October 2019), 8.

[7] ACT Human Rights Commission, Submission to Council of Attorneys-General review of age of criminal responsibility (28 February 2020).

[8] #RaiseTheAge, 'Statement to the Council of Attorneys-General on raising the age' (19 May 2021).

The MACR is also directly relevant to the ***PACYPC's*** jurisdiction, which includes oversight of the Bimberi Youth Justice Centre, monitoring services for the protection of children and young people as well as advocating for the rights and interests of children and young people (including those with disability) in ways that promote their protection from abuse and exploitation. The PACYPC is also responsible for consulting with children and young people in the ACT in ways that promote their participation in decision-making.

The **VOCC** is responsible for consulting on, and promoting reforms, that meet the interests of victims. Raising the MACR will necessarily have implications for the rights and interests of victims who have been harmed by the conduct of a child or young person. Likely impacts include consideration of victim rights to therapeutic services and financial assistance, along with rights to respectful treatment, recognition, information, consultation and participation, as enshrined in the charter of rights for victims of crime.

The Commission commends the ACT Government for prioritising reform to increase the MACR in the ACT alongside commensurate investment in accompanying service responses to children who engage in harmful behaviours. In view of the ACT Government's commitment to raise the MACR, our submission largely avoids restating those arguments about raising the MACR to 14 years of age or higher that we articulated in our earlier submission to the Council of Attorneys-General in February 2020. For further discussion of these arguments, including the medical and developmental evidence about a child's developing capacity, cohort numbers in the ACT and broad human rights implications underpinning these proposed reforms, we refer to our earlier submission.[9] This submission instead outlines the Commission's views on implementing a revised MACR in the ACT, as guided by the Discussion Questions.

Throughout this submission, the term 'younger children' should be taken as referring to children aged 10 to 13 years. Although mindful that the ACT Government is yet to settle an alternative service response for children and young people under the revised MACR who engage in harmful behaviours, the Discussion Paper indicates, at page 21, that preliminary consultations have identified a multidisciplinary panel model as a potential component. This submission alludes to this alternative response, in whatever form it takes, as a 'therapeutic panel model'.

Finally, the Commission acknowledges that developing the surrounding legislative, policy and regulatory framework around an increased MACR will necessarily proceed in further stages. The Commission would be pleased to participate in further consultation and discussion at any stage as this important work progresses.

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

1.1. The Commission calls on the ACT to raise the MACR to at least 14 years of age, in all circumstances and without exceptions for serious and/or repeated harmful behaviours. Excepting specified offences or recurrent offending from an increased MACR is irreconcilable with the underlying rationale and stated evidence base for increasing the MACR and so would, in our view, be incompatible with rights protected by the *Human Rights Act 2004* (HR Act).

1.2. In reaching this position in respect of exceptions, the Commission has been informed by statements of the UN Committee on the Rights of the Child, and views of Australian peak bodies, including the Law Council of Australia, the Royal Australasian College of Physicians and the Australian Medical

[9] Above 7.

Association.[10] These bodies each reiterate research on brain development that indicates children at 10 years of age do not have sufficient decision-making ability to form the requisite intent to be held criminally responsible.[11]

1.3. We also acknowledge and take seriously the prevalence of views within the community, including those expressing concern about children who engage in serious or repeated harmful behaviours. In this regard, we recognise and have closely considered calls for criminal justice responses that reflect the gravity and impact of a child's conduct as well as the accountability of the individual child.

1.4. As the discussion paper alludes, the prevailing medical consensus indicates that children under the age of 14 *may* not have the required capacity to be found criminally responsible.[12] We realise that members of the community who have experienced harmful behaviour also raise valid concerns about setting a fixed age at which all children are deemed incapable of criminal responsibility, regardless of their individual capacities or antecedents (as elaborated in Discussion Question #2).

1.5. Incarceration has not been shown to deter future offending by children aged 10 to 13.[13] Indeed, studies have shown that the younger a child is at the date of their first interaction with the justice system, the higher their rate of recidivism.[14] Prescribing offence-based exceptions to the MACR cannot therefore rationally yield a deterrent effect or greater protection of the community from youth offending. In rare situations where younger children do engage in serious harmful behaviours, those behaviours are more likely to be symptomatic of a systemic failure to address their developmental needs and, often, their own experiences of victimisation.[15]

1.6. In addition, the prevailing neuroscientific consensus as to the still-limited 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 specific offences. In this regard, the High Court of Australia has affirmed that serious or repeated harmful behaviours cannot, in themselves, demonstrate the requisite capacity of a child to be found criminally liable.[16]

1.7. Given these considerations, responses framed as 'juvenile justice' are, in the Commission's view, ill-equipped to meaningfully address the underlying causes of offending by children and are in fact likely to be counter-intuitive to their stated aims: rehabilitation, accountability and protection of the community. Raising the MACR uniformly, without exceptions for serious or repeated harmful

---

[10] UNCRC, General Comment 24: Children's rights in the child justice system ('General Comment 24'), UN Doc CRC/C/GC/24 (18 September 2019); Law Council of Australia, Submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review (2 March 2020); Royal Australasian College of Physicians, Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility (29 July 2019); Australian Medical Association, Submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review (13 February 2020).

[11] See, for example, Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*, 86, 87.

[12] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing Sentencing Advisory Council, Sentencing Children and Young People in Victoria (2012) 11; Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1) *Current Issues in Criminal Justice* 123; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13(2) *Youth Justice* 102.

[13] Andrew McGrath & Don Weatherburn, 'The effect of custodial penalties on juvenile reoffending' (2012) 45(1) *Australian & New Zealand Journal of Criminology*, 26.

[14] Sentencing Advisory Council, 'Reoffending by Children and Young People in Victoria', (December 2016), 26.

[15] Kelly Richards, 'Juveniles' contact with the criminal justice system in Australia' (Monitoring Report No 07, Australian Institute of Criminology, Canberra, 2009) <https://www.aic.gov.au/publications/mr/mr7>

[16] *RP v The Queen* [2016] HCA 53, [9].

behaviours, must not, however, mean that younger children are not held accountable for such behaviours.

1.8. While a juvenile justice response cannot, in our view, offer a suitable mechanism for responding to harmful behaviours engaged in by children, there must still be a graduated and tailored civil response that addresses the therapeutic needs of the child, recognises the consequences of their behaviour and ensures the safety of the community, including affected persons. It is hence fundamental that meaningful and effective service responses are developed and amply resourced to ensure the successful implementation of an increased MACR in the ACT.

2. Should doli incapax have any role if the MACR is raised?

2.1. The Commission would not anticipate a continuing need for the common law presumption of *doli incapax* nor its statutory reflection in s 26 of the Code to be retained should the MACR be increased uniformly to 14 years of age.

2.2. Requiring the prosecution prove that an individual child understood that an act was seriously wrong by adult standards, may appear preferable in theory to raising the MACR. We accordingly acknowledge that there is no uniform rate at which children mature nor a single age at which a child can be said to have reached their physical and mental maturity; an accused child who is younger than 14 years of age may have capacity to understand that their acts were seriously wrong whereas others of that age (or older) may not.[17]

2.3. The statutory presumption of *doli incapax* is therefore intended to operate as a flexible means of applying criminal justice responses based on a child's individual capacity to appreciate the moral status of their acts, in accordance with the presumption of innocence and in recognition of the special vulnerability of children.[18] The common law presumption requires the prosecution to adduce evidence that infers beyond a reasonable doubt that the relevant child knew their act was seriously wrong, as opposed to 'naughty' or 'mischievous'.[19] The prosecution must establish this knowledge separately and in addition to the requisite elements of the offence (ie the child's act and intention).

2.4. As outlined in our submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group in February 2020, however, the practical operation of *doli incapax* is often afflicted by procedural and substantive inconsistencies, both between and within jurisdictions.[20] In this regard, its inherent complexity has been criticised as leading to inconsistent outcomes and delays that further entrench remanded children into patterns of lifelong interaction with the criminal justice system.[21] For example, because evidence of the child having engaged in the act constituting the offence cannot itself be relied on to establish this knowledge,[22] *doli incapax* will generally require that prosecutors obtain expert evidence from paediatric psychiatrists and development psychologists, whose limited availability in a small jurisdiction may delay or extend proceedings and a child's time on remand.

2.5. The ACT Supreme Court recently observed misapprehension affecting the presumption of *doli incapax* and its codification in the ACT in *Williams v IM* [2019] ACTSC 234. These proceedings centred on

---

[17] *RP v The Queen* [2016] HCA 53, [12].
[18] Reflected in the ACT in the *Human Rights Act 2004*, ss 11, 20(2), 22(1) and 22(3).
[19] *RP v The Queen* [2016] HCA 53, [38]; *C v DPP* (1995) 2 All ER 43.
[20] ACT Human Rights Commission, Submission to Council of Attorneys-General review of age of criminal responsibility (28 February 2020).
[21] Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be Raised to 14 Years of Age' (Media Release, 25 March 2019).
[22] *RP v The Queen* [2016] HCA 53, [9]; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38.

whether a Magistrate had erred in requiring the prosecution to establish *doli capax* beyond reasonable doubt in circumstances where the relevant child had already plead guilty to the charges at issue. The Court found that, although the common law presumption automatically requires the prosecution establish *doli incapax*,[23] in the ACT an accused child must first point to evidence suggesting a reasonable possibility that they did not have the requisite legal capacity before the presumption will apply.[24]

2.6. There is, consequently, a disparity in the operation of the statutory presumption in the ACT and other jurisdictions (including neighbouring non-Code jurisdictions, New South Wales and Victoria) where the prosecution is automatically required to rebut the presumption. In some circumstances, an accused child may also then be required to bear the costs of obtaining psychological assessments and related reports in order to activate the rebuttable presumption.

2.7. Yet, even where an accused child successfully raises the presumption and is not shown by the prosecution to be *doli capax*, research has shown that a child's exposure to criminal justice processes, including any length of detention on remand, compounds their propensity to further offending.[25] Prolonged exposure to such criminogenic influences is of greater concern for younger children in youth detention facilities where developmental immaturity, often combined with other vulnerabilities, like trauma history, disability and other complex needs, renders them more susceptible to negative peer influence and initiation into new criminal networks, strategies and skills.[26] To assess *doli incapax* after a child has been remanded has therefore been criticised as largely counterintuitive to its protective intent.[27]

2.8. These considerations together broach whether the practical value of *doli incapax,* as it has been reflected in ACT law, provides a sufficient safeguard for the rights of children and others. In conjunction with detention on remand, individually examining an accused child's capacity may instead be counterintuitive to their rehabilitation and, more broadly, safety of the community.[28] Should the continued operation of *doli incapax* under the Code be further contemplated under an increased MACR, the government may wish to review its operation to ensure the presumption currently ensures sufficient protection for the rights of accused children.

Section Two: An alternative model to the youth justice system

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

3.1. The Commission welcomes the development of key principles that will guide the development of legislation to establish a revised MACR, as well as supporting policies and procedures. It is essential from a human rights perspective that any new therapeutic approach is sufficiently transparent, consistent and accessible, for the benefit of participating children and their families, for affected people and for government agencies and service providers alike. It follows, in our view, that this new model must be established in statute and supplemented by subordinate law, rather than administered

[23] *RP v The Queen* [2016] HCA 53, [32].
[24] *Williams v IM* [2019] ACTSC 234, [46]; see *Criminal Code 2002*, s 58(2).
[25] Kelly Richards, 'What makes juvenile offenders different from adult offenders?' ('Richards 2011') (Australian Institute of Criminology, Trends & issues in crime and criminal justice No 409, February 2011) 6.
[26] Ibid 7.
[27] Kate Fitzgibbon and Wendy O'Brien 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 26.
[28] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 *Sydney Law Review* 339, 341.

solely by policy and guidelines alone. Implementing legislation should include, for example, the establishment of relevant bodies, terms of appointment, necessary powers, obligations and thresholds, decision-making processes and availability of review and authorised disclosures of information (discussed further at Discussion Question #18).

3.2. The Commission does not support, in such terms, the development of an '*alternative model to a youth justice response*'; that is, action that is only triggered after harmful behaviours, which are currently deemed 'criminal', occur. Rather, the Commission supports an integrated, early intervention, diversionary approach that aims to change the life trajectory of children and young people at risk. Children and young people must be referred at the earliest opportunity based on assessment of risk of harm to others, the community and themselves.

3.3. Where harmful behaviours do occur, the new approach must ensure that the underlying therapeutic needs of the child are met, while maintaining the rights of victims and protecting community safety. The Commission considers that several principles in the discussion paper will need to be refined, and further principles included, to address these interrelated priorities. To this end, we also encourage government to explicitly locate any new therapeutic model within a human rights framework. Importantly, any new model must take account of article 3 of the United Nations Convention on the Rights of the Child, which provides that in all actions concerning children the best interests of the child must be a primary consideration.[29] Our suggested refinements are as follows:

- *Principle 4:* While the Commission supports Principles 1-3 and 5 as they are presently framed, we consider that Principle 4 requires amendment. The Commission supports a principle acknowledging that each child and young person has unique needs, and that children and young people are generally best supported within the network of relationships in which they live. Services involving whole families are essential to keeping children out of youth justice, and out of care and protection and homelessness, which are themselves risk factors for contact with youth justice.[30] However, Principle 4 as currently drafted omits the provision of any direct support to children and young people themselves. This is a critical oversight.

  Further, the particular emphasis in Principle 4 on schools and health services is concerning. While health and education are of course essential as universal service providers having key interactions with children and young people under the MACR, this historic reform necessitates a whole-of-government response, and responsibility among a broader range of directorates and services. At minimum, housing, transport and city services, justice (beyond the criminal sphere), migrant and refugee services, and sport and recreation will all have important roles to play. Accordingly, the Commission recommends that Principle 4 be modified as follows:

  > *'ensure the safety and wellbeing of children and young people by supporting them, their families and communities'*

- *Principle 6* requires amendment to unlink 'restorative and culturally appropriate' practices. Both elements are essential in their own right, though should not be conflated and are not always interlinked. Given the inequitable rate of detention of Aboriginal and Torres Strait Islander children and key relevance of this reform to Aboriginal families and community, the Commission favours

[29] Convention on the Rights of the Child, opened for signature 20 November 1989 UNTS No 1577 (entered into force 2 September 1990), art 3.

[30] Catia Malvaso, Delfabbro, Paul Defabrro & Andrew Day, 'The child protection and juvenile justice nexus in Australia: A longitudinal examination of the relationship between maltreatment and offending' (2017) 64 *Child Abuse & Neglect* 32-46; Australian Institute of Health and Welfare, 'Young people in child protection and under youth justice supervision 2014–15', (Data linkage series No. 22, Canberra, 2016).

focussing a principle specifically on culturally appropriate practices. Recognising both the rights of victims and the importance of accountability for harmful behaviours, we consider that another separate principle, focussed specifically on restorative practices, should also be added, as suggested below.

- *Principle 7* raises serious concerns for the Commission regarding its current framing, which contemplates mandating support as a response of last resort. Our reasons for concern are elaborated in our answers to Discussion Questions #8 and #9 below. The Commission recommends that the principle be deleted or otherwise substantially revised as follows:

  'recognise that the mutual obligation established by mandated support may be necessary to meet the best interests of the child or young person, their family and community'

3.4. We further recommend adopting the following additional principles for this historic reform:

- **Early intervention and diversion** that aims to prevent children and young people reaching the point that harmful behaviours occur and responding appropriately in those instances where harmful behaviours nevertheless eventuate.

- **Child-centred** ensuring that all processes and procedures are designed with the child at the centre, so as to be accessible, understandable and relevant to children and young people.

- **Restorative** ensuring that the rights of victims are maintained, and that accountability for harmful behaviour is integral to the new approach. A broader range of restorative practices must be able to be incorporated flexibly to maximise therapeutic and diversionary benefit to the child or young person; opportunities for victim participation and recognition of harm caused, and long-term safety of the community.

- **Meet diverse needs**. While currently 'culturally appropriate' is mentioned as one aspect of one principle, the principles collectively do not reflect an essential responsiveness to diversity and inclusion. The new approach will need to meet the specific needs of individuals and families with a range of diverse and complex, intersecting needs, not only cultural diversity. Examples include disability, developmental stage, communication ability, gender, care experiences, intergenerational trauma, and socio-economic disadvantage.

- **Trauma informed**. Recognising that harmful behaviours among young people aged 10-13 years almost invariably have their roots in trauma and complex needs, all supports and processes in the new approach must be trauma informed.[31] Trauma informed approaches are also essential in supporting victims of harmful behaviours.

- **Adequately funded**. Any alternative model for the ACT will fail to divert young people from a criminal justice pathway without an injection of funding into fundamental support services. Funding must extend to not only a bespoke new arrangement for identification and coordination of support for children under the MACR, such as a therapeutic assessment panel, but also to community-based, wraparound support services.

---

[31] Haley Zettler, 'Much to do about trauma: A systematic review of existing trauma-informed treatments on youth violence and recidivism' (2021) 19(1) *Youth Violence and Juvenile Justice*, 113-134; Leanne Dowse, Therese Cumming, Iva Strnadova, Jung Sook-Lee and Julian Trofimovs, 'Young People with Complex Needs in the Criminal Justice System' (2014) 1(2) *Research and Practice in Intellectual and Developmental Disabilities, 174-185.*

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

4.1. The Commission emphasises the need to provide allocated funding for evidence-based approaches, recognising the comprehensive evidence for early intervention and prevention, as this will meet the needs of children and young people while also prioritising the safety of the community and victims. The Commission refers to its previous advocacy for specific examples of evidence-based therapeutic services in this and other jurisdictions.[32] Further, the Commission is aware of the independent review being conducted by Emeritus Professor Morag McArthur et al and has been briefed on progress and preliminary findings. The Commission notes and supports the solid evidence base for multidisciplinary, wraparound service approaches that are responsive to complex need.

4.2. The example of a multidisciplinary panel (Discussion Paper, p. 21) is a helpful example of one of the new elements that will be required to support raising the MACR in the ACT. The Commission notes that the PACYPC recommended a panel model to the Human Services Cluster Inter-Directorate Committee two years ago for children and young people with the most complex needs, although this was not progressed during the Ninth Legislative Assembly. The Commission agrees that a multidisciplinary therapeutic panel should form a key part of the administrative architecture supporting an increased MACR.

4.3. This therapeutic panel model must be central to a new early intervention approach, with children, young people and their families referred to the panel at the earliest opportunity and based on assessment of risk to themselves and community. As noted above in response to Discussion Question #3, the Commission would not endorse a model in which the panel becomes the substitute gatekeeper to services only *after* harmful behaviour, which would presently be deemed criminal, occurs. Rather the Commission supports an integrated, early intervention, diversionary approach which aims to change the life trajectory of children and young people at risk.

4.4. As noted, the Commission has been briefed on the independent review being conducted by Emeritus Professor Morag McArthur et al. The Commission broadly supports the proposal for a new multidisciplinary panel and wraparound therapeutic service model, subject to:

a. adequate statutory authority to ensure independence and decision-making authority, to compel information, and to mandate service provision and engagement

b. a mandatory requirement that the panel include Aboriginal and Torres Strait Islander persons when engaging with an Aboriginal or Torres Strait Islander child or young person

c. increased funding for community-based support and therapeutic services

d. referral at the earliest possible stage of risk identification, and not only when behaviours which would currently be criminal have occurred

e. a therapeutic first approach which is child-centric, with support scaffolded around the young person's needs and the protection of others

f. inclusion of a range of restorative practices when a child or young person's behaviour has already harmed others, to uphold the rights of victims and promote accountability

[32] ACT Human Rights Commission, Submission to Council of Attorneys-General review of age of criminal responsibility (28 February 2020), 13-17.

g. funding discretion to create tailored and bespoke service support packages for individual children and young people

h. a 'whatever it takes for as long as it takes' response per child/young person, recognising that high costs for early intervention are unlikely ever to equate to the current whole-of-life costs of failing to change a young person's criminal trajectory. Currently, detention of young people in Bimberi costs the ACT on average $3,464 per young person per day.[33] This is without the costs of harm to victims and community, and the lifetime costs of recidivism

i. the ability to purchase services from other jurisdictions given workforce and skills shortages in the ACT (including as exacerbated by the ongoing public health emergency), particularly to meet the needs of children and young people with the most complex behaviours

j. fidelity to the recommended model, including not exceeding recommended capacity and caseload limits without further resourcing; and

k. resources to ensure no waitlist for assessment and response by the panel, including capacity for immediate response in situations of crisis or serious harmful behaviour.

4.5. The success of the panel will depend upon the existence and availability of community-based services. The discussion paper states, at page 21, that "[b]y intervening early, the Panel could provide appropriate services and supports to children and young people that respond to the underlying causes of harmful behaviour." It is very unlikely that the panel itself would provide services directly to children and young people. Rather, the panel will be the assessment, coordination and communication pathway for securing and maintaining services from within government and community. Notwithstanding this focus, a child or young person should also be invited to participate in panel discussions when considered therapeutically beneficial, as reinforced by Article 12 of the Convention on the Rights of the Child.[34]

4.6. Detailed consideration will need to be given to not only the funding of the panel, but to securing service provision from provider organisations both within government and non-government sectors. The Commission supports a statutory requirement for service provision in response to panel recommendations (see also our answer to Discussion Question #8). Currently, contractually based arrangements and service agreements lead to gaps in care for children in the ACT, with no agency responsible for aspects of their therapy, for planning and transferal of paperwork, for example. In the Commission's experience, service coordination for children and families is stronger where there is one designated lead agency with decision making authority. If the new panel is to take this lead role, its decision-making authority will need to be clearly articulated in legislation and it will need to be adequately funded to have a direct, hands-on role in ensuring that service commitments are implemented.

4.7. Based on the Commission's experience working with, and awareness of current children and young people with complex and challenging behaviours, we see a critical shortfall, and in some cases absence of, services in the following areas to support this historic reform:

- youth homelessness and housing, including crisis, short-term and long-term accommodation
- child and adolescent complex trauma services
- child and adolescent mental health services

[33] Productivity Commission, Report on Government Services 2021 (20 January 2021), Part F, Section 17, Table 17A.20.
[34] Convention on the Rights of the Child, opened for signature 20 November 1989 UNTS No 1577 (entered into force 2 September 1990), art 12.

- Aboriginal and Torres Strait Islander run services for Aboriginal and Torres Strait Islander children, young people and families
- therapeutic out-of-home care, particularly residential care
- services for children and young people with co-morbidity, such as drug and alcohol issues and mental illness
- services for children and young people with disability and other needs, such as complex trauma or mental illness
- youth engagement within ACT policing
- alternative education programs; and
- family-based therapies.

4.8. The Commission is not resourced to provide a comprehensive review of the existing evidence-based services that warrant further funding and expansion, but makes the following comments on services that we have knowledge of under our existing remit:

- *Functional Family Therapy*: The current trial of Functional Family Therapy – Child Welfare (FFT-CW) in the ACT is a partnership between Gugan-Gulwan and OzChild. It is focussed on Aboriginal and Torres Strait Islander children and their families, who have contact with the care and protection system. The pilot is currently being evaluated, with anecdotal reports suggesting consistently positive outcomes, including that *none* of the families who have participated in FFT-CW in the ACT have had their children removed through the care and protection system. Pending the outcomes of the evaluation, an obvious step in support of raising the MACR is to expand FFT-CW in the ACT to include families of non-Aboriginal and Torres Strait Islander children, and families who are not yet in contact with the care and protection system.

- *Ruby's therapeutic accommodation for under 16s*: While the shortfall in youth accommodation under a raised MACR is most visibly apparent at the point of crisis, for example when there is no safe environment for police to return a young person to at night, upstream interventions are needed to prevent young people's family and housing arrangements breaking down irrevocably. Homelessness is a known correlated factor in youth offending.[35] *Ruby's Reunification Program* is a proposed model of respite and short-term accommodation for young people under 16 years, aiming to restore young people to family environments.[36] While funding for the accommodation element has been committed and is welcomed, we are unclear whether any funding has to date been allocated for the therapeutic element of the model. This is a major concern. The building, without the therapy, will not achieve the aims of this initiative.

- *Psycho-social services, including through CAHMS and other existing services*: If funded, there is potential for existing services to expand to include mental health services for younger children (under 12 years) and flexible models of service delivery that include outreach and therapeutic support to children and young people in unstable circumstances.

- *School Psychologists, through Education*: While the psychological support provided in schools through school psychologists is an important service in a universal setting, the limited availability of school psychologists is well known. It is the Commission's understanding that most schools

[35] See, for example, Australian Institute of Health and Welfare, 'Young people in child protection and under youth justice supervision 2014–15', (Data linkage series No. 22, Canberra, 2016).
[36] Uniting Communities, 'Ruby's Reunification Program' <https://www.unitingcommunities.org/service/rubys-reunification-program>

have a psychologist available only on a part-time basis for the entire school community. Individual children and young people have reported to the Commission how impossible it is to get in to see the school psychologist. Further, numerous children and young people have reported the stigma associated with seeking psychological support in this setting, and that they would prefer to access psycho-social support outside the school environment were such services available.

- *Youth Engagement within ACT Policing*: This unit requires significant expansion to assist in diversion, and a new model will be required once the MACR is raised (see response to Discussion Question #6). The Commission has heard directly from teenagers about the need for an expanded youth engagement presence within ACT policing. Young people are looking for the opportunity for officers to get to know them on the streets at night when they are not in crisis, so that responses are better targeted when critical incidents occur. Teens are also acutely aware of the different practices and varying approach among officers across the Territory. Which officers are involved can have a significant impact on what happens next in terms of a young person's involvement with the criminal justice system.

4.9. A range of other services that to which we commend for attention and possible expansion as part of implementing these important reforms include:

- The sustained MACH nurse home visit program, for its potential to identify children and families at risk and facilitate supported referrals, and potential to maintain engagement with families if extended.
- The Family Violence Safety Action Pilot, given the identification of children and young people with complex trauma support needs.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

5.1. The needs of children and young people in youth justice are multiple and complex. Often, they have come from communities of entrenched socio-economic disadvantage and from Aboriginal and Torres Strait Islander communities living with the legacy of colonisation, intergenerational trauma and institutional racism. Young people in youth justice have fragmented education experiences, marked by periods of exclusion and expulsion, resulting in poor educational outcomes. They have precarious living arrangements including homelessness and/or placements in out of home care. They have experienced drug and alcohol related addiction, struggle with complex, unresolved trauma and live with mental illness and one or more disabilities. Children in the youth justice system have higher rates of speech, language and communication disorders, ADHD, autism spectrum disorders, FASD, and acquired/traumatic brain injury.[37]

5.2. Such underlying issues need to be understood and supported before children and young people's behaviour escalates to serious harm. As noted in response to Discussion Question #4, the Commission considers that an expansion of key universal and secondary services is required to respond to children and young people before harmful behaviour occurs. A wraparound service model, coordinated via a new therapeutic assessment panel, is integral to the early intervention and diversion approach required before crisis occurs.

5.3. The Commission accordingly considers that referral to the new therapeutic assessment panel should occur at the earliest possible occasion of identified concern regarding a child or young person,

[37] For more information, see Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017).

including contact with police, or behaviour that raises safety concerns within their home, school or community. As noted above at Discussion Question #3, referral should not be envisaged as a youth justice 'substitute' gateway to services that is accessed only once serious harmful behaviour has occurred.

5.4. We therefore perceive a need for a working group to perform detailed mapping of existing and potential referral pathways and thresholds for referral to the new panel, as opposed to support within existing siloed services. This group should include representation from the Commission, JACSD, CSD, Health and Education directorates, as well as community service providers. It is essential that front-line staff are included in the working group.

5.5. A wealth of information is already available across government and community services that would enable children with complex needs and behaviours who are at risk of developing harmful behaviour to be identified. Such information is, however, inadequately harnessed, filtered and coordinated, and existing services are inadequately resourced and coordinated to respond. For example, many individual teachers have excellent understanding of the behavioural indicators of children in their classrooms. MACH nurses are well aware of the background circumstances of infants that are failing to thrive. The 16,000 notifications made to care and protection in the ACT each year shows that the community has a radar on the safety and wellbeing of our youngest citizens. [38] While these individual notifications do not each signal a child at risk, or at risk of developing harmful behaviours, collectively care and protection notifications have been shown to accurately identify those most at risk. Quite simply, the most notifications are made about the children and families with the most complexity.

5.6. In addition, police data, care and protection data, emergency department presentations, mental health orders, personal protection and family violence orders, critical incident health data for pre-schoolers (per the Australian Children's Education & Care Quality Authority reporting requirements); kindergarten health checks, school attendance records and the network student engagement team reflect some of the key information sources already available within government for identifying children and young people who demonstrate, or at risk of developing, harmful behaviours.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

6.1. The Commission foresees the following three immediate requirements to support younger children under the revised MACR during crisis:

- A new model within ACT Policing, possibly based on the Victorian Embedded Youth Worker Model, or modified from the successful ACT PACER model, in which youth workers accompany police on call outs involving children and young people. These accompanying staff will be skilled in de-escalation and child/youth-centric practice, well-known in the youth sector and immediately able to connect to relevant services and the therapeutic panel model. The Commission has received direct feedback from teenagers about the difference the PACER model has made at times when their behaviour has escalated. The greater engagement and dignity with which they have been treated has had a concrete impact on diverting them from further police contact.

- Supported crisis accommodation that is available 24/7, staffed by skilled therapeutic youth workers, with funding to ensure that beds are available at all times. This accommodation will be

[38] ACT Community Services Directorate, 'Keeping children and young people safe: A shared community responsibility (A guide to reporting child abuse and neglect in the ACT)' (September 2019), <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0015/1132080/Keeping-children-and-young-people-safe.pdf>

the essential place of safety for police and other first responders to take children and young people under the increased MACR at times of crisis.

The Commission does not support use of physical restraint in these settings. If the behaviour of a child under the MACR warrants some form of immediate restraint for victim, community or their own safety, this should occur in a clinical health setting, such as hospital or adolescent mental health facility, under appropriate supervision. As noted at Discussion Question #9, the Commission requests explicit prohibition of the detention of children under the MACR in adult facilities, including secure mental health facilities, such as Dhulwa Mental Health Unit, and the Adult Mental Health Unit. Other forms of monitoring to ensure safety of the young person and others, such as 24/7 observation or a requirement for the young person to be accompanied when leaving the premises, may be appropriate in crisis accommodation settings, and will require sound protocols and regulatory oversight developed in accordance with human rights principles.

- Supported crisis accommodation available 24/7 for young people to self-refer when behaviour is escalating and/or their existing housing arrangements are unsafe.

6.2. In addition, we note that communication protocols will be required between first responders, supported crisis accommodation, clinical settings, the new therapeutic assessment panel, and relevant legal guardians, with the intention that the panel chairperson may make interim directives, and convene the panel at short notice to assess the child or young person's needs and any risks to victim/community safety.

7. How should children and young people under the MACR be supported after crisis points?

7.1. There can be no one-size-fits all model for supporting children under the MACR during and following crises. As noted at Discussion Question #5, children who engage in harmful behaviour have multiple and complex needs and have often experienced severe trauma. Ongoing post-crisis supports will need to be tailored to the underlying needs of the child or young person, and have regard to the safety needs of victims, the community and the child or young person themself. As noted at Discussion Question #4, the key principle here is 'as much as it takes for as long as it takes', noting that investment in children under the MACR stands to be lower than the lifetime costs (to young people, victims and the community) of failing to divert children from a criminal trajectory.

7.2. The Commission reiterates that supports must be evidence-based and reflect the solid body of research recommending coordinated, wraparound services. Locally, the Commission is aware of bespoke arrangements having been established that have seen intensive, wraparound services result in significant change in the trajectory for young people, after years of siloed service delivery and youth justice experience failed to have an impact. The success of the reform that needs to sit alongside an increased MACR will rest on interventions such as these being established far earlier in the life of any child or young person recognised to have complex high-level needs.

7.3. Tailored ongoing support arrangements need to be determined by and reviewed by the new therapeutic panel model, prioritising the therapeutic needs of the young person and safety of victims and community. The Commission broadly favours a tiered panel model, which includes not only assessment and independent decision-making authority, but direct service coordination and case management. That is, the therapeutic assessment panel must have a practical, front-line component in close regular contact with the child, the child's family and ongoing services.

7.4. Post-crisis supports will also need to be flexible and adapt to changing circumstances. Such supports may include a range of services such as accommodation, clinical mental health treatment, complex

trauma therapy, family therapies, drug and alcohol services, disability support, educational support and legal support.

7.5. Integral to post-crisis support for all children under the MACR, in circumstances where harmful behaviour has occurred, must be flexible restorative practices that enable victims and affected people to be heard. No one model, such as restorative justice, will be appropriate for all victims or all children and young people under the MACR. The Commission supports a broader range of restorative approaches being included within the remit of post-crisis supports, to ensure that all victims may be heard and the opportunities for accountability and therapeutic and diversionary impact are increased. A broader range of restorative practices may also assist in promoting meaningful accountability by tailoring approaches to a child and young person's ability to understand their behaviour's consequences and their engagement with services to date.

7.6. The Commission considers that the aim for all children and young people supported under panel arrangements, whether referred pre- or post-crisis, is that they are able to eventually transition safely to ongoing support by mainstream services.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

8.1. The Commission does not support a framework that posits children and young people as 'subject to a mechanism that mandates them to engage with services and support'. Rather, the Commission supports a strong statutory framework mandating mutuality of both service provision and engagement. A framework of this kind should, in our submission, place obligations respectively on the child or young person, their families and guardians, on service providers, and on government to adequately resource and facilitate timely service provision.

8.2. The Commission is aware of many current examples where children and young people with complex and potentially harmful behaviour require services and supports, and these services are not available, not forthcoming, or not provided in a way that is accessible to the child or young person. For multiple, complex reasons including lack of funding for outreach, and constrained eligibility criteria, some services do not remain engaged with children and their families, particularly where behaviours are challenging and there are other clients on a waiting list. The Commission is aware of numerous examples where children, young people and their families have been 'closed' by services when the need is still very apparent. If service *provision* is not mandated, children and young people will continue to fall through the cracks.

8.3. It will also be essential, for consistency with rights under the HR Act, that independent merits review is made available in respect of directions that require a child or other individuals to engage with services and supports, including those involving restrictive practices. As outlined above at Discussion Question #3, it will also be critical for compatibility with human rights that any mechanism for mandating engagement with services or imposing conditions is grounded in legislation, which clearly sets out such powers and considerations informing their exercise. In this respect, mandating that a child, young person, or their family engage with services should only be contemplated as a last resort and where all reasonable options to engage the person on a voluntary basis have been pursued. For clarity, this should not, however, mean that a child or young person would not be referred to the therapeutic panel model at the earliest opportunity

Case examples*

Example 1: young person using harmful behaviour does not receive services because they cannot get to appointments

A 13-year-old boy has been disengaged from school for an extended period of time. He is showing increasingly harmful antisocial behaviour and has had contact with police for property crimes. A clinical service has closed the young person from their books, stating that the young person will not engage and is non-compliant with treatment plans, as he has repeatedly missed therapy appointments. However, the days the young person has missed therapy he has been unable to leave his home due to extreme social anxiety. The challenge of getting out of the house and catching two connecting buses to get to the clinical appointment, or phoning to rearrange appointments, is insurmountable for the young person when mentally unwell. He is now no longer able to access the clinical service and his antisocial behaviour escalates.

If this service was mandated, the provider would have an obligation to find a more flexible way to work with the young person when they are unwell, in order to meet contractual performance obligations. Currently, young people exhibiting harmful behaviours can just be shut off the books.

* To preserve confidentiality, these examples do not represent specific individuals that the Commission has worked with, but rather represent common system blockages that have emerged across multiple cases.

Example #2: a child using harmful behaviour does not get services because they are not in stable accommodation

A 12-year-old girl is showing complex, challenging behaviours and has had repeat contact with police for aggressive, antisocial behaviour when drunk out at night. She has not been charged, and police have no other options but to return her to her home. The history of domestic and family violence in her home is well known and she has been referred to a trauma therapy and mental health service. However, she is ineligible for the service because she does not have stable housing arrangements. Mum has been to refuges and moves in and out with different friends while she tries to get accommodation sorted, taking her daughter with her. The therapy service is clear that therapy achieves better and lasting outcomes when clients have stable accommodation, and that is a core requirement for admission to the service. There is a long wait list of children who already meet this criterion, and no other service to refer the girl to.

If trauma services for children under the MACR were mandated, methods and models would need to be developed to work with children in whatever complex circumstances they are living. An injection of funding is required to ensure that either: enough places are available to meet the needs of all children referred and not just those that meet certain criterion (such as age, stable housing); or adequate funding for housing and other essential services must be provided to ensure that all children can meet the therapy inclusion criteria. Unless service provision is mandated, children and young people with the most complex and potentially harmful behaviours in the most vulnerable circumstances will continue to be turned away.

Example #3: child using harmful behaviour does not get services because of other judicial processes

A 10-year-old boy is showing harmful sexual behaviours in school such as repeatedly trying to touch other students' genitals. He has no apparent impulse control or respect for personal boundaries. The boy discloses to a teacher that his father often rubs his genitals. Reports are made to CYPS, which has received a previous notification of possible bodily harm to the child. CYPS proceeds to investigate the allegation of sexual abuse but is unable to substantiate the child's claims. The case is put on hold when the mother explains that she is seeking full-time custody through the Family Court. The child is referred to the school psychologist but receives no other services. The court grants shared custody to both parents.

As this example illustrates, even highly regulated, intensive sectors do not currently ensure that children using harmful behaviours in the ACT get the services they need. Despite what policies and procedures may say in writing, in practice various services are reticent to work with families that have matters in the Family Court, or where members of the family are involved in other parts of the judicial system (for example, parents facing criminal charges).

8.4. In developing these reforms to raise the MACR in the ACT, we recommend that the ACT Government undertake detailed mapping of applicable frameworks for mandatory service provision and engagement, consequences for failure to comply by any of the involved parties, and oversight and avenues for review. The Commission would be pleased to contribute to further thinking and analysis in such a process. At this stage, however, we expect that authority to compel relevant service provision and mandate mutual obligations would reside with the new multidisciplinary panel under the leadership of a statutorily appointed independent chairperson.

8.5. The Commission acknowledges that there are likely to be a range of stakeholder views and considerations relevant to determining an appropriate threshold for mandating mutual obligations and engagement. In our view, the threshold for mandated service provision and engagement should be determined by way of comprehensive assessment (ie a whole of system assessment of relevant factors), including with specific regard to:

- the therapeutic needs of the child or young person
- the ongoing risk to victims, community and the child or young person themselves
- contextual circumstances giving rise to harmful behaviours; and
- history of previous service provision and engagement.

8.6. In this regard, we emphasise that no uniform threshold or blanket indicator, such as a set number of repetitions of a certain behaviour, or certain kind of seriousness of behaviour, will provide a satisfactory alternative to comprehensive assessment. As noted in response to Discussion Question #9, the nature and seriousness of harmful behaviours that have occurred, any patterns of related and/or repeated behaviour, and the likelihood of future harmful behaviour, will be important elements in comprehensive risk and needs assessment. The Commission also draws attention to its response to Discussion Question #9, in noting that without a strong framework for mutuality of both service provision and engagement, it will be difficult to substantiate claims for the deprivation of liberty of a child or young person is necessary as a last resort.

9. Should children and young people under the MACR ever be deprived of their liberty (restrictive practice) as a result of serious harmful behaviour (eg murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

9.1. The Commission reiterates Article 37(b) of the United Nations Convention on the Rights of the Child:

> *The 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.*

In this context, 'last resort' denotes that detaining children should be exceptional and, in principle, to be avoided in all types of institutions.[39]

9.2. The Commission recognises that in exceptional circumstances and on a case-by-case basis, restrictive practices may be required in respect of a child under the revised MACR to ensure the safety of victims, the broader community and the child or young person themself. In such circumstances, we consider that an assessment of safety risk and therapeutic need must guide the exceptional use of restrictive practices on children under the MACR. Similarly, the deprivation of liberty of a child or young person **must only** occur after a thorough needs and risk assessment. The nature and seriousness of harmful behaviours that have occurred, any patterns of related and/or repeat behaviours, and the underlying contexts in which those behaviours have occurred will each inform a thorough risk and needs assessment. The existence of one of these factors alone will not, in itself, be determinative of need or the level of risk.

9.3. As a broad hypothetical example, a young person that has seriously assaulted another person after experimenting with drugs for the first time will pose a different ongoing threat to the victim and community relative to a young person who has seriously assaulted someone as part of a pattern of behaviour associated with ongoing drug use, in a family already known to be engaged in drug trafficking. The individual acts of harm are serious, both victims require support and both young people need to be held accountable. However, the act of 'serious assault' is not itself an indicator of the different ongoing risks that each of these young people pose to the victims and others, and their therapeutic, rehabilitation and diversion support needs.

9.4. The Commission holds serious implementation concerns regarding the deprivation of liberty of children under the revised MACR. The current absence of therapeutic services that are child-centred and trauma informed indicates that a case of 'last resort' will be difficult to substantiate in the Territory. Further, significant culture change is required within the Territory to understand and operate with deprivation of liberty of children and young people as a last resort. The Commission holds serious concerns that if a secure facility is provided for children under the MACR, it will be sought not as a last resort, but as a more convenient, accessible, purportedly more responsive and efficient, and at times punitive, method of responding to harmful behaviour.

9.5. In a similar regard, the Commission is opposed to the allocation or construction of a secure therapeutic residential facility for detaining children and young people under the revised MACR. The Commission also requests explicit prohibition of the detention of children under the MACR in adult facilities including Dhulwa and the Adult Mental Health Unit.

---

[39] The Beijing Rules, Rules 13.1, 18.2 and 19.1, United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'), GA Res 45/112, UN GAOR, 45th sess, 68th mtg, UN Doc A/RES/45/112 (14 December 1990) [46]; Manfred Nowak, Global study on children deprived of liberty GA Res 72/245, UN GAOR 74th sess, Item 68(a), UN Doc A/74/136 (11 July 2019) [3].

9.6. The Commission recommends that authorised uses of restrictive practices under the MACR must be individualised to the particular child or young person on recommendation of the therapeutic panel model, and subject to the ongoing scrutiny and oversight of the Senior Practitioner. It is important to note that restrictive practices do not inherently mean 'locked up'. A range of bespoke arrangements are possible, including temporary confinement to the child or young person's existing home, or allocated supervision and monitoring within a community setting.

9.7. Further, we note that restrictive practices are not in and of themselves therapeutic or diversionary, and so do not enhance long-term community safety. To change behaviours, restrictive practices are dependent on integrated therapeutic support. Studies show that "effectiveness of secure care depends on the quality of therapeutic input, on skilled interactions with staff, and on purposeful transition planning".[40]

9.8. Any use of restrictive practices under the MACR must be undertaken with a view to achieving not only short-term safety, but long-term diversionary outcomes. The 'focus of the young person's containment must be to allow a therapeutic approach to trauma recovery. The containment and restraint must explicitly not be punitive in nature, but rather understood as necessary to give time for other therapeutic strategies to gain traction.[41] The intention is to stabilise the child or young person so that they can safely (for victims, the community and themselves) transition to less restrictive arrangements.

Section Three: Victims' rights and supports

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

10.1. The Commission views the rights of victims as a central component of reform in raising the MACR, acknowledging that harm is caused even where behaviours are not the subject of formal criminal processes, and that many victims of harm are children and young people themselves. The ACT Government's reform to the MACR should consider the rights of victims in this context.

10.2. Consideration must also be given to the role of victims in any alternative model for responding to harmful behaviours by younger children, noting the likelihood for limited opportunities for victims to have the harm perpetrated against them formally recognised, and decreased opportunities for participation in a justice response.

10.3. The Commission considers that where a child or young person cannot be held criminally liable for an offence due to their age, victim's rights will nonetheless continue to apply on the basis that criminal liability is distinct from whether conduct can be characterised an offence. This is currently the case for adults who lack capacity and who are found not guilty by reason of mental impairment. Regardless, we note that amendments may be required to the definition of 'victim' in the *Victims of Crime Act 1994*, to reflect the terminology in the *Victims of Crime (Financial Assistance) Act 2016* at s 7(2)(b) regarding legal capacity. This is to ensure that the legislation is clear that a victim of an 'offence' is not excluded from accessing rights, just because the person who engaged in the harmful conduct lacks the legal capacity to be charged of an offence.

10.4. Further, amendments may be required to s 31(3) of the *Financial Assistance Act*, to provide for the ability of a victim to apply for financial assistance when the person who caused the harm is under the

[40] Dr Sara McLean (20 January 2016), 'Report on Secure Care Models for Young People at Risk of Harm: Report to the SA Child Protection Systems Royal Commission', University of South Australia, Australian Centre for Child Protection, 5.
[41] Klaassen, F. and Bowes, P., Mercy Family Services (2016) *Submission 1: Family Interventions Services*. Submission to the 2012 Queensland Child Protection Commission of Inquiry.

revised MACR and a police report has not been made due to the age of the person engaging in harmful behaviour.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

11.1. Opportunities for information sharing and participation for victims must be utilised in the design of an alternative model for responding to harmful behaviours by younger children. This is to ensure that the proposed therapeutic panel model appropriately prioritises the safety of the victim and community, recognises the harm caused to the victim, and acknowledges the integral role victim participation can play in accountability mechanisms.

11.2. People affected by harmful behaviour should be able to access information that is relevant to promoting the safety of the victim. This may include information about the child or young persons' whereabouts or engagement with services, until such a point as they are successfully transitioned out of therapeutic supervision. A new approach should include careful consideration of the existing restrictions in the *Children and Young People Act 2008* for the sharing of information with victims of young offenders. In particular, any decision to share information needs to consider that many aspects of a child or young person's needs and behaviours to be assessed and considered by the therapeutic panel model may be irrelevant to any specific incident of harm.

11.3. While the Commission supports victim **participation** in the form of restorative justice (noting amendments will be required to the *Crimes (Restorative Justice) Act 2004* to ensure its continued availability), we recognise that face-to-face restorative conferencing may not always be available due to the absence of consent (from the person harmed, or the relevant child) or deemed appropriate in the circumstances. The Commission therefore supports the use of other restorative practices to promote opportunities for participation for those affected by the harmful behaviour of a child or young person, which in turn supports the aim of encouraging accountability to address the underlying causes of harmful behaviour

11.4. The Commission considers that one such restorative practice may include the use of a 'therapeutic victim impact statement'. This may involve the victim impact statement being provided to the expert multidisciplinary panel and/or therapeutic coordinator to be used at their discretion as a therapeutic tool for increasing accountability of a child or young person's conduct. This would also be a particularly useful restorative practice available to victims in the circumstances noted above, where a restorative conference is not consented to or appropriate in the circumstances.

11.5. We note that the *Age of Criminal Responsibility (Scotland) Act 2019* established a right for anyone affected by a child's physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive, behaviour that caused harm to another person to request information about the particular behaviour and/or action taken in response.[42] Disclosure of this information by the 'Principal Reporter' (a role broadly comparable to the proposed therapeutic panel) under this provision must not be contrary to the best interests of the child and take account of factors like the child's age, the seriousness and circumstances of the behaviour, the effect of their behaviour on anyone and any other considerations they consider appropriate. The Commission commends this model to government for consideration, noting that relevant rights under the HR Act (including those of children, families and victims) must also, by law, inform such decisions to divulge information.[43]

[42] *Age of Criminal Responsibility (Scotland) Act 2019* (asp 7), s 27.
[43] *Human Rights Act 2004*, s 40B.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

12.1. Community members affected by harmful behaviour should continue to be supported after crisis points in accordance with the existing frameworks surrounding victims' services and financial assistance, including the continued application of relevant rights under the charter of rights for victims of crime. This includes our observations above, at Discussion Question #10, in relation to amending the definition of 'victim', to clarify the continued application of victims' rights under legislation for those who have experienced harm by someone under the MACR, and in relation to legislative amendments for financial assistance.

12.2. The role of accountability for the behaviour of children and young people is central to raising the MACR. Accountability mechanisms in the absence of criminal processes will be imperative to prevent ongoing harmful behaviour and recognise the harm that has been caused to a person or their property. The Commission supports continuing facility for accountability mechanisms, such as restorative conferencing, participation through a therapeutic victim impact statement and fact-finding processes by the multidisciplinary panel, with independent merits review of decisions being made available.

Section Four: Additional legal and technical considerations

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

13.1. It would appear logical that existing police powers in Division 10.7 of the *Crimes Act 1900*, outlined in the discussion paper, should be extended under a revised MACR. These include powers to arrest a child (including, in some circumstances, without a warrant) and to take them to a parent or other responsible carer or agency.

13.2. We adopt this position in recognition of the need to ensure the safety of the child, the public and any persons affected by serious harmful behaviours, particularly at crisis points, and consider that the existing powers are appropriately circumscribed such as to authorise reasonable limitations of rights in the HR Act. In particular, the Commission welcomes that police officers are required to "do the minimum necessary to prevent or stop the conduct for which the warrant was issued or the arrest was made." It is, in this way, important that a younger child's interaction with the criminal justice system and police is limited except insofar as is necessary to investigate and/or prevent harmful behaviour that places the community at imminent risk. We anticipate that an Embedded Youth Worker model, as adverted to above at Discussion Question #6, would assist ACT Policing officers to de-escalate and reduce situations in which use of force or arrest is necessary.

13.3. Similar powers are made available to police under Scottish legislation which implemented an increased MACR of 12 years of age, although employing different terminology and subject to additional safeguards.[44] For example, the Scottish provisions do not refer to the 'arrest' of a child, but instead authorise a police officer to take the child to a declared place of safety where satisfied it is necessary to protect the person from an immediate risk of significant harm or further significant harm.[45] A place of safety may include a police station – though not a cell – if it is not reasonably practicable to take the child elsewhere.[46] A child must only be kept in a place of safety for as long as is necessary to put in

[44] *Age of Criminal Responsibility (Scotland) Act 2019* (asp 7).
[45] Ibid, s 28.
[46] Ibid, s 28(5)-(6).

place arrangements for their care (or to take intimate samples) and, in either case, not longer than 24 hours.[47] Accompanying obligations include notifications of prescribed persons, responsibilities to provide certain information to the child, records that must be kept as to the reason for the child being taken to the place of safety and length of stay, and related annual reporting.[48]

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers police should not have?

14.1. We are conscious that police investigation of the harmful behaviours of younger children may receive lesser focus once such children are no longer capable of criminal prosecution. Should the therapeutic panel model involve findings of fact, it will be important that police (or another appropriate entity) are authorised and adequately resourced to sensitively investigate harmful behaviours by younger children which, although constitutive of an offence, cannot give rise to criminal responsibility.

14.2. As alluded to throughout this submission, it is not clear that existing police powers, under Part 10 of the *Crimes Act 1900* and premised on reasonable suspicion of an offence having been committed, would be unavailable in relation to a child under a revised MACR. Other circumstances in which a person who is accused of an offence will not be held criminally responsible include, for example, where they are shown to have lacked capacity due to mental impairment or were acting under duress. If successfully argued, these defences excuse the person's behaviour but do not prevent their behaviour from being interpreted as an offence for other purposes (eg police powers, victims' rights, extensions of criminal responsibility). Whether a younger child's harmful behaviour is an offence (comprising physical and fault elements) is therefore a separate question to whether they had capacity to be held *criminally* responsible for that offence.[49] This is an important distinction that we encourage the government to query through independent legal advice.

14.3. Consequently, it may be that those existing police powers premised on reasonable suspicion of an offence would remain available in respect of younger children under an increased MACR. Individual police officers are presently required to properly consider the rights of children, as required by s 40B of the HR Act, when deciding whether to exercise their powers, and must do so in a way that is compatible with human rights. We consider, however, that it would be desirable for government to consider further statutory protections to ensure additional considerations and constraints on the exercise of police powers in respect of younger children. In this regard, the Commission supports extending the existing safeguards that prevent children under the current MACR from being strip searched or participating in an identification parade.[50]

14.4. As suggested above, at Discussion Question #13, the *Age of Criminal Responsibility (Scotland) Act 2019* offers a useful starting point in considering procedural and substantive safeguards for the rights of younger children who come to the attention of police under a revised MACR. Among these protections, we note the requirement for police to apply to a judicial officer (ie a sheriff – broadly equivalent to a Magistrate) for an order authorising a search of a child younger than the Scottish MACR or an order allowing police to interview them without their and a parent's agreement.[51] As a separate protection, we also note that, though searches of younger children without a warrant are still permitted based on reasonable suspicion of the child having committed, or being about to commit, an offence, this does

[47] Ibid, s 28(4).
[48] Ibid, ss 30, 32.
[49] See, for example, this distinction in *Williams v IM* [2019] ACTSC 234 at [53]; *RP v Ellis & Anor* [2011] NSWSC 442 at [19]; *BP v R, SW v R* [2006] NSWCCA 172 at [27]; Glanville Williams, Criminal Law, The General Part, 2nd ed (London: Stevens, 1961), 817-818.
[50] *Crimes Act 1900*, ss 228 and 234.
[51] *Age of Criminal Responsibility (Scotland) Act 2019*, s 34 and Chapter 3.

not extend to a child obstructing the officer in the exercise of one of their powers or the child's failure to comply with a lawful direction.[52]

14.5. This Scottish model, albeit uncommenced, in our view provides a discrete and sufficiently flexible framework that incorporates scope for judicial oversight and review where necessary, which we commend to government for consideration. To this end, we encourage government to consider legislating a discrete suite of police powers for use in respect of children younger than the revised MACR, informed by those enacted in Scotland. Further, should the government conclude that *additional* police powers are warranted in respect of children under the revised MACR, we reiterate that proposed new provisions must be strictly circumscribed and feature adequate safeguards that suitably account for the rights of children and others.[53]

14.6. As discussed above in response to Discussion Question #6, the Commission recommends adoption of an Embedded Youth Worker model (akin to the Police, Ambulance and Clinician Early Response (PACER) model) whereby a qualified youth worker accompanies police officers when responding to calls involving children and young people. Adopting a model of this kind may also necessitate additional authorisations and powers to facilitate an effective working relationship between officers and accompanying youth workers (eg provision of information).

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

15.1. We acknowledge that enactment of a further offence targeting adults who incite children under the revised MACR to engage in criminal acts is appropriately a matter for Government. While the Commission welcomes discrete measures that recognise the special vulnerability of children, it is our present understanding that increasing the MACR would not preclude attribution of responsibility for a younger child's criminal acts to adults.

15.2. Part 2.4 of the Code governs the extension of criminal responsibility in various circumstances, including complicity, commission by proxy, incitement and conspiracy. Specifically, the existing offence of incitement (the Code, s 47) appears to apply in situations in which a person induces a child younger than the MACR to commit an offence, notwithstanding the child's inability to be held criminally responsible and even where they do not proceed to commit the offence. We note, however, that it is presently unclear on a reading of s 47(6) whether an adult defendant would be permitted to raise the child's age as a defence against prosecution for incitement.

15.3. As noted above at Discussion Question #10, raising the MACR does not, as we understand it, prevent acts of children from constituting an offence; rather, it simply excuses their commission of an offence.[54] In May 2020, the High Court of Australia considered, in *Pickett v Western Australia* [2020] HCA 20, the liability of four adults for a criminal act that may have been committed by a child considered *doli incapax* under the *Criminal Code Compilation Act 1913 (WA)*. The majority judgment of Kiefel CJ and Bell, Keane and Gordon JJ observed that "[i]t is the doing of the act or the making of the omission by the actor that is attributed to another person or other persons, not the criminal responsibility of the actor."[55] We acknowledge, however, that these proceedings related to the participation of both the adults and younger child in offending charged by way of joint commission or complicity and common

[52] Ibid, s 33(3)(c).
[53] Per *Human Rights Act 2004*, s 28(2).
[54] *Criminal Code 2002*, Part 2.3, s 25 (cf. Part 2.2 (The elements of an offence)).
[55] *Pickett v Western Australia* [2020] HCA 20, [66].

purpose.[56] The government may therefore wish to seek legal advice about whether the High Court's reasoning would similarly extend to offences under Part 2.4 of the Code.[57]

15.4. We note that the maximum penalty for the Code offence of incitement is linked to the offence that was incited. The ACT Sentencing Database indicates that, since 1 July 2012, there has only been one conviction of incitement in the ACT in 2017, for which a suspended sentence was imposed. Subject to further development, government may also wish to review whether the existing offence of incitement is appropriately enforced and carries a sufficiently high penalty such as to deter the strategic use of children younger than the revised MACR.

15.5. Inducement of children, given their inherent vulnerability, should, in our view, already inform the objective seriousness of an offence such as to warrant a more severe sentence than might otherwise apply. Enactment of a specific offence concerning incitement of children younger than the MACR would, however, provide an opportunity to fix a harsher maximum penalty that denounces the strategic use of children for criminal purposes. We acknowledge that similar offences exist in other jurisdictions, such as Victoria, which may bear consideration.[58]

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

16.1. The Commission would strongly support efforts to transition a convicted child who is younger than the MACR and awaiting sentence into the therapeutic panel model. In this regard, neurocognitive research suggesting that a child younger than 14 years of age cannot necessarily appreciate the criminal nature of their actions to the requisite legal standard apply equally to those children who have already been convicted, but not yet sentenced, when the revised MACR takes effect.

16.2. We therefore suggest that the government consider commencement of the therapeutic panel model in advance of the revised MACR taking effect. Trialling the new process ahead of raising the MACR would promote time for the new model, wraparound services and necessary referral pathways to be piloted. Early establishment of the therapeutic panel model should also facilitate planning regarding the needs of younger children whose sentencing proceedings are pending and those serving sentences at the date the MACR is raised.

16.3. Consistent with the intent of Part 3A.5 of the *Victims of Crime Act 1994,* which recognises rights of relevant victims to be kept informed of outcomes on sentence, arrangements should be made to ensure that affected victims are notified about the intended transition of a child into the therapeutic panel model.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

17.1. The Commission does not anticipate that transitioning children who are already serving a sentence to the therapeutic panel model would unreasonably limit rights in the HR Act. As the discussion paper

---

[56] *Criminal Code Act Compilation Act 1913*, ss 7(b)-(c) and 8.

[57] For more information, see Law Council of Australia, 'Supplementary submission to Age of Criminal Responsibility Working Group – Pickett v Western Australia [2020] HCA 20' (12 June 2020).

[58] See, for example, *Crimes Act 1958*, Division 11A – enacted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic), No 43 of 2017.

notes, the HR Act recognises that a convicted child must be treated in a way that is appropriate for a person of their age who has been convicted.[59] As noted above, medical consensus concerning the neurocognitive and emotional vulnerabilities of children younger than 14 years of age extends equally to those children younger than 14 years of age who are serving a sentence of imprisonment or who are on community orders. Transitioning children currently serving sentences, whether on community orders or in incarceration, would serve to recognise and support rights of children, including those that apply in criminal proceedings.[60]

17.2. Accordingly, the Commission recommends that, in raising the MACR, the government consider empowering the ACT Childrens Court to modify the existing sentences of children who were convicted of an offence committed when they were younger than the increased MACR – whether on its own initiative, on application by the child or at fixed review points after the revised MACR takes effect. To this end, the government may wish to obtain legal advice about whether such measures may affect the institutional integrity of the Court.

17.3. Should the Childrens Court avail itself of any power to modify a child's sentence and enable their transition into the therapeutic panel model, we recommend that corresponding provision also be made to ensure affected victims are notified as appropriate. Such notification would, in our view, be consistent with the intent of the s 16F(1)(a) of the *Victims of Crime Act 1994*, which requires the Director of Public Prosecutions to notify a victim of an offence about the outcome of relevant proceedings, including any sentence imposed, as soon as practicable after they conclude.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

18.1. The Commission's preferred approach is that all historical convictions for offences committed by children younger than the revised MACR at the time of their offence become spent automatically and with immediate effect on commencement of an increased MACR. To this end, we are mindful that a criminal sentence is intended to reflect "a just and appropriate measure of the total criminality" of a person's conduct.[61] Any person who has been convicted of an offence should not therefore be unduly stigmatised or denied opportunities (eg to work or study, to travel etc) in addition to having served their sentence as imposed by the court.

18.2. Accordingly, in the ACT, the *Spent Convictions Act 2000* authorises a person not to disclose certain convictions to anyone after a period of desistance from crime, except in specified situations. The *Discrimination Act 1991* supplements this scheme by prohibited direct and indirect discrimination based on irrelevant criminal record, including spent convictions, in several areas of public life (eg employment, accommodation, education). Information about a person's spent convictions may, however, be sought or disclosed for appointment to certain roles (eg police or prison officers, teachers, childcare, disability or aged care providers/workers, justice of the peace etc) and for registration under the *Working With Vulnerable People (Background Checking) Act 2011*.[62] Such exclusions contemplate situations in which spent convictions may inform community safety.

18.3. To fully realise the policy intent in raising the MACR, children who have previously been charged with, or convicted of, a criminal offence while below the revised MACR should be protected from the stigma of criminal conviction. Recalling the Commission's position in respect of Discussion Question #1 that

[59] *Human Rights Act 2004*, s 20(4).
[60] See, for example, *Human Rights Act 2004*, ss 8, 11, 18, 20, 22(3).
[61] *Postiglione v The Queen* [1997] HCA 2, per McHugh J.
[62] *Spent Convictions Act 2000*, s 18.

the MACR should be raised uniformly – without exceptions for serious or repeated harmful behaviours – we recommend that convictions of any offence type (including sexual offences) committed by a child who was, at the time, below the revised MACR be spent automatically. We consider this position to be consistent with the prevailing neuroscientific consensus, reflected in the views of the UNCRC, that a child's capacity to be held criminally responsible does not vary based on offence type (as noted at Discussion Question #1).

18.4. The Scottish Government similarly considered this question before raising its MACR to 12 years of age in 2019.[63] The *Age of Criminal Responsibility (Scotland) Act 2019* consequently exempts any conviction of an offence committed when the person was under the country's MACR from the Scottish spent convictions scheme.[64] That Act further established workplace and occupational protections for people who had earlier failed to disclose that they had been convicted of an offence committed when they were younger than the previous MACR, which we also commend to the government for consideration.[65]

18.5. As we have noted above at Discussion Question #11, a person who has experienced the harmful effects of offending by a child may continue to have an interest in how that child's needs and behaviours are subsequently addressed. Part 3A.5 of the *Victims of Crime Act 1994* presently confers on the victim of an offence rights to be notified about the related police investigation, prosecutorial consideration, any decisions on bail, hearings, trial and appellate outcomes (including sentence) and inquiries and outcomes regarding parole or release on licence.[66] These provisions, which form part of the Victims Charter of Rights, together give rise to an expectation that a victim ought to be apprised of a change to the child's conviction, including if that conviction is spent automatically under these reforms.

18.6. As discussed further at Discussion Question #19, our support for historical convictions being spent is premised on there being a suitable mechanism under the new therapeutic panel model for relevant information about a child who has engaged in a harmful behaviour being capable of limited release. Notwithstanding our recommendation that historical convictions of younger children be spent with immediate effect, it may also be appropriate that children with historical convictions who are still younger than the revised MACR be referred to the therapeutic panel model for consideration of their needs and appropriate service responses.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act 2008* and the *Information Privacy Act 2014* sufficient?

Information sharing to inform therapeutic panel response

19.1. The Commission anticipates that effective operation of a therapeutic panel model will necessarily entail flows of protected information about children and other persons between government agencies, panel members, therapeutic service providers, coordinators and other persons affected by harmful behaviours of younger children. As such information is likely to include both personal information and

[63] Scottish Government, *The Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (March 2016) <https://consult.gov.scot/youth-justice/minimum-age-of-criminal-responsibility/supporting_documents/00497071.pdf>

[64] *Age of Criminal Responsibility (Scotland) Act 2019* (UK), s 4(2); see also *Rehabilitation of Offenders Act 1974* (UK), ss 1(7) and (8).

[65] Ibid, s 7(3).

[66] *Victims of Crime Act 1994,* ss 16-16I.

personal health information, which are each regulated under separate statutes, our view is that a bespoke legislated information sharing scheme will be essential.

19.2. In preparing a specific information sharing framework to support needs-based services under an increased MACR, we suggest the government be mindful of the delineation between 'protected information' and 'sensitive information' under the *Children and Young People Act 2008* (CYP Act) and restrictions on disclosure of such information. Given the documented proportion of children in contact with the youth justice system who also experience out of home care,[67] we consider it critical that the therapeutic panel model, and relevant service providers, have ready and timely access to all information relevant to the therapeutic and rehabilitative needs of the child. It should not, for example, be incumbent on the panel to request and await protected information from the Director-General under s 851 of the CYP Act. In this regard, we also suggest the government critically examine whether the therapeutic panel model may, in some circumstances, benefit from access to sensitive information under the CYP Act.

19.3. In the Commission's experience, statutory authorisations to share information about children and young people are, in themselves, insufficient to promote timely and targeted disclosures of relevant information or to counteract institutional cultures of secrecy. Insofar as particular categories of information may be relevant to an effective and holistic response to a child's harmful behaviours, placing positive duties on agencies to provide that information to the therapeutic panel model may also warrant greater consideration. In addition, we would also suggest government bear in mind the deterrent effect, if any, of s 712A of the Code, which creates an offence for publishing information that identifies someone else as a person who is or was a child the subject of a children's proceeding.[68]

Information sharing for other purposes

19.4. As discussed above at Discussion Question #11, information about a child having previously engaged in harmful behaviours or the corresponding service response may have a bearing in other contexts, including for reasons of public health or safety. As the ACT Spent Convictions Scheme will no longer apply in respect of information about a child's referral to, and participation in, a needs-based civil pathway, government may wish to explore a tailored regime for disclosures of relevant information, akin to that contemplated by the Scottish model.

19.5. The *Age of Criminal Responsibility (Scotland) Act 2019* provides for release of information about harmful behaviours of a child younger than the MACR, albeit subject to the guided discretion of an independent assessor. As recalled in the Discussion Paper, the Scottish model will see an independent reviewer determine whether relevant behaviours ought to be included in an enhanced criminal record certificate which inform working with vulnerable people registrations and appointment to various positions of responsibility.[69]

19.6. Given the low number of younger children expected to proceed through the therapeutic panel model and resourcing constraints in a smaller jurisdiction, the Commission recognises that it may be inefficient to establish an Independent Reviewer in the ACT. Features of the Scottish model may, however, be incorporated into the existing legislative architecture or substantially similar framework. For example, the *Children and Young People Act 2008*, could be amended to permit agencies to disclose relevant information about a person who engaged in harmful behaviour when they were younger than

[67] See for example, Victorian Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (June 2019).
[68] *Criminal Code 2002*, s 712A.
[69] *Age of Criminal Responsibility (Scotland) Act 2019*, s 18.

the revised MACR, but only insofar as the agency considers that information relevant to specified purposes (eg working with vulnerable people registrations, appointment to certain roles, professions etc).[70] Consistency with human rights would rely on the person being given advance notice of the proposed disclosure and the opportunity to make submissions about the relevance of the harmful behaviour, as well as the availability of independent merits review in respect of proposed or final disclosures.[71] Despite this, the Commission would strongly favour the establishment of an independent body tasked with considering proposed disclosures of information about a younger child's harmful behaviours.

19.7. In either case, we recommend that the applicable disclosure framework take account of the interest of victims in being kept apprised of a child's engagement with the therapeutic panel model and their rehabilitative progress (in keeping with the intent of Pt 3A.5 of the *Victims of Crime Act 1994*) insofar as appropriate. As noted above in response to Discussion Question #11, we note that the Scottish model enables people who have been harmed by the action or behaviour of a child, including victims of offences committed by children, to request information about action that has been taken in response.[72]

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

20.1. Consistent with our response to Discussion Question #18, the Commission recognises that propensity information or intelligence about children who have engaged in harmful behaviours while younger than the revised MACR may assist police to ensure the safety of the community and victims. Presently, under the *Spent Convictions Act 2000*, a law enforcement agency may make information about a spent conviction available to another law enforcement agency or a court.[73]

20.2. Despite this position, we recognise that police use of propensity information may facilitate the selective monitoring and recurrent interactions with younger children whose associates, family members or prior conduct are known to law enforcement agencies. The Commission unequivocally opposes younger children being placed at risk of such profiling, especially absent existing scope for independent oversight of the use of that information.

20.3. It is therefore incumbent on government to enact robust safeguards that ensure police use of such information is measured and not used in a manner contrary to the decriminalising intent of raising the MACR. The Commission hence recommends government conscientiously explore with ACT Policing options for recording and annual reporting about use of information and corresponding interactions with children younger than the revised MACR. In particular, it will be critical that the therapeutic assessment panel is promptly made aware of information that is held or acquired by police about children younger than the revised MACR who are engaging, or have engaged, in harmful behaviours. Prompt referral of this information to the panel would, in our submission, enable timely and coordinated interventions, including considered engagement with the child and their family.

20.4. Consistent with amendments made under the Scottish model, Government may also wish to critically examine whether the *Evidence Act 2011* might facilitate information about a younger child's harmful behaviours being admitted in later judicial or tribunal proceedings. Information of this kind is expressly

[70] *Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013*, schs 1-4.
[71] *Age of Criminal Responsibility (Scotland) Act 2019*,
[72] *Age of Criminal Responsibility (Scotland) Act 2019*, s 27.
[73] *Spent Convictions Act 2000*, s 17(3).

deemed inadmissible under the Scottish framework, except insofar as approved as relevant by the Independent Reviewer (referred to above).[74]

21. Other matters arising

Need for evaluation

21.1. The Commission is acutely aware of the wide-ranging complexity of this reform agenda and the potential for unforeseen consequences. As stated in our response to Discussion Question #7, services response must also be shown to be effective, and evidence based. To ensure ongoing transparency and inform any necessary changes, we suggest that government consider mandating in legislation a series of independent reviews to ensure that the service response addresses the underlying rationale for increasing the MACR.

21.2. At minimum we suggest that, in the first instance, these reforms be reviewed within two years of the increased MACR taking effect to ensure their operation as intended and identify and resolve any unforeseen implications; that is, to identify systemic barriers and challenges identified by the therapeutic assessment panel. Government may then also wish to mandate further evaluation of outcomes in the longer term, including with regard to the broader cultural change anticipated by these reforms. A five-year review, for example, might also offer an opportunity to ensure that all prior recommended changes have been implemented as intended. To this end, we recommend that the proposed reforms canvass obligations around collection and reporting of empirical and qualitative data, taking into account privacy implications within the small projected cohort of younger children who will be affected.

Protection orders

21.3. The Commission also recognises that an increased MACR is likely to have implications for the enforcement of family violence and personal protection orders. We therefore note that there is a need for government to investigate and address alternative options for responding to family and personal violence by children under the increased MACR.

Response where parents or family are incarcerated

21.4. The Commission recognises that families and other significant people will have a central role in the success of the therapeutic panel model and related services responses (eg Functional Family Therapy). Where a child or young person's family member or other loved one is presently serving a custodial sentence, their incarceration must not preclude the person's participation in therapeutic responses to the child's needs and, where relevant, harmful behaviours (insofar as considered appropriate by the panel). We accordingly suggest that government consider specific supports, including visitation and contact, in circumstances where a participating child's loved ones are incarcerated or otherwise involuntarily detained within the ACT.

Jervis Bay Territory

21.5. The Commission observes that an increased MACR may extend, by force of Commonwealth law, to the criminal law applicable in the Jervis Bay Territory (JBT). Given our position that an increased MACR must be accompanied by tailored and appropriate wraparound service responses to the needs of younger children, we encourage government to take special account of services available to the JBT and its unique context when increasing the MACR in the ACT.

[74] *Age of Criminal Responsibility (Scotland) Act 2019, ss* 6-8.

JAILING IS FAILING

JUSTICE REFORM INITIATIVE

THE JUSTICE REFORM INITIATIVE

The Justice Reform Initiative (JRI) is a national justice advocacy organisation that considers that jailing is failing. We are working to reduce over-incarceration in Australia and promote a community, in which disadvantage is no longer met with a default criminal justice system response (see JRI 2021). We currently have a network of over 100 eminent Australians as our patrons, including two former Governors-General, a number of former High Court judges, current and former public prosecutors, and multiple former parliamentarians from all sides of politics.

The JRI recognises the need for multiple legislative and policy, social, health, and human service reforms to be enacted, so that historically over-incarcerated and disadvantaged populations have opportunities to thrive in the community. Raising the minimum age of criminal responsibility (MACR) to 14 is one of the key priority reform areas for the JRI, and we welcome the opportunity to make a submission on the ACT Government's discussion paper on this matter.

Childhood is a time of learning to be responsible, of being encouraged to take active responsibility for repairing harm. This is quite a different conception of responsibility from that of criminal law jurisprudence, which is more about holding people responsible for things they have done in the past. Formal criminal law is about a more backward-looking version of responsibility in that sense. Responsibility for children is more about a restorative version of responsibility of children learning how to take active responsibility for putting things right for justice as a better future.

SECTION ONE: THRESHOLD ISSUES FOR RAISING THE MACR

The JRI is of the view that there should **not** be any exceptions on the MACR, on the basis of the 'type' or severity of the offence or behaviours.

The evidence is clear that 14 is the **minimum** age, developmentally and neurologically, that children could or should be held criminally responsible (see Farmer, 2011; Cunneen, 2017; Australian Medical Association, 2019). There are in fact compelling developmental arguments to suggest this age should be higher. The United Nations Committee on the Rights of the Child has pointed to developments and neuroscientific evidence that shows adolescent brains continue to mature beyond teenage years and has therefore ‘commend[ed] States Parties to have an even higher minimum age, for instance 15 or 16 years’ (2019: [22]).

The frame around which decision-making should be made, with regard to the minimum age should be medical and developmental – not political. If a child is not able to be held criminally responsible for offences that might be considered 'less serious' (for instance, shoplifting), then there is no reason

why they could be held criminally responsible for more serious offences. This is especially the case for offences that require specific intent, for example, the requirement for murder that the person intended to cause the person's death or cause serious harm to the person (see *Crimes Act 1900* (ACT) s 12(1)(a), (c)).

If our starting point is the developmental frame and we are clear that children between 10 and 13 cannot be held criminally responsible, then there is no role for *doli incapax* for this age group.

SECTION TWO: AN ALTERNATIVE MODEL TO THE YOUTH JUSTICE SYSTEM

SERVICE DELIVERY AND ALTERNATIVE MODELS

The principles noted in the discussion paper are a solid starting point for the development of an alternative youth justice model, although we suggest that consideration be given to the proposed multidisciplinary panel also including a member with relevant legal expertise, to ensure that young people's legal rights are respected. Furthermore, if someone aged 10-13 has allegedly engaged in behaviour that would previously have constituted an offence, guilt should not simply be assumed. Removal of the case from the criminal justice system should not deprive the child of an entitlement to a hearing on the merits, accompanied by due procedural fairness.

There are additional considerations that should be given to the principles underpinning the 'mode' of service delivery, which will have a significant impact on the extent to which young people can engage with such services. These relate to both the relationships developed between workers and young people, and the adequate resourcing of services, so that they can provide support that is both flexible (including services that have skilled workers working outside of business hours) and meaningful. Service models should also recognise and respond to the family and social determinants of crime.

Service delivery for young people should also be person-centred, strengths-based, flexible, trauma-informed, culturally safe, holistic, and relational in approach (see Sotiri, 2008; Semczuk et al 2012; Cunneen et al, 2021). The quality of the relationship between workers and young people is critical, in terms of building trust, engagement and hope. Long-term support, where relationships can be developed over time, should always be an option. First Nations children should also always have the option of receiving culturally safe support. Highly vulnerable young people, with multiple and complex support needs, are accustomed to their needs being 'too much' for service and support providers in the community and too often end up 'managed' in justice system settings, rather than supported in the community. In order to build an alternative system, support services must be equipped to be able to work intensively and long-term with highly vulnerable young people. Workers and services must have the capacity to 'hold' multiple and complex issues, and wherever possible (although specialist support is essential), there should be one point of contact and connection for the young person, who also serves as an advocate, when it comes to navigating service systems. Children need to feel and know that there is someone in their corner, who can help them through a difficult time. Consistency and the option of long-term support is critical here.

Services should have the capacity and resourcing to work with young people both in and out of crisis and service systems should assume that consistent and sustained support over time will be required to shift the kinds of behaviours that often result in young people coming into conflict with the law.

Key resourcing issues in service delivery include, but are not limited to, access to:

- immediate, safe, supported and appropriate housing (including in times of crisis);
- meaningful disability support;
- mental health support;
- educational support; and
- holistic family support.

For children who have loved ones in custody – including children who are in the care and protection system, as a consequence of parental incarceration – specific support around this, including facilitating visitation and contact, is also required.

MANDATED ENGAGEMENT AND/OR DEPRIVATION OF LIBERTY

Any form of coercive response should be a last resort. The fact that, 68% of young people in detention across Australia in 2019-20 were on remand (Australian Institute of Health and Welfare, 2021) demonstrates the need to ensure this principle is upheld in practice. In the rare circumstances where a child presents an **immediate and serious threat of harm to themselves and/or others** and this behaviour is unable to be de-escalated, a mechanism to mandate engagement in services should be available and should be formally embedded in the systems of any first responders. This mechanism should immediately connect the young person with services and supports **outside** of the justice system. Decisions about mandated placements or engagement should be made by skilled practitioners.

Repeated behaviour that **does not** present an immediate or serious threat requires a different frame for response. If a young person is repeatedly engaging in behaviours that are bringing them to the attention of police and/or the community, but are **not** presenting a serious threat, there should not be a mechanism for a mandated response. If a child is refusing to engage in a program, then the reasons for this disengagement should be unpacked, but the child should not be punished for their lack of engagement. Person-centred responses very clearly place the onus on the services, to ensure that they are meeting the needs of the child, including operating in ways that will facilitate engagement. Given the clear evidence about the failure of punitive measures to work as a deterrent in the justice system, we should not replicate this logic in the community sector. That is, the potential threat of mandated 'treatment' or 'secure accommodation' will not shift repeated behaviours because it will not address them.

Deprivation of liberty is a punitive response and should not be used **unless** the child presents an **immediate** and serious threat (either to themselves or others). It should not be used in response to a child committing a serious offence, **unless, in the period after the offence, the child continues to pose an immediate and serious threat**. Where deprivation of liberty occurs, this should not occur in

any form of custodial setting and it should be limited until the immediacy of the threat has subsided. That is, it should be a short-term response to immediate threat and should take place in a therapeutic, rather than a custodial, setting.

Approaches should also be consistent with the ACT Government's *Disability Justice Strategy 2019-2029*, which recognises that

> the range of disadvantages experienced by people with disability are best addressed early in the life of a person with disability, as well as early intervention in the development stages of legal needs will lead to better outcomes. if the human services system works effectively to identify needs and provide supports at an early stage this can work to reduce the level of future contact with the justice system (2019: 5).

SECTION THREE: VICTIMS' RIGHTS AND SUPPORTS

The JRI acknowledges the importance of the rights of victims in the development of any alternative framework for responding to harmful behaviours. However, the starting point for this should be that that the rights of victims and the rights of young people engaging in problematic behaviours are not in opposition. Many children currently in contact with the justice system are themselves victims of crime. Ensuring that victims of crime (including children who have harmed others) have a voice and are heard is critical in terms of developing a response to harm that seeks to be restorative, rather than punitive. Restorative and transformative approaches offer potentially important avenues, with regard to facilitating responses which promote accountability, transparency, and elevate the experience of any victims. The ACT has a long and proud history of restorative justice practices and the effectiveness of this, both in terms of participant satisfaction and reductions in reoffending, has been borne out by the research (see Broadhurst et al, 2018).

The absence of criminal responsibility should not alter these processes (in fact restorative justice exists in many settings outside of the justice system, including in schools). It should, however, be voluntary, and the developmental capacity of the young person to participate in a way that is useful for them must be carefully assessed. Similarly, the rights of victims to have their experience acknowledged (through, for instance, financial assistance) should not be reliant on the age of criminal responsibility.

SECTION FOUR: ADDITIONAL LEGAL AND TECHNICAL CONSIDERATIONS

Where police interactions with children occur, these should be focused on connecting children with other supports and services outside of the justice system. Consideration should be given to the use of different frameworks in terms of first responders (for instance, co-responder models using skilled youth workers, comparable to the PACER model, which appears to currently be working well in the ACT, in response to people with mental health conditions: see Power, 2021).

The existing offence provisions when applied to adults who recruit, induce or incite a child to engage in criminal activities will remain sufficient under the new MACR

All children between the ages of 10-13 who are currently in the youth justice system (whether incarcerated or in the community) should be transitioned out of this system and into an alternative system as soon as practicable. An expert panel could be set up specifically to facilitate appropriate referrals and pathways.

Historical convictions for offences committed by children when they were younger than the revised MACR should be automatically and universally spent, given that the new framework is to be built on the evidence around our medical understanding of the childhood and adolescent development.

REFERENCES

ACT Government (2019). *Disability Justice Strategy 2019-2029*. Canberra.

Australian Institute of Health and Welfare (2021). *Youth Justice in Australia, 2019-20*. Canberra.

Australian Medical Association (2019). *AMA submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review.*

Broadhurst R et al (2018). *Restorative Justice: An Observational Outcome Evaluation of the Australian Capital Territory (ACT) Program*. Canberra: Australian National University.

Cunneen C (2017). *Arguments for Raising the Minimum Age of Criminal Responsibility*. Comparative Youth Penalty Project. Sydney: University of New South Wales. http://cypp.unsw.edu.au/node/146.

Cunneen C, Russell S & Schwartz M (2021). Principles in diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction, *Current Issues in Criminal Justice*, 33: 170-190.

Farmer E (2011). The age of criminal responsibility: Developmental science and human rights perspectives, *Journal of Children's Services*, 6: 86-95.

JRI (2021). *Jailing is Failing.* https://www.justicereforminitiative.org.au.

Power C (2021, February 3). ACT Government recommits to PACER mental health election promise. *Canberra Weekly*. https://canberraweekly.com.au/act-government-recommits-to-pacer-mental-health-election-promise/.

Semczuk M et al (2012). *An Analysis of the Relationship Between a Community-based Program for Young People with Multiple and Complex Needs and the Prevalence of Crime*, NDARC Monograph No 65. Sydney: University of NSW.

Sotiri M (2008). Meeting the needs of marginalised young men: An analysis of service provision, *Youth Studies Australia*, 27, 29-38.

United Nation Convention on the Rights of the Child (2019). *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*.

actlawsociety

5 August 2021

ACT Justice and Community Safety Directorate
GPO Box 158
Canberra ACT 2601

By email: macr@act.gov.au

RE: DISCUSSION PAPER – RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The ACT Law Society (the Society) welcomes the opportunity to comment on the Discussion Paper: Raising the Minimum Age of Criminal Responsibility (the Discussion Paper). We have sought input from several of the Society's specialist committees that have an interest in this area and the following comments are provided.

Section 1: Threshold Issues

Question 1 – Exceptions

The Society supports the view taken by the Law Council of Australia that there should be no carve-outs or exceptions.[1] We consider that having exceptions will defeat the purpose of raising the minimum age of criminal responsibility (MACR).

While we do not agree with having exceptions, if any exception is to be considered, it should be limited to murder or offences with the maximum penalty of life imprisonment. If murder is considered an exception, a clear line must be drawn between different degrees of murder including attempted murder and manslaughter as well as different fault elements.

Question 2 – Doli Incapax

Doli incapax refers to the rebuttable presumption that a child between the age of 10 and 14 cannot commit a crime unless the child can distinguish between right and wrong.[2] This concept has been criticised as out of date and difficult to prove in court.[3]

The presumption will be redundant if the MACR is raised to 14 without exceptions. If there are to be exceptions, the principle of *Doli Incapax* remains relevant for these cases. Care should be taken to ensure that *Doli Incapax* is applied consistently in court, the onus of proof must always be on the prosecution to rebut the presumption. We note that concerns have been raised that the defence often has to informally initiate adherence to the presumption.[4] In our view, it would be ideal to remove the presumption completely by raising the MACR without exceptions.

---

[1] Law Council of Australia, 'Council of Attorney-General – Age of Criminal Responsibility Working Group Review' (2 March 2020) 9.
[2] Australian law Reform Commission, *Seen and heard: priority for children in the legal process,* Report No 84 (1997) [18.19].
[3] Law Council of Australia, above n 1, 5. See also Thomas Crofts, 'Will Australia Raise the Minimum Age of Criminal Responsibility' (2019) 43 *Criminal Law Journal* 26, 35-38.
[4] Ibid 23.

the law society of the australian capital territory a member of the law council of australia
fourth floor 1 farrell place canberra act 2601
gpo box 1562 canberra act 2601
dx 5623 canberra
telephone 02 6274 0300
mail@lawsociety.asn.au www.actlawsociety.asn.au

Section 2: Alternative Model

The Society does not have expertise on support services for children at risk and urges the government to consider input from experts working in that area. However, we would support an alternative model that:

- Supports facilitated collaboration between victims, offenders and families;
- Establishes a new authority to deal with children under the MACR; and
- Establishes a mechanism to mandate compliance in serious cases or cases of repeat offending or lack of engagement.

Any alternative model should have a focus on being trauma-informed, non-punitive and with a focus on therapeutic responses to a child's needs.

Youth Justice Conferencing

The Society supports the continued use of restorative justice conferences in the ACT for children under the revised MACR,[5] or a conferencing scheme more specifically designed for children and young persons. We note that Youth Justice Conferencing (YJC) is in other jurisdictions such as New South Wales, Queensland and internationally.

YJC provides a forum for the young offender to take responsibility for their actions and enhances victims' rights and participation in the decision-making process. Through YJC, an appropriate action plan and support mechanisms can be identified, which may include a letter of apology or undertakings from the young offender to repair damages, make repayments or to engage with community services or support programs (including counselling, drug and alcohol rehabilitation programs etc.). There will be circumstances where YJC is not appropriate such as when:

- The offence is too serious;
- Either party is not willing to attend the conference; or
- The young offender does not admit to the offence or has previously participated in a conference and there is no improvement in behaviour.

If a similar scheme is adopted in the ACT, it should be clearly established under statute; the *Young Offenders Act 1997* (NSW) can be used as an example. There will also need to be an appropriate authority to monitor and manage the child's compliance with the action plan post conference.

Other types of conferences can also be explored, for example, a conference between the offender and members of the offender's family to discuss the circumstances and reasons behind the offending and how they may be addressed. Providing support to the whole family (as opposed to just the young offender) should be considered. For Aboriginal and Torres Strait Islander children, Elders from community and extended kin should be included and consulted in these conferences to ensure that support is provided in a culturally safe manner.

Authority Responsible for the Alternative Model

The Society considers a multidisciplinary case management panel an appropriate approach to monitor and provide support to children under the revised MACR. Children involved in the criminal justice system often come from disadvantaged and marginalised communities and have complex needs, which may include (among other things) mental health issues, disability, drugs and alcohol abuse, exposure to family violence.[6] A multidisciplinary approach would assist in assessing needs and facilitating information sharing between relevant organisations. The Society strongly supports the inclusion of members of the Aboriginal community on the panel.

---

[5] See *Crimes (Restorative Justice) Act 2004* (ACT).

[6] Alasdair Roy, Brianna McGill and Lisa Fenn, 'Children & Young People with Complex Needs in the ACT Youth Justice System' (Report, ACT Human Rights Commission, 2016).

Establishment of a new authority/organisation also avoids putting further strain on existing resources.

Mechanism to Mandate Compliance

A mechanism to mandate compliance or to deprive the liberty of the young person under the revised MACR may be necessary in extreme circumstances, such as when there is a risk to public safety.

We note there are already civil law provisions that allow the court to order involuntary detention or participation in a program or community service, such as in the *Mental Health Act 2015* (ACT).[7] A similar scheme could be considered for children under the revised MACR. Matters to be considered on a case-by-case basis may include:

- The seriousness of the offence;
- Repeated harmful behaviour
- A lack of voluntary engagement;
- Past failures to comply with warnings and cautions.

Depriving the liberty of the young person should only be considered as a last resort measure after other less restrictive forms of supervision and isolation have been exhausted. Such coercive power should only be exercised by the court. If decision-making power is given to an authority other than the court, clear pathways for merits and judicial review for those decisions must be established.

Further, the following must also be considered:

- Clear maximum time limits on the use of any forms of isolation;
- Facilities to support a therapeutic and educational approach (for example, small-scale facility with well-trained multidisciplinary staff);[8]
- Access to education;
- Family visitations (if appropriate); and
- Conditional release options.

Section 3: Victims Rights and Supports

Question 10 – Rights of Victims

Raising the MACR supports future rehabilitation and outlook for children, and these efforts can be undertaken alongside supporting victims. Victims' rights are best considered via the previously mentioned Youth Justice Conferencing scheme. YJC provides a forum for victims to discuss the impact of the offender's behaviour on their lives. Victims' input is also considered in making decisions regarding the support programs and community services the young offenders should engage with. The *Victims of Crimes (Financial Assistance) Act 2016* (ACT) may also be relevant.
Question 11 – Should victims be given access to information about the child?

Access to this information should be heavily restricted. If victims are provided the opportunity to participate in the decision-making process during mediation/facilitation, their involvement should end at the conclusion of the conference. It is not appropriate for victims to access personal information about the young offender post conference.

---

[7] *Mental Health Act 2015* (ACT) ss 58, 66.
[8] See for example the Diagrama Foundation, Save the Children Submission No 60 to the Victorian Parliament Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria,* April 2017, attachment 8.

Section 4: Technical and Legal Considerations

Question 13 – Power to Arrest

Being put under arrest is a form of engagement with the criminal justice system and as such, it may have a negative impact on the young person and accordingly, care needs to be taken to ensure such power is used appropriately.

We note that there is already a power for police officers to arrest children under the age of 10 in the ACT.[9] Arrest can be made on reasonable grounds when:

- The child's conduct makes up the physical elements of an offence: or
- A person has suffered physical injury because of the conduct; or
- There is an imminent danger of injury to a person or serious damage to property because of the child's conduct; and
- It is necessary to arrest the child to prevent the conduct or to protect life or property.

We consider that the above principles form a good starting point. Arrest of children under the revised MACR should only be used as a last resort and be strictly limited. Imminent danger to the child should also be captured as a trigger for use of power (to take the child into protective custody). Children should only be detained for the shortest amount of time before being referred to a parent/guardian or an appropriate authority. An option for an appropriate authority (under the new model) or a parent or guardian to be contacted prior to (or simultaneously with) police engagement should also be explored.

Question 14 – Other powers

Investigative powers such as the power to conduct questioning or to conduct searches should be retained. There may be circumstances where a child will not admit to the crime and in the interest of justice and to protect the young person's presumption of innocence, investigative powers are necessary to establish facts.

Safeguards and restrictions on use of investigative powers should be established. Under current law, children under the age of 10 cannot be stripped searched,[10] have identification materials taken,[11] or participate in an identification parade.[12] Children cannot be interviewed without an appropriate person present such as a parent or a social worker, or when appropriate, the Aboriginal Legal Service should be contacted.[13] Accordingly, these safeguards should also apply to children under the revised MACR.

Question 15 – Inducement and Incitement

The Society opposes the creation of a separate offence to specifically deal with children under the revised MACR. We consider that the current offences, such as commission by proxy and incitement are sufficient to cover this type of conduct.[14] It is also well recognised in common law that adults can be convicted for their involvement in the criminal acts even if another person, such as a child carried out the physical element of the offence.[15] Creating a new offence will unnecessarily duplicate existing offences and is unlikely to achieve a different outcome.

---

[9] *Crimes Act 1900* (ACT) ss 252B-C.
[10] *Crimes Act 1900* (ACT) s 228(1)(e).
[11] Ibid s 230A(1).
[12] Ibid s 234(1).
[13] Ibid s 252G.
[14] *Criminal Code 2002* (ACT) ss 46-7.
[15] See e.g., *Pickett v Western Australian* [2020] HCA 20.

Question 16-17 – Transition for children who have and have not been sentenced.

We consider that children who have *and* have not been sentenced should be automatically transitioned to the alternative model as soon as the MACR is raised. Considering that raising the MACR supports the principle that children under the age of 14 are incapable of committing crimes, it would seem extraordinarily unjust to exclude certain child under the MACR from the scheme merely because of the timing of the offence.

Question 18 – Historical Convictions

Under the *Spent Convictions Act 2020,* a juvenile conviction (that relates to a sentence of imprisonment of no longer than 6 months) can be automatically spent after 5 years of crime-free period.[16] We suggest that this wait period be waived on application to support the transition process. Each case can be considered on merits. The same process should apply to all offences including serious offences such as sexual offences.

Question 19 – Personal Information

We note that Chapter 25 of the *Children and Young People Act 2008* deals with information secrecy and sharing, however, this largely relates to information in care and protection matters. On the other hand, the *Information Privacy Act 2014* deals with protected personal information in general. Special measures may be necessary to protect personal information of children under the revised MACR in relation to its handling, collection and distribution.

Question 20 – Should the police be able to use information gathered about a child under the MACR after the child has reached the MACR?

The police and the appropriate authority under the new model (such as a multidisciplinary panel) should continue to have access to this information for the purpose of monitoring the child's behaviour and to provide further support as necessary. The information may also be useful for statistical and evaluation purposes.

These records cannot be used as evidence in future trials or sentencing hearings for further offences, or in any other way adverse to the young person. Records should only be retained for a limited period, we consider that 5 years is appropriate.[17] Alternatively, an approach similar to that taken by the Warrumbul Circle Sentencing Court, Drug and Alcohol Court and the Therapeutic Care Court in the ACT can be considered.

Yours sincerely,

Simone Carton

Chief Executive Officer

[16] *Spent Convictions Act 2000* (ACT) ss 11, 13.

[17] See Australian Law Reform Commission, above n 2, recommendation 254.

Foundation for Alcohol Research & Education

5 August 2021

Emeritus Professor Morag McArthur

Raising the Minimum Age of Criminal Responsibility Review
Justice and Community Safety Directorate
ACT Government
GPO Box 158 Canberra ACT 2601
macr@act.gov.au

Re. Raising the Minimum Age of Criminal Responsibility Review

Dear Professor McArthur,

Thank you for the opportunity to provide a written submission to the above Review.

The Foundation for Alcohol Research and Education (FARE) is a not-for-profit organisation working towards an Australia that is free from alcohol harm. We approach this through developing evidence-informed policy, enabling people-powered advocacy and delivering health promotion programs. Working with local communities, values-aligned organisations, health professionals and researchers across the country, we strive to improve the health and wellbeing of everyone in Australia.

FARE congratulates the ACT Government on being the first Australian jurisdiction to commit to raising the Minimum Age of Criminal Responsibility (MACR). This reform is based on the following 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.[1]
2. **Significantly improved life outcomes.** 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.[2]
3. **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. [3]

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

Summary of Recommendations

FARE recommends:

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

Recommendation 2: No exceptions. The MACR must be raised to at least 14 years old. There should be no exceptions and no exemptions to this, regardless of the severity of behaviours.

Recommendation 3: Implement alternative means to achieve community safety. Protect community safety by referring children that would have come into contact with the justice system for clinical assessment to identify potential neurological disorders, and appropriate support.

Recommendation 4: End Doli incapax for 10 to 14-year-olds. Replace Doli incapax by raising the MACR to at least 14 years old.

Recommendation 5: Ensure that evidence of behaviour from before children were 14 years old cannot be used in future prosecutions. Ensure that police and courts are not able to use / rely on behaviour that occurred before a child was 14 years old in future prosecutions.

Recommendation 6: 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 7: 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 8: Develop FASD professional capacity. Invest in professional workforce development to establish capacity in the ACT for FASD screening, diagnosis and support. Allocate resources to educating professionals in recognising FASD.

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

Recommendation 11: Use trauma-informed care. Trauma-informed care should be used when engaging with children who are also victims of crime and survivors of trauma.

Recommendation 12: Automatically extinguish convictions. Automatically extinguish all previous convictions of children who were 10 to 14 years old at the time of the offence.

Recommendation 13: Allow restricted information sharing. Facilitate the sharing of information related to children 10 to 14 years old only for child protection, case management, and investigation of suspected adult exploitation of children.

Recommendation 14: Publish accurate crime data regularly. Collect, analyse and regularly publish accurate crime statistics, conviction, sentencing and recidivism data, and comprehensive costings for all aspects of the justice system.

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

Fetal Alcohol Spectrum Disorder (FASD)

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). 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.[4] Despite the lack of intent, this can place them at increased risk of early contact with the criminal justice system.[5]

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 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.[6]

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

Section One: Threshold issues for raising the MACR (Questions 1 and 2). *Should there be any exemptions or exceptions to the new MACR for children and young people that engage in repeated or very serious harmful behaviours?*

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 behaviour that would have brought them into contact with the justice system, should be referred for clinical assessment to identify causal factors such as trauma and potential neurological disorders, (including FASD). Assessment can help identify causal factors, triggers and appropriate behavioural strategies and approaches.

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.

While 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*, 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 – however 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

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

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.[7]

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 ACT Government should also consider dual track sentencing option for young people up to 21 years of age who are particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison. This system is in place in Victoria.[8]

There must be greater recognition and education of police, lawyers and judiciary regarding children with disabilities and cognitive impairment (including FASD) which can mean they do not have the cognitive capacity to form criminal intent and should not be dealt with by the criminal justice system at all. FASD is a frequently misunderstood and misdiagnosed disability. Given that approximately half the children who 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.

Recommendation 2: No exceptions. The MACR must be raised to at least 14 years old. There should be no exceptions and no exemptions to this, regardless of the severity of behaviours.

Recommendation 3: Implement alternative means to achieve community safety. Protect community safety by referring children that would have come into contact with the justice system for clinical assessment to identify potential neurological disorders, and appropriate support.

Recommendation 4: End Doli incapax for 10 to 14-year-olds. Replace Doli incapax by raising the MACR to at least 14 years old.

Recommendation 5: Ensure that evidence of behaviour from before children were 14 years old cannot 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.

Recommendation 6: 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.

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

Section Two: An alternative model to the youth justice system (Questions 3 to 9). *What services should be introduced, reoriented or expanded to support children and young people who demonstrate harmful behaviours? How should children and young people under the MACR be supported before, during and after crisis points?*

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[9] 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. 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. The ACT does not currently have FASD diagnostic services or support services for those living with 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.[10] This can lead to children being misdiagnosed with Attention Deficit Hyperactivity Disorder (ADHD) or other disorders.[11] 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 suspected of having FASD is in 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.[12]

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 health professionals with the expertise required to undertake a FASD diagnosis in the ACT.

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

Justice and legal professionals also need multidisciplinary, trauma-informed, culturally-appropriate training about FASD and its medical, social and legal implications[13]. This can help them identify and manage young people suspected of having FASD or other neurological disorders.

Any mandatory elements in the new system need to be carefully considered to avoid net-widening, especially in regards to any consequences of breaching mandatory compliance. The 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.[14] 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.

Recommendation 7: 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 8: Develop FASD professional capacity. Invest in professional workforce development to establish capacity in the ACT for FASD screening, diagnosis and support. Allocate resources to educating professionals in recognising FASD.

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

Section Three: Victims' rights and supports (Questions 10 to 12). *How should this reform consider the rights of victims?*

Children who come into contact with the justice system are almost invariably themselves victims of significant abuse and traumatic experiences.[15] 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'.[16] This means that by better responding to children with these behaviours (in providing supports and services, instead of engaging with the justice system), the ACT 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 ACT 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 system in the ACT. The appropriateness of restorative justice would be dependent upon the cognitive capacity of the child. Restorative justice programs that involve victims in justice processes have been found to increase victim and community satisfaction with the criminal justice system[17]. They are also found to be a cost-effective way to reduce

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

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.[18] Currently, participation in restorative justice in the ACT occurs on a voluntary basis. 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 10: Consider voluntary restorative justice processes or elements in designing the new model. Include voluntary restorative justice processes where appropriate in the new model.

Recommendation 11: Use trauma-informed care. Trauma-informed care should be used when engaging with children who are also victims of crime and survivors of trauma.

Section Four: Additional legal and technical considerations (Questions 13 to 20). *Police Powers, Transition and Information Privacy*

As discussed above, all justice professionals, including police, should be trained to recognise the features of potential neurological disorders such as FASD. This can facilitate the referral on to expert professionals trained to support children at crisis points.

Transitional provisions should include the automatic extinguishing of historical criminal convictions.

Policy collecting information about the child's harmful behaviour may be necessary for child protection services, and the investigation of exploitation by adults. There should also be information-sharing provision for the multi-disciplinary panel assessing the needs of the child.

Recommendation 12: Automatically extinguish convictions. Automatically extinguish all previous convictions of children who were 10 to 14 years old at the time of the offence.

Recommendation 13: Allow restricted information sharing. Facilitate the sharing of information related to children 10 to 14 years old only for child protection, case management, and investigation of suspected adult exploitation of children.

Challenging the harmful 'tough on crime' narrative

A key contributor to the lack of political appetite for the MACR reform by Australian governments has been the harmful '*tough on crime'* narrative, especially following incidents of significant harmful behaviour by children and during election campaigns. Evidence shows that imprisonment rates are increasing, (despite falling rates of crime), the costs are high and increasing, and that increased imprisonment can actually make the community less safe.[19]

Despite this 'tough on crime' approach requiring significantly increased spending on (often privatised) prisons and the criminal justice system, no significant return on investment has been achieved. This investment has not led to a reduction in offending rates, reduction in recidivism rates or improvements in community safety.[20]

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

The Australian Survey of Social Attitudes (ASSA) indicated that the Australian public sources their information about the criminal justice system primarily from broadcast and tabloid media. This has resulted in much of the public having inaccurate views about the occurrence of crime and the severity of sentencing. The ASSA indicates that the Australian public perceives crime to be increasing when it isn't, overestimates the proportion of crime that involves violence, and underestimates the proportion of charged persons who go on to be convicted and imprisoned. [21]

The 'tough on crime' rhetoric appeals to this misinformation both because of a fear of becoming a victim of crime and the belief that offenders deserve harsher punishments. As a result, the criminal justice system has been skewed unfairly towards harsher, more punitive responses including mandatory sentencing, minimum terms, and reduced parole. These approaches impinge excessively and unnecessarily on human rights, without evidence of positive outcomes of reducing crime or recidivism.[22]

Harsher penalties including mandatory sentencing, minimum terms, and reduced parole, do not reduce crime, imprisonment or recidivism, but do cause harm, including criminalising and breaching human rights. One way for governments to help end the self-defeating 'tough on crime' rhetoric is for independent bodies to regularly collect, analyse and publish accurate justice information, including crime statistics, conviction, sentencing and recidivism data, and comprehensive costings for all aspects of the justice system.

The ACT Government committing to raising the MACR is a significant first step in implementing this long overdue reform throughout Australia. Designing and implementing an effective alternate model in the ACT will be another significant stage towards country-wide implementation. Collecting, analysing and regularly publishing accurate crime data will form another part of this this important reform.

Recommendation 14: Publish accurate crime data regularly. Collect, analyse and regularly publish accurate crime statistics, conviction, sentencing and recidivism data, and comprehensive costings for all aspects of the justice system.

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

Yours sincerely,

CATERINA GIORGI
CHIEF EXECUTIVE OFFICER

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

[1] Law Council of Australia (2019) *Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax* https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax

[2] ACTCOSS (2020) *Submission to the Council of Attorneys-General Review of Age of Criminal Responsibility* https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a3902734ecdd22cc6932ed/1621332008645/ACTCOSS.pdf

[3] Cuneen, C (2017) *Arguments For Raising The Minimum Age Of Criminal Responsibility - Comparative Youth Penality Project Research Report*, UNSW https://www.cypp.unsw.edu.au/sites/ypp.unsw.edu.au/files/Cunneen%20%282017%29%20Arguments%20for%20raising%20the%20minimum%20age%20of%20criminal%20responsibility.pdf

[4] NOFASD (2019) *What Is FASD?* https://www.nofasd.org.au/alcohol-and-pregnancy/what-is-fasd/

[5] NOFASD (2021) *The Senate Inquiry Series: FASD in The Justice System* https://www.nofasd.org.au/blog/the-senate-inquiry-series-fasd-in-the-justice-system/

[6] 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*. https://bmjopen.bmj.com/content/bmjopen/8/2/e019605.full.pdf

[7] Law Council & AMA (2019) *Joint statement on the medical basis for raising the age to 14 years* https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf

[8] Sentencing Advisory Council (2021) *Sentence Types for Children and Young People* https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentence-types-for-children-and-young-people

[9] Senate Community Affairs References Committee (2021) *Submissions to the Inquiry into Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/FetalAlcoholSpectrumDi/Submissions

[10] Bower C, Elliott EJ (2016) Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD) Australian Government Department of Health https://www.fasdhub.org.au/siteassets/pdfs/australian-guide-to-diagnosis-of-fasd_all-appendices.pdf

[11] Weinberg J (2018) *Fetal Alcohol Syndrome Sometimes Misdiagnosed and Under-Reported due to Stigmas Around Drinking*. Vancouver Coastal Health Research Institute. https://www.vchri.ca/stories/articles/2018/05/01/fetal-alcohol-syndrome-sometimes-misdiagnosed-and-under-reported-due

[12] Senate Community Affairs References Committee (2021) *Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder Report,* March 2021 p.111 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024357/toc_pdf/Effectiveapproachestoprevention,diagnosisandsupportforFetalAlcoholSpectrumDisorder.pdf;fileType=application%2Fpdf

[13] Passmore HM, Mutch RC, Watkins R, et al (2020) *Reframe the Behaviour: Evaluation of a training intervention to increase capacity in managing detained youth with fetal alcohol spectrum disorder and neurodevelopmental impairments*, https://www.tandfonline.com/doi/abs/10.1080/13218719.2020.1780643

[14] ACT Justice and Community Safety Directorate (2021) *Raising the minimum age of criminal Responsibility - Discussion Paper* https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4516/2433/2390/Discussion_Paper_-_FINAL.pdf

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

[15] Wall, Higgins & Hunter (2016) *Trauma-informed care in child/family welfare services.* CFCA PAPER NO. 37 https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca37-trauma-informed-practice.pdf

[16] Lincoln, Brotto (2019) *Exploring the victim-offender overlap at the intra-individual level: Reimagining justice for crimes of interpersonal violence* https://research.bond.edu.au/en/publications/exploring-the-victim-offender-overlap-at-the-intra-individual-lev

[17] Queensland Productivity Commission (2019) *Inquiry into Imprisonment and Recidivism – Final Report* https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf

[18] UN (2016) *Promoting restorative justice for children.* Special Representative of the Secretary-General on Violence against Children. https://sustainabledevelopment.un.org/content/documents/2599Promoting_restorative_justice.pdf

[19] Queensland Productivity Commission (2019) *Inquiry into Imprisonment and Recidivism – Final Report* https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf

[20] WAAMH, WACOSS & WANADA (2013) *Submission to Senate Legal & Constitutional Affairs Committee Inquiry: Value of a justice reinvestment approach to criminal justice in Australia,* http://www.aph.gov.au/DocumentStore.ashx?id=3d698e1e-9d5a-4164-8c5a-93260b4afaee&usg=AOvVaw2DMz-BHf4pSUcJTepqCcRH

[21] Roberts & Indermaur (2009) *What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes* https://www.aic.gov.au/sites/default/files/2020-05/rpp101.pdf

[22] QCOSS (2019) *A new justice narrative - QCOSS submission in response to the Queensland Productivity Commission Inquiry into Imprisonment and Recidivism Draft Report* https://qpc.blob.core.windows.net/wordpress/2019/04/IRDR024-Inquiry-into-Imprisonment-QCOSS-1.pdf

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

Submission

to

the ACT Government Discussion Paper

on

Raising the Minimum Age of Criminal Responsibility

August 2021

AUSTRALIAN
CHILD RIGHTS
TASKFORCE

The Australian Child Rights Taskforce

CONVENOR
UNICEF Australia

STEERING COMMITTEE	
Child Fund Australia	Save the Children Australia
ACU Institute of Child Protection Studies	Dr Georgina Dimopoulos (Swinburne University)
Prof Amanda Third (Western Sydney University)	Dr Fiona Robards (Sydney University)
Dr Holly Doel-Mackaway (Macquarie University)	Dr Sheridan Kerr
Dr Ani Wieringa (Melbourne University)	Alex Cahill

For More Information:

James McDougall
ACU Institute of Child Protection Studies
P: +61 (0)419 243 179
E: james.mcdougall@acu.edu.au

Howard Choo
Save the Children Australia
P: +61 (0)3 7002 1613
E: howard.choo@savethechildren.org.au

EXECUTIVE SUMMARY

This submission shares the insights of the Australian Child Rights Taskforce concerning this important development in justice and wellbeing for children and young people in Australia today.

Childhood and adolescence are 'critical times for building capabilities for life'[1]. Learning experiences don't come in neat packages for all children and young people. Sometimes these experiences are guided by mistakes or misguided by the less than perfect circumstances around them. The criminal justice system offers a fundamentally flawed approach for supporting and learning for children. The surrounding service systems are not always child-centred and respectful of children's rights and health and wellbeing.

We believe that this inquiry offers an important opportunity to review the limitations of existing policy and practice in the service system for children and to consider possible future direction and developments that will improve justice, health and wellbeing and respect for rights for children and young people in Australia more generally.

In 1997 the Australian Law Reform Commission & Australian Human Rights Commission handed down a joint report called "Seen and Heard: priority for children in the legal process". Today, this landmark report remains the most comprehensive examination of children and the legal system in Australia. Disturbingly, many of the failures of legal processes for children identified in this report remain today:

- discrimination against children;
- a failure to consult with and listen to children in matters affecting them;
- a lack of co-ordination in the delivery of services to children;
- an overly punitive approach to children in criminal justice systems;
- the over-representation of Indigenous children in the justice and protection systems;
- court processes which are bewildering and intimidating for children; and
- school exclusion processes without fairness and natural justice.

The reform under consideration today in the ACT provides an opportunity to revisit and address some of the findings of that report.

Our recommendations

- The minimum age of criminal responsibility should be raised to 14 years with no exceptions.
- Child rights should guide the implementation of the reform.
- Gaps and weaknesses in the existing service system should be addressed.
- The focus should be to create and maintain safe, stable, and supportive environments.
- The views of children should be heard in design, implementation and decision making.
- The reforms should address coordination and integration of services and systems.
- The reforms should produce systems that address need and are voluntary and accountable.
- Services to victims of crime should not be affected.

[1] McLachlan, R., Gilfillan, G. and Gordon, J. 2013, *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra at page 14.

Background

The Issues

The ACT Government has proposed raising the minimum age of criminal responsibility in the ACT as a priority reform. It has identified that before any change is implemented, the ACT community needs to have the right systems in place to support children who will be affected by the legislative reform.

The Australian Child Rights Taskforce supports the reform and wishes to assist in the implementation of the reform.

A Discussion Paper has been released to guide the preparatory discussions. We also note that an independent review of the service system and implementation requirements has been commissioned. The review team will map existing service pathways and needs for children and young people using harmful behaviours, identify gaps and provide recommendations around options for mechanisms to replace the current youth justice system.

The Discussion Paper notes that:

> *"A key component of this reform is the decriminalisation of harmful behaviour for a larger cohort of children and young people. To support this, a continuum of community and Government-based services will be needed. An alternative response must address the needs of children, young people, their families, and their communities. It must also improve access to early supports, provide optionsfor therapeutic care and accommodation, embed restorative approaches, contain alternatives or other changes to court processes and consider how to support victims when traditional justice mechanisms are no longer available."*

The Australian Child Rights Taskforce and its work

The Australian Child Rights Taskforce[2] is a coalition of over 100 organisations, networks and individuals who are committed to the protection and development of the rights of children and young people in Australia. UNICEF Australia convenes the Taskforce, and its work is guided by a Steering Committee.

One of the key roles of the Taskforce is to hold Australian Governments to account on the implementation of the *United Nations Convention on the Rights of the Child* (the Convention). When Australia ratified the Convention in 1990, this represented a commitment that every child in Australia should enjoy the rights set out in the Convention.

The Child Rights Taskforce has published a series of reports (most recently 'The Children's Report')[3], that have examined the implementation of the Convention in order to assist the United Nations Committee on the Rights of the Child[4] in its review of Australia's performance. These reports acknowledge that while Australia is a wonderful place for most of its children, there remains significant structural and material disadvantage for many children.

These reports have informed the recommendations of the Committee[5] which have covered a broad range of policy areas where improvements were considered necessary, including the raising of the age of criminal responsibility.

The Committee has also noted that despite Australia's ratification of the Convention in 1990, it has yet to effectively incorporate rights into policy and legislative frameworks to benefit children and there are unacceptable gaps in the legal protection of children's rights.

The Child Rights Framework

The Convention reflects a fundamental shift that occurred during the 20th Century in the way that children were viewed. Previously children were largely viewed as the property of adults. This shift to an understanding of children as autonomous rights holders has begun to be reflected in domestic legal systems as well as international law.

The Convention sets out this understanding in a range of ways including through its requirement that processes in law, government policy and judicial review will act to guarantee the effective implementation of the rights set out in the Convention for each Australian child (Article 2.1) and to require that all appropriate legislative, administrative and other measures are taken in order to implement the rights set out in the Convention: (Article 4).

[2] http://www.childrights.org.au/welcome
[3] https://apo.org.au/node/200771
[4] http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx
[5] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/5-6&Lang=En

The Australian Child Rights Taskforce's Contribution

Raising the minimum age of criminal responsibility to 14 years is a far-reaching reform and a powerful enabler for children's rights. If implemented well, it will have a systemic effect in interrupting intergenerational cycles of disadvantage, changing life trajectories for many children, and creating safer and fairer communities across the ACT.

The Australian Child Rights Taskforce commends the ACT Government for its decision to raise the age and its national leadership in undertaking this much needed reform. In doing so, the ACT is acting in accordance with the scientific and medical evidence about appropriate support for children's development.

It implicitly acknowledges the ineffectiveness of detention and other punitive responses in addressing the underlying issues in the challenging behaviours of children currently dealt with by the justice system in the relevant age group. It addresses the breach of international human rights standards which has seen Australia receive sustained criticism from the United Nations and a number of other nations globally. It seeks to address the stark reality that the current low minimum age (of 10 years) reinforces intergenerational disadvantage and disproportionately affects Aboriginal and Torres Strait Islander children.

The Australian Child Rights Taskforce supports the ACT Government's commitment to be guided by child rights principles as it implements a raised minimum age of criminal responsibility.

We acknowledge that the community expects that where appropriate, children are held responsible for their actions and given the opportunity to learn from their mistakes. We support coordinated and strategic action to support community safety and prevent and address harmful behaviours, including by children.

We note that the decision to raise the age of criminal responsibility puts a spotlight on the services and strategies available and required to build community safety and prevent harmful behaviours, both immediately and in the longer term. We acknowledge that this will identify gaps and weaknesses in the existing service system and structures including some that already existed without the challenge of implementing this reform.

We support the intention of the discussion paper to explore the challenges posed by this reform and the use of the identified threshold issues to assist the process of planning for the implementation of the reform. We offer our insights as we address the issues outlined in the paper.

We acknowledge and endorse the work of Save the Children and the ACT Raising the Age Coalition. Along with the insights of a range of other Taskforce members, this work (a submission and position paper respectively) has informed and guided our work on this submission.

SECTION ONE: THRESHOLD ISSUES

Building Appropriate Service System Responses

The Taskforce's view is that the minimum age of criminal responsibility should be raised to 14 years for all offences, with no exceptions.

There is no principled basis for distinguishing between different types of offence for this purpose. The criminal justice system is an inappropriate and ineffective way of dealing with children at this stage of development, physical, neurological, and moral. As the United Nations Committee on the Rights of the Child has said, exceptions to the minimum age 'are usually created to respond to public pressure and are not based on a rational understanding of children's development'.[6]

We are concerned that the creation of exceptions to the application of the minimum age may undermine the effectiveness and aims of the reform.

We acknowledge the importance of addressing the issue of appropriate service system responses to children engaging in serious harmful behaviours. The key intent of this reform should be that those responses are not based in the criminal justice system.

We also acknowledge that community expectations of justice and safety remain key considerations in building responses. However, there remain effective opportunities to address these concerns with strategies and responses that engage with and empower children, families, and communities.

Doli Incapax

The legal practice principle, *doli incapax* has offered a theoretical method for ensuring that a child aged under 14 cannot be held criminally responsible for an offence unless it can be proven that they knew what they were doing was seriously wrong. However, the practical problems with how *doli incapax* currently operates, and its failure to safeguard children's rights and best interests in practice, have been well documented.[7]

Further the principle is designed to operate within a criminal justice system and in the context of criminal justice response. Raising the age of criminal responsibility offers the opportunity to reframe both the system and the response within a broader and more comprehensive service system setting. In those circumstances the principle should no longer be required.

[6] Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, United Nations, 18 September 2019, [25].
[7] See, e.g., Aboriginal Legal Service (NSW/ACT), *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, 3 March 2020, available at https://www.raisetheage.org.au/cag-submissions.

The Middle Years

We agree with the proposition that raising the age will require significant reform and expansion to the services and interventions available to support children and young people aged 10 to 13 years. Whilst the current context focuses on those currently identified with therapeutic needs, we would argue that the universal and strategic service system responses for children between the ages of 8 and 12 (often described as "the middle years")[8] require better attention.

We note and endorse the intent to identify gaps in service system responses in implementing this reform and developing an alternative model. Addressing the broader needs of this age group more generally will be of significant value, will avoid the risk of stigmatising particular groups and build responses to the needs for this age group more comprehensively.

SECTION TWO: AN ALTERNATIVE MODEL

Making a Fresh Start

The Australian Child Rights Taskforce endorses the notion that this reform provides the opportunity to redesign the approach to understanding and responding to harmful behaviours; shifting the focus to creating and maintaining safe, stable, and supportive environments; and to address the underlying causes of harmful behaviour.

However, child rights principles would also support an approach that recognises that all children have a right to live in a safe, stable, and supportive environment. Shifting the focus away from the criminal justice system to the rights of all children to have their development needs met (rather than to solely the prevention of harmful behaviours) offers a more comprehensive and less potentially stigmatising approach.

As the Discussion Paper states:

> *"Evidence demonstrates that early support, family-led decision making, and robust, consistent, and reliable service systems are critical for preventing children from entering a cycle of harmful behaviour."*

However, this should not permit shifting of responsibility from governments as the key coordinating agency for service systems that support the development of children (and responsibility for human rights entitlements more generally). Given the causes of serious and ongoing harmful behaviours in children are often found in broader social conditions, addressing expectations of accountability should not replace a focus on strong and coordinated service system responses and a principled child rights framework.

[8] https://pursuit.unimelb.edu.au/articles/the-importance-of-your-child-s-middle-years

We endorse and support the recognition in the Discussion Paper that the rights of children will be central to this reform.

We endorse the commitments that:

- Policy and practice will be driven by what is in the best interests of the child,
- Strong and resilient families will provide safe, stable, and supportive environments
- Children should be involved in the design and implementation of any solutions.

Using a child rights framework will offer the opportunity to build in the necessary safeguards and mechanisms to address issues of personal and community safety and accountability.

Design Principles for an Alternative Model

The Australian Child Rights Taskforce endorses the child rights and human rights principles set out in the Discussion Paper for the design and development of the alternative model.

The Taskforce supports the inclusion of two additional principles consistent with our commentary in this submission on child rights and broad service system reform (as set out by Save the Children in its submission).

> *"First, any alternative model should prioritise hearing and taking seriously the views of children and young people in all decisions relevant to them, including in responding to harmful behaviour. Children have a right to be heard and taken seriously in such decisions, as reflected in Article 12 of the Convention on the Rights of the Child. Among other benefits, this assists in ensuring that children's best interests are being met. Moreover, when children are meaningfully involved in decisions about them, they are more likely to take support those decisions and the decisions themselves are more likely to achieve their desired purpose."*
>
> *"Second, any alternative model should focus on identifying and addressing underlying causes and risk factors for harmful behaviour, including child and family poverty, child and family contact with the child protection system, and disengagement from education. This would include building strong links at all levels of policy making, budgetary investment and services across all relevant portfolios, programs and actors across levels of government and within communities."*[9]

We offer these additional observations on the design and development of an alternative model

We endorse the comments of Save the Children in its submission that "the alternative that replaces the criminal justice system needs a more holistic approach in how it pursues its goals, including addressing the underlying causes – at a social and individual level – of harmful behaviours"; that the model should be based on child rights and child-centred; and addressing the social determinants of harmful behaviour (but not just for the sake of addressing harmful behaviours).

[9] Save the Children Submission, August 2021

We note with approval Save the Children's observation that community safety is best served in preventing harmful behaviours by strategic and early interventions that support behaviour change. Early intervention models can be built on risk and need but must still be wary of the stigmatising impact of interventions that are not based on supporting family and involving willing participation by children, families, and communities.

There will be a challenge to ensure that the gate keepers to the model (whether police or other services) do not indirectly widen the net and stigmatising impact of referral into what otherwise would have been the criminal justice system.

There will still need to be a process of initial assessment before referral. Just as the existing system should operate with discretionary warnings and cautions before the referral into the more formal justice system, there will need to be assessments of whether any referral to further service beyond the risk and need.

The integration into existing (and where possible extension of) service models (including education, disability, and health services both universal and targeted) should be built on the provision of required support services that focus on risk and need.

Addressing Existing Service System Gaps

The position paper of the ACT Raising the Age Coalition makes the important observation that the existing service system has significant gaps in the delivery of services based on need. These include services for children that are homeless or at risk of homelessness; disability support needs and psycho-social services. It is hoped that this reform provides a strategic opportunity to fill those gaps.

Both the Discussion Paper and the ACT Raising the Age Coalition position paper propose the use of a multidisciplinary assessment and referral panel. We also support this suggestion. We would add that such Panels can offer improved accountability and transparency if supported and led by strong independent community expertise that is not beholden to any particular sectoral or government stakeholder. An independent statutory authority can offer support for ensuring consistency in performance and outcomes.

The use of community expertise can also improve processes for shared decision making and ensure the interests of children, families and communities can be heard during assessment, referral, and service delivery. This could provide opportunities for the involvement of key leaders and contributions from local Aboriginal and Torres Strait Islander families and communities.

Key Components of an Alternative Model

The Australian Child Rights Taskforce notes the important recognition of the need for accessible supports for children and families and the challenges that exist in the current service system to identify needs and provide appropriate supports.

Again, these challenges reflect gaps and limitations in existing service systems, including those that work alongside the current criminal justice system. By reframing the system on the basis of assessment of need, there are opportunities to achieve improvements in the coordination and delivery of each system.

Pathways of referral and eligibility should be reviewed. Community engagement and independent assessment offer new opportunities for overcoming existing barriers.

We defer to the knowledge of local communities and providers in identifying and meeting existing gaps. But in principle, we would expect that all universal and secondary services currently providing services to children and families (health; education; housing; welfare; family violence; disability; mental health and child-care and development) should be involved in the shift in focus and opportunity.

Coordinated and collaborative community-led and independent assessment and referral can lead and guide these mechanisms.

Voluntary and Accountable

Critically the Taskforce believes that, as a fundamental principle, referral to services should be voluntary and that efforts for involvement should be focused on addressing barriers rather than mandating compulsory involvement.

Any exceptions to this principle must be statutory and subject to accessible review.

The Discussion Paper has initially identified three areas likely to create referral opportunities: (when a crisis occurs; after a crisis; and when a crisis continues to occur). These suggest the involvement of responding agencies (police; mental health; intensive education supports; emergency services). Reporting and responding guidelines will be required and there may be the need for immediate family support or accommodation services.

Otherwise, initial assessment and if appropriate and required, referral to full assessment will be the next steps. There will also be the opportunity for assessment for accountability mechanisms where there has been an impact on other community members. Mechanisms could include restorative conferencing or fact-finding as suggested in the Discussion Paper.

We do not support any exceptions to the model for serious harmful behaviours. And so, the model must be able to respond and address a variety of behaviours that may have attracted attention.

However, there is also the opportunity to consider how the model (and service systems) may support referrals in other circumstances where need or concern has been identified.

SECTION THREE: VICTIM RIGHTS ANDSUPPORTS

We support the notion that the alternative model should provide access to community members to supports that would be available to victims of crime: access to restorative justice mechanisms and assistance with recovery.

There will need to be mechanisms that protect against stigmatisation of the children involved. There may be mechanisms within victim offender mediation that can provide proxies for an offender. But these should not diminish recognition and respect for the rights of victims and those affected to safety, privacy, dignity, and participation.

SECTION FOUR: ADDITIONAL LEGAL AND TECHNICALCONSIDERATIONS

We would anticipate that police will continue to play a key role in detecting and protecting community safety in dealing with children affected by the reforms.

Adjustments may be necessary to police powers and relevant offences. There may be additional statutory measures to ensure the involvement of other agencies and invested assessment bodies or persons.

In principle, we would support as far as possible the transition of children dealt with by the criminal law for offences committed between the ages of 10 and 13 to the alternative model and to have their criminal records adjusted to reflect the changed status of their offending.

Particular attention will be required to manage the personal information of children affected by the reforms. It may be that the review of services that will provide an opportunity to review the principles, policies, and practices in relation to information sharing and the improved coordination of services.

We note that these practices, particularly as they relate to child protection and child safety have already been the subject of recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Submission:

Raising the minimum age of criminal responsibility: Discussion paper response

August 2021

About ACTCOSS

ACTCOSS acknowledges Canberra has been built on the land of the Ngunnawal people. We pay respects to their Elders and recognise the strength and resilience of Aboriginal and/or Torres Strait Islander peoples. We celebrate Aboriginal and/or Torres Strait Islander cultures and ongoing contributions to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) advocates for social justice in the ACT and represents not-for-profit community organisations.

ACTCOSS is a member of the nationwide COSS Network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS's vision is for Canberra to be a just, safe and sustainable community in which everyone has the opportunity for self-determination and a fair share of resources and services.

The membership of the Council includes the majority of community-based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

Contact Details

Phone:	02 6202 7200
Address:	Weston Community Hub, 1/6 Gritten St, Weston ACT 2611
Email:	actcoss@actcoss.org.au
Web:	actcoss.org.au
CEO:	Dr Emma Campbell
Policy Officer:	Dr Gemma Killen

August 2021

© Copyright ACT Council of Social Service Incorporated

This publication is copyright, apart from use by those agencies for which it has been produced. Non-profit associations and groups have permission to reproduce parts of this publication as long as the original meaning is retained and proper credit is given to the ACT Council of Social Service Inc (ACTCOSS). All other individuals and Agencies seeking to reproduce material from this publication should obtain the permission of the CEO of ACTCOSS.

An ACT Government funded initiative.

Initiative of

ACT Government

Table of contents

Acronyms 4

Introduction 4

Context 4

Section One: Threshold issues for raising the MACR 5

Section Two: An alternative model to the youth justice system 6

Section Three: Victim's rights and supports 9

Section Four: Additional legal and technical considerations 11

Priorities 11

Acronyms

ACTCOSS	ACT Council of Social Service Inc.
AFI	Advocacy for Inclusion
MACR	Minimum age of criminal responsibility
UPR	UN Human Rights Council periodic review

Introduction

Thank you for the opportunity to respond to the Discussion Paper on raising the minimum age of criminal responsibility.

The ACT Council of Social Service (ACTCOSS) strongly advocates that the minimum age of criminal responsibility (MACR) in the ACT should be raised from 10 to at least 14 years old, with no exceptions or carve outs. In addition, community services working with children and families should be properly resourced to support diversion away from engagement with the justice system and help build resilience and protective factors as and *before* crisis arises.

There is substantial medical and social research to support raising the MACR. Criminalising children as young as 10 can lead to a lifetime of harmful consequences, including sustained contact with the justice system.

We support submissions to this discussion from our member organisations, including Advocacy for Inclusion (AFI), Youth Coalition of the ACT, and Families ACT. ACTCOSS is also part of the ACT Raise the Age Coalition which strongly supports raising the minimum age of criminal responsibility.

In this submission, we focus on responding to questions in Section Two on an alternative model to the youth justice system.

Context

In Australia our legislation, regulations and social rules reflect an understanding that young people under the age of 14 are not yet developmentally responsible enough to vote, drink alcohol or drive cars. Yet, we hold children as young as 10 accountable to a criminal justice system that often leaves them traumatised and caught in cycles of recidivism.

MACR of 14 is supported by scientific research on child development and social research on offending. In the UN Human Rights Council periodic review (UPR)

released in January, more than 30 countries called on Australia to raise the minimum age of criminal responsibility[1].

Raising the age of criminal responsibility is particularly important for Aboriginal and/or Torres Strait Islander children and families who are hugely overrepresented in youth justice systems. In the ACT, Aboriginal young people are detained at 18 times the rate of their non-Indigenous peers.[2] Community controlled organisations must be consulted and prioritised throughout the implementation of this legislation.

Similarly, young people with disabilities are overrepresented in the ACT youth justice system, and people with disabilities and disability advocacy organisations must be given adequate support to respond to the MACR discussion.

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

No, we must raise the criminal age of responsibility with no exceptions and no carve-outs. The evidence clearly shows that young people under the age of 14 do not have the capacity to form criminal intent. If we agree that children cannot be held responsible for minor offences, we must agree that they are not criminally responsible for more serious offences.

Further, the very small number of young people under the age of 14 who might be arrested and charged with serious or harmful offending is highly likely to have experienced trauma or violence themselves. These children must also be protected and cared for through adequate, targeted, and therapeutic service provision, rather than incarceration.

Children under the age of 14 are particularly vulnerable to the harm arising from early contact with the justice system, which can result in high rates of disadvantage throughout life, including continued and sustained contact with the justice system. Keeping these kids out of prison, no matter the offence, is the best way to protect them, their families and the whole ACT community.

---

[1] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, United Nations General Assembly, 24 March 2021, accessed 1 August 2021.

[2] Report on Government Services, *Youth Justice* Australian Government Productivity Commission, 2021 accessed 25 May 2021

2. Should *doli incapax* have any role if the MACR is raised?

No. ACTCOSS affirms the Australian Medical Association (AMA) and Law Council of Australia position that *doli incapax* legal presumption is not adequate to protect young people encountering the justice system.[3] Children often face lengthy waits in remand and in custody while matters of *doli incapax* are debated and decided. *Doli Incapax* is legally opaque and raising the MACR to 14 would remove the need for such a provision.

Criticisms of *doli incapax* are well documented and we refer you to the joint submission from Youth Co and Families ACT on this matter. As they point out, *doli incapax* relies on judicial discretion for implementation, which can lead to an increase in racial bias.

Section Two: An alternative model to the youth justice system

3. Are these appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

ACTCOSS agrees that the principles listed on page 20 offer a good starting point for the development of an alternative model to a youth justice response.

Given the high rates of children with disabilities in the youth justice system, we also recommend that universal design and universal access underpin service design and delivery.

Each of these principles must be implemented through non-punitive, trauma-informed and therapeutic responses to a child's needs.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed – to better support this cohort?

ACTCOSS endorses the idea of establishing a multidisciplinary panel as outlined on page 21 of the discussion paper. This panel will bring together service providers and agencies to identify and respond to the needs of a child to prevent engagement with the youth justice system.

[3] AMA and Law Council of Australia, *Minimum Age of Criminal Responsibility: Policy Statement*, AMA and Law Council of Australia, 2020, accessed 1 August 2021.

We support the response from Youth Coalition and Families ACT in relation to the structure of this multidisciplinary panel. In particular, the panel must feed into a wrap-around service consisting of a wrap-around coordinator, an embedded youth outreach worker working with the police force and four-six therapeutic care coordinators who are able to work closely with the child and their family.

This system, consisting of the multidisciplinary panel, the wrap-around coordinator and therapeutic care providers should be overseen by a fully funded statutory governance board consisting of community-based and government members as well as Aboriginal and Torres Strait Islander representatives. The Board will provide systemic oversight and advocacy on all elements of the reformed service system. The separation of the Governance Board and the Multidisciplinary Panel will enable systemic advocacy and practical, individual advocacy to occur simultaneously.

Beyond the multidisciplinary panel, the ACT needs to see an expansion of the Functional Family Therapy – Youth Justice program similar to the Functional Family Therapy – Child Welfare partnership with Gugan Gulwan.

We also need an expansion of psycho-social services for young people, especially those with disabilities, as well as greater education and training across services to improve responses to disability support needs.

ACTCOSS continues to advocate for adequate accommodation services for children under the age of 16 experiencing homelessness. The development of 'Ruby's' therapeutic accommodation service will be beneficial, however there are concerns that the service will be at capacity without the added demand of raising the MACR. As per Youth Co/Families ACT's recommendation, the multidisciplinary panel should have access to funding to source appropriate crisis accommodation from existing providers on the rare occurrence that this is required.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/crisis occurs?

The Multidisciplinary Panel would create a new early referral pathway, prior to points of crisis. Frontline service providers including in the community sector, as well as in education, health, or housing, will be able to refer young people and families to the Panel and the wrap-around coordinator for further support and intervention.

This system will require cross-directorate support, and whole of Government responses. If problems can be identified and referred early, without necessitating a justice or a child protection response, we will be much more able to engage young people in the services they need to steer them away from harmful behaviours.

The Multidisciplinary Panel would also need to be responsive to the needs of potential parents and pregnant women who seek help in the prenatal period. Families must be supported from the beginning, not just when harmful behaviour begins to be noticed in a young person or child. Protections must also be in place to ensure that families who come forward for support must not be inappropriately directed into the child protection system.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

As a priority, the ACT Government should fund the Ruby's model of accommodation for 10–17-year-olds. This must be coupled with investments in 24/7 therapeutic support targeted toward young people and families. The lack of a youth housing model in the ACT means that police have nowhere safe to send children after hours if they do not have a safe family environment to return to.

As per Youth Co/Families ACT's submission, the new model would include an embedded youth worker and wrap-around coordinator that would be alerted to the case at crisis point and able to respond and provide advice immediately. Professor McArthur's report will likely contain more details of how this would work and where funding would need to be allocated for success and sustainability.

7. How should children and young people under the MACR be supported after crisis points?

The establishment of the Multidisciplinary Panel will be able to respond to individual cases of crisis with a needs-based framework. As cases are referred to the Panel after immediate crisis points, appropriate assessment and referrals to relevant services could occur. This process would be managed by the wrap-around coordinator.

Service engagement would be family-driven, confidential, and limited to the providers in the room. This process must avoid referrals to Child Protection Services where possible so that voluntary engagement is sustainable. Human services and the community sector *must be* adequately funded and resourced to respond to harmful behaviour and to support and protect children and young people as they move through periods of crisis.

8. **Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?**

Service engagement is most successful when it is done voluntarily.

In serious cases, where the safety of the child is at risk, it is our understanding that there are already provisions in ACT legislation which allow a judge to compel a child, regardless of the minimum age of criminal responsibility, to participate in a program or reside in a facility. Similar provisions exist in the Mental Health Act which allow for involuntary detention for therapeutic reasons.

Though these provisions exist, they should be considered a last resort, and they should not be an avenue of criminalisation. Mandated measures are often unsuccessful, and the Panel and Wrap-around service are adequately funded, we hope that mandatory engagement will be unnecessary.

9. **Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?**

Children should not be deprived of their liberty. Young people's needs can and should be met in the community with support, empathy and well-funded service provision. As mentioned in response to the previous question, there is precedent to mandate service engagement or *temporary* detainment for medical or mental health reasons. Children under 14 should never be deprived of their liberty as a punitive measure, nor have any temporary detainment for medical reasons recorded as a criminal offence.

Section Three: Victim's rights and supports

10. **How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?**

Criminal responses are not always the best ways to recognise and respond to the traumas and experiences of victims. Nor should a recognition of criminal responsibility be the only mechanism through which government support is offered to victims. Compensation and therapeutic support should be offered on an as-needed basis, to those that can demonstrate harm as occurred, regardless of fault. Other options such as restorative justice processes are also important to ensure the experiences of victims are recognised and addressed.

We also know that children who engage in problematic behaviours are also often victims. Young people who experience trauma and violence are more likely to come into contact with the criminal justice system. Responding to children who are victims of trauma and violence should encompass compassionate and non-punitive responses.

Supporting young people in this way protects the whole community and decreases the likelihood of recidivism. According to the AIHW, early engagements with the criminal justice system entrench criminal behaviour.[4] The younger a child is when they enter the justice system, the more likely they are to reoffend. This puts the whole community at risk of harm, including children.

11. **What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?**

This is beyond the scope of our expertise. However, it is important to maintain age-appropriate and therapeutic responses to children that may have caused harm. Given that we are advocating for non-criminal responses, privacy of the young people involved should be protected. Any restorative or conciliatory processes should be entered into voluntarily and with adequate support for the young person involved.

12. **How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?**

Community members should be supported on an as-needed basis. Accountability can be important for addressing trauma and harmful

[4] Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2017-2018*, AIHW, 2019, accessed 4 August 2021.

behaviour, though the mechanisms to enact this should be determined by the wrap-around coordinator and the Multidisciplinary Panel.

Section Four: Additional legal and technical considerations

Legal considerations are beyond our expertise. We refer the ACT Government to submissions from Aboriginal legal services as well as advice given by *Change the Record.*

The evidence is clear however, that engagement with the criminal justice system in any form can cause harm. This means that police engagement with children under the age of 14 must be minimised. Where this is not possible, this engagement must be therapeutic and involve the proposed embedded youth workers and wrap-around coordinator as first responders.

This legislation should not be about delaying engagement with the criminal justice system, but rather reshaping our approach to caring for children who display potentially harmful behaviours. If we invest sufficiently in the community sector and youth service providers in the ACT, we will make a substantive difference in the lives of young people and give them an opportunity to thrive.

Priorities

As a priority, we call on the ACT Government to;

- Raise the minimum age of criminal responsibility to at least 14 years old
- Have no exceptions or carve-outs
- Adequately fund services to support and protect young people from engagement with the criminal justice system
- Invest in Aboriginal community-controlled organisations
- Prioritise voluntary, preventative, and community-focused responses to potential harms.

We would be happy to discuss this response in further detail. Please contact me at emma.campbell@actcoss.org.au, or our Senior Policy Officer for children, young people and families, Dr Gemma Killen at gemma.killen@actcoss.org.au.

Save the Children

5 August 2021

Mr Shane Rattenbury MLA
Attorney-General
London Circuit
GPO Box 1020
Canberra ACT 2601
macr@act.gov.au

Dear Attorney-General,

Raising the minimum age of criminal responsibility in the Australian Capital Territory

Save the Children is pleased to have the opportunity to provide this submission about the ACT Government's commitment to raise the minimum age of criminal responsibility to 14 in the ACT.

This submission is made by Save the Children and has been endorsed by the Australian Child Rights Taskforce. The Australian Child Rights Taskforce is made up of over 100 organisations and individuals with expertise in child rights in Australia. The submission may not reflect the individual views of every member of the Taskforce.

Raising the minimum age of criminal responsibility to 14 is a far-reaching reform and a powerful enabler of children's rights. If implemented well, it will have a systemic effect in interrupting intergenerational cycles of disadvantage, changing life trajectories, and creating safer and fairer communities in the ACT.

Save the Children commends the ACT Government for its decision to raise the age and its national leadership in undertaking this much needed reform. As with the decision to become the first jurisdiction to establish a human rights Act,[1] this demonstrates a continued commitment to lead by example on human rights issues in Australia. In doing so, the ACT is acting in accordance with medical evidence about children's development and the ineffectiveness of detention and other punitive responses in changing children's behaviour, international human rights standards which have seen Australia receive sustained and heavy criticism from the United Nations and many of our peer countries globally, and the stark reality of how the current low minimum age of 10 reinforces intergenerational disadvantage and disproportionately affects Aboriginal and Torres Strait Islander children.

Save the Children's overarching recommendation is that the ACT Government stay the course by being strongly guided by child rights principles as it implements a raised minimum age of criminal responsibility to 14. At its core, raising the age is about realising children's rights. The ACT will only fully achieve its goals in raising the age if it continues as it has begun – by keeping children's rights as its guiding principle and applying that principle comprehensively.

Save the Children also recognises that the community expects that children are held responsible for their actions and learn from their mistakes, and that communities are safe from harmful behaviours, including by children. These are legitimate considerations that should be addressed.

Save the Children has participated in national, State and Territory discussions about the age of criminal responsibility across Australia in recent years. This has included providing a submission to the Council of

[1] *Human Rights Act 2004* (ACT).

Save the Children

Attorneys-General Working Group review of raising the age of criminal responsibility in February 2020[2] and engaging with State and Territory-level reviews. Save the Children has taken a leading role in human rights discussions through Australia's Third Cycle Universal Periodic Review, the hearing for which took place before the United Nations Human Rights Council in January 2021 and strongly highlighted Australia's low minimum age of criminal responsibility as a pressing human rights concern.[3] Additionally, Save the Children is an active member of the national Raise the Age alliance.[4]

In this submission, we elaborate on what this means in practice by responding to the discussion paper's questions about threshold issues for raising the minimum age of criminal responsibility, and an alternative model to replace the youth justice system.

1. Threshold issues for raising the minimum age of criminal responsibility

Save the Children's strong view is that the minimum age of criminal responsibility should be raised to 14 for all offences, with no exceptions or 'carve outs'.

There is no principled basis for distinguishing between different types of offence for this purpose. The criminal justice system is an inappropriate and ineffective way of dealing with children whose brains are still developing and who are still learning right from wrong, regardless of their actions. As the United Nations Committee on the Rights of the Child has said, exceptions to the minimum age 'are usually created to respond to public pressure and are not based on a rational understanding of children's development'.[5] If the ACT creates exceptions to its new age of criminal responsibility, it will fundamentally undermine the effectiveness and aims of the reform before it even begins.

In theory, *doli incapax* should protect children by ensuring that a child aged under 14 cannot be held criminally responsible for an offence unless it can be proven that they knew what they were doing was seriously wrong. However, the failure of *doli incapax* to safeguard children's rights and best interests in practice have been well documented.[6] If the age of criminal responsibility is raised to 14 for all offences, *doli incapax* will cease to operate.

2. An alternative model to replace the youth justice system

Raising the minimum age of criminal responsibility creates the opportunity to re-envision how our society treats children – particularly those most at risk of being harmed by the current system by being criminalised early in life.

Children should meaningfully participate and be involved in developing an alternative to the youth justice system. This should include children with experience of the existing youth justice system. Any alternative to the criminal justice system should be child-centred and grounded in a genuine understanding of

---

[2] Save the Children, *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General,* 25 February 2020, available at https://www.raisetheage.org.au/cag-submissions.

[3] Save the Children has been an Advisory Committee member of the Australian Universal Periodic Review NGO Coalition. During the hearing in January 2021, 30 countries called on Australia to raise the age of criminal responsibility, the single most-made specific recommendation. For further details on views of the Coalition, see; Australian UPR NGO Coalition, *Joint NGO Submission on behalf of the Australian NGO Coalition*, April 2020, available at: https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/602b2a925246cb1b62bc23a4/1613441688187/UPR++-+Australian+NGO+Coalition+Submission+-+domestic+publication+version+-July+2020+%28new%29.pdf.

[4] For further information, see: https://www.raisetheage.org.au.

[5] Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, United Nations, 18 September 2019, [25].

[6] See, eg, Aboriginal Legal Service (NSW/ACT), *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, 3 March 2020, available at https://www.raisetheage.org.au/cag-submissions.

children's perspectives and needs. This will not be possible without the involvement of children themselves in designing the alternative. Such participation is essential for the alternative model to be effective and achieve its aims.

a. Design principles for an alternative model

The principles underpinning the development of an alternative to criminal justice for children aged 10 to 13 should be based on a children's rights framework as enshrined in the UN Convention on the Rights of the Child, as well as other relevant human rights treaties and declarations – notably the UN Declaration on the Rights of Indigenous Peoples.

The discussion paper proposes a set of principles to underpin the development of the alternative model, namely that any alternative model should:

- assess and respond to the needs of children and young people, rather than focusing on offending and punishment
- ensure self-determination of Aboriginal and Torres Strait Islander communities in service design and delivery
- provide for the safety and wellbeing of children and young people to benefit the whole community
- ensure the safety and wellbeing of children and young people by supporting families, communities, schools and health services
- recognise the right to safety for all members of our community and victims of harmful behaviour by children and young people
- use restorative and culturally appropriate practices to respond to harmful behaviours by children and young people
- only mandate a child or young person to receive support if it is in their best interest, and only as a last resort.

Save the Children supports the proposed principles while recommending two additional principles.

First, any alternative model should prioritise hearing and taking seriously the views of children and young people in all decisions relevant to them, including in responding to harmful behaviour. Children have a right to be heard and taken seriously in such decisions, as reflected in Article 12 of the Convention on the Rights of the Child. Among other benefits, this assists in ensuring that children's best interests are being met. Moreover, when children are meaningfully involved in decisions about them, they are more likely to support those decisions and the decisions themselves are more likely to achieve their desired purpose.

Second, any alternative model should focus on identifying and addressing underlying causes and risk factors for harmful behaviour, including child and family poverty, contact with the child protection system, and disengagement from education. This would include building strong links at all levels of policy-making, budgetary investment and services across all relevant portfolios, programs and actors across levels of government and within communities.

Save the Children also emphasises that removal of children from their community separates them from their support network and their identity, particularly Aboriginal and Torres Strait Islander children. This has compounding harmful effects. Children in our youth programs who have experienced custodial sentences have noted that the stigma and shame associated with going to 'juvey' further reinforces their negative self-worth. They have spoken to us about how they were driven toward anti-social influences and behaviours following detention as this is where many found acceptance and validation for the first time. For many children, once they become known to authorities – police, magistrates, and child

protection – they feel ostracised and lose faith in trustworthy adults. This is a cycle that can only be broken by a true focus on the child or young person's needs, based in their community, including re-establishing trusting relationships with adults and supporting the child or young person to re-engage with their community and to identify and achieve their goals.

> *"Once I had been to Parky [Parkville Youth Justice Centre] I felt embarrassed. My family were worried that me being a criminal would rub off on my little brother and it made me feel like I didn't want be here anymore. I'd try to do the right thing for a while but because I screwed up so badly, I'd just think, 'stuff it,' and go get into trouble with my mates. The coppers would just target me and made me feel like a criminal, so I just did it anyway. I didn't care. If I'm gonna' just get accused of stuff, I may as well do it.*
>
> *"Instead of sending me away from my family, there has to be a better way. I learnt tips on how to offend better while locked up, but that was all really. Going to Parky didn't make me a better person and did not help me understand what I did wrong. It was only back in Shepparton that I got workers that understood me, didn't lose it at me when I made mistakes, and really tried to help. Having someone care about me taught me more than prison could."*
>
> – 18 year old Aboriginal male, first had contact with youth justice at age 10[7]

b. *Key components of an alternative model*

The existing criminal justice-based model does not make the community safer. It actively harms the children who become caught in it. To avoid repeating the errors of the existing system, the alternative that replaces the criminal justice system needs a more holistic approach in how it pursues its goals, including addressing the underlying causes – at a social and individual level – of harmful behaviours.

This alternative system will need to have children's rights at its centre. It will need to be child-centred, which means taking a 'whole-child' perspective and understanding children in the context of their families, communities and wider social and structural forces affecting them and their opportunities.

In seeking to prevent harmful behaviours, an effective alternative to criminal justice will need to address underlying causes at a society-wide level – that is, the social determinants of harmful behaviour – including poverty and social disadvantage. It will also need to address the needs of children and enable their healthy development, rather than seeking to punish them for undesirable behaviour. In turn, this can provide a foundation for genuinely early intervention – support that arrives before children begin engaging in harmful behaviours. This alternative system will also need to respond early, effectively, proportionately and therapeutically to repeated and escalating harmful behaviours, as well as to serious and crisis situations.

This alternative system should be built on the recognition that the best way to keep the community safe is to prevent harmful behaviours before they occur and intervene as early as possible to constructively change behaviour and support children to understand and take responsibility for their actions. In all cases, punitive responses should be avoided. Trauma-informed and therapeutic services that respond to children's needs are more effective and more appropriate.

The alternative system will require mechanisms to identify children who are at risk of engaging in harmful behaviours and assist them and their families to access wrap-around support to meet their needs, including additional assessments as needed and referrals to other services. In other jurisdictions, multidisciplinary panels or boards of service representatives have been established for this purpose and proved effective. Critical to their success is the adoption of a child-centred approach, which entails individualised, therapeutic, needs-based assessment and responses and avoidance of 'one size fits all' responses. Save the Children supports proposals for the establishment of a multidisciplinary panel or

[7] Current participant in Save the Children youth justice program, Victoria, July 2021.

board in the ACT along these lines, as also recommended by the Youth Coalition of the ACT and the ACT Raise the Age Coalition following detailed consideration of existing services and needs.[8]

There are many existing, evidence-based programs already working effectively across Australia to achieve the goals we have described for an alternative system. To be effective, programs must be appropriate to the specific location and community in which they are provided. Nonetheless, many can readily be scaled or adapted to new places in a way that is sensitive to local context while maintaining fidelity of implementation of the program as designed. Three examples are highlighted below.

The *Youth Partnership Project* in the south-east corridor of Perth, an area with high social disadvantage and high rates of youth offending and recidivism, is a collective impact initiative that has developed an innovative cross-sector early intervention model. The model is based on early identification of young people with complex needs, drawing on shared and co-designed cross-sector definitions and data, which in turn allows the provision of intensive collaborative support.

The early intervention model has a particular focus on boys aged 8 to 12 who have not yet had contact with the justice system but are highly likely to have such contact without holistic support. It has substantially reduced participants' suspension rates and improved participants' school attendance, behaviour, literacy skills, life skills and social and emotional development, and attention and concentration, executive function and intellectual, emotional and coping skills.

The *Youth Partnership Project* was developed and carried forward by a highly engaged coalition of community partners in the geographic area that it serves. However, core elements of its early intervention model and methodology would readily translate to other locations where the relevant conditions exist – which could include the Canberra region – and would be directly relevant as part of an alternative to criminal justice responses to children with complex needs who are at risk of engaging in harmful behaviours.

Out Teach is a comprehensive, integrated and customisable service offering which is designed to reduce youth re-offending and support education, skill-building and employment (including vocational education) outcomes. It is currently being offered in Tasmania and Shepparton, Victoria, and could be adapted for application in a relatively small jurisdiction such as the ACT.

Individualised case-work and holistic education support is delivered as part of a tiered and mobile programming approach to build protective factors that prevent involvement in the justice system. Specialist teachers work from a trauma-informed approach to develop individualised education plans for each young person that builds on their strengths and helps them achieve their learning goals.

To date, children and young people aged 10 and older have benefited from participation. Other services drawing on similar components have successfully engaged with children as young as seven.

Out Teach helps children and young people by forming positive relationships to guide them along a suitable learning pathway, addressing social barriers and meeting the students' immediate needs. Its flexible service model has demonstrated effectiveness in supporting children and young people with a range of circumstances, needs and goals, with consistently positive outcomes for participants including significantly lower rates of return to youth justice supervision and improved school attendance.[9]

Mobilise is a child rights education program that supports children and young people to understand their rights. It has been successfully delivered in community, early intervention and youth justice settings,

---

[8] Position paper on service gaps and needs in the ACT, Youth Coalition of the ACT on behalf of the ACT Raise the Age Coalition, shared with the ACT Government in March 2021

[9] See, eg, Reimer, K., Pangrazio, L. and Selwyn, N., 2017, *Out Teach Mobile Education Evaluation: Final Report*, November 2017, Monash University.

supporting young people to understand their rights and engage as active citizens in their communities while establishing a baseline of respect for self and others.

The program aims to enable children and young people to enjoy their rights and respect the rights of others, apply their greater knowledge around their rights in a practical way, participate in their communities, and be empowered and responsible, with their voices heard and acknowledged. Participants have reported that they felt better equipped to share what they learned with their peers, empowered to advocate on issues important to them, and connected to services and opportunities that will support them post-program.

Mobilise has been delivered in a range of settings and communities in New South Wales, Queensland and Victoria. It is expected to expand in the near future to additional youth detention settings beyond its existing implementation. It has supported children from the age of 13.

Save the Children has particular familiarity with the initiatives and programs described above due to our involvement with their delivery.[10] There are many others already operating within the ACT and elsewhere in Australia that could readily be scaled and/or adapted and implemented in the ACT as part of a comprehensive, child-centred alternative to the current youth justice system. In this respect, we highlight the significant expertise about these matters that exists within the ACT and which is held by ACT service providers and stakeholders, and we encourage the ACT Government to work closely with that sector in developing more detailed service responses.[11]

c. Serious harmful behaviours

Save the Children recognises that there may be rare circumstances where it is appropriate for a child under the age of 14 to be mandated to receive services or supports.

These might include, for example, mandated psychological and other assessments or participation in therapeutic programs.

Services or supports should only be mandated when this is truly a last resort and in the best interests of that child. This is a very high standard to meet. For those requirements to be satisfied, it would need to be demonstrated that:

- the ACT Government had taken all possible steps prior to the mandated services and supports to address root causes, prevent the harmful behaviours or intervene earlier in time, including through appropriate wraparound supports for the child and their family
- the best interests of the child had been assessed in the comprehensive and holistic sense required by the Convention on the Rights of the Child – which is the source of the concept of 'the best interests of the child' – and taking into account how all of the Convention's underlying general principles interact, namely:
    - non-discrimination, which means that all children should be able to access all their rights without discrimination
    - best interests of the child, which requires an assessment of the child's best interests and requires governments to take all possible steps to ensure those interests can be satisfied
    - the right to life, survival and development, which is the entitlement of all children to the opportunity to develop healthily and reach their full potential

[10] Further information and data can be provided on request about the outcomes for program and service participants described in this submission.
[11] For example, we refer to and support the position paper on service gaps and needs in the ACTdeveloped by the Youth Coalition of the ACT and the ACT Raise the Age Coalition and referred to above.

  - respect for the views of the child, which is a right that children have arising from their inherent dignity and worth, as well as being a prerequisite for children's best interests to be met
- the child – and, to the extent appropriate, their family – had been fully informed about their options, and provided the opportunity to be heard and taken seriously about their experiences and preferences in relation to available services and supports
- the services or supports are mandated for the shortest appropriate time
- the decision to mandate the services or supports is subject to robust administrative and judicial review.

It would also be important to learn from the operation of existing civil law provisions allowing compulsion and involuntary intervention directed at children in certain very limited contexts, including any instances where their application has resulted in children's rights not being fully upheld.

Thank you for considering our submission. For further information or to discuss any aspect of our submission, please do not hesitate to contact me or Howard Choo, our Australian Policy and Advocacy Lead, at howard.choo@savethechildren.org.au.

Kind regards,

Paul Ronalds
CEO
Save the Children Australia
Direct Tel: +61 3 7002 1788
Email: paul.ronalds@savethechildren.org.au

Endorsed by:
Australian Child Rights Taskforce
Contact: James McDougall, james.mcdougall@acu.edu.au

ACT Justice and Community Safety Directorate and
ACT Community Services Directorate

BY EMAIL 5 August 2021

To whom it may concern,

RE: Raising the minimum age of criminal responsibility

The Australian National University ('ANU') Law Reform and Social Justice ('LRSJ') Indigenous Reconciliation Project ('Indigenous Reconciliation Project') welcomes the opportunity to provide this submission to the ACT Government on raising the minimum age of criminal responsibility ('MACR'), responding to Questions 1, 2, 5, 8 and 9 of the Discussion Paper on 'Raising the minimum age of criminal responsibility.' The project also welcomes the opportunity for this submission to be made public.

The ANU LRSJ Indigenous Reconciliation Project falls within the ANU College of Law's LRSJ program, which supports the integration of law reform and principles of social justice into teaching, research, and study across the College. Members of this group are students engaged with a wide range of projects aimed towards exploring the law's complex role in society, and the part that lawyers play, in using the law to promote social justice and stability.

The recommendations provided are based on research, rather than informed by the lived experience of this submission's authors. None of our members identify as Aboriginal and/or Torres Strait Islander. In noting that the MACR disproportionately impacts First Nations peoples, we implore your office to consider this as a step towards reconciliation. The first step in achieving reconciliation must involve decreasing the overrepresentation of Aboriginal and Torres Strait Islander people in the youth justice system.

If further information is required, please contact us at anulrsj.indigenousproject@gmail.com.

On behalf of the ANU LRSJ Indigenous Reconciliation Project:
Authors: Ali El-Zein, Dimitrios Bezos, Petra Lejins, Saskia Teale, Min Kyung Kim and Sukriti Kapoor
Edited by: Eve Walker, Ali El-Zein and Amogh Ananth
Under the supervision of: Professor Lorana Bartels (ANU Centre for Social Research and Methods)

Contents

Q1: Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured? 4

1. Introduction.....4

2. International Recommendations 4

3. Effects on the Child 5

5. Conclusion 6

Q2: Should *doli incapax* have any role if the MACR is raised? 7

1. Introduction.....7

2. Introductory Issues Concerning *Doli Incapax* 7

2.1 Engagement with the Juvenile Justice System 7

2.2 Onus of Proof.....8

3. Abolition: MACR = 14 8

4. Continued Use: Exceptions to MACR for Certain Offences.....9

4.1 Premise 9

4.2 The Presumption.....9

4.3 Rebutting the Presumption 11

4.4 Police Understanding.....13

5. Continued Use: MACR < 14 13

6. Behavioural Treatment 13

7. Recommendations.....14

Q4: What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed – to better support this cohort? 15

1. Introduction.....15

2. The Current Juvenile Justice System in Australia 15

4. ARACY's Three-level Preventative Approach 16

4.1 Primary Prevention 16

4.1.1 Social skill development and conflict management 17

4.1.2 Peer Resistance 17

4.2 Secondary Prevention 18

4.2.1 Family Therapy.....18

4.2.2 Parental Training 19

4.3 Tertiary Prevention 20

Conclusion 20

Q5. How should the Government/Community service providers identify and respond to the needs of the children and young people before harmful behaviour/ crisis occurs? 22

1. Introduction.....22

Q8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours? 25

2. Current national and international examples 25

3. Threshold considerations 26

4. Age.....26

5. Lack of voluntary engagement 27

6. Serious Harmful Behaviour 28

7. Continuing harmful behaviour.....28

Conclusion 28

Q9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

1. Statistical context of serious offending by children under the MACR.....30

2. Risk factors contributing to serious offending for young people 31

3. Detention for children who commit serious offences:.....31

4. The implications of the James Bulger Case.....33

5. Early intervention, prevention and diversion: 34

Q1: Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

1. Introduction

This Submission calls for the ACT Government to raise the MACR to 14 years old, with no exceptions for serious offences or young people who have been apprehended more than once. We believe there should be consistency and that the MACR should not be tailored to specific offences. As having an MACR is within the Territory's purview, the ACT has an opportunity to be an exemplary human rights jurisdiction. This is in line with s 20(4) of the *Human Rights Act 2004* (ACT) which states '[a] convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted'.[1]

2. International Recommendations

2.1 United Nations

The United Nations Committee on the Rights of the Child strongly opposes exceptions to the MACR.[2] Instead, it maintains that there must be 'one standardized age below which children cannot be held responsible in criminal law, without exception'.[3] Exceptions for serious crimes are often based on community concern and a 'tough on crime' mindset, rather than a rational understanding of how a child is developing.[4]

2.2 International Comparisons

The ACT's current MACR of 10 is inconsistent with international norms. For instance, the MACR in Austria, Spain, Germany and Hungary is 14, whilst it is 15 in Sweden and Denmark and 16 in Portugal.[5] Further, most of these jurisdictions have no exceptions.[6] Even though our inconsistency with other jurisdictions does not solely demonstrate the need to increase our MACR, it demonstrates that it is feasible to raise the MACR with no exceptions.

---

[1] *Human Rights Act 2004* (ACT) s 20(4).
[2] Committee on the Rights of the Child, *General Comment No. 24 (2019), replacing General Comment No. 10 (2007) Children's rights in juvenile justice*, UN Doc CRC/C/GC/24 (18 September 2019).
[3] Ibid para 25.
[4] Australia Human Rights Commission, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, *Age of Criminal Responsibility Working Group* (26 February 2020) 10.
[5] Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Report, 2017) 3.
[6] Ibid.

3. Effects on the Child

3.1 Disadvantaged Backgrounds

Children who commit crimes are very likely to have experienced adversity and trauma such as physical or sexual abuse, significant economic disadvantage and neglect.[7] For example, the Australian Institute of Health and Welfare found that children in the youth justice system are 15 times more likely to be involved with child protection than children in the general community.[8] This is discussed further in Question 9 of this submission.

3.2 Neurological Development

From a scientific perspective, the Royal Australasian College of Physicians agrees that an MACR of 10 is 'inappropriate in light of the physical and neurocognitive vulnerabilities experienced by children'.[9] Professor Chris Cunneen's research found that, from the experience of a detention centre manager, 12 and 13-year-old children 'can't really link behaviour and consequences'.[10] Australian research demonstrates that this is the consensus among 'legal stakeholders and [juvenile] justice practitioners'.[11] This issue, and *doli incapax*, are discussed further in Question 2 of this submission.

3.3 Recidivism

Research demonstrates that, the earlier children interact with the Juvenile justice system, 'the more likely they are to reoffend'.[12] For example, the Australian Institute of Health and Welfare found that of the Australian children aged 10 to 16 who were released from sentenced detention between 2017 and 2018, '40% return[ed] to sentenced supervision within 6 months and … 80% return[ed] within 12 months'.[13] Assuming that the justice system's main priority is to keep the general public safe, this figure undermines any claim that detention sentencing is able to rehabilitate young people. Therefore, by implementing an MACR of 14 for all offences, the ACT can take a small step to reduce the number of young people.

4. Disproportionate Impacts on Indigenous Children

Of the young people aged between 10 and 17 who were sentenced in 2017/2018, 36% were Indigenous peoples.[14] This is horrifying, when considering the population of Indigenous peoples

---

[7] Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17 (2) *Youth Justice*
[8] Ibid.
[9] Public Interest Advocacy Centre, Submission to Council of Attorney-General- *Age of Criminal Responsibility Working group*, 28 February 2020, 3.
[10] Ibid 12.
[11] Ibid.
[12] Australia Human Rights Commission, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, *Age of Criminal Responsibility Working Group* (26 February 2020) 11.
[13] Australian Institute of Health, Young people returning to sentenced youth justice supervision (2018-2019), 13
[14]Ibid, 6.

in Australia is approximately 5%.[15] Further, in terms of recidivism, the Australian Institute of Health and Welfare found that Indigenous peoples 'were … slightly more likely than non-[I]ndigenous young people to return with a detention sentence within 12 months'.[16] This reinforces the idea that increasing the MACR will lead to fewer Indigenous children becoming Stuck and ingrained in the juvenile justice system.

5. Conclusion

This submission argues that there should be no exceptions to the MACR of 14. Allowing exceptions for certain offences, such as murder, will unnecessarily complicate how children are treated by the legal system. On a more principled basis, however, having two different standards is hypocritical, because adopting a separate standard for certain offences negates the evidence-based research about children's maturity, the increased rate of recidivism once a child enters detention, and the fact that most children who become involved in the justice system are disadvantaged and/or Indigenous.

[15] Jenns Korf, 'Aboriginal Population in Australia', *Creative Spirits*, (24 April 2021) <https://www.creativespirits.info/aboriginalculture/people/aboriginal-population-in-australia>.
[16] Australian Institute of Health, Young people returning to sentenced youth justice supervision (2018-2019), 13.

Q2: Should *doli incapax* have any role if the MACR is raised?

1. Introduction

The presumption of *doli incapax* ('the presumption') is that a child is unable to form criminal intent as their age inhibits their capacity to distinguish between what may be considered 'seriously wrong' and 'merely naughty' acts. This issue is highly complex and there are many issues surrounding its use. However, in certain circumstances, it may still have a role to play if the MACR is to be raised. Clear legislative framework would need to be enacted if this were the case to ensure that consistent outcomes are applied by practitioners.

This submission will discuss the issues concerning *doli incapax* (Section 2), and then propose solutions in terms of *doli incapax* (Sections 3-5), if, and when, the MACR is raised. Recommendations are summarised in Section 7.

2. Introductory Issues Concerning *Doli Incapax*

2.1 Engagement with the Juvenile Justice System

2.1.1 Prolonged Process

The principal difficulty with this presumption is its rebuttal. This process is often lengthy. Even in the case of minor criminal charges, *doli incapax* frequently results in prolonged court proceedings spanning up to 15 months.[17] During this time, the young person is subject to significant interaction with the juvenile justice system. In some cases, they are 'required to undergo what can be a difficult and emotional assessment … [meaning] the child is already in the [criminal justice] system and is subject to the negative impacts of that exposure'.[18]

As noted by National Legal Aid, '[t]his period in the system permanently impacts the development and rehabilitation of children and is in itself criminogenic.'[19] Essentially, the purpose of the presumption, to protect children, is defeated by the prolonged exposure to the justice system. In order for *doli incapax* to operate in a way that protects children, their exposure to the justice system should be minimised.

---

[17] National Legal Aid, Submission to Council of Attorneys-General, *Age of Criminal Responsibility Working Group review* (28/2/2020), 14, <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/39267/NLA-sub-CAG-age-of-criminal-responsibility-28-02-20.pdf> ('*NLA MACR Submission*').

[18] Victoria Legal Aid, *Lift the age of criminal responsibility to give children a chance to reach their potential* (Web Page) <Lift the age of criminal responsibility to give children a chance to reach their potential | Victoria Legal Aid> ('*VLA MACR'*).

[19] *NLA MACR Submission* (n 2) 22.

2.1.2 Remand or Custody

During the prolonged process of discharging or rebutting the presumption, the young person is held in remand, sometimes in correctional facilities.[20] This is contrary to the interests of the young person and violates ss 19(2) and 20(1) of the *Human Rights Act 2004* (ACT), which require accused persons be kept separate from convicted persons, and accused child be segregated from accused adults respectively. The consequences of this include 'separation from family and community, disruption to education, the negative effects of associations with sentenced young people and lack of access to therapeutic programs.'[21] Therefore, *doli incapax* currently operates in practice to the detriment of children or young people, often harmfully exposing them to the juvenile justice system.

2.2 Onus of Proof

Studies have shown that, in addition to exposing children and young people to the juvenile justice system, *doli incapax* has effectively become a defence, rather than a presumption. In some jurisdictions, such as Victoria, the 'defence' of *doli incapax* may not even be raised.[22] In Victoria the onus is on the defence to establish *doli incapax*, meaning that rather than being assumed, it must be established to the court by the defence. The young person is exposed to the juvenile justice system to a greater degree.

In contrast, the ACT legislation clearly establishes that the onus of rebutting *doli incapax* is on the prosecution.[23] It is important to ensure that this position remains in a reformed juvenile justice system rather than adopting the potentially detrimental policy of placing the onus on the defence.

3. Abolition: MACR = 14

In the alternative to the position detailed above, if the MACR is raised to 14, and there are no exceptions, then *doli incapax* would become redundant.

Currently, *doli incapax* is in place to protect children aged 10 to 14. If the MACR is raised to 14, and there are no exceptions to this raised age, then there is no need for *doli incapax*, as children aged between 10 and 14 would not be able to be criminally prosecuted.

---

[20] Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* ('*Doli Incapax in Victoria*').
[21] Ibid 26.
[22] See, eg, *Doli Incapax in Victoria* (n 3).
[23] *Criminal Code 2002* (ACT) s 26(3).

4. Continued Use: Exceptions to MACR for Certain Offences

4.1 Premise

If children aged between 10 and 14 may be prosecuted for certain offences when exceptions apply, *doli incapax* should remain in place for children younger than 14 to rely upon as a presumption. This is in accordance with observations made by the United Nations Committee on the Rights of the Child, which recommended that *doli incapax* should be available for persons under 14 years, if they can be criminally prosecuted.[24] However, as outlined above, there is a need to alter *doli incapax*, as well as for other methods of reducing criminalisation and recidivism. Thus, certain alterations ought to be made to the presumption to ensure its usefulness and efficacy.

4.2 The Presumption

4.2.1 Onus of Proof

The onus of proof with regards to *doli incapax* has arguably come to function as a defence in Victoria rather than a presumption the prosecution must rebut. If *doli incapax* were to be retained for young people aged under 14, it is essential that an equivalent provision to s 26(3) of the *Criminal Code 2002* (ACT) be included,[25] to ensure that the burden remains on the prosecution to rebut the presumption.

Ensuring that the prosecution has the onus to rebut the presumption may reduce the child's exposure to the juvenile justice system. The present nature of *doli incapax* means that, until the presumption is rebutted, the young person may be held in custody or released on bail. Meaning, they may be subject to strict curfews and frequent police checks for multiple months, before *doli incapax* even comes into effect.[26] Thus, the reversal of the process means that accused children are already in contact with the juvenile justice system.

Between 2016 and 2018, in New South Wales ('NSW'), young people aged 10-13 were 15 times more likely to be convicted of criminal offences than those who successfully relied upon *doli incapax*.[27] Ensuring that *doli incapax* is a rebuttable presumption may also result in a fairer administration of justice. The nature of evidence the prosecution may use to rebut the presumption will be discussed in Sections 4.2.3 and 4.3.

---

[24] UN Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth period reports of Australia* (30/9/2019), 48(a).
[25] Section 26(3) provides: 'The burden of proving that a child knows that his or her conduct is wrong is on the prosecution'.
[26] See, eg, *NLA MACR Submission* (n 1) 24.
[27] *NLA MACR Submission* (n 1) 28-9.

4.2.2 Seriously Wrong

C v DPP[28] clearly outlines the 'test' for rebutting *doli incapax*, and has been relied upon by courts within New South Wales ('NSW') .[29] Expansion of this principle within ACT legislation would not only bring it in line with an increased human rights standard, but also enable young people living on the border of the ACT to receive a consistent outcome than what they would expect in regional NSW. In addition to requiring the onus to be on the prosecution to rebut the presumption (see above), Lord Lowry held that it must be shown that 'in doing that act he [the young person] knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief,'[30] for the prosecution to rebut the presumption. This distinction is of significance, as it provides a clearer standard for the evidence required to rebut the presumption, and it must be enshrined in legislation as it is central to the doctrine of *doli incapax*. However, the current ACT legislation does not make this sufficiently clear. The *Criminal Code 2002* (ACT) only provides that the young person must have known that their act was 'wrong.'[31]

Tasmanian legislation requires the prosecution to prove that the child had *capacity* to determine whether their act was wrong.[32] However, as noted above, prolonged psychological assessments are frequently to the detriment of the child. In contrast, the distinction of 'seriously wrong', as opposed to 'mere naughtiness or mischief', imports considerations beyond pure mental capacity, including the circumstances and actions of the young person.[33] Thus, the distinction allows for a more effective assessment of the young person's knowledge of the 'wrongness' of their act, whilst serving to minimise the child's interaction with the juvenile justice system.

If *doli incapax* were to continue to operate, the ACT legislation should be amended to clarify that the prosecution must prove that the young person knew their act was *seriously wrong, as opposed to mere naughtiness or mischief.*
Section 4.3 will discuss how the prosecution may seek to do this.

4.2.3 Impact of Age

An important element of *doli incapax* is the acknowledgement that 'the lower the child is in the scale between … [10 and 14], the stronger the evidence necessary to rebut the presumption, because in the case of an eight year old it is conclusively presumed he is incapable of committing a crime.'[34] Inversely, this qualification makes it comparatively easier for the prosecution to rebut *doli incapax*, the closer the young person is to 14. Indeed, this is a 'practical way of

---

[28] *C v DPP* (1996) 1 AC 1 ('*C v DPP*').
[29] See, eg, *R v CRH* (Unreported, NSWCCA, Smart, Hidden and Newman JJ, 18 December 1996) ('*C v CRH*').
[30] *C v DPP* 38 (n 13).
[31] *Crimes Act 2002* (ACT) s 26(1).
[32] *Criminal Code Act 1924* (TAS) s 18(2).
[33] NJ Lennings and CJ Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry Psychology and Law* 1-3.
[34] *B v R* (1960) 44 Cr App R 1, 3, confirmed in Australia by, eg, *R (a child) v Whitty* (1993) 66 A Crim R 462.

acknowledging young people's developing capacities … [and] allows for a gradual transition to full criminal responsibility.'[35]

> *"Everyone's been a 10 year old, everyone knows a ten year old, we all know our children belong in schools, not homes and playgrounds, not in prison cells."*[36]
>
> - Cheryl Axleby, Co-Chair of Change The Record

4.3 Rebutting the Presumption

4.3.1 The Act Itself

Currently, the prosecution cannot rely upon the act that the young person (allegedly) committed as evidence that they knew their act was seriously wrong. This is best seen in *C v DPP*, where it was held that 'the evidence to prove the defendant's guilty knowledge ... must not be the mere proof of the doing of the act charged, however horrifying or obviously wrong that act may be.'[37] As such, the commission of the act itself cannot be used as evidence to rebut *doli incapax*, though, as discussed below, the circumstances surrounding the commission of the act may be used.

4.3.2 Statements or Admissions Made by the Child

Statements made by the child currently *may* be used to rebut *doli incapax*, subject to the normal rules of evidence (including the child's right to silence). However, this has caused multiple issues to arise, principally, that of exposing the child to the juvenile justice system to a significant extent, via interviews.[38] Furthermore, the child's statements following the offence may not reflect their mental state at the time of the offence; having potentially been arrested or at least interviewed by police, the child would likely have come to the conclusion that their act was wrong when they are interviewed.[39] Nonetheless, the child's own statements may be crucial in determining whether or not the child knew their act was seriously wrong at the time.

Admissions made by the child ought to be admissible, though they must be subject to the ordinary rules of evidence, including the right to silence. Further, the child's statement must be

---

[35] Australian Law Reform Commission, *Seen and heard: Priority for children in the legal process* (Report No 84, September 1997) ch 18 para 20.
The prosecution must prove beyond a reasonable doubt that 'this' child knew that 'this' offence was seriously wrong and not just naughty.
[36] Cheryl Axleby, *Raising the Age of criminal responsibility and disproportionate impacts on Indigenous Youth* Online Webinar (28 April 2021). <https://law.anu.edu.au/event/webinar/raising-age-criminal-responsibility-and-disproportionate-impacts-indigenous-youth>
[37] *C v DPP* (n 13) 38.
[38] See, eg, *Doli Incapax in Victoria* (n 3).
[39] *Children's Law News* (n 25).

consistent with the standard required to rebut *doli incapax*, namely, it must be strong and clear evidence that is beyond reasonable doubt, is unequivocal and free from contradiction.
The onus being clearly on the prosecution to rebut *doli incapax* may serve to minimise the child's exposure to the juvenile justice system as it will not require the defence to subject the child to extensive interviews, to gather evidence establishing the child's incapacity.

Measures should be put in place to ensure that the emphasis on the prosecution's onus to rebut the presumption does not result in the prosecution subjecting the child to extensive interviews by police or psychiatrists. Thus, legislation should 'ensure that children who are "doli" are identified and assessed prior to being put on remand to prevent the disadvantage associated with this point of contact with the justice system.'[40]

4.3.3 Behaviour and Circumstances Surrounding the Commission of the Act

Though evidence of the act itself, however horrifying, cannot be relied upon to rebut the presumption, the 'surrounding circumstances including conduct closely associated with the act constituting the offence may be considered for the purpose of proving the relevant capacity in relation to that offence.'[41]

In light of the many detriments associated with using the child's own testimony, and the problems with using evidence as described in Sections 4.3.5,6, the child's behaviour and actions before and after the commission of the act should be the principal evidence used to rebut the presumption. As the majority noted in the case of *Follng*, 'such conduct may include asserting a false alibi, rendering a victim incapable of identifying the accused or preventing a victim from summoning assistance during the commission of an offence.'[42] Other examples of conduct suggesting an appreciation of the wrongness of an act may include where a defendant child 'persistently lied, pretended to find the body of his cousin (of whom he was accused of attempted murder) called the police and pretended that he saw the assailants run away.'[43]

4.3.4 Prior Criminal History

Prior convictions or charges may indicate that the child is aware of the wrongness of their act. However, this is not conclusive, as a 'child who has a criminal history is not precluded from raising doli incapax as an issue at a hearing for a later offence'.[44] Crucially, '[t]he elements of the offence and the complexity of the charge should also be carefully considered.'[45]

---

[40] *Doli Incapax in Victoria* (n 3) 26.
[41] *The Queen v Jay Michael Folling* (QLD SCCA, 26/3/98) 6.
[42] Ibid.
[43] *LMS* (1996) 2 Cr App R 50, 54.
[44] *Children's Law News* (n 25).
[45] Ibid.

4.3.5 Evidence from Parents, Teachers and Home Background

Currently a child's upbringing and circumstances, as well as evidence from their parents and teachers, are considered. However, relying on evidence from parents or teachers may be detrimental to the child, as it may 'adversely impact a child's relationships and rehabilitation', due to undermined trust.[46] As such, it may be beneficial for evidence from parents to be subject to limits. Further, evidence from teachers could be limited to only discussions to which the child was privy about the wrongness or illegality of certain acts.

Evidence about the child's upbringing or home background may be beneficial to the child, for example, if come 'from a community where there is less emphasis placed on ownership of objects [and] may not understand that taking a bike from another child is seriously wrong.'[47] However, for serious offences, this may not be relevant, though the child's education and social circumstances may be. Further, 'the prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct.'[48]

Such considerations may give scope to consider a child's Indigenous status, as this may be relevant in rebutting or defending the presumption.

4.4 Police Understanding

As noted by National Legal Aid, a lack of police awareness and understanding of *doli incapax* is a significant contributor to children being subject to interaction with the juvenile justice system. Proper awareness of the presumption would have prevented or minimised this.[49] Thus, it is critical that police are aware of the nature of *doli incapax*, which presumes that children aged 10 to 14 are presumed to be *incapable* of understanding the nature of crime.

5. Continued Use: MACR < 14

Should the MACR be raised to an age lower than 14, with or without exceptions, *doli incapax* ought to apply as a rebuttable presumption with reference to the reforms outlined in Section 4 above.

6. Behavioural Treatment

Though *doli incapax* may be beneficial to children, it is not a substitute for seeking to address the behaviour which has brought the child into contact with the juvenile justice system.[50] It is critical

[46] *NLA MACR Submission* (n 1) 22.
[47] *Children's Law News* (n 25).
[48] *RP v The Queen* (2016) 259 CLR 641, paraphrased in *NLA MACR Submission* (n 1).
[49] Ibid 27-9.
[50] Ibid 25.

that the child be supported and treatment or therapy be available to prevent future misconduct and/or criminalisation.

7. Recommendations

Doli incapax is not a replacement for interventions which prevent or minimise a child's interaction with the juvenile justice system, including education, rehabilitation, treatment or therapy.

If there is a possibility of a child under 14 years of age being criminally prosecuted, *doli incapax* should remain in force, though it should be codified in legislation to reflect the following recommendations:

1) To rebut the presumption, the prosecution must show that the child knew that their act was seriously wrong, as opposed to merely naughty or mischievous.
2) The standard of proof required by the prosecution to rebut the presumption should be strong and clear evidence that is beyond reasonable doubt, is unequivocal and free from contradiction.
3) The commission of the act itself cannot rebut the presumption, however horrifying or obviously wrong that act may be.
4) The following rules of evidence for rebutting the presumption should be put in place:
    a) Statements made by the child are subject to the normal rules of evidence, including the right to silence.
    b) There are limits to the length and number of interviews the child may be subject to, in order to gather evidence to rebut the presumption.
    c) The circumstances surrounding the commission of the act are admissible and preferred as evidence, due to the objective nature of this evidence.
    d) Evidence from parents or teachers may be admissible, but should be subject to limitations, to preserve the child's trust in and relationships with these figures.
    e) The child's background, education and upbringing are admissible, where relevant.
    f) Evidence from psychologists or psychiatrists is admissible, subject to the normal rules of evidence, though this should be considered by the court for the potential of bias.
5) Police ought to be educated on the nature of *doli incapax*, which presumes children to be incapable of crime.

Q4: What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed – to better support this cohort?

1. Introduction

The *Discussion Paper's* two main rationales behind raising the MACR are: (1) children under the age of 14 who engage in violent behaviour often do so as a result of trauma, mental health issues, abuse or disability; and (2) early involvement with the juvenile justice system negatively impacts the neurological and social development of children under the age of 14 in a way that can lead to further offending.[51]

To address these issues, the alternative model to the juvenile justice system needs to identify the causes of offending on a case-by-case basis, and then refer juveniles involved in problematic behaviours to appropriate secondary services to address the causes of these behaviours. This will have the effect of diverting the young people from contact with the juvenile justice system. Ultimately, addressing systemic issues related to antisocial behaviours and preventing early exposure to the justice system will reduce further offending and end the cycle of juvenile justice.

This part of the submission will begin with a brief summary of the current juvenile justice system and existing secondary services. Then it will identify the gaps in the existing system, particularly concerning the lack of early intervention programs. Lastly, some suggestions by the Australian Research Alliance for Children and Youth (ARACY) will be discussed.

2. The Current Juvenile Justice System in Australia

The entry into the justice system is initiated with a police investigation and, if they are aged between 10 and 17 at the time of the alleged offence, then they are dealt with under the juvenile justice system.[52] In Australia, children and young people who have committed, or allegedly committed, criminal offences are managed at a state and territory level.[53]

Legislation in each of Australia's jurisdictions recognises the importance of diversion of juveniles from the juvenile justice system as one of the core principles of juvenile justice.[54] For

---

[51] ACT Government, 'Discussion Paper: Raising the minimum age of criminal responsibility' (Discussion Paper), 2.
[52] Australian Institute of Health and Welfare, 'About', *Youth Justice*, (Web Page, 21 July 2021) <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/about>.
[53] Australian Institute of Health and Welfare, 'National data on the health of justice-involved young people: a feasibility study 2016-17' (Research Report No JUV 125, Canberra) 1. <https://www.aihw.gov.au/getmedia/4d24014b-dc78-4948-a9c4-6a80a91a3134/aihw-juv-125.pdf.aspx?inline=true>.
[54] K Richards, NSW Government, 'What makes juvenile offenders different from adult offenders', *Children's Court of NSW Resource Handbook* (Web Page, 21 July 2021) <https://www.judcom.nsw.gov.au/publications/benchbks/children/cm_juvenile_offenders_different.html#ftn.d5e10616>.

example, s 94(1)(f) of the *Children and Young People Act 2008* (ACT) states that detention in custody is to be used as a 'last resort and for the minimum time necessary'.[55]

Even after the charge is proven at a Children's Court hearing, leading to a conviction, non-custodial penalties such as fines and community-based supervision are preferred over detention.[56] Community-based supervision and detention are the two main types of supervised legal orders that the Court can issue:

- **Community-based supervision**: about 84% of young people under supervision fell into this group and, which composed of those who reside in the community with supervision from the juvenile justice department.[57]
- **Detention**: the remaining 16% were in a detention facility or a juvenile justice centre.[58]

3. Gaps in Existing Services

This submission proposes that the alternative model to the juvenile justice system be centred around introducing children and parent education as an early intervention strategy, to specifically address the underlying causes of youth offending. In particular, the three-level preventative approach suggested by the Australian Research Alliance for Children and Youth ('ARACY') to prevent violent behaviour in children aged between 10 and 14 years should be adopted.[59] For their 'Preventing Youth Violence' project, ARACY reviewed numerous evidence-based programs that have been effective in reducing violent behaviours in target groups.

4. ARACY's Three-level Preventative Approach

4.1 Primary Prevention

The suggested framework begins with early intervention programs that are aimed at educating all young people aged between 10 and 14. While some of the mentioned research has been undertaken in the United States ('US'), the results may be applicable internationally; particularly in developed countries, where research has shown that violent and antisocial behaviour works in similar ways.[60] It is acknowledged, however, that there may also be a need to adapt programs to

---

[55] *Children and Young People Act 2008* (ACT).
[56] Ibid.
[57] Australian Institute of Health and Welfare, 'National data on the health of justice-involved young people: a feasibility study 2016-17' (Research Report No JUV 125, Canberra) 3 <https://www.aihw.gov.au/getmedia/4d24014b-dc78-4948-a9c4-6a80a91a3134/aihw-juv-125.pdf.aspx?inline=true>.
[58] Ibid.
[59] Sherly A Hemphill and Rachel Smith, 'Preventing youth violence. What does and doesn't work and why? An overview of the evidence on approaches and programs', *Australian Research Alliance for Children & Youth*, 19 <https://www.aracy.org.au/publications-resources/command/download_file/id/122/filename/Preventing_Youth_Violence_-_What_does_and_doesn't_work_and_why.pdf>.
[60] Ibid 26.

ensure that they are appropriate to the local context. Ensuring they are culturally appropriate for Indigenous participants would be an example of this.

4.1.1 Social skill development and conflict management

Social development training, which aims to build on social skills through improving communication skills and promoting cooperative behaviour, has been observed to be effective in the US.[61] Behavioural problems and substance disorders are often linked with offending at a young age. Furthermore, they are often prevalent combination with certain psychosocial parameters, such as increased externalising and internalising behaviours and symptoms, lack of ability to cope with emotions and social isolation.[62] Therefore, social development training aimed at correcting these precursor behavioural issues may eliminate or reduce some risk factors associated with youth offending.

The 'Responding in Peaceful and Positive Ways' program in the US specifically targeted middle and junior high school students aged between 10 and14.[63] By introducing the students to conflict scenarios and encouraging them to choose non-violence strategies, this conflict resolution program resulted in reduction in various markers for violence, such as less frequent physical aggression within the cohort at a six-month follow-up.[64] The 'Too Good for Violence' program incorporated social learning theory into the US' justice system by modelling and rewarding pro-social skills. The program reported a 45% reduction in intention to fight amongst the target group.[65]

4.1.2 Peer Resistance

While individual social development is crucial in behaviour correction, scientific research shows that children and adolescents are more likely to engage in behaviour that they perceive as 'risky' and the decision to engage in such risky behaviour is highly influenced by their peers.[66] One study has suggested that, while at risk youths do not lack the capacity to engage in risk/reward assessment, they consider these risks and rewards in a social or emotional context; something their adult counterparts are less likely to do.[67]

---

[61] Ibid.
[62] Clio Belle Weisman and Paul Montgomery, 'Functional Family Therapy (FFT) for Behaviour Disordered Youth Aged 10-18: An Overview of Reviews' 2019 29(3) *SAGE Journals*.
[63] National Gang Centre (US), 'Responding in Peaceful and Positive Ways (RiPP)', *Strategic Planning Tool* (Web Page, 21 July 2021) <https://nationalgangcenter.ojp.gov/spt/Programs/106>.
[64] Ibid.
[65] The US Government, 'Too Good for Violence' (Web Page, 21 July 2021) <https://youth.gov/content/too-good-violence>.
[66] K Richards, NSW Government, 'What makes juvenile offenders different from adult offenders', *Children's Court of NSW Resource Handbook* (Web Page, 21 July 2021) <https://www.judcom.nsw.gov.au/publications/benchbks/children/cm_juvenile_offenders_different.html#ftn.d5e10616>.
[67] Laurence Steinberg, 'Cognitive and affective development in adolescence' (2005) 9(2) *Trends in Cognitive Sciences*.

4.2 Secondary Prevention

Secondary preventative steps still target children aged 10 to14 which have yet to make contact with the juvenile justice system but are identified as being at higher risk of doing so.[68] It is well established in the relevant literature that common risk factors for offending children include: unstable and unhealthy living conditions, including family breakdown, abuse, poverty, family criminality, contact with the child welfare system, including removal from family care, education difficulties, anti-social or criminal role models, substance abuse, poor social skills, traumatic experiences, such as physical or emotional abuse neglect, abandonment, and poor mental health.[69] Risk factors for re-offending trajectories for serious young people include: prenatal risk factors, which can lead to foetal alcohol spectrum disorder,[70] childhood maltreatment, including experiences of trauma neglect, and physical or sexual abuse, childhood personality disorders,[71] neuro-psychological abnormalities, cognitive disabilities, reduced impulse control, below average intelligence, and extreme child temperaments.[72]

4.2.1 Family Therapy

Another intervention approach derived from the US is the Functional Family Therapy ('FFT') program, which involves a systemic approach to family therapy to provide a short-term intervention, generally consisting of 30 hours of treatment.[73] Similar to the rationale behind social skill development, FFT aims to address and correct the underlying behavioural issues that manifest in children aged between 10 and 14, which are potential risk factors for youth offending. This is achieved through identifying and modifying maladaptive family dynamics and communication patterns, thereby addressing familial dysfunction.[74]

Australia has also adopted the general framework of FFT into a child welfare setting, to be used to work with families with children and young people aged between 0–18, after referral from

---

[68] Sherly A Hemphill and Rachel Smith, 'Preventing youth violence. What does and doesn't work and why? An overview of the evidence on approaches and programs', *Australian Research Alliance for Children & Youth*, 26 <https://www.aracy.org.au/publications-resources/command/download_file/id/122/filename/Preventing_Youth_Violence_-_What_does_and_doesn't_work_and_why.pdf>.

[69] Anna C Baldry, Andreas Kapardis *Risk Assessment for Juvenile Violent Offending*, Willan Publishing, 2012 ProQuest Ebook Central 61. <https://ebookcentral-proquest-com.virtual.anu.edu.au/lib/anu/detail.action?docID=306146>

[70] Ibid 65.

[71] Sula Wolff, R. Alexander A. McCall Smith "Child Homicide And The Law: Implications Of The Judgements Of The European Court Of Human Rights In The Case Of The Children Who Killed James Bulger" Child Psychology And Psychiatry Review 5 (3) (2000)) 135.

[72] Ibid.

[73] Ibid 31.

[74] Clio Belle Weisman and Paul Montgomery, 'Functional Family Therapy (FFT) for Behaviour Disordered Youth Aged 10-18: An Overview of Reviews' 2019 29(3) *SAGE Journals*.

secondary services, such as child protective or mental health services[75]. The evidence of the efficacy of the framework is well established with 60% lower recidivism rates and a 50% reduction in substance abuse in comparison to alternative programs and treatments.[76]

4.2.2 Parental Training

Like FFT, parental training is another example of a relationship-level approach that aims to develop a positive environment within young people's home to encourage good behaviour.[77] In contrast with FFT, which targets the family dynamic as a whole, parental training specifically focuses on the interaction between young people who are at risk of offending and their parents.[78] The program recognises that young people manifesting violent or anti-social behaviours need guidance in managing emotions, and thus incorporates teaching parents to use behaviour management techniques.[79] Other parts of the program reflect FFT, with respect to teaching effective communication and how to establish clear expectations.

In Australia, an example of an effective parental training program is the Triple P Positive Parenting Program.[80] Its target audience is particularly young, as it is designed for parents and carers of children aged 0 to 16. It is a blended, multi-level intervention, which begins with a more universal approach at Level 1, with generalised parenting information campaigns, that gradually increases in intensity and narrows in breadth of reach.[81] This program also offers a specialist program for those with children with a disability or emotional disorder, and accommodates children from diverse socio-economic, cultural, and ethnic backgrounds, as well as Indigenous parents and carers.

Studies have shown that the Triple P Positive Parenting Program significantly reduced disruptive behaviours in children with long-term effects. The improvements were observed to be maintained at six and 12-month follow-ups.[82]

---

[75] Anglicare Victoria, *Family Functional Therapy (FTT) Delivering better outcomes for Youth Justice* (Report, 2020) < https://www.anglicarevic.org.au/wp-content/uploads/2021/02/Functional-Family-Therapy.pdf>
[76] Ibid.
[77] Sherly A Hemphill and Rachel Smith, Australian Research Alliance for Children & Youth, 'Preventing youth violence. What does and doesn't work and why? An overview of the evidence on approaches and programs' 32 <https://www.aracy.org.au/publications-resources/command/download_file/id/122/filename/Preventing_Youth_Violence_-_What_does_and_doesn't_work_and_why.pdf>.
[78] Ibid.
[79] Ibid.
[80] Australian Institute of Family Studies, 'Triple P Positive Parenting Program' *Communities for Children Facilitating Partners Evidence-based programme profile* (Web Page, 23 July 2021) <https://apps.aifs.gov.au/cfca/guidebook/programs/triple-p-positive-parenting-program>.
[81] Matthew R Sanders, 'Development, Evaluation, and Multinational Dissemination of the Triple P-Postivie Parenting Program' (2012) 8 *Annual Review of Clinical Psychology* 348.
[82] Ireen de Graaf et al, 'Effectiveness of the Triple P Positive Parenting Program on Behavioural Problems in Children: A Meta-Analysis' (2008) 32(5) *Behaviour Modifications*.

4.3 Tertiary Prevention

While not mentioned by the ARACY, mental health services during incarceration may also pose a potential intervention point for reaching young people. Young people in the juvenile justice system are disproportionately affected by mental health issues. The 2009 Young People in Custody Health Survey found that approximately 87% of young people within the NSW juvenile justice detention system (eight juvenile justice centres and one maximum security juvenile correctional centre) had at least one psychological disorder and 72% were found to have two or more psychological disorders.[83] Over 60% had a history of child abuse or trauma.[84]

Yet, studies show that these young people lack access to the health care system prior to incarceration.[85] This can be due to a combination of factors, such as being disconnected from family, school, or the community.[86] Therefore, detention provides a unique opportunity to identify and treat the underlying mental health issue that may have contributed to offending, thereby reducing re-offending. Furthermore, connecting with the young people during this time can be critical in facilitating their access to adequate health care beyond their incarceration.

> *"From my angle you can't just look at is as changing the legislation, it's about supports and early intervention […], ensuring families have adequate housing, it's ensuring that homelessness is addressed […] out of home care that's a big issue for our kids that are in the youth justice system, education, disability, all these area need to be examined when we are looking this issue. It can't just be 'let's change the law', it's governments need to take responsibility and action and need to do it with Aboriginal communities to get a better result, a better outcome to where we are now."*[87]

- Emma Towney, Solicitor, Dhurrawang Aboriginal Human Rights Program at Canberra Community Law

Conclusion

Programs that reflect the structures of 'Responding in Peaceful and Positive Ways' and 'Too Good for Violence' should also be introduced in Australia. Through these early education programs, the goal is to teach Australian children aged between 10 and 14 how to socialise and

---

[83] Indig et al. NSW Justice Health, *2009 NSW Young People in Custody Health Survey: Full Report* (Report, March 2011) 17 <http://www.juvenile.justice.nsw.gov.au/Documents/2009%20YPICHS.pdf >.
[84] Ibid.
[85] Mana Golzari, Stephen J Hunt and Arash Anoshiravani, 'The health status of youth in juvenile detention facilities' (2006) 38(6) *Journal of Adolescent Health* <*https://www.sciencedirect.com/science/article/abs/pii/S1054139X05003009?casa_token=L_3xrwXIUosAAAAA:aJnTmRWQzEbkcACOt6uZaoirDvWA1tFB-WW9bEjTh3cXNmZv_YKuc_R83FQ3-Uhe8l-_oL5zg55v* >.
[86] Ibid.
[87] Emma Towney, *Raising the Age of criminal responsibility and disproportionate impacts on Indigenous Youth* Online Webinar (28 April 2021). <https://law.anu.edu.au/event/webinar/raising-age-criminal-responsibility-and-disproportionate-impacts-indigenous-youth>

communicate effectively with their peers and how to identify non-violent strategies in a conflict situation. Peer resistance programs should be initiated alongside these social skill development programs, so that the children and young people are more resilient, when they are exposed to circumstances where they may be influenced to make a risky decision. Relationship-based programs, such as family therapy and parent training, should also be adopted and/or expanded. There should be a meta-analysis conducted to summarise the findings of studies on efficacy of the existing programs such as Triple P Positive Parenting Training on modifying youth behaviour.

This submission notes the over-representation of young people with mental illness within the juvenile justice system. Better methods for mental health screening should be implemented across Australian juvenile justice systems. Lastly, juvenile justice centres should develop mental health programs, so that incarcerated young people are adequately supported.
The objective of these programs should be repurposed, so that the focus is on rehabilitating young people, so that they can integrate successfully into the society after their release, rather than being punitive.

Q5. How should the Government/Community service providers identify and respond to the needs of the children and young people before harmful behaviour/ crisis occurs?

1. Introduction

The Australian Government has always prioritised crisis intervention,[88] but it has fallen short when addressing the needs of the young Aboriginal and Torres Strait Islander people.[89] There is not only a need for a systemic juvenile justice system, but also a conscious reformation of the existing crisis intervention framework by the ACT Health Directorate .[90]This part of the submission provides an assessment of the current risk factors, accompanied by policy recommendations for ACT, suitable for identifying harmful behaviour. The impacts of the current child youth protection services ('CYPS') in the ACT will be discussed, in the light of *Our Booris, Our Way Steering Committee Final Report 2019*.[91] It is acknowledged that the ACT Government has noted the recommendations in the report, but they have not yet been implemented to improve and/or develop a concrete CYPS crisis framework.

Further recommendations will be made regarding an early intervention model for all community service providers, including the community legal centres in the ACT. The focus is laid on early intervention, paving the way for an improved identification and response model carried by the ACT.

2. Mental health risks and crisis management

The lives of young people are influenced by several factors that may include their family dynamic, community, school, and other individual factors.[92] It is essential that, upon the onset of a crisis, the community initiates a meaningful relationship with such children and engages them with holistic social and wellbeing opportunities.

At the same time, community and government agencies must be cautious and acknowledge that self-determination is central to the provision of Aboriginal and Torres Strait Islander health services.[93]

---

[88] 'Helping young people identify their needs', Module 8, The Department of Health, Australian Government (2004) < https://www1.health.gov.au/internet/publications/publishing.nsf/Content/drugtreat-pubs-front8-wk-toc~drugtreat-pubs-front8-wk-secb~drugtreat-pubs-front8-wk-secb-6>

[89] 'Productivity Commission report reveals high rates of incarceration for Indigenous children in the ACT' Joint media release: ACT COSS and Winnunga Nimmityjah Aboriginal Health and Community Services, 20 January 2021 < https://www.actcoss.org.au/news-events/media-release/joint-media-release-productivity-commission-report-reveals-high-rates >

[90] Ibid 6.

[91] Our Booris, Our Way Steering Committee, *'Our Booris Our Way Final Report'*, December 2019

[92] Ibid 20.

[93] Hall, S., Fildes, J., Tiller, E., Di Nicola, K. and Plummer, J. 'National Aboriginal and Torres Strait Islander Youth Report: Youth Survey 2019' *Mission Australia: Sydney* (2020), 12

"There's a lot of programs through justice reinvestment (...) and there are initiatives that are working well around Australia that are demonstrating that Aboriginal-led solutions are actually making a real difference in communities ... it's important that we make sure our voices are at the table developing policy and designing programs."[94]

- Cheryl Axleby, Co-Chair of Change The Record

Studies show that Indigenous children are at a higher risk of psychological distress, which may involve signs of behavioural difficulties, self-harm and deaths.[95] Most mental health risks go undetected because the benchmark is set against non-Indigenous populations across the globe.[96] It is necessary that categories of risk of poor mental health, and alternate sources, such as adverse childhood experiences, be considered, in assisting these children.

The Commonwealth Department of Health does not involve the intervention of Indigenous Elders within the crisis management framework.[97] This can have a detrimental impact on Indigenous children, as this is not in their best interest and separates them from their cultural and spiritual identity. It is submitted that the 'best interest' test should not be used to separate Indigenous children from their families but used to preserve their cultural heritage.[98]

3. Identify future impacts based on an ACT crisis intervention framework

'Diversion' of eligible young people from the juvenile justice system has been described as a three-level approach, involving: (1) crime prevention strategies that prevent the young people from offending; (2) diversionary schemes that divert the young people from juvenile justice system; and (3) sentencing options that divert young people from custodial sentences.[99] Our submission suggests a more early intervention-intensive, crime prevention approach to the alternative model to the juvenile justice system. Consequently, this would reduce their contact with the juvenile justice system.[100]

---

[94] Cheryl Axleby, *Raising the Age of criminal responsibility and disproportionate impacts on Indigenous Youth* Online Webinar (28 April 2021). <https://law.anu.edu.au/event/webinar/raising-age-criminal-responsibility-and-disproportionate-impacts-indigenous-youth>

[95] A Twizeyemariya, Sophie Guy, Gareth Furber, 'Risks of Mental Illness in Indigenous Australian children: A descriptive study demonstrating high levels of vulnerability', Milbank quarterly, 95(2) (2017)

[96] Ibid.

[97] 'Helping young people identify their needs', Module 8, The Department of Health, Australian Government (2004) <https://www1.health.gov.au/internet/publications/publishing.nsf/Content/drugtreat-pubs-front8-wk-toc~drugtreat-pubs-front8-wk-secb~drugtreat-pubs-front8-wk-secb-6 >

[98] Our Booris, Our Way Steering Committee, *'Our Booris Our Way Final Report'*, December (2019),19

[99] Kelly Richards, 'Blurred Lines: Reconsidering the Concept of 'Diversion' in Youth Justice Systems in Australia' (2014) 14(2) *Youth Justice* 126.

[100] Kathleen R Skowyra and Joseph J Cocozza, US Department of Justice, *Blueprint for a Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System* (Report No. 2011-BR-JX-0001).

So where would the young people be 'diverted' to? Referring back to the three-level approach in 'diversion', after the initial approach, the young people would be diverted from the juvenile justice *system* as a whole.[101] After apprehension, young people would be diverted from criminal justice *outcomes*, to 'non-court institutions', community support services and treatment programs.[102]

> "[In other country's youth justice systems] *they've invested in training and education and looking at dealing with some of the actual trauma [….] it's about having a therapeutic response and filling in the building blocks where children have missed out on education.*"[103]
>
> - Cheryl Axleby, Co-Chair of Change The Record

[101] Ibid 127.
[102] Ibid.
[103] Cheryl Axleby, *Raising the Age of criminal responsibility and disproportionate impacts on Indigenous Youth* Online Webinar (28 April 2021). <https://law.anu.edu.au/event/webinar/raising-age-criminal-responsibility-and-disproportionate-impacts-indigenous-youth>.

Q8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

1. Introduction

The *Discussion Paper* notes that, given the impact serious harmful behaviour has on the young person, their family and the community under a human rights approach, those under the MACR could benefit from access to an 'alternative model'.[104] Currently those under the MACR can be arrested by police and taken to a safe place.[105] One important element of an alternative model of juvenile justice is support and services, particularly therapeutic support, is whether it should be mandated. Currently those under the MACR cannot be subject to a juvenile justice supervision order and, therefore, as the *Discussion Paper* notes 'any engagement with services, counselling, or support is undertaken voluntarily'.[106]

2. Current national and international examples

There are various national and international examples of the mandating of therapeutic services for youth engaged in serious behaviours that are both harmful to others (e.g., sexual crimes) and/or themselves (eg, substance abuse). In NSW, New Street Adolescent Services provides therapeutic services for young people aged between 10 and 17 who have engaged in, but have not been charged with, 'harmful sexual behaviour towards others, and their families and caregivers'.[107] The service model of the organisation is as follows: referral, assessment, entry into intensive phase, case closure. The service offers direct counselling to the young person, as well as support to the family/carer, in order to aid the therapy.

Currently, the majority of substance abuse services such as 'Juna Buwa!'s, 'Young Person Opportunity Program' (WA) and YSAS drug and alcohol support services (VIC) are voluntary.[108] However, there are court-mandated programs, such as the 'Youth Supervised Treatment Intervention Regime' (WA).[109]This program requires referral from a magistrate and is

[104] ACT Government *Discussion paper: Raising the age of criminal responsibility* (23/6/21), 6
[105] Ibid 23.
[106] Ibid 24.
[107] New Street Services, *NSW Health* New Street Services - Children and young people with problematic and harmful sexual behaviour
[108] National Legal Aid, Submission to Council of Attorneys-General, *Age of Criminal Responsibility Working Group review* (28/2/2020), 49, <Review of age of criminal responsibility – National Legal Aid submission to the Council of Attorneys> ('*NLA MACR Submission*').
[109] *Diversion Options for Juveniles*, Government of Western Australia Mental Health Commission, https://www.mhc.wa.gov.au/getting-help/diversion-support-programs/diversion-options-for-juveniles/

for young people between 10 and 17.[110] The program involves regular meetings with a drug and alcohol counsellor and urine analysis.[111] The Education Justice Initiative (Vic)is another non-mandatory service for people aged 10-17, which seeks to re-engage them with education and has seen a 75% success rate in re-engagement.[112]

3. Threshold considerations

Given the outcome framework proposed by ACT suggests a focus on rehabilitation, well-being and proactive prevention of harmful behaviour, these values can inform discussion surrounding what the threshold should be for mandating support and services for those under the MACR. Brown and Charles stated that mandated support and services focused on these values are 'rights respecting appropriate interventions',[113] which are characterised as 'interventions to support them [young people] as they face personal, social and familial issues'.[114] In the *Discussion Paper*, examples are given for considerations/thresholds in relation to 'rights respecting appropriate interventions'. These include age, continual or serious harmful behaviour and lack of voluntary engagement. To implement mandated support and services for those under the MACR, the ACT requires an overhaul, as a mandate requires a court referral. If the MACR is raised, those under the new age would require a mechanism outside of the current juvenile justice system, which could mandate support and services.

4. Age

Age is given as a possible threshold for whether support and services should be mandated for those under the proposed MACR of 14. Evidence from the NSW Parliament on diversionary programs in NSW suggests that age is an important consideration in the treatment of youth in the justice system. Phillip Boulten SC of the NSW Bar Association noted that '[children who are] only 10 or 11 have nothing like the same ability to be able to understand why things are wrong or how it is going to impact on other people if they do wrong things'.[115] In evidence, Melanie Hawes, Executive Director of Youth Justice Australia, Kate Acheson, Chief Executive Officer of Youth Action, Peter Johnstone, President of the Children's Court of NSW, and Tracy Mcleod Howe, Chief Executive Officer of the NSW Council of Social Services, all suggested that the effectiveness of diversionary programs for youth required a willingness to change on the part of the young person.

---

[110] Ibid.
[111] Ibid 48.
[112] Ibid 46.
[113] Aaron Brown and Anthony Charles 'The minimum age of criminal responsibility: the need for a holistic approach' (2019) *Youth Justice*, The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach - Aaron Brown, Anthony Charles, 2019, 14.
[114] Ibid.
[115] Report on proceedings before Committee on Law and Safety Inquiry into the adequacy of Youth Diversionary Programs in NSW, 30/5/18 p.57. COMMITTEE ON LAW AND SAFETY

It is worth noting that Aaron Brown and Anthony Charles acknowledged the dangers of early immersion of young people in the juvenile justice system:

> 'Longer term, system contact and continuing system immersion (potentially as a consequence of the consolidation of criminogenic behaviour, toxic mix and negative impacts on a child's character) also remain, particularly when those as young as 10 could possibly be embroiled in such a circumstance.'[116]

Given a mandated stay in a therapeutic institution may exist as a form of detention, this sentiment should drive a focus on 'support which meets their needs rather than being arbitrarily enforced by the State'.[117]

5. Lack of voluntary engagement

Experts who gave evidence for the NSW report on diversionary programs were sceptical about mandating particular support and services, for various reasons. In particular, Melanie Hawes expressed doubt as to whether young people who did not want to attend would attend if it was mandated.[118] Katie Acheson cautioned against mandating programs, as this creates an 'all or nothing approach' for the young person involved, which is not conducive to the success.[119] Mandating programs which were involuntary to begin with undermines their effectiveness.

Evidence from the NSW report suggests that diversionary programs like 'Youth on Track' (and early intervention scheme which provides a means of referring young people to support services without a legal mandate) achieve their best outcomes through voluntary engagement, a conscious choice on the part of young people 'to really participate'.[120] A lack of voluntary engagement may mean that the young person is not 'ready to change' for, as Peter Johnstone noted, 'unless you are change ready, being put into a program is ineffective'.[121]However, Judge Johnstone also acknowledged that 'there is another school of thought that says put people into a program and quite often you will get results'.[122]

---

[116] Aaron Brown and Anthony Charles 'The minimum age of criminal responsibility: the need for a holistic approach' (2019) *Youth Justice*, The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach - Aaron Brown, Anthony Charles, 2019, 7
[117] Ibid 14.
[118] *Law and Safety Committee*, The Adequacy of Youth Diversionary Programs In New South Wales, Law and Safety Committee report 2/56- September 2018
[119] Report on proceedings before Committee on Law and Safety Inquiry into the adequacy of Youth Diversionary Programs in NSW, p.13. (8/5/18) COMMITTEE ON LAW AND SAFETY
[120] *Law and Safety Committee*, The Adequacy of Youth Diversionary Programs In New South Wales, Law and Safety Committee report 2/56- September 2018, 72
[121] Report on proceedings before Committee on Law and Safety Inquiry into the adequacy of Youth Diversionary Programs in NSW, 30/5/18 p.6
[122] Ibid.

6. Serious Harmful Behaviour

As previously mentioned, serious harmful behaviour has a great impact on the young person, their family and the community.[123] After a crisis point, a young person may be at 'risk of harming themselves, property or another person in the community'.[124] If they were above the MACR, this may be the point at which they would become subject to the mechanism of the juvenile justice system; however, currently in the ACT, those under the MACR can only be taken to a safe place. Given harmful behaviours most often occur in the context of early trauma, stress, and adverse life events, the failure to address the 'underlying causes' represents a missed opportunity to prevent youth from entering the juvenile justice system in the future.

7. Continuing harmful behaviour

The ACT government discussion paper aptly notes that the "underlying causes of harmful behaviour are not being successfully addressed", if continual harmful behaviour occurs.[125] This threshold point is useful, as it can provide an insight into the effectiveness of non-mandated services and support. Continuing harmful behaviour likely indicates a failure of support and services to address the causes of this behaviour.[126] Therefore, it indicates that a shift in support services is required.

Conclusion

The multi-disciplinary panel suggested in the *Discussion Paper likely represents the best solution to considerations over* how threshold points may be utilised, to ascertain which support and services are required and if they should be mandated. The threshold points given the *Discussion Paper* could be used to design an admissions screening program focused on which support services are necessary for the ACT community. It must be noted, however, that objective admissions screening is most effective when "tailored to the individual circumstances and needs of the implementing government",[127] supporting the point made by Will Bovino from Youth off the Streets, that young people should be considered on a 'case-by-case' basis.[128] The existence of the reference within the *Discussion paper* to a single 'threshold point' is an oversimplification of the challenge of harmful behaviours that may be exhibited by those under 14.[129]

---

[123] ACT Government *Discussion Paper raising the age of criminal responsibility* Discussion Paper (23/6/21),6.
[124] ACT Government *Discussion Paper raising the age of criminal responsibility* Discussion Paper (23/6/21),23.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] *Law and Safety Committee*, The Adequacy of Youth Diversionary Programs In New South Wales, Law and Safety Committee report 2/56- September 2018, 9
[129] ACT Government *Discussion Paper raising the age of criminal responsibility* Discussion Paper (23/6/21), 7.

For some young people, mandated engagement with therapeutic support and services may be necessary. However, this can only be ascertained through a complex assessment of the needs of each young person, rather than use of categorical threshold points. In addition, given the over-representation of First Nations youth under 14 within the juvenile justice system, mandating residing in a therapeutic institution should be a last resort, given the potential negative impacts this has. Removal from Country can cause "emotional and spiritual distress" [130] and prevent young people from fulfilling "cultural obligations by [stopping them] attending family and community funerals."[131]

[130] Elizabeth Grant, Approaches to the design and provision of prison accommodation and facilities for Australian Indigenous prisoners after the Royal Commission into Aboriginal Deaths in Custody, (2013) 17(1) *Australian Indigenous Law Review* 47-49.
[131] Ibid 50.

Q9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

1. Statistical context of serious offending by children under the MACR

Between 2017 and 2019, approximately 13,800 crimes were committed by children aged 10 to 14. Within this age group, the most common offences were acts intended to cause injury (including assault), making up 248 offences per 100,000 offences.[132] Offences relating to homicide were very uncommon, with only 0.2 offences committed per 100,000 children aged 10 to 14. [133] Between 2019 and 2020, of the 46,949 young people who were proceeded against by police (between 10 and 17 years) 20% of the offences were acts intended to cause injury, 96% of those being assault.[134] Only 3 of individuals within the 10 to 13 year old demographic were charged with homicide.[135] This demonstrates that violent crime statistics involving youths are often skewed by data sets which over represent allegations made against older teens.

It is rare for children to be prosecuted and convicted for serious offences (such as homicides or sexual assault) and uncommon for children between 10 and 14 to receive long periods of imprisonment.[136] In 2019-20, 3 young people under 14 were recorded as engaging in a homicide related offence and 809 were engaged in offences of acts intended to cause injury and 172 in sexual assault related offences.[137]

The Australian Institute of Criminology found that, in this time period, compared to other states and territories, ACT had the highest relative rate of homicides committed by children. Of the murder convictions between 2001 and 2007, in the 16 cases committed by offenders under 18, the young person received between 11- and 23-year imprisonment (unfortunately the number of offenders aged 10 to 14 of this group are unknown).[138] However, this data set holds little relevance to contemporary policy due to its age.

---

[132] Australian Institute of Health and Welfare 2020, 'Australia's children' (Research Report No CWS 69, Canberra) 317. https://www.aihw.gov.au/getmedia/6af928d6-692e-4449-b915-cf2ca946982f/aihw-cws-69-print-report.pdf.aspx?inline=true
[133] Ibid 318.
[134] Sophia Beckett, Lester Fernandez and Katherine McFarlane 'Provisional Sentencing for Children' (Research Report NSW, Sentencing Council, 2009) 17. <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/provisionalsentencingforchildren.pdf>
[135] https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release
[136] Sophia Beckett, Lester Fernandez and Katherine McFarlane 'Provisional Sentencing for Children' (Research Report NSW, Sentencing Council, 2009) 17. <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/provisionalsentencingforchildren.pdf>
[137] Australian Bureau of Statistics, Recorded Crime - Offenders, 2019-20 financial year, (Catalogue no. 45190. 11 February 2021) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/2019-20>
[138] Ibid 18.

2. Risk factors contributing to serious offending for young people

The 2015 NSW Young People in Custody Survey found 83.3% of youths met the criteria for at least one psychological disorder, whereas 63% of study met the criteria for two or more disorders.[139] The connection with unsteady family environments is made clear in the Victorian Sentencing Advisory Council, finding where children first detailed between 10 and 13 were highly likely to be known to protection services.[140]

3. Detention for children who commit serious offences:

It is widely accepted that detaining children is damaging and criminogenic, causing entrenchment in the juvenile justice system and disadvantage. [141] This affirms the juvenile justice approach that detention should be considered as a last resort for children, as upheld in United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('United Nations 1985') ('the Beijing rules').[142]

Article 37(b) of the *Convention on the Rights of the Child* outlines that depriving a child's liberty must only be used as a last resort and for the shortest appropriate period of time. Further, art 40 requires that the sanctions imposed on children who come into conflict with the law must pay consideration to ''the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

As strongly set out in Beijing Rule 17.1(c), detention is only to be imposed on children for very serious offending.[143] The Beijing Rules hold that detention should only be imposed where there are serious acts involving personal violence or persistent serious offending.[144]

Commentary to Beijing Rule 19 states:

> 'Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of

---

[139] Justice Health and Forensic Mental Health Network, '2015 Young People in Custody Health Survey: Full Report Justice Health & Forensic Mental Health Network and Juvenile Justice NSW' (Research Report, NSW Government, 2017) 21.<https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF>

[140] Victorian Sentencing Advisory Council ''Crossover kids': Vulnerable children in the youth justice system. Report 1: Children who are known to child protection among sentenced and diverted children the Victorian Children's Court (Research Report, Victorian Government, 2019). <https://www.sentencingcouncil.vic.gov.au/projects/ crossover-kids-in-youth-justice-system>

[141] Clancey G, Wang S & Lin B, 'Youth justice in Australia: Themes from recent inquiries. Trends & issues in crime and criminal justice' (Research Paper, no. 605, Australian Institute of Criminology 2000) 8. https://www.aic.gov.au/sites/default/files/2020-09/ti605_youth_justice_in_australia.pdf

[142] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"),* Adopted 29 November 1985, 40/33

[143] UN General Assembly, and United Nations Congress on the Prevention of Crime and the Treatment of Offender, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") :* resolution GA RES 40/33 (29 November 1985) 68.

[144] Ibid 10.

institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences.[145] Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles that for adults because of their early stage of development.'[146]

> *"We need to align ourselves with international best practice [and countries] who have raised the age for many years and are investing in children's futures, through education, training, and development and are offering alternative pathways*."[147]

- Cheryl Axleby, Co-Chair of Change The Record

The *'Seen and heard: priority for children in the legal process*' 1997 report by the Australian Law Reform Commission highlighted that the aim of sentencing children should be 'designed to encourage rehabilitation and reintegration in the community'[148]. The report acknowledged that 'there will always be some children to whom a sentence of detention is considered necessary as a last resort',[149] but emphasised that practices within juvenile detention facilities must be assessed to ensure the children are being rehabilitated during their sentence.[150]

When a child is sentenced to a period of detention, they come into contact with the most extreme end of the justice system.[151] In their submission, the Townsville Community Service pointed to research highlighting that detention can create dependency, training opportunities for further criminal behaviour, a network for criminal peers, and leave children without proper education, life skills or reintegration into society.[152] In relation to children who commit sexual assault offences, Recommendation 240 of the report stated that, '[s]entencing options for young sex offenders should include specific treatment programs appropriate to this category of offenders.'[153] Where custodial sentences for child sexual offenders are seen as necessary for

---

[145] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"),* Adopted 29 November 1985, 40/33
[146] Ibid.
[147] Cheryl Axleby, *Raising the Age of criminal responsibility and disproportionate impacts on Indigenous Youth* Online Webinar (28 April 2021). <https://law.anu.edu.au/event/webinar/raising-age-criminal-responsibility-and-disproportionate-impacts-indigenous-youth>
[148] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process (Report no 84, September 1987) 293.*
[149] Ibid 306.
[150] Ibid.
[151] Ibid 305.
[152] Ibid 306.
[153] Ibid 294.

addressing offending behaviour it is paramount sentences include a condition the child receives specialist treatment for sexually abusive behaviours.[154]

Early intervention and diversionary programs are essential for avoiding detention. However, there will continue to be a need for detaining small numbers of children who commit serious offences.[155]The Youth justice in Australia: Themes from recent inquiries report identifies that Youth detention systems in Australia can be significantly improved to support violent offenders through appropriate programs and adequately resources services to young offenders, better provision of education programs, culturally responsive programs for Indigenous Young People and properly trained supervising correctional staff.[156]

Young people held in detention are exposed to risk factors such as aggressive environments, similar to those that cause their offending behaviour initially and likelihood of continuing violent reoffending.[157] Studies in Australia, Canada and the US have pointed to the insufficient provision of mental health and welfare services for incarcerated young people in correctional centres.[158] Particularly for younger children, exposure to the risk factors that exacerbate offending behaviours can cause or escalate aggression and anxiety.[159]

4. The implications of the James Bulger Case

Focused discussion on how the law treats young offenders who commit serious offences was stimulated by the killing of two-year-old James Bulger in the UK in 1993. It was found that two 10-year-olds, T and V, intentionally caused Bulger's death. In this case, the public played an active role, in applying pressure on the judiciary to impose retribution for the children's acts. 278,300 people signed a petition asking for the children to never be released[160].After being sentenced to 15 years of detention, T and V's case was appealed to the European Court of Human Rights, which found that, throughout their trial, articles of the European Convention for

---

[154] Riddhi Blackley and Lorana Bartels, *'Sentencing and treatment of juvenile sex offenders in Australia Trends & issues in crime and criminal justice*' (Research Paper No. 555, Australian Institute of Criminology, July 2018) 7.
[155] Clancey G, Wang S & Lin B 'Youth justice in Australia: Themes from recent inquiries. Trends & issues in crime and criminal justice' (Research Paper, no. 605, Australian Institute of Criminology 2000) 8. https://www.aic.gov.au/sites/default/files/2020-09/ti605_youth_justice_in_australia.pdf
[156] Ibid.
[157] Wolff, Sula, and R. Alexander A. McCall Smith. 2000. "Child Homicide And The Law: Implications Of The Judgements Of The European Court Of Human Rights In The Case Of The Children Who Killed James Bulger". Child Psychology And Psychiatry Review 5 (3): 133-138. doi:10.1017/s1360641700002318 135.
[158] Anna C Baldry and Andreas Kapardis, 'Risk Assessment for Juvenile Violent Offending' Willan Publishing, 2012 ProQuest Ebook Central 62. <https://ebookcentral-proquest-com.virtual.anu.edu.au/lib/anu/detail.action?docID=306146>
[159] Ibid.
[160] Sula Wolff, R. Alexander A. McCall Smith "Child Homicide And The Law: Implications Of The Judgements Of The European Court Of Human Rights In The Case Of The Children Who Killed James Bulger" Child Psychology And Psychiatry Review 5 (3) (2000)) 133-138. [1] Australian Institute of Health and Welfare 2020, 'Australia's children' (Research Report No CWS 69, Canberra) 317. https://www.aihw.gov.au/getmedia/6af928d6-692e-4449-b915-cf2ca946982f/aihw-cws-69-print-report.pdf.aspx?inline=true

the Protection of Human Rights (Council of Europe, 1991) had been infringed upon.[161] A committee established after the Bulger Trial, held the approach that the detention of young people should only be for the rehabilitation of the child and protection of society, rather than for deterrence.[162]

5. Early intervention, prevention and diversion:

The CRACOW was designed as a risk/needs instrument to assist governments and communities in the creation of prevention and interventions for violent youth.[163] The instrument is multi-staged and designed for developmental stages of a child from pre-natal, early childhood, middle to late children and to adolescence.[164] The guide identifies risk factors for violent behaviours at each developmental stage and stage-specific support for those risks. Substantial evidence supports early intervention to prevent violent offending behaviours is the most effective way to manage youth crime.[165] While the CRACOW risk management instrument demonstrates a plethora of complex risk and protective factors to prevent violent offending behaviours, targeted treatment programs to address the multi-risk combinations have not been created. [166]

The prevailing literature on reducing and preventing youth offending centres around offending behaviour being correlated with eight key criminogenic risk factors ('the Central Eight'), where targeted rehabilitation and interventions can mitigate the influence of these factors on children.[167] D.A. Andrews, James Bonta and R.D. Hoge created the Risk-Need- Responsivity (RNR) model for rehabilitating young people and adults effectively.[168] The model centres around the role of cognitive-behavioural programs and other specialised programs, tailored to the needs of the child.[169] Research on this model has identified the importance of positive relationships with correctional employees, who facilitate a positive environment promoting rehabilitation for the child.[170]

---

[161] Sula Wolff, R. Alexander A. McCall Smith "Child Homicide And The Law: Implications Of The Judgements Of The European Court Of Human Rights In The Case Of The Children Who Killed James Bulger" Child Psychology And Psychiatry Review 5 (3) (2000)) 133-138. [1] Australian Institute of Health and Welfare 2020, 'Australia's children' (Research Report No CWS 69, Canberra) 317. https://www.aihw.gov.au/getmedia/6af928d6-692e-4449-b915-cf2ca946982f/aihw-cws-69-print-report.pdf.aspx?inline=true

[162] Ibid.

[163] Ibid.

[164] Cullen, F. T., Wright, J. P., Brown, S., Moon, M. M., Blankenship, M. B., and Applegate, B. K.'Public support for early intervention programs: Implications for a progressive policy agenda.' (Crime and Delinquency 1998, 44(2)) 187– 204.

[165] Ibid.

[166] Wolff, Sula, and R. Alexander A. McCall Smith. 2000. "Child Homicide And The Law: Implications Of The Judgements Of The European Court Of Human Rights In The Case Of The Children Who Killed James Bulger". Child Psychology And Psychiatry Review 5 (3): 133-138. doi:10.1017/s1360641700002318 133

[167] Clancey G, Wang S & Lin B 'Youth justice in Australia: Themes from recent inquiries. Trends & issues in crime and criminal justice' (Research Paper, no. 605, Australian Institute of Criminology 2000) 8. https://www.aic.gov.au/sites/default/files/2020-09/ti605_youth_justice_in_australia.pdf

[168] Ibid.

[169] Ibid.

[170] Andrews, D. A. and Bonta, J, 'The psychology of criminal conduct (4th ed.)' (Newark, NJ: LexisNexis, 2006).

Diversionary approaches for supporting 'at-risk' youth and children with escalating behaviour assists in preventing incarceration and diverting children away from the juvenile justice system.[171] The success of diversionary measures was recorded in the Northern Territory, where, in 2015 to 2016, 35% of children and young people were diverted after coming into contact with police.[172] Approximately 85% of diverted young people did not reoffend.[173] Diversionary program studies have demonstrated that they are effective at both cost-effective and can be particularly effective at reducing Aboriginal overrepresentation in juvenile justice systems.[174]

Conclusion:

Overall, our position is that the minimum age of criminal responsibility must be lifted to a minimum of 14 years of age with no exceptions.

[171] Clancey G, Wang S & Lin B 'Youth justice in Australia: Themes from recent inquiries. Trends & issues in crime and criminal justice' (Research Paper, no. 605, Australian Institute of Criminology 2000) 9. https://www.aic.gov.au/sites/default/files/2020-09/ti605_youth_justice_in_australia.pdf

[172] Royal Commission: The Protection and Detention of Children in the Northern Territory Final Report, 17/11/17, 393 <https://www.royalcommission.gov.au/royal-commissiondetention-and-protection-children-northern-territory>

[173] *Ibid.*

[174] Clancey G, Wang S & Lin B 'Youth justice in Australia: Themes from recent inquiries. Trends & issues in crime and criminal justice' (Research Paper, no. 605, Australian Institute of Criminology 2000) 9. https://www.aic.gov.au/sites/default/files/2020-09/ti605_youth_justice_in_australia.pdf

Raising the minimum age of criminal responsibility in the ACT: ARACY Response to the Discussion Paper

ARACY
August 2021

Contents

Summary of Key Points: 3

Section One: Threshold issues for raising the MACR 4

Section Two: An alternative model to the youth justice system 5

Appendix 9

References 11

Summary of Key Points:

- ARACY supports raising the MACR without exception on neurodevelopmental and human rights grounds, but emphasises the need for this legislative change to be coupled with evidence-based services and supports to children who fall below the MACR, and not inadvertently deprive children below the MACR of effective programs and supports.

- ARACY emphasises the importance of including the views of children, young people, and their families who are affected by the youth justice system throughout all stages of development, implementation, and evaluation through direct consultation. This is consistent with children's right to have a say in issues that affect them and is consistent with evidence indicating improved outcomes when consultation is utilised.

- ARACY supports the principles proposed in the discussion paper and recommends the addition of principles regarding a commitment to the use of evidence-based interventions, and a commitment to rigorous evaluation and monitoring with flexible implementation to facilitate ongoing improvements.

- ARACY points to the guiding principles published by the United Nations in the Guidance Note of the Secretary-General: UN Approach to Justice for Children for adoption or adaption in addition to the proposed principles.

- ARACY suggests consideration of consultation with the mental health workforce regarding the difficult ethical, legal, and logistical questions pertaining to the provision of mandatory supports given that mandatory treatment of mental health patients has some parallels with the provision of mandatory supports to children with harmful behaviours.

- ARACY recommends a dedicated systematic review of the literature be undertaken to identify all the effective universal and secondary services that could be introduced and/or expanded to support children and young people in contact or at risk of contact with the youth justice system. One example of a program that may be suitable for adaption to the ACT and presently being evaluated via a randomised controlled trial is the NSW Youth On Track program. Preliminary data is promising, and attention should be paid to the results of this randomised controlled trial due later this year.

- ARACY points to existing evidence-based resources that may help in assessing and responding to the needs of children and young people. From a policy and program perspective, ARACY's The Nest is one example an evidence-based wellbeing framework developed in broad consultation with children, young people and their families that could help in the development of holistic policies and programs.

- ARACY points to existing evidence-based resources that may help in assessing and responding to the needs of children and young people. From a service and delivery perspective, ARACY's Common Approach is a training program designed and evaluated to assist in the early identification of problems within each domain of a child's life to help facilitate early referral and prevention of crises. Widespread rollout of this program across industries who work with children and young people in contact with and at risk of contact with the youth justice system (such as education, child

protection, police, and health) has significant potential to impact the aversion of crises, and a pilot of this intervention should be considered.

- ARACY supports the deprivation of liberty of children in extreme circumstances provided:
  - The deprivation of liberty is consistent with the principles outlined in the Convention on the Rights of the Child
  - That the deprivation of liberty is coupled with evidence-based supports and interventions that facilitate the appropriate development and safe reintegration of the child into the community

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

ARACY takes the position that there should be no exceptions to an increased MACR for children and young people on neurodevelopmental grounds. Irrespective of the seriousness of the offence, children's brains are developmentally immature and multiple medical organisations argue for an increase in the MACR on this basis. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) has high-level expertise in both forensic psychiatry and child and adolescent psychiatry and represents the medical perspectives of over 6700 members. The RANZCP advocates for an increase in the MACR "to 14 years for all federal, state and territory criminal offences in Australia" arguing this is "in line with neurodevelopmental research and international human rights standards"[i].

The wider medical community supports this view, as seen in a media release by the Royal Australian College of Physicians:

> *"Children of this age have relatively immature brain development when it comes to decision-making, organisation, impulse control and planning for their future. We shouldn't criminalise actions that may be developmentally normal for children of this age and they should not be incarcerated as a consequence…The Royal Commission has recommended raising the minimum age of criminal responsibility and this is a recommendation we fully support from a health perspective,"* [ii]
>
> - Dr Mick Creati, International Child and Adolescent Health Specialist and Senior Fellow with the Royal Australasian College of Physicians

Raising the MACR has also been publicly supported by other medical institutions including the Australian Medical Association and the Australian Indigenous Doctor's Association[iii].

Additionally, allowing exceptions to the MACR goes against the recommendations made by the Committee on the Rights of the Child. See the following excerpt from General Comment No. 10 paragraph 18[iv]:

> *"The Committee wants to express its concern about the practice of allowing exceptions to a MACR which permit the use a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States Parties set a MACR that does not allow, by way of exception, the use of a lower age."*
>
> - UN Committee on the Rights of the Child, General Comment No. 10 paragraph 18

The Committee's reasoning is that "The system of two minimum ages is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices." (p. 8 paragraph 16).

However, children who engage in very serious or repeated harmful behaviours should have these behaviours addressed for the benefit of themselves, their victims, and the wider community. ARACY advocates for interventions to address this behaviour that are neurodevelopmentally appropriate, demonstrably effective in reducing harm, and based on sound principles i.e., focusing on recovery and rehabilitation in a child-centred, strengths-based, holistic, and collaborative manner[v]. (See our responses to Section 2 below). All means of addressing problematic behaviours in children and young people should be assessed under the same criteria as potential alternatives: are they are appropriate, effective, and based on sound principles? Present evidence indicates that in general, the imprisonment of 10-14 year-olds does not reduce rates of reoffending and is associated with reduced likelihood of school completion, tertiary education, and employment[vi]. The present response to criminal behaviours of children in the ACT should be evaluated for the effectiveness of improving child outcomes and should include the views of children and young people in contact with these systems. If elements of the present system are found to be useful, caution must be taken that raising the minimum age of criminal responsibility does not inadvertently deprive children below the MACR from accessing them.

In summary, ARACY supports raising the MACR without exception on neurodevelopmental and human rights grounds but emphasises the need for this legislative change to be coupled with evidence-based services and supports to children who fall below the MACR.

Section Two: An alternative model to the youth justice system

1. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

Principles proposed in the discussion paper:

- Assess and respond to the needs of children and young people, rather than focusing on offending and punishment.
- Ensure self-determination of Aboriginal and Torres Strait Islander communities in service design and delivery.
- Provide for the safety and wellbeing of children and young people to benefit the whole community.
- Ensure the safety and wellbeing of children and young people by supporting families, communities, schools, and health services.
- Use restorative and culturally appropriate practices to respond to harmful behaviours by children and young people.
- Only mandate a child or young person to receive support if it is in their best interest, and only as a last resort.

Additional principles:

ARACY wholly supports the described principles to underpin the development of an alternative model to youth justice. There are several additional principles ARACY would like to recommend for consideration:

1. That all approaches to addressing youth justice be based on **evidence of what works** to minimise harm for all children and young people, both those who engage in harmful behaviour and victims.
2. That the alternative model of youth justice is submitted to **rigorous evaluation and ongoing monitoring with appropriate indicators** to determine impact and enable flexible and ongoing improvements to implementation and delivery. These indicators should include child-centred indicators developed in consultation with them i.e., what are the outcomes children, young people, and their families would like to see as a resulting from youth justice and does the youth justice model help achieve these?
3. That direct consultation with children and young people and their families is embedded in all stages of the development, implementation, and evaluation of an alternative youth justice model. **This consultation should include children and young people in contact with the justice system or as risk of being in contact with the system, children and young people who are victims, and their families**. As stated in our position statement[vii], the right for a child to have a say in issues that affect them is reflected in the UN Convention on the Rights of the Child, and evidence indicates that children are capable research participants, and that the incorporation of their views is beneficial to both project outcomes and children directly.

The United Nations has developed a document outlining the approach to justice for children which includes a set of guiding principles for all child justice interventions including policy development[viii]. The many of the underlying concepts embedded in these guiding principles are implicit in the present s. However, incorporation of the principles especially those that are not already captured would be worth consideration. The guiding principles are included below, and an excerpt from the original document including a description of these can be found in Appendix 1:

1. Ensuring that the best interests of the child is given primary consideration.
2. Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination.
3. Advancing the right of the child to express his or her views freely and to be heard.
4. Protecting every child from abuse, exploitation, and violence.
5. Treating every child with dignity and compassion.
6. Respecting legal guarantees and safeguards in all processes.
7. Preventing conflict with the law as a crucial element of any juvenile justice policy.
8. Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time.
9. Mainstreaming children's issues in all rule of law efforts.

Additional considerations

The principle "Only mandate a child or young person to receive support if it is in their best interest, and only as a last resort" could be adjusted slightly to reflect the rights of victims and the intended outcome of supports. For example, "Only mandate a child or young person to receive supports if it is likely to benefit themselves and/or the victims of their behaviour, and there is no other less restrictive option appropriate and reasonably available". This wording reflects the wording of the involuntary temporary admission of a mentally unwell patient to a mental health facility for the protection of themselves or others[ix]. Indeed, mandatory treatment of mental health patients has some parallels with the provision of mandatory supports to children with harmful behaviours, and the mental health workforce may be a source of information on how to address difficult ethical, legal, and logistical questions pertaining to the provision of mandatory supports.

Another final consideration relates application of the principle regarding assessing and responding to the needs of children and young people. There are multiple evidence-based frameworks that can assist

in effectively assessing and responding to the needs of children and young people. ARACY developed the first national framework for children's wellbeing (The Nest) which was developed in broad consultation with over 4000 children and young people and their families of diverse background, professionals, and policy makers[x]. The framework could prove useful in the practical application of the first principle, as it effectively captures the needs of children and young people in a holistic manner accompanied by a host of useful indicators for monitoring these needs at a population level.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed to better support this cohort?

Identifying all the universal and secondary services appropriate for introduction or expansion in the ACT requires a dedicated review of the literature that is beyond the capacity of this submission. However, one example of an intervention that may be suitable is the NSW Department of Communities and Justice (DJC) secondary intervention called Youth on Track, offered to children and young people aged 10 – 17 years at significant risk of offending[xi]. Referral pathways that can be initiated by a variety of relevant bodies including NSW Police, Education, Community Services, out of home care providers, and mental health services, combined with automated referrals based on police databases[xii]. Referred children are screened for likelihood of offending/reoffending by a specially designed screening tool developed for the program and enter the program if they are above the threshold risk level[xiii]. The program is based on sound principles including early intervention with an emphasis on risk and needs of participants, offering multidisciplinary evidence-informed interventions to address the underlying causes of offending[xiv].

The program is currently being evaluated via a randomised controlled trial conducted by the NSW Bureau of Crime Statistics and Research (BOSCAR) with results anticipated to be available by the end of this year. Preliminary results include[xv]:

- Approximately 50% of eligible participants accept the voluntary referral with even higher (60%) participation for Aboriginal and Torres Strait Islanders
- Overall reduction in risk of reoffending with 50% reduction in rates of formal police contact following the program
- 25% of participants are aged 10 -13 years

This represents a promising intervention that could likely be adapted to suit the needs of the ACT. Particular attention should be paid to the results of the randomised controlled trial with consideration for a similar model to be implemented in the ACT if proven to be effective. If so, attention should also be given to improving voluntary uptake rates.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

The Common Approach is an evidence-based training program developed by ARACY that equips both frontline and administrative level workers in assessing and thinking about the needs of children and young people in a holistic way (see Appendix 2). It was developed under the National Framework for Protection Australia's Children[xvi] with the aim of early identification of problems within each domain of a child's life, to help facilitate early referral and prevention of crises[xvii]. It has been independently evaluated by the Social Policy Research Centre[xviii] which found that the Common Approach increased the number of practitioners identifying child and family needs earlier, and increased practitioners' ability to identify strengths and weaknesses, their confidence and willingness to engage with clients,

and their awareness of their role in prevention. Internal evaluation[xixxx] has found improved relationships between families and services and increased referrals to informal services and supports in the community. Rollout of the Common Approach to frontline workers who regularly engage with at risk children and young people such as teachers, police officers, child protection workers etc. could assist in the early identification of problems and needs in a child's life and help to facilitate an appropriate response to prevent crises. As always, implementation should be done with ongoing evaluation and include consultation with of children and young people and their families who are the target population of the intervention.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

As discussed above, the mandatory treatment of mental health patients has some parallels with the provision of mandatory supports to children with harmful behaviours. As such, and the mental health workforce may be a source of information on how to address difficult ethical, legal, and logistical questions pertaining to the provision of mandatory supports.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g., murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

The Convention on the Rights of the Child (CRC)[xxi] Article 37 states that "The 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". The CRC further clarifies that children deprived of their liberty must:

- Be treated with humanity and respect, and in a manner, which takes into account the needs of a person of their age
- Shall be separated from adults unless it is not in their best interests
- Have the right to maintain contact with family through correspondence and visits
- Have the right to prompt legal access, to challenge the legality of the deprivation before a court with a prompt decision
- Not be subject to torture, cruel, inhumane, or degrading treatment
- Not be subject to capital punishment nor life imprisonment

ARACY supports the deprivation of liberty of children in extreme circumstances provided:

- The deprivation of liberty is consistent with the principles outlined in the Convention on the Rights of the Child
- That the deprivation of liberty is coupled with evidence-based supports and interventions that facilitate the appropriate development and safe reintegration of the child into the community

Appendix

Appendix 1: The Guiding principles to child justice as set out by the United Nations, adapted from their publication Guidance Note of the Secretary-General: UN Approach to Justice for Children (2008)

The following principles, based on international legal norms and standards, should guide all justice for children interventions, from policy development to direct work with children:

1. Ensuring that the best interests of the child is given primary consideration. In all actions concerning children, whether undertaken by courts of law, administrative or other authorities, including non-state, the best interests of the child must be a primary consideration.

2. Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination. The of non-discrimination underpins the development of justice for children programming and support programmes for all children's access to justice. A gender sensitive approach should be taken in all interventions.

3. Advancing the right of the child to express his or her views freely and to be heard. Children have a particular right to be heard in any judicial/administrative proceedings, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. It implies, for example, that the child receives adequate information about the process; the options and possible consequences of these options; and that the methodology used to question children and the context (e.g., where children are interviewed, by whom and how) be child-friendly and adapted to the particular child. In conflict an d post conflict contexts, it is also important to involve children in transitional justice processes.

4. Protecting every child from abuse, exploitation and violence. Children in contact with the law should be protected from any form of hardship while going through state and non-state justice processes and thereafter. Procedures have to be adapted, and appropriate protective measures against abuse, exploitation and violence, including sexual and gender-based violence put in place, taking into account that the risks faced by boys and girls will differ. Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment) must be prohibited. Also, capital punishment and life imprisonment without possibility of release shall not be imposed for offences committed by children.

5. Treating every child with dignity and compassion. Every child has to be treated as a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected.

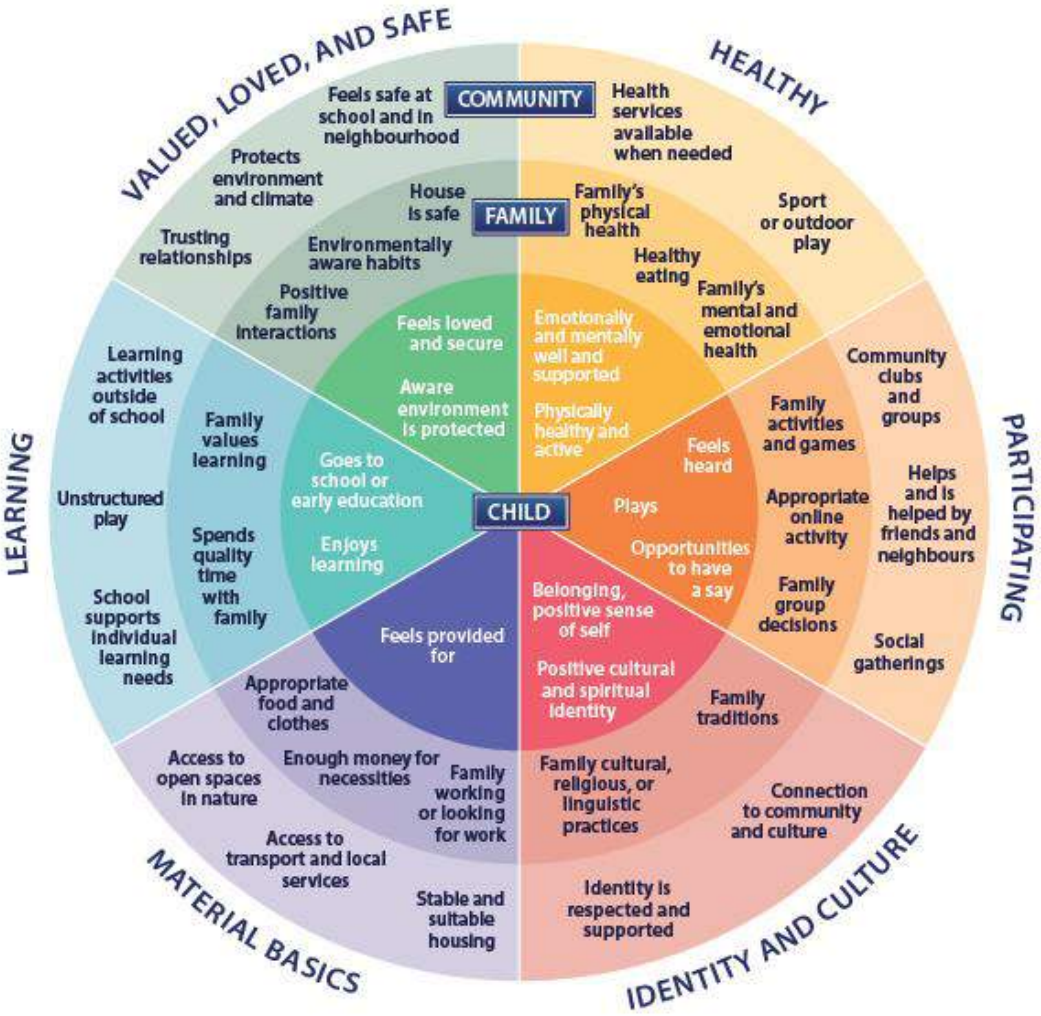
6. Respecting legal guarantees and safeguards in all processes. Basic procedural safeguards as set forth in relevant national and international norms and standards shall be guaranteed at all stages of proceedings in state and non-state systems, as well as in international justice. This includes, for example, the right to privacy, the right to legal aid and other types of assistance and the right to challenge decisions with a higher judicial authority.

7. Preventing conflict with the law as a crucial element of any juvenile justice policy. Within juvenile justice policies, emphasis should be placed on prevention strategies facilitating the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work. Prevention programmes should focus especially on support for particularly vulnerable children and families.

8. Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time. Provisions should be made for restorative justice, diversion mechanisms and alternatives to deprivation of liberty. For the same reason, programming on justice for children needs to build on informal and traditional justice systems as long as they respect basic human rights principles and standards, such as gender equality.

9. Mainstreaming children's issues in all rule of law efforts. Justice for children issues should be systematically integrated in national planning processes, such as national development plans, CCA/UNDAF, justice sector wide approaches (SWAPs), poverty assessments/Poverty Reduction Strategies, and policies or plans of action developed as a follow up to the UN Global Study on Violence against Children; in national budget and international aid allocation and fundraising; and in the UN's approach to justice and security initiatives in peace operations and country teams, in particular through joint and thorough assessments, development of a comprehensive rule of law strategy based on the results of the assessment, and establishment of a joint UN rule of law programme in country.

Appendix 2: The Common Approach Wheel



ARACY

© ARACY 2021. The Common Approach® and The Common Approach Training® are registered trademarks of ARACY.
Common Approach® resources may only be used following official Common Approach Training®. Please visit www.aracy.org.au for training details.

References

[i]https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a39526d1c1f244809ff4f7/1621333287361/RANZCP.pdf
[ii]https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility
[iii]https://www.ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age
[iv] https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment10-02feb07.pdf
[v] aracy.org.au/the-nest-in-action/the-common-approach
[vi] https://www.amnesty.org.au/wp-content/uploads/2018/11/AIA-to-QLD-Productivity-Commission_Imprisonment-and-Recidivism.pdf
[vii] https://www.aracy.org.au/news/childrens-voice-position-statement
[viii] https://www.un.org/ruleoflaw/files/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf
[ix] https://www.health.nsw.gov.au/mentalhealth/legislation/Documents/nh600900A.pdf
[x] https://www.aracy.org.au/the-nest-in-action/the-common-approachthe%20nest
[xi] http://www.youthontrack.justice.nsw.gov.au/
[xii] http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot-model.aspx
[xiii] http://www.youthontrack.justice.nsw.gov.au/Pages/yot/youth_on_track_scheme/elements_model.aspx
[xiv] http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot-model.aspx
[xv] http://www.youthontrack.justice.nsw.gov.au/Documents/youth-on-track-2020-snapshot-report.pdf
[xvi] https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business
[xvii] https://www.aracy.org.au/the-nest-in-action/the-common-approach
[xviii] https://www.aracy.org.au/documents/item/128
[xix] https://www.aracy.org.au/publications-resources/command/download_file/id/79/filename/CAARS_Final_Report_-_Working_together_to_prevent_child_abuse_and_neglect_-_a_common_approach_for_identifying_and_responding_early_to_indicators_of_need.pdf
[xx] ARACY. (2014). *Launceston to George Town Pilot of The Common Approach – Final Report.* Canberra, ACT: ARACY.
[xxi] https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

Canberra Restorative Community Network Submission into Raising the Minimum Age of Criminal Responsibility and other issues raised in the Discussion Paper

The Canberra Restorative Community Network (CRCN) welcomes the opportunity to contribute to the discussion on raising the minimum age of criminal responsibility. Canberra is leading the country in this regard reflecting a balanced and thoughtful stance to the issues arising from criminalising behaviours of children and young people .

In any proposed contemplation of how to respond to the harmful behaviour of children and young people, the CRCN would like to see children and young people engaged in formal and informal conversations about what is working well, what is not working well and what they think might make for better responses. It is of the utmost importance that the views of children and young people have been surveyed, that they have been invited to be involved in forums and discussions about this issue affecting them directly.

Impacts of criminalising children and young people's behaviour

It is long and well established across a vast research evidence base that incarceration often involves a raft of unintended negative consequences for vulnerable members of our community and ultimately, further incarceration. When this occurs, there are no wins for anyone, let alone for victims of crime who overwhelmingly wish to see the cycle of offending cease and for children and young people to live constructive, purposeful, responsible lives.

Aboriginal deaths in custody will continue at their appalling and unacceptable rates as a direct result of a cascading of punitive, and in some cases, well meaning, interventions which begins with the criminalisation of children as young as 10. In 2019-20, Aboriginal and Torres Strait Islander children were 20 times more likely to be in juvenile detention in the ACT than non-Indigenous children[1].

Children's offending behaviour must be understood in terms of their levels of development and emotional maturity as well as any unmet physical and mental health needs and within the context of their relationships with their families and significant others in their lives. In situations where adults and the community fail to take responsibility for meeting the needs of children, it is hardly befitting of a 'restorative community' to then expect disadvantaged children to understand 'right relationships' and act responsibly, but it's important we empower them to experience learning opportunities that develop empathy wherever possible.

In the words of Emeritus Professor Gale Burford, we should be asking "What would responses to offending behaviour by young people look like that don't involve the criminal justice system, or involve the criminal justice system and other state systems as safeguards of restorative justice principles?"

Minimum Age of Criminal Responsibility

The United Nations Committee on the Rights of the child has recommended 14 years as the minimum age of criminal responsibility, which is underpinned by current evidence and research.[2]

This evidence supports a lay observation that although most kids know simple 'right from wrong' most get swept up and influenced unduly by the 'storm of adolescence', some have deeply dysfunctional family lives and rarely do any have a perspective that allows them to see consequences far beyond their current circumstances. Knowing this, it does not make sense in logic

or principle to have exceptions even for serious offences among the 10 to 14 yr age group (and many would argue for older young people. The nature and likely cause of the child or young person's behaviour may dictate different therapeutic options and safety mechanisms for individuals and the community. Wherever possible, they will have an obligation to better understand the significance of the harmful consequences of their behaviour to the person harmed and others. Facilitators and circles of support in the restorative justice process help children and young people achieve realisations about the impacts of their harmful behaviour, in preparation and in conference. Making good that harm where possible and within their capacity is appropriate and allows them to demonstrate an acceptance of responsibility and satisfy the victim/s and community that meaningful intervention has occurred.

If the minimum age of criminal responsibility is raised to 14 then children and young people below this age cannot be 'convicted' of an offence and have a 'criminal record'. A higher age of criminal responsibility will support a reduction in the over representation of Indigenous young people in the criminal justice system.

Even when it comes to a level of critical intervention, we don't want a system which retains the ability to enforce life-limiting outcomes that convictions and criminal histories impose. Any new system must however, contain the long fought for protections that exists in the criminal law. The ACT Childrens Court currently has the legislative basis to prioritise rehabilitative aims and successive dedicated Childrens Court Magistrates have shown strong adherence to these aims, but despite this concession to the immaturity of children and young people, convictions for them become inevitable in this system following repeated offences or for more serious offences before the Court, as pressure builds from prosecutors for punishment and community safety objectives to become a higher priority.

Children and young people who cause harm (akin to 'offences') will still however, have engaged in behaviour that our community sees and feels as morally wrong and unacceptable so opportunities to respond in ways which balance the needs of people harmed and of children and young people are crucial.

In other words, we see the need to remove the 'criminal responsibility' and focus on supporting 'journeys of responsibility' for children, young people and their families/communities of care.

Public interest

We understand there will be many in the community who fail to feel compassion in the face of significant or repeated wrongdoing by children and young people, even those under 14 yrs. They will need to adjust to a changed concept of justice:

> *Restorative Justice goes against the image of Lady Justice in all of its elements: blindfold, scales, and sword. Its eyes and ears are wide open to see and hear the faces and the voices of those who have harmed and those who have been harmed. It does not have the arrogance to think we can measure pain and equate it with punishment. It deals with the irreversibility of human action. What is done cannot be undone. There is no equality of pain. Crime and punishment are not interchangeable. We must move on from this[3].*

If there is insufficient opportunity for children and young people to be accountable to those they've harmed, there is a likelihood victims of crime and the general public will reject the changes. The

community will need opportunities to be involved in the response to understand how restorative approaches can be respectful of all and powerfully effective, to be on board. The wider community would benefit from an ongoing engagement and dialogue with government and agencies involved in the restorative justice system. Attention would focus on the effectiveness of the restorative practices approach, the successes achieved, and the potential for the new era to contribute to a truly restorative city. Media of all kinds could be used for this.

Leaders will need to fully understand, embrace, and be strong ambassadors, for how a restorative philosophy which calls for a 'balanced approach' in every aspect of our interactions with children and young people is wholeheartedly in the public's interest.

Cultural change – doing justice differently, valuing the experience and issues of children and young people, their families and significant others, the broader community, and those that work with them.

We need a balanced, restorative system for children and young people both before and after harmful behaviour occurs – one focussed on prevention and one on rehabilitation and restoration of 'right relationships' rather than knee-jerk reactions fuelled by self-righteous anger; one which encompasses the values and practices of restorative justice and relational healing rather than reverting to the old cultural paradigm of intolerance, exclusion, stigma and punishment.

We need to look at how to behave as a community when this group engages in harmful behaviour. Once we have moved beyond the idea of criminal responsibility for 10 to 14 year olds, we can hopefully move beyond making judgements about which children and young people are 'worthy' of our respectful, constructive responses. Policing responses across jurisdictions, for example, have often used the 'attitude test' to determine which young people might be suitable for restorative justice. This ignores victims' needs and the young persons' need to be supported on a journey toward responsibility in a safe process.

This 'thinking differently' is the hard part for formal (criminal justice workers) and informal (family, community, volunteer) responders. As Jung once said, "thinking is difficult, that's why most people judge". Restorative philosophy helps guide our thinking and is an inspiration for right action when the going gets tough. When we are being ignored, evaded, screamed at, insulted/assaulted and/or ridiculed by 'offenders', we need to keep our cool, be resilient and stick to modelling and encouraging what we want to see in children and young people. We need to keep doors open and stay 'vitally interested' in young people's lives and potential. Sadly, we understand that it will still on occasion be necessary to restrain and detain some young people in some way when their safety or that of others is imminently, foreseeably at risk of significant harm.

There is also a need for a work-culture shift toward improving the status of child and youth work, recognizing the skills and training required, developing staff and remunerating accordingly. Many 'youth-work' positions that deal with children and young people and their families are deemed somehow, less worthy of equal status and pay of those who work with adult equivalents, yet when they respond ineptly, the impacts on our communities are enormous and can play out over whole lifetimes. There is a sense across jurisdictions that prosecutors view working in the Childrens Court as a 'training ground' for the real work of operating in the adult courts. There is no dedicated Children's Court prosecutor in the ACT. There has been no perceived 'time resource' according to

DPP for them to consider which matters related to children and young people, might not be in the public interest to prosecute, prior to the prosecution beginning.

Many volunteers who work with babies, children and young people are currently voicing the deep disappointment that their unique perspective, skills and knowledge are not appreciated by authorizing bodies when important decisions are being made.

The message we can't afford to send our community is that children and young people's justice and wellbeing issues and experiences are of lesser value. We want to see staff (paid or voluntary) being viewed as valuable resources who are trained and ready to 'show up consistently for their clients' courageously, creatively and compassionately, knowing that their organization is supporting them in their difficult work, providing opportunities for reflection, best practice advice and effective action.

Cultural change relies on bringing the broader community along with the proposed changes

Embedding restorative principles

In any model supporting a raising of the minimum age of criminal responsibility, we would like to see the principles of restorative practices firmly embedded. In a world where we have recognised the damaging potential of some religious ideology and state control, we are sorely in need of a philosophy espousing a set of values to live by, which promises to be inclusive, compassionate and accountable while resisting becoming a damaging ideology itself. Restorative principles value people and relationships, aim to uphold the rights of individuals and groups to co-create their rules of engagement with a firm focus on respectful interaction, understanding and accepting difference, listening to everyone, especially vulnerable voices and affirming shared responsibilities.

Vermont Emeritus Professor Gale Burford, a member of the International Learning Community on a Restorative Approach who has collaborated with the Canberra Restorative Community Network, says that a restorative response to actions where someone is harmed or someone does harm limits the additional harms arising from the dominant criminal justice responses. Some of these arise from the use of more regulatory formalism, which provides less voice for those who have been harmed as well as those who have harmed someone. It can also narrow the idea of the public interest to a forensic perspective and undercuts the potential role for informal helping networks. By comparison, a restorative approach can "heal" in its structure and processes:

- **Fully restorative approaches are relational:** emphasise widening circle of stakeholders, putting problem in centre not person, leadership from harmed person(s), diverse voices and checks and balances on multiple sources of power;
- **Restorative approaches build on capacities** of informal helping in partnership with formal systems, invigorate mutual aid self-help and self-regulation;
- **Restorative justice as relational or responsive regulation best sits in relational governance arrangements**; (e.g. restorative networks – cities, groups, families, organisations)

Burford goes on to say that restorative reforms " need to put resources into regulatory 'hotspots' (e.g. intersection of child protection and domestic violence) including policy, research, practice and interdisciplinary research.

Within this broad agenda for change, the CRCN sees a place for restorative and relational options at all places along the continuum. Local solutions can be important in creating the human and social capital to support children, young people and families. For example, as a preventive measure in relation to harming behaviours and a way of learning other ways of dealing with harm, the CRCN sees schools, sporting organisations and community hubs as ideal environments for restorative practices, building a herd immunity to toxic reactive thinking and actions and promoting inclusive, healthy and peaceful environments.

While the CRCN would like to see children and young people's behaviours decriminalized it recognizes that opportunities must be created for children and young people to build their capacity to be responsible and develop constructive, caring, purposeful ways of living in their community. For some this will occur almost immediately following their harmful behaviour as they know instinctively it is the 'right thing to do', for others who have had no model of responsibility-taking and see little justice in their own lives, it will be a longer, harder journey.

The great success of Restorative Justice in the ACT for responding to the offending behaviour of children and young people has been the collaboration with ACT Policing and the Childrens Court with young people and their families. The incentives to participate have, in part, been to avoid a more serious consequence (e.g. of going to court if it's a police diversion or avoiding conviction if it is a court referral) if they are found suitable and agree to address the incident in a conference.

Maintaining incentive to participate in restorative justice without the concession of diversion from a more serious consequence (Court) would be an issue for consideration.

Possible Restorative Model for Raising Minimum Age of Criminal Responsibility

Rather than dismantling the existing formal response structures for children and young people's harmful behaviour, the CRCN would like to see a hybrid approach, with policing and courts maintaining involvement but with convictions removed as sentencing outcome possibilities.

The CRCN would like to see policing and the courts become super specialised at responding to children and young people and even more restorative, relational and rehabilitative in focus.

The CRCN sees merit in the NZ model of maintaining involvement of criminal justice system agencies to be key responders and coordinators in a rehabilitative/restorative response which works to divert children and young people to interventions relevant to the circumstances and seriousness of their behaviour. Police, who will often be responding to reports of offences anyway (given the ages of offending children and young people won't be known immediately), and the courts need to maintain specialist (highly valued) child and youth responders within their organisations who understand and embrace a rehabilitative, protective, restorative, empowering imperative over punitive reactions. Police could use 'plain clothed officers' who understand trauma informed approaches and have an intimate knowledge of available services for children and young people where possible. They will also need to include Indigenous officers and a high degree of cultural competence and sensitivity to work with Indigenous young people, their families, and services, such as those currently intersecting with the Warrumbul Court.

The CRCN sees no need or place for prosecutors in this model with its fully rehabilitative/restorative function. Funding that previously went toward prosecuting children and young people under

fourteen years of age can be redirected to community restorative justice/ youth workers and programs/services for young people.

Legislation change/innovation will likely be needed to allow the judiciary to mandate appropriate program attendance for children and young people without a conviction being recorded and to be able to order forensic mental health reports and refer to restorative justice.

Restorative Justice diversions would be an ideal 'gold standard justice' diversion if all parties are suitable and agree to conferencing as it almost invariably *meets the needs of everyone involved/impacted by the harmful behaviour*.

The voluntariness of a restorative justice process must be maintained, so secondary programs and activities that develop empathy, pro-social behaviours and put something positive back into the community need to included in a spectrum of diversionary and or mandated programs that police (for smaller matters) and the Childrens Court (for more serious, complex matters) can refer.

ACT Policing continues a commitment to divert all children and young people (for less serious offences) to restorative justice interventions but retain the option to also initiate prosecution (known as a 'dual referral'). This occurs when an officer feels the community may be at risk by repeated or serious level behaviour (such as a 14 year old stealing and driving a car). Many children and young people, including those most vulnerable, whose harmful behaviour occurs in residential facilities are still coming before the Childrens Court. The Childrens Court needs to have restorative justice and other programs and services available for en-masse diversionary referral such as occurs in New Zealand, to support appropriate further action with these kids and their families rather than pursue formal proceedings against them.

Schools, shops and neighbourhoods (community generally) should be supported to respond to child and youth incidents in ways which reflect restorative principles, and have recourse to support of restorative justice/youth workers if matters can't be resolved on-site or involve serious or repeated, escalating harmful behaviours. It has to be acknowledged that an incident by a child or young person causing damage or harm to a person or their property is essentially a violation of people and relationships. It creates obligations to make things right where possible. Resolution involves looking at the harm caused by the incident and asking all present "How can this harm be repaired?" Ideally children and young people are supported in this journey of accountability by family members, mentors and responsible adults where needed or appropriate. Even children and young people with profound disadvantages should not be treated as 'victims' first and foremost, but valuable and visible members of our community who matter, and whose behaviour matters.

It cannot be ignored, that community members who feel victimized by young peoples' behaviour (this includes other young people as victims), who have no understanding of the context behind the behaviour and feel unequipped to deal with it or perceive that 'nothing is happening' in way of remedy can often make more punitive and damaging responses than the criminal justice system we are currently critiquing as harmful.

DRAFT

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

No exceptions for convictions or criminal records. A restorative approach sees little consistency in decriminalizing less serious offences while criminalising 'serious' harmful behaviours of 10-14 year olds More complex responses and interventions are certainly required however for children and young people identified as engaging in seriously harmful behaviours.

2. Should doli incapax have any role if the MACR is raised?
No role for doli incapax. See little relevance of the doli incapax principle which appears to assume innocence until proven evil. We'd rather extend a tolerance and determination to intervene with this age group in ways that won't use 'evidence of badness' to justify branding and punishing children and young people under 14.

A restorative approach avoids broad assumptions and seeks to understand the child and young person's whole context as well as their motivation for harmful behaviour.

Section Two: An alternative model to the youth justice system

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?
Restorative justice and practices principles are appropriate, as is a rehabilitative non punitive focus that precludes convictions for offences committed by children and young people under 14.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?
Maintain existing services, specialize and train for working restoratively with children and young people, include more trained voluntary community workers to promote connection and support (youth development circles, community circles, community services volunteers). Change legislation to allow courts to work with children and young people and refer to services, mandating where seriousness/grievousness impels, to therapeutic/rehabilitative intervention. See Appendix A for current services that could be expanded and introduced. Research undertaken by Dr Sharynne Hamilton[4] and colleagues has shown " little evidence of key professional relationships as sources of hope and

inspiration" for young people involved with the youth criminal justice system (Hamilton et al 2020). Engagement with the United Ngunnawal Elders Council in relation to referrals to the Ngunnawal Healing Farm would be important for Aboriginal and Torres Strait Islander children and young people as a way of addressing the legacies of historical and continuing trauma.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

Community/neighbourhoods, commercial areas, should be trained and supported to respond to low level incidents themselves, including having the ability to recognize when safety requires them to allow formal service to intervene instead. Police youth response service to provide response where insufficient confidence in community or seriousness/impact on victims is significant. There also needs to be a rethinking about the current mandatory reporting arrangements, so that parents who are seeking help for their children and young people or for their family relationships and behaviours are able to be provided with assistance by services, without requiring reporting of the family to Children & Youth Protection Services. The impact on many families in need of assistance of mandatory reporting has been to NOT seek help for risk of becoming embroiled with "the welfare". Making helping services safe places for people with children or young people who are at risk of doing harming behaviour to help-seek early is a crucial way of becoming more focussed on prevention.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

Emergency accommodation and supports should be mediated by the police youth response team. Police should retain some powers to arrest in cases of where the safety of the community or children and young people are at risk, but this should be used as last resort. There are provisions under the *Children and Young People Act 2008* for protection orders and emergency protection arrangements under Chapter 13.

7. How should children and young people under the MACR be supported after crisis points?

Programs and support services must be available for children and young people and their families post crisis.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

Mandatory mechanisms are likely necessary to respond to higher levels of imminent risk and following serious harmful behaviours in best interests of children and young people and community. This can still be done outside of the criminal law context – the issue must be the protection of self or others, while therapeutic assessments are undertaken, as soon as

possible. Under the *Children and Young Peoples Act 2008*, there are provisions for therapeutic protection arrangements under Chapter 13 and these may be useful in these situations.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

Yes: to protect themselves or others initially. If the child or young person is believed to create an ongoing risk to self or others because of mental illness, there is the possibility of using the Mental Health Act. An emergency order under that Act allows time for an assessment to be made of the child or young person's mental state. Another reason may be to protect them or others from harm while the circumstances relating to the alleged offence are clarified and a therapeutic program is worked out. Where possible the deprivation of liberty should occur in an area which is secure but not in a correctional facility, but in a therapeutic place. Similarly, the duration of time of deprivation of liberty needs to be as short as possible. At the moment about two-thirds of children and young people in detention are on remand. Under the *Children and Young Peoples Act 2008*, there are provisions for therapeutic protection arrangements under Chapter 13 and these may be useful in these situations.

Section Three: Victims' Rights and supports

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

Victims' rights should remain a high priority for response mechanisms. Offences can still be recognized as inappropriate or harmful behaviour even if no conviction can be recorded or gaol imposed. The legislation on Victim's rights already allows someone to access their services but may need to be amended if that is 'legal offence' reliant.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

Victims should be provided information about restorative justice processes and consider engagement in a process/ conference if suitable for all parties. Without consent, there should be no access to specific information about the children or young people. Victims can be informed about the spectrum of programs that children and young people can be offered, relevant to the offence and level of seriousness of offence. Victims should be able to access support from Victim Support ACT and other community relevant support services where needed.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

The people harmed should be supported the same way they are supported now. Accountability should play a key role to encourage children or young people to engage in a process of reflecting and considering what they have done, how it has impacted another/s and what they might be able to do to help put things right. This will vary according to the psychological and emotional wellbeing of the children or young people, understanding that, a restorative journey toward taking responsibility is a gentle, development opportunity that involves facilitators who will ensure the pace, content and outcomes of restorative justice remain trauma informed, reasonable, achievable, relevant and appropriate within the context of situation and capabilities.

Where the children and young people who have caused harm cannot be involved with victims directly via RJ, there may be other mechanisms for neighbourhood and community support. These options need to be explored across a range of setting (e.g. Scouts, religious, sporting and interest groups). Neighbourhood watch, for example, may be one group who might/could request/coordinate local support for helping victims of crime repair the harms (lending a hand for material or emotional support) where possible.

Section four: Additional legal and technical considerations

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

We do not have information about what those police powers in relation to children under ten look like. It would have been good to provide reference or further information in relation to this question. However, in principle, yes, for a specialist 'youth response team' of police who understand the rights, needs, interests of children and young people, the ability to arrest where the situation requires it for safety reasons, would be necessary on occasion.

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?

The police youth response team should ideally have strong working relationship with whole community, especially the Indigenous community and agree not to arrest/detain a children or young people including an Aboriginal and or Torres Strait Islander children or young people without a family member, Elder or Indigenous liaison worker present.

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

This is hard to say and we would be wary of possible unintentional consequences. Do we have any data of the prevalence of this concern now? Higher penalties for adults or older young people who recruit/exploit children and young people to offend may lead to higher level coercion, threat or actual violence against children and young people by those people. This should be monitored as part of the post change implementation to see what effect, if

any, there is in this area. If necessary, additional legislation that allows this information to be collected should be implemented at the point of change.

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?
Yes, transition children and young people to alternative model. Transition should focus on retaining any rehabilitative aspects of the sentence.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?
Transitional arrangements that are retrospective may need to quash convictions for all children and young people previously convicted of offences that they committed below the age of 14. These records should not be able to be used, in any case. Situations such as sexual offences should also be included in this ban. There are examples of children who were in care who were convicted in very unclear circumstances of a sexual offence at 11 years of age, and even though there was no further criminal sexual behaviour after that, the young person at 30 was not able initially to get a Working With Vulnerable Persons approval for his training as a health professional because of this "conviction". Transitional arrangements could address these situations and fix these injustices.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?
Yes - they should be spent automatically and universally and where they are included in other Government record-keeping, like in the Vulnerable Peoples recording system, they should be removed.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?
Personal information for children who display harmful behaviours should only be accessed/used if children and young people are at risk of harm or harming others (with sufficient reason and imminency). The information provisions of the *Children and Young People Act 2008* have sometimes been used to prevent children and young people knowing what has been recorded about them on case files. There needs to be clear and appealable rights for children and young people to access the information held about them. If they want this access during their legal minority, to their legal representative or nominated adult who has parental responsibility for them or is otherwise in *loco parentis*.

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

Such information should only be able to be used for reasons of safety and risk assessment, not for punitive action.

DRAFT

Existing programs, models and resources for providing restorative support

Conflict Resolution Service is one of the agencies already committed to Restorative Practice work, as outlined on its website, along with several others listed below). CRS ran a Peer mediators training program in the 1990's., which might provide a useful model for people to train in community led restorative conferencing.

Safe & Connected Youth Program (S&CY) https://crs.org.au/scyp/

- aims to provide support for children and young people under the age of 16 and their parents/carers and family, who are experiencing or at risk of homelessness.
- **30%** of homeless people in Australia are under the age of 18.
- **1** in **200** people are homeless in Australia on any given night.
- **27,688** young people aged between 12-24 years are experiencing homelessness, account for one quarter of the total homeless population in Australia.

The Program is funded by ACT Government and is an integrated service model provided by the following community organisations:

- Conflict Resolution Service, to provide mediation to families where young people are at risk of homelessness due to family conflict;
- Northside Community Service, to provide therapeutic casework;
- Woden Community Service, to provide therapeutic casework; and
- Marymead: *CRS CEO Melissa Haley identifies family conflict is one of the highest contributing factors to youth homelessness. The ongoing support from the ACT Government is key to ensuring families can remain engaged, connected, and strong.*

At present, CRS, NCS and WCS work closely together to provide early intervention support to children and young people who are experiencing family conflict, who may still be at home (at risk of homelessness), or moving in and out of homelessness. The aim of the early intervention support is to assist children, young people, and their families to improve family functioning, mitigate the risk of youth homelessness, and improve overall wellbeing of participating family members.

On the 10th September 2020, ACT Minister for Children, Youth and Families Rachel Stephen-Smith allocated money to build fit-for-purpose accommodation for young people under the age of 16. The fit-for-purpose accommodation site will be based on the Ruby's model in South Australia. Ruby's is an evidence-based model, providing young people with a safe place to stay while also working with families to resolve conflict and improve relationships. The S&CY team will work in close partnership with the provider of the Ruby's refuge model.

Relationships Australia: run a range of courses to help people improve their relationships, provide support for parents and families etc

Models we can pilot: Youth development circles, community circles, community services volunteers.

Special needs groups: e.g. refugee youth- what other services/groups do we need to engage with?

Implementing Restorative Justice with Children – Practical Guide. This is a useful resource produced by International Juvenile Justice Observatory. available at: https://www.euforumrj.org/en/implementing-restorative-justice-child-victims-2016-2018.

Endnotes

[1] Productivity Commission. 17A, Youth Justice Services – Data tables Table 17A.5, which showed that ACT Indigenous children and young people between 10-17 were in juvenile detention at the rate of 42.7 per 10,000, while non-Indigenous children and young people were detained at 2,4 per 10,000. This was the highest differential rate in Australia. Available at https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/community-services/youth-justice

[2] For a good summary of the research into brain and emotional development, UK Parliamentary Office of Science and Technology. *Age of Criminal Responsibility.* POSTNOtE 577 June 2018. Available at: http://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf

[3] Quoting from Brunilda Pali at https://kuleuvenblogt.be/2018/02/13/imagining-a-justice-that-restores/ in International Juvenile Justice Observatory. *Implementing Restorative Justice with Children – Practical Guide.* European Commission 2018. The practical guide is part of the European project "Implementing Restorative Justice with Child Victims" (Grant agreement number JUST/2015/RDAP/AG/VICT/9344), co-funded by the European Union's Rights, Equality and Citizenship Programme. It is available at: https://www.euforumrj.org/en/implementing-restorative-justice-child-victims-2016-2018

[4] Australian Institute of Health and Welfare (AIHW). *Youth Justice in Australia 2019-20*. Cat No. JUV 134 . AIHW 2021 Canberra: Page 14 and Figure 3.5. Available at: https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/overview.

[5] For a discussion of some of these complex issues, see Office of the Prime Minister's Chief Science Advisor (OPMCSA). *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand.* 12 June 2018. OPMCSA 2018 Auckland. See especially: parts 1.1 and 1.2, pages 16-27. Available at: https://www.pmcsa.org.nz/wp-content/uploads/Discussion-paper-on-preventing-youth-offending-in-NZ.pdf. While there are specific New Zealand issues also raised in this paper, many of the its explanations are common with the Australian context.

[6] Hamilton, S. L., Maslen, S., Best, D., Freeman, J., O'Donnell, M., Reibel, T., Mutch, R. C., & Watkins, R. (2020). Putting "justice" in recovery capital: Yarning about hopes and futures with young people in detention. International Journal for Crime, Justice and Social Democracy, 9(2), 20–36. https://search.informit.org/doi/10.3316/informit.171423354201892

Productivity Commission. 17A, Youth Justice Services – Data tables Table 17A.5, which showed that ACT Indigenous children and young people between 10-17 were in juvenile detention at the rate of 42.7 per 10,000, while non-Indigenous children and young people were detained at 2,4 per 10,000. This was the highest differential rate in Australia. Available at https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/community-services/youth-justice

[2] For a good summary of the research into brain and emotional development, UK Parliamentary Office of Science and Technology. *Age of Criminal Responsibility.* POSTNOtE 577 June 2018. Available at: http://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf

[3] Quoting from Brunilda Pali at https://kuleuvenblogt.be/2018/02/13/imagining-a-justice-that-restores/ in International Juvenile Justice Observatory. *Implementing Restorative Justice with Children – Practical Guide.* European Commission 2018. The practical guide is part of the European project "Implementing Restorative Justice with Child Victims" (Grant agreement number JUST/2015/RDAP/AG/VICT/9344), co-funded by the European Union's Rights, Equality and Citizenship Programme. It is available at: https://www.euforumrj.org/en/implementing-restorative-justice-child-victims-2016-2018

4 Hamilton, S. L., Maslen, S., Best, D., Freeman, J., O'Donnell, M., Reibel, T., Mutch, R. C., & Watkins, R. (2020). Putting "justice" in recovery capital: Yarning about hopes and futures with young people in detention. International Journal for Crime, Justice and Social Democracy, 9(2), 20–36. https://search.informit.org/doi/10.3316/informit.171423354201892

Raising the Minimum Age of Criminal Responsibility

AFI Response to Discussion Paper

About Advocacy for Inclusion

Advocacy for Inclusion incorporating People with Disabilities ACT is a leading independent organisation providing dedicated individual and self-advocacy services and training, information and resources in the ACT. We deliver reputable national systemic advocacy informed by our extensive experience in individual advocacy and community and government consultation.

As a Disabled People's Organisation, the majority of our organisation, including our Board of Management, staff and members, are people with disabilities. Advocacy for Inclusion speaks with the authority of lived experience and is strongly committed to advancing opportunities for the insights, experiences and opinions of people with disabilities to be heard and acknowledged.

Advocacy for Inclusion operates under a human rights framework. We uphold the principles of the United Nations *Convention on the Rights of Persons with Disabilities* and strive to promote and advance the human rights and inclusion of people with disabilities in the community. Advocacy for Inclusion is a declared public authority under the *Human Rights Act 2004*.

Contact details:
2.02 Griffin Centre
20 Genge Street
Canberra City ACT 2601
Phone: 6257 4005
Email: info@advocacyforinclusion.org
ABN: 90 670 934 099

Prepared and written by Stacy Rheese, Team Leader Policy
Authorised by Nicolas Lawler, Chief Executive Officer
© Copyright Advocacy for Inclusion Inc.

Advocacy for Inclusion acknowledges the Aboriginal and Torres Strait Islander peoples as Traditional Custodians of the lands where we live, learn and work.

We respect and celebrate diversity of individuals, including those amongst the lesbian, gay, bisexual, trans, and intersex communities and we value and promote inclusion and diversity in our communities.

Introduction

Advocacy for Inclusion (AFI) strongly welcomes and supports the ACT Government's commitment to raise the minimum age of criminal responsibility. We strongly support raising the age to *at least* 14 years old, with no exemptions and no carve outs.

This submission will focus in the majority on responding to the questions raised in 'Section two: An alternative model to the youth justice system' of the *ACT Government Discussion Paper Raising the minimum age of criminal responsibility* (Discussion Paper).[1] AFI wishes to highlight the significance of this discussion as a disability issue, and the necessity of ensuring disability perspectives and considerations are included in the development of an alternative model. We emphasise the importance of early support in the community and recognise the significant opportunities which are provided to better identify and respond to the needs of children at risk of contact with the youth justice system. We also wish to highlight important considerations which must not be overlooked in the development of an alternative model, chiefly regarding mandatory engagement and specific accommodation options, to successfully meet the needs of this cohort.

The prevalence of disability and mental ill health in youth justice

The 'appallingly high'[2] prevalence of mental health disorders and cognitive disabilities within youth justice systems means that it is critical that considerations of disability and mental health underpin and frame all levels of discussion of raising the minimum age of criminal responsibility.

Although Australia does not collect comprehensive national data on the prevalence of mental health conditions and cognitive disability of children and young people within the youth justice system, research collected from States and Territories, inspectorates, academics and non-government organisations has indicated a high prevalence.[3] It is also commonly recognised from within Australian youth justice systems that 'most young people who come through the system have 'a mild issue or impairment or disability'.'[4] However the prevalence and significance of intersections of disability, mental health and complex support needs of young people within youth justice are 'conspicuously under-researched and under-theorised.'[5]

This is certainly the case in the Australian Capital Territory (ACT), where even young people detained in the youth justice system are not adequately screened for disability, and sufficient data

[1] ACT Government *Discussion Paper Raising the minimum age of criminal responsibility* Justice and Community Safety Directorate and Community Services Directorate.
[2] Baldry, E. et al, *Cruel and unusual punishment': an inter-jurisdictional study of the criminalisation of young people with complex support needs* (2018) Journal of Youth Studies, 21:5, 636-652, DOI: 10.1080/13676261.2017.1406072, p 644.
[3] Ibid, p 637.
[4] Ibid, p 640.
[5] Ibid, p 637.

is not collected on the prevalence of disability among detainees.[6] Despite this, comparative evidence from other states and nationally indicates that the high prevalence of mental health conditions and disability within youth justice is an extensive and entrenched problem.

Research from New South Wales (NSW) has found that rates of psychological disorders in young people in custody range from 83% to 88%.[7] While limited research has been conducted, the high prevalence of cognitive disabilities in young people in youth justice systems is also evident, with studies suggesting that 18% of young people in custody in NSW have cognitive functioning in the low-range (IQ < 70),[8] while 39% to 46% fall into the borderline range of cognitive functioning (IQ 70–79).[9] This is significantly higher than estimations of the national prevalence of intellectual disability in children of 4.3%.[10]

Studies also show that young people in contact with youth justice systems have higher levels of speech and language impairments, acquired brain injury, attention deficit hyperactivity disorder (ADHD) and fetal alcohol spectrum disorder (FASD).[11] Cognitive impairments and associated conditions such as FASD may characteristically include "poor impulse control, developmental delay, poor memory, difficulties with abstract concepts and difficulties with planning and following through on goals."[12] (While it will not be addressed further in this submission the prevalence of, and failure to adequately assess, cognitive impairment may have significant implications for concepts such as *doli incapax*.)[13]

The high rate of co-occurrence of multiple impairments within these conditions must also be noted. Children with cognitive disabilities experience higher rates of additional developmental disorders such as autism spectrum disorder (ASD) and ADHD,[14] and it is estimated that 40% also present with mental ill health.[15] Adding to the complexity of support needs of this cohort, children with such conditions are also much more likely to present with associated behavioural problems, experience bullying, and engage in harmful drug and alcohol use.[16] However it is important to note

---

[6] ACT Inspector of Correctional Services *Report of a healthy centre review of Bimberi Youth Justice Centre* 2020, p 12.
[7] Baldry, E. et al, above n 2, p 637.
[8] Ibid, p 638.
[9] Other jurisdictions (England and Wales) have recorded 23% of young people in juvenile justice having cognitive functioning in the low-range (IQ < 70) in Baldry, E. et al, above n 2, p 638.
[10] Australian Institute of Health and Welfare *Australia's Children* <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/health/children-disabilities> last updated 03 Apr 2020.
[11] Baldry, E. et al, above n 2, p 638.
[12] Commonwealth of Australia, *Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder* Senate Standing committee Report, March 2021, p 15.
[13] 'It was reported that many young people appearing before the courts have cognitive functioning and reading and writing levels at an age well-below the age of criminal responsibility (10 years of age) in Australia and England and Wales. Many respondents reported that children and young people with cognitive and borderline cognitive impairments have a reduced capacity to understand and comprehend the implications of their offending and to follow, and actively engage with, the legal process' in Baldry, E. et al, above n 2, pp 640-641.
[14] Ibid, p 638.
[15] The Australian & New Zealand Mental Health Association *What About the Mental Health of Kids with Intellectual Disability?* <https://anzmh.asn.au/child-mental-health/mental-health-kids-intellectual-disability/>.
[16] Baldry, E. et al, above n 2, p 638.

that on the whole research has found 'no inherent link between disability and crime', rather it has found 'a strong causal link between disability and incarceration'.[17]

For children with cognitive impairments and mental health conditions engaging with the youth justice system, contact with police often begins at a young age, as both victims and offenders.[18] In this cohort, police contact 'typically' starts in the early teenage years, becomes frequent and continues for many years. Children with multiple co-occurring disabilities or impairments and associated complex support needs often have a significantly lower age of initial contact with police, and are more likely to go on to have a higher number of arrests, custodies and remands, while also being more likely to be convicted of lower level offences.[19] This pattern is very common in young people with 'the trifecta' of cognitive impairment, mental health conditions and contact with youth justice, who have been referred to as 'frequent fliers'.[20]

This description is likely to be very fitting of the small number of children in the ACT who are at the centre of considerations of raising the age of criminal responsibility. Given the age range of 10-14 years of the children captured in these discussions (and accordingly their very young initial contact with the justice system), it is highly likely that these children are experiencing disability and/or mental health conditions, potentially undiagnosed or unidentified, and it is likely that their associated support needs have not been, and are not being adequately supported.

Aboriginal and Torres Strait Islander children in youth justice

Aboriginal and Torres Strait Islander peoples experience higher rates of mental health conditions and cognitive impairment than non-Indigenous Australians.[21] The overrepresentation of Aboriginal and/or Torres Strait Islander children in youth justice systems in Australia has been linked to 'schools and police viewing certain kinds of behaviour through prisms of institutional racism and offending rather than disability.'[22] Aboriginal and/or Torres Strait Islander peoples in particular commonly experience co-occurring conditions as well as further complex support needs that are 'managed by police and justice systems, often from childhood'.[23] Research has also highlighted 'a severe and widespread lack of appropriate early diagnosis and positive culturally responsive support for Indigenous children and adults with cognitive disability' within criminal justice systems.[24]

---

[17] McCausland, R. and Baldry, E. *'I feel like I failed him by ringing the police': Criminalising disability in Australia* (2017) Punishment & Society, Vol. 19(3) 290–309, p 293.
[18] Ibid, p 294.
[19] Baldry, E. *Vulnerable young people with complex support needs and the criminal justice system* (2016) South Australia Disability Justice Plan Symposium.
[20] Baldry, E. et al, above n 2, p 641.
[21] McCausland, R. and Baldry, E. above n 17, p 294.
[22] Ibid, p 294.
[23] McCausland, R. and Baldry, E. above n 17, p 292.
[24] Ibid, p 294.

It is important to recognise the different perceptions and experiences of the concept of 'disability' in different communities. This can impact on the cultural appropriateness, accessibility and engagement level of disability services and supports, including concern within Aboriginal and/or Torres Strait Islander communities of the use of Western assessments and criteria, as well as the potential for intervention into families.[25]

It is essential that the ACT Government engages with Aboriginal and/or Torres Strait Islander peoples to support culturally appropriate responses and supports.

In summary, it is inappropriate and inadequate to manage children with disability, mental health concerns and complex support needs through a framework of criminal justice. The overrepresentation of this cohort within youth justice represents both the criminalisation of disability,[26] and the failure to adequately identify and respond to disability needs. The minimum age of criminal responsibility must be raised, and the needs of these children must be through an approach which is consistent with our obligations under international human rights law, particularly the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), in order 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'[27]

Principles underpinning the development of an alternative model to a youth justice response

Due to the high prevalence of disability and mental health concerns within young people in the youth justice system, and the significant likelihood that the youngest children in contact with the youth justice system may have multiple disabilities and mental health conditions and associated complex support needs, a disability perspective and considerations of accessibility must be incorporated into every level of discussion and design of an alternative model to a youth justice response.

AFI highlights that disability perspectives and accessibility considerations have not been adequately included within youth justice or wider mainstream support services in the ACT previously. These systems, and new alternatives, will continue to fail to meet the needs of this cohort if this trend continues.

[25] McCausland, R. and Baldry, E. above n 17, p 292.
[26] Baldry, E. et al, above n 2, p 639.
[27] United Nations *Convention on the Rights of Persons with Disabilities* Art 1.;
Also see McCausland, R. and Baldry, E. above n 17, p 292.

The Social Model of Disability

AFI strongly emphasises the necessity of incorporating the principles of the Social Model of Disability into the development of an alternative model. This distinguishes disability from being solely an individual impairment, to acknowledging the disabling impact of socially constructed discriminatory barriers.[28]

Fundamental consideration of the interaction of disability and mental health on other social structures such as family cohesion, mainstream and specialist supports and services (including Child and Youth Protection Services [CYPS] and out-of-home-care [OOHC]) and interactions with police and justice systems processes is needed to 'better comprehend the dynamic interactions between individuals, institutions and systems that lead to disadvantaged and marginalised young people with disability (and/or complex needs) being funnelled into, around, and often back into, youth justice systems before eventually being discharged into adult prisons.'[29] These interactions and experiences impact on disability needs and behavioural responses and have significant implications for the design of effective response models.[30]

The narrow scope of intervention thresholds

AFI notes with concern the narrow scope indicated in the Discussion Paper of the three main thresholds indicating key points for intervention, starting at 'when crisis occurs'.[31] AFI submits that priority of focus of an alternative model should be before harmful behaviour occurs or reaches crisis point. We recognise the inconsistency of a crisis point focus with the *Early Support by Design* reform highlighted in the *ACT Disability Justice Strategy* to 'shift from a heavy focus on crisis driven responses, where service impacts are less effective in achieving positive intergenerational change, to a system focused on early support'.[32] AFI emphasises that an alternative model must look beyond the usual points which create engagement opportunities for a youth justice response, and instead incorporate community support at a much earlier stage than a crisis point:

> *The way that people with mental and cognitive disability are managed by police, courts and prisons in Australia highlights systemic problems requiring systemic responses. Their over-representation in criminal justice systems cannot be addressed by conceiving of those systems as therapeutic. Criminal justice systems are premised on punishment and risk management rather than on responding to the unmet needs of the high proportion of persons in their care who have mental and cognitive disability and the underlying causes of their offending. As a result, diversionary mechanisms, however well intentioned, are serving to entrench rather than divert. Law reform, adequate resources, education and training for police, lawyers, magistrates and*

[28] Baldry, E. et al, above n 2, p 639.
[29] Ibid.
[30] Ibid, p 641.
[31] ACT Government, above n 1, p 23.
[32] ACT Government *Disability Justice Strategy 2019-2029 A Strategy to Address Unequal Access to Justice in the ACT*, p 39.

corrections staff to ensure more equitable access to justice for people with mental and cognitive disability should be a matter of urgent national priority. However, what is fundamentally required is a genuine commitment to providing children and adults with mental and cognitive disability with appropriate holistic support in the community throughout their lives to ensure genuine alternatives to criminalisation.[33]

Identification of needs of children and young people

Assessment and identification of disability and mental health need is not occurring early enough, or sufficiently in the ACT. As stated previously, even young people detained in the youth justice system are not adequately screened for disability.[34] While the *Healthy Centre Review of Bimberi Youth Justice Centre 2020* highlighted the need for better disability screening (and development of screening is under consideration), AFI highlights the 'cognitive dissonance' of aiming to prevent children with cognitive and mental disability connecting with youth justice, while also potentially only managing the assessment and identification of disability need *within* the youth justice system.[35]

The lack of adequate identification of disability need, and the implications this has on the effective response towards harmful behaviours may have several causes in the ACT, including a lack of disability awareness across mainstream services, and the lack of or inaccessibility of assessment services. However, AFI emphasises that there is significant opportunity in the ACT to increase the capacity of services and systems to better recognise and respond to disability needs. We note that the utilisation of these opportunities could strongly link with a multidisciplinary panel, as discussed in the Discussion Paper.[36]

AFI highlights that a child at risk of contact with the youth justice system is often connected to a number of formal and informal support networks which provide opportunity for identification and response to disability need, including family, education, health, youth services, support services, CYPS and OOHC. Many factors which increase the likelihood of contact with youth justice are well known, including childhood abuse and neglect, OOHC and complex support needs.[37] We highlight that:

> *Many of these factors are identifiable early in life and, potentially at least, there are opportunities for government agencies and related services to mobilise appropriate support for such children, young people and their families. Early recognition of need and the concomitant provision of support through infant health services, early childhood programmes and preschool and school-based interventions (see also Baldry et al. 2015) offer the prospect of positive and preventive outcomes for young people. In cases where these early opportunities are missed, the same young people are invariably criminalised and 'washed-up' into youth justice systems and, unless*

[33] McCausland, R. and Baldry, E. above n 17, p 303.
[34] ACT Inspector of Correctional Services, above n 6, p 12.
[35] Baldry, E. et al, above n 2, p 644.
[36] ACT Government, above n 1, p 21.
[37] Baldry, E. et al, above n 2, p 646.

> *diversionary screening is activated at the very first point of contact with such systems, young futures are blighted.*[38]

Across many services and systems in the ACT there are clear and strong opportunities for earlier intervention to change the trajectory for these children. Various supports and services may be greatly assisted by being able to refer children who are presenting with harmful behaviours or who may be at risk of contact with youth justice to a multidisciplinary panel with the expertise and ability to put appropriate supports in place.

Considerations for a Multidisciplinary Panel

AFI emphasises the importance for a multidisciplinary panel to uphold a Social Model view of disability, and not resort to a Medical Model view of disability, which could simply perpetuate the response and access issues currently experienced by many people with disability in attempting to access support in the ACT (outlined further below).

AFI also highlights the necessity of the panel to include disability awareness and expertise. We note with concern the wording in the Discussion Paper of including on the panel 'Mental health *or* disability' (emphasis added).[39] AFI cautions against the conflation of mental health and disability (particularly cognitive impairment) as these are distinct and require specific and distinct responses and support:

> *The conflation of cognitive impairment and mental health disorders in the criminal justice system is a particular problem (NSW Law Reform Commission 2012, 2013; Sotiri et al., 2012: 46). People with cognitive disability require specific processes and diversionary pathways; responding as if their cognitive impairment is the same as a mental illness is neither effective nor appropriate. Cognitive disabilities are permanent and cannot be 'treated' in the way mental illness may be with pharmaceutical and clinical treatment but people with cognitive disability can be supported to live fulfilling and engaged lives. Nevertheless, people with cognitive disability also frequently suffer from mental health issues, complicating their support needs (Baldry et al., 2013). People with cognitive disability are often seriously disadvantaged by being included in the forensic system because they tend to be treated like someone with mental illness and not someone with cognitive disability. This can result in indefinite or longer detention than had they been sentenced for an offence (Gooding et al., 2016). This is because they may be found unfit to plead or not guilty by reason of mental impairment but may be thought to be a risk to the community, have no other place to go and are not released because they are not seen to improve (Baldry, 2014: 381).*[40]

Further, as will be outlined below, expertise and experience in mental health or disability can also be distinct practices and cannot be conflated, as this can often result in inadequate responses and poorer outcomes.

---

[38] Baldry, E. et al, above n 2, p 646.
[39] ACT Government, above n 1, p 21.
[40] McCausland, R. and Baldry, E. above n 17, p 294-295

AFI also emphasises that a multidisciplinary panel will only be as good as the services and supports available to resource it.[41]

Need for improved community support

AFI submits that the high prevalence of children with cognitive disability and mental health conditions is significantly driven by a 'lack of community-based provision and the inadequate nature of support available for children and young people with complex needs.'[42] We emphasise that the improvement and increase of adequate community support for this cohort must be of highest priority in developing an alternative model.

Early support is essential to prevent the escalation of unidentified and unaddressed disability needs and the funnelling of children and young people with disability into acute crisis services and the youth justice system. AFI recommends the prioritisation of increased early disability support in line with the *Early Support by Design* reform under the *ACT Disability Justice Strategy.* This recommendation should also be considered in relation to the ACT's implementation of the *National Disability Strategy* and the recommendations of the final report of *Our Booris, Our Way.* Additionally, AFI supports the development of a First 1000 Days Strategy in partnership with the community,[43] with inclusion of disability awareness.

Additionally, AFI recommends that existing services are made more accessible and inclusive through improved disability awareness and increasing the capacity of services to better identify and respond to disability needs. We also recommend the provision of additional services to meet demand, including through the creation of new services and the expansion of existing services. Early disability support may include identification and response measures, alongside family, respite and behaviour support.

Improved and increased assessment services are also needed, however these must be reinforced by robust and effective community supports to address need:

> *Those whose disability is recognised and formally diagnosed may receive early intervention and specialist support. Yet all too often, for those from disadvantaged backgrounds in particular, this does not result in timely, appropriate and effective support and can result in stigma, discrimination and negative marginalising treatment by the law. Those whose disability may not be recognised or diagnosed, such as those with borderline intellectual disability, foetal alcohol spectrum disorder or acquired brain injury, are often seen as just poorly behaved and as wilfully offending. Without timely therapeutic support in the community, both groups are set on a trajectory of criminal justice contact.*[44]

[41] Baldry, E. et al, above n 2, p 645.
[42] Ibid.
[43] ACT Government *Parliamentary and Governing Agreement 10th Legislative Assembly for the Australian Capital Territory* (2 November 2020), Appendix 3, 19.5.
[44] McCausland, R. and Baldry, E. above n 17, p 302

The coordination of services must also be improved, through the reduction of siloing of services and improved information sharing to support a coordinated and holistic approach to meeting the needs of this cohort.[45]

Assessment services

Research has found that children and young people engaging with youth justice systems are 'increasingly presenting with multiple disabilities and health problems and, therefore, must be screened for a whole range of conditions'.[46] There is substantial need for a range of specialist services in the ACT, with interstate services often being the only option (and therefore out of reach for many). AFI highlights particular need for mental health services appropriate for children and young people with cognitive disabilities, ASD and other developmental and behavioural disorders. We note the ongoing need for specialist allied health professionals to meet demand for Autism Spectrum Disorder (ASD) assessments,[47] and also note that the Foundation for Alcohol Research and Education (FARE) has repeatedly called for the establishment of a Fetal Alcohol Spectrum Disorder clinic in the ACT.[48] We highlight the lack of progress in the ACT since MLA Elizabeth Kikkert brought a *Bimberi Youth Detention Centre, Screening Practices, Foetal Alcohol Spectrum Disorder* motion, amended and agreed to in 2018, including identifying 'best practice approaches and tools for the diagnosis and treatment of FASD, both in juvenile detention settings and in the community'.[49]

Service access issues

Mainstream services in the ACT are not currently equipped to adequately support many disability needs, and specialist disability services are lacking. AFI strongly encourages initiatives to increase the accessibility of mainstream services, as well as the extension or creation of specialist disability services. Common barriers to accessing services in the ACT for children and young people with disability can include financial constraints and the lack of existing services. Additionally, disability specific accessibility barriers can prevent adequate service and treatment. Of particular concern in the ACT is a lack of disability awareness and specific disability knowledge in health services. This can lead to communication barriers, misunderstandings, increased difficulty implementing

[45] Baldry, E. et al, above n 2, p 646.
[46] Ibid, p 644.
[47] Community Services Directorate *Annual Report 2019-20* (Report, ISSN 2206–9968, 2020), p 94.
[48] Foundation for Alcohol Research and Education *Election commitment sought for Canberra FASD clinic* 9 September 2017 <https://fare.org.au/election-commitment-sought-for-canberra-fasd-clinic/>;
See also Foundation for Alcohol Research and Education *ACT Drug Strategy Action Plan 2018-2021* August 2018, p 21-22.
[49] Legislative Assembly for The Australian Capital Territory *Minutes of Proceedings* (Parliamentary Minutes, No 57, 9 May 2018) <https://www.parliament.act.gov.au/ data/assets/pdf file/0006/1198311/MoP057F1.pdf>.

management plans, examination difficulties and an increased likelihood of misdiagnosis and diagnostic overshadowing.

Diagnostic overshadowing is a significant concern in identifying and determining disability and/or mental health factors impacting behaviour in children. The presentation of mental health concerns co-occurring with developmental and behavioural disabilities can be atypical, and often missed by mainstream mental health services:

> *Australian research following a cohort of children and adolescents with ID [Intellectual Disability] for 14 years demonstrated that just 10% of those with a mental disorder received intervention. This compares unfavourably with access to mental health supports for the general population which has been estimated to be about 35% over a one year period.*
>
> *Potential barriers to accessing effective mental health care for people with ID in an Australian and NSW context include: a lack of substantial epidemiological data on prevalence of mental illness in people with ID; a lack of data on the interaction between, and distinct roles and responsibilities of disability and mental health services; a lack of training and confidence of mental health professionals; poor understanding by carers, disability and mental health workers of the manifestations of mental disorders in people with ID; a lack of coherent service models and funding for ID mental health services; lack of coordination between services and treating agencies; and a lack of specific inclusion of people with ID in mental health policy.*[50]

Additionally, the co-occurrence of conditions can lead to underdiagnosis, for example recent research has found that "ADHD is a common problem in children with neurological disabilities and may be underdiagnosed due to overshadowing of somatic, physical or syndromal features of the disability."[51]

Siloing of services contributes to misdiagnosis and diagnostic overshadowing in the ACT. For example, Child and Adolescent Mental Health Services (CAMHS) appears unable to provide assessments for ADD/ADHD or ASD,[52] and AFI has been told young people with ASD have been turned away from CAMHS due to their lack of specialist knowledge of ASD. A siloed service approach and lack of information sharing has been identified as contributing to difficulties of adequately identifying disability needs 'as young people often bounce from service to service without important diagnostic and assessment information travelling with them.'[53]

---

[50] Mental Health Commission of New South Wales *Clinical Services Planning for Adults with Intellectual Disability and Co-occurring Mental Disorders* 2014, <https://www.nswmentalhealthcommission.com.au/sites/default/files/old/assets/File/Intellectual%20Disability%20and%20mental%20disorders%20cover%20page.pdf> p 6.

[51] Hendriksen, J. et al. *Diagnostic overshadowing in a population of children with neurological disabilities: A cross sectional descriptive study on acquired ADHD* (2015) 19(5) European Journal of Paediatric Neurology 10.1016/j.ejpn.2015.04.004.

[52] Health Direct *Child and Adolescent Mental Health Services (CAMHS) – Northside* <https://www.healthdirect.gov.au/australian-health-services/20133970/child-and-adolescent-mental-health-services-camhs---northside/services/belconnen-2617-56-lathlain-street>.

[53] Baldry, E. et al, above n 2, p 644.

The gap in mental health services for young people with moderate mental illness in the ACT is well known.[54] There is currently also a lack of services providing adequate behaviour support for people with disability in the ACT. AFI supports appropriate initiatives to address mental health needs, including those of people with cognitive disabilities and ASD, and effective behaviour support (including carer information and support) for children and young people presenting with challenging behaviour associated with disability.

A further concern is that children and young people presenting with harmful behaviour 'are often turned away from health and welfare services as a consequence of their 'disruptive' behaviour. Accordingly, they have a higher than normal public presence/profile and are often left to the police to 'manage".[55] Even National Disability Insurance Scheme (NDIS) service providers can refuse service to someone presenting with challenging behaviours. The result is that people who require complex support are often excluded from support services.

For further information on current accessibility barriers experienced by children and young people with disability in health services in the ACT see AFI's *Submission to the Standing Committee on Health and Community Wellbeing Review of ACT health programs for children and young people*.[56]

Improvement of existing systems

Existing systems and services in the ACT such as education, youth services and OOHC provide significant opportunity for improved responses. For example, children who interact with police are often 'overrepresented amongst those excluded from school'.[57] The ACT has confirmed that it has a 'higher representation of students with a disability among suspended students'.[58] The ACT Civil and Administrative Tribunal has also highlighted problematic use of suspension against children with disability.[59] Additionally, AFI notes the strong correlation between OOHC and contact with the youth justice system, and the need for significant improvement in the identification and response to disability need in OOHC, particularly in behaviour management and response.[60]

---

[54] ACT Government, Office for Mental Health and Wellbeing *Review of Children and Young People in the ACT* March 2020, p 22.

[55] Ibid, p 641.

[56] Available at <https://www.advocacyforinclusion.org/review-of-act-health-programs-for-children-and-young-people/>.

[57] Baldry, E. et al, above n 2, p 641.

[58] (Note these statistics are not released publicly) Lindell, J. *Suspension rate up by a third in ACT public schools* 24 January 2021 <https://www.canberratimes.com.au/story/7096933/suspension-rate-spikes-across-act-public-schools/>.

[59] '"Surely a decision-maker would hesitate to impose a suspension ... if it appears probable that the behaviour prompting the suspension is in part a manifestation of one of the child's underlying disabilities," ACAT said.' in Bushnell, I. *ACAT sets aside suspension of Year 2 student with disabilities* 7 January 2021 <https://the-riotact.com/acat-sets-aside-suspension-of-year-2-student-with-disabilities/430744>.
For further information see also Advocacy for Inclusion's *Submission to the Inquiry into the Management of ACT School Infrastructure by the Standing Committee on Education and Community Inclusion* available at <https://www.advocacyforinclusion.org/submission-to-the-inquiry-into-the-management-of-act-school-infrastructure-by-the-standing-committee-on-education-and-community-inclusion/>.

[60] Baldry, E. et al, above n 2, p 642;
See also Campo, M. & Commerford, J. *Supporting young people leaving out-of-home care* Child Family Community Australia CFCA Paper No. 41, 2016, p 10.

Prioritising early support, through greater disability awareness and improved response to already well-known circumstances which increase risk of contact with police and the youth justice system could lead to improved identification of disability need and earlier intervention.

Reliance on the National Disability Insurance Scheme

AFI cautions against overreliance in the ACT upon the NDIS to provide support for people with disability, following the loss or reduction of wider community supports in the rollout of the NDIS. Only a small minority of people with disability gain access to the NDIS. Additionally, children and young people in the cohort being discussed face additional barriers to gaining access to the NDIS, particularly for support of a mental health condition. The NDIS requirement for 'permanence' is harder for young people to meet as the NDIA considers factors such as length of time of the impairment and potential development with age. Mental health practice is often hesitant to diagnose permanence of a condition, especially in children and young people,[61] making it very difficult for young people to be found eligible. The lack of identification of disability, and lack of access to assessment services in the ACT also has implications for the ability of children and young people to gain access to NDIS support.

Emergency supports at crisis points

AFI again highlights the necessity of adequate provision of supports in the community to prevent escalations to crisis.

Presentation at Emergency Departments

Children with disability and mental health conditions often have a high reliance on acute services such as emergency departments (EDs),[62] which arises due to a lack of adequate early support services and the failure of existing services to meet their needs. In AFI's experience, people with disability may make frequent presentations to EDs due to their needs not being met by community supports. Research reflects this, indicating that admission rates are higher for people with

[61] 'Generally, treating health professionals have been reluctant to confirm that someone has a likely to be permanent impairment as a result of their mental health condition before the age of 25. If you are supporting someone under 25 to collect information for their access request, the evidence has to be very clear around treatment options explored and that there are no future treatments that are likely to remedy the impairment.' in *Frequently Asked Questions (FAQs) For mental health professionals supporting people applying for the NDIS* <https://www.ideas.org.au/images/resources/facts/FAQs - NDIS Access.pdf> pp 7-8.
'When interpreting evidence against the likely permanence of impairment requirement, the NDIA considers how long the person has had the impairment, and to what extent treatment options have been explored (noting that the impairment may alleviate with age-appropriate development).' in *Accessing the NDIS, A Guide for Mental Health Professionals* August 2017.
[62] Drainoni, M. et al. *Cross-Disability Experiences of Barriers to Health-Care Access: Consumer Perspectives* 17(2) Journal of Disability Policy Studies, 2006, p 102.

disability who present with "conditions that could have been prevented through appropriately individualised preventative health care or early disease management."[63]
It is not uncommon for parents and carers of children and young people with disability and mental health concerns to present in EDs with their child as a last resort, or even for youth and other support services to contact emergency after having exhausted all other options during a crisis. EDs and acute mental health services in the ACT are ill-suited to cater to children and young people, especially those with cognitive disability, and presentation to EDs can lead to restrictive practices, isolation, sedation and additional trauma. Many recommendations have been made regarding the need to improve the sensory environments and responses to mental health presentations in hospitals.[64]

Police response

> *Police management of highly disadvantaged young people and adults with mental and cognitive disability has served to criminalise them, and courts, criminal justice diversion and therapeutic approaches have failed to stem their flow into and return to prisons. The entrenched discrimination and disadvantage experienced by marginalised and racialised people with mental and cognitive disability... require reconstruction of the way people with disability who are at risk of criminalisation are understood and responded to, in line with international human rights principles.*[65]

A police response is not an adequate response to children and young people with disability or mental health in a non-criminal crisis.[66] In the ACT young people have raised concerns about 'how the police have treated them/themselves/friends when in a state of mental health crisis,' as 'ACT Police have been reported to exacerbate mental health crises in some instances, rather than calm them.'[67] Police responses to young people experiencing mental health crisis raise further concerns of vulnerability, early contact with the criminal justice system, criminalisation and stigmatisation. AFI supports the increased use of PACER and welcomes the development of a police best practice guide for engaging with people with disability. However, as 'ongoing negative interactions and inadequate police responses to disability-related behaviours have the effect of propelling young people deeper into the youth justice system'[68] AFI recommends that all attempts should be made to prevent formal police responses to children with disability and mental health as much as possible.

---

[63] Hull, E. *Preventable hospitalisation rates 4.5 times higher for people with intellectual disabilities, research reveals* (15 June 2021) *ABC News* <https://www.abc.net.au/news/2021-06-14/people-with-intellectual-disabilities-hospitalisation-research/100209410>.
[64] Productivity Commission *Inquiry Report Mental Health Volume 2* (Inquiry Report, No. 95, 30 June 2020), p 603.
[65] McCausland, R. and Baldry, E. above n 17, p 303
[66] Office of Police Integrity, Victoria, *Policing People Who Appear To Be Mentally Ill*, Parliamentary paper, session 2010-12, no. 190 p. 15.
[67] Youth Interact, Youth Advisory Council, ACT Government, *Our Voice Our Impact 2018 ACT Youth Assembly Report* (2018) p. 12.
[68] Baldry, E. et al, above n 2, pp 641-642.

Emergency accommodation

AFI supports 'Ruby's Reunification Program' through the Youth Coalition of the ACT, which supports young people to reunite with families and be diverted away from homelessness, and additional initiatives which prevent an alternative to detention and youth justice settings. AFI emphasises the importance of such programs to be accessible to young people with cognitive disability and mental health needs in order to effectively support this cohort, and highlight the opportunity of the design of new services to ensure they are fundamentally accessible in design and practice.

Additional considerations may be given to increasing the availability of respite facilities for both children with disabilities and their families, with a focus on provision of best practice behaviour support.

Mandatory engagement

AFI cautions against the adoption of a Medical Model approach towards disability needs in the mandating of 'treatment' or therapies:

> *Steele et al. (2016) have raised particular concerns about the way that the medical model of disability, which focuses on disability as an internal, individual pathology, contributes to the marginalisation of people with disability in the criminal justice system, notably by providing a legitimate basis for the legal and social regulation of people with disability in the name of therapeutic interventions. This speaks to the problem raised by Baldry (2010) that diversionary programmes tend to be embedded in a concept of individual responsibility and choice around offending that can be counterproductive for people with mental and cognitive disability, as it presumes they can simply choose to stop offending. Failure to meet the eligibility criteria of a diversion programme or to complete it for whatever reason is considered as failure of the individual rather than a result of systemic factors, ill-conceived programme design or punitive administration (McCausland, 2015: 203).*[69]

In considering non-compliance or failure to engage with services, potential barriers of accessibility and systemic discrimination must be explored as a priority, as perceived 'non-compliance' may be the result of failure to identify and adequately respond to disability. Obligations intended to be therapeutic 'may in reality be entrenching people with mental and cognitive disability in the criminal justice system.'[70] AFI recommends addressing systemic barriers as a first priority, above developing new mandatory requirements to ensure existing failing processes are not simply incorporated into an 'alternative' model and perpetuated.

Specific therapeutic accommodation

AFI cautions against the creation of alternative 'therapeutic accommodation' which could exist in actual fact as a prison by another name. We acknowledge that such an option could be created from an intention to provide services which are not available in the community:

---

[69] McCausland, R. and Baldry, E. above n 17, p 296.
[70] Ibid, p 295-296.

> *Conceiving of prisons as therapeutic places turns them into sites where people with mental and cognitive disability are 'managed', often returned to as the only 'residential service provider' for many whose behaviour is seen as too complex or difficult to be supported in the community.*[71]

AFI submits that no such service should be designed in the absence of sufficient resourcing of community support. Every effort should be made to provide services which allow children and young people to remain in their homes and communities where possible. Importantly, the decision to place a child with complex support needs arising from disability and/or mental health in specific settings is an indication that social and environmental factors contributing to disability are being ignored and left unaddressed:

> *Rendering some behaviours by persons with disability criminal and then individualising and isolating them makes the determining effects of negative compounding and cumulative factors invisible (Baldry and Dowse, 2013: 224). These factors are embedded in institutional policies and practices and in social and systemic arrangements, sanctioning and perpetuating criminalisation of this group.*[72]

AFI strongly recommends consideration to be given to the findings of the Senate Community Affairs References Committee in *Indefinite detention of people with cognitive and psychiatric impairment in Australia*[73] and the alternative, less restrictive measures which have been recommended including investment in early intervention,[74] improved services for people with cognitive impairment and improved justice reinvestment.[75]

Section 31 (1) of the *Human Rights Act 2004* states that 'International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right'.[76] Australia is a party to the United Nations *International Covenant on Civil and Political Rights* and *Convention on the Rights of Persons with Disabilities.*

> Article 9 of the *International Covenant on Civil and Political Rights* states: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[77]
>
> Article 14 of the *Convention on the Rights of Persons with Disabilities* states that people with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.[78]

---

[71] McCausland, R. and Baldry, E. above n 17, p 295-296.
[72] Ibid, p 292.
[73] Senate Community Affairs References Committee *Indefinite detention of people with cognitive and psychiatric impairment in Australia* Commonwealth of Australia, November 2016.
[74] 'The committee strongly supports a move to early intervention in mental health care as a better model of health service delivery.' In Senate Community Affairs References Committee, *above n* 71, p 143.
[75] *Ibid*, p 181.
[76] *Human Rights Act* 2004 s31 (1).
[77] United Nations *International Covenant on Civil and Political Rights* Art. 9.
[78] United Nations *Convention on the Rights of Persons with Disabilities* Art. 14.

Alternative accommodation settings, and the potential for mandated engagement raises significant concerns both about the justice process through which children may face mandated engagement, and the detention of children on the basis of disability.[79] The United Nations *Committee on the Rights of Persons with Disabilities* continues to raise serious concerns about Australia's:

> *(a)Legislative frameworks, policies and practices that result in the arbitrary and indefinite detention and forced treatment of persons with disabilities, and that such frameworks, policies and practices disproportionately affect Aboriginal and Torres Strait Islander persons with disabilities and persons with intellectual or psychosocial disabilities;*
>
> *(b)The ongoing practice of obliging persons with "cognitive and mental impairment" to undergo treatment, including through indefinite detention in psychiatric centres, despite the recommendations contained in the Senate Community Affairs References Committee 2016 report Indefinite Detention of Persons with Cognitive and Psychiatric Impairment in Australia;*
>
> *(c)The commitment of persons with intellectual or psychosocial disabilities to custody, often indefinitely or for terms longer than those imposed in criminal convictions;*
>
> *(d)The absence of data on the number of persons found not guilty due to "cognitive or mental health impairment" indefinitely detained and the number of such persons detained on an annual basis;*[80]

Additionally, proportionality and severity of breaches must be given adequate consideration in the limitation of any human rights. Section 28 ss (1) & (2)(e) of the Human Rights Act state that:

> *(1)Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.*
>
> *(2)In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:*
>
> *(e)any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.*[81]

AFI submits that deprivation of liberty and mandated residence in specific facilities cannot be considered proportionate while there fails to be adequate investment into less restrictive community support options.

---

[79] See further Senate Community Affairs References Committee, *above n* 71.
[80] United Nations, Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia CRPD/C/AUS/CO/2-3* 15 October 2019 para 27.
[81] *Human Rights Act* 2004 Part 3B, s28(1) & (2).

Conclusion

Raising the minimum age of criminal responsibility in the ACT is a significant consideration for children and young people with disability and mental ill health. It is critical that consideration is given to disability perspectives and that accessibility, inclusion and the human rights of children with disability is prioritised in the development of an alternative approach.

AFI emphasises the importance of codesign with people with disability, including children, in designing effective measures to address the needs of children and young people with disability. We note that the Convention on the Rights of Persons with Disabilities, Article 4 (3) states:

> In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disability, States Parties shall closely consult with and actively involve persons with disability, including children with disability, through their representative organizations.[82]

[82] United Nations *Convention on the Rights of Persons with Disabilities* Art. 4 (3).

SACOSS Submission to Justice and Community Safety Directorate and Community Services Directorate, ACT Government

A response to the Discussion Paper: *Raising the Minimum Age of Criminal Responsibility*

August 2021

SACOSS Submission to Justice and Community Safety Directorate and Community Services Directorate, ACT Government.

Per email to macr@act.gov.au

First published in August 2021 by the South Australian Council of Social Service.
SACOSS consents to this submission being made public.

47 King William Road
Unley, SA, 5061 Australia
Ph (08) 8305 4222
Email: sacoss@sacoss.org.au
Website: www.sacoss.org.au

Introduction

The South Australian Council of Social Service (SACOSS) welcomes the opportunity to provide a response to the issues raised in the ACT Government's Discussion Paper, which considers how a higher minimum age of criminal responsibility (MACR) could be implemented in the ACT.

SACOSS is the peak body for the non-government health and community services sector in South Australia. We envision a future of justice, opportunity and shared wealth for all South Australians. To actualise this vision, we speak out on issues that affect our community, our State, our Nation and our world. We lead and support our community to take action. We hold governments, business and communities to account when their actions disadvantage vulnerable people, including children and young people who face contact with the child protection and youth justice systems.

We believe that developing a fair and just community is possible. We believe that a thriving community sector will help to address poverty and disadvantage, and we speak with, alongside and for all South Australians.

SACOSS commends the ACT Government in taking the lead on working towards raising the age of criminal responsibility and in developing the comprehensive discussion paper. In preparing this submission we have considered the Discussion Paper, *Raising the Minimum Age of Criminal Responsibility*, as prepared by the Justice and Community Safety Directorate and Community Services Directorate of the ACT Government. This submission is structured in response to the set of questions framed in the Discussion Paper, with specific treatment given to those areas of interest and relevance to our member organisations. We wish to acknowledge the work undertaken by both the Youth Coalition of the ACT as well as the Human Rights Law Centre in providing guidelines and source material that has been drawn upon in preparing this submission.

Response to the Discussion Paper

SECTION ONE: Threshold issues for raising the MACR

1. **Should there be any exemptions or exceptions to the new MACR for children and young people that engage in repeated or very serious harmful behaviours?**

SACOSS believes that there should be no exemptions or exceptions in terms of the application of the scope of the new MACR. This approach is consistent with robust medical evidence, namely, that children under the age of 14 years do not have the capacity to form criminal intent or

comprehend consequences of their actions, which applies to both serious and less harmful behaviours.

The medical evidence is clear that children under 14 years of age are particularly vulnerable to developmental harm when they come into contact with the criminal legal system. The purpose of raising the age of criminal responsibility is to ensure that all children under the age of 14 should not be exposed to the criminal legal system and should not be subjected to the trauma associated with it, and which can subsequently result in a higher prevalence of mental illness, unemployment, homelessness and premature death later in life.

It is rare that children under the age of 14 years are arrested and charged with serious or violent offending. When they are, it is usually as a result of the child having to cope with a stressful or challenging home environment, often being exposed to trauma, violence or because they live with a disability or have significant mental health and behavioural needs.

It is in the best interests of the child, and in the best interests of the whole community and promoting community safety, for the needs of the child to be met as soon as possible and in a therapeutic and rehabilitative manner, rather than the child being exposed to further and life-long harm through the criminal justice system.

The United Nations Committee on the Rights of the Child (CRC) has acknowledged that young children can commit offences but that when they do so, they should be dealt with through diversionary or special protective measures, rather than through the criminal process.[1]

2. Should *doli incapax* have any role if the MACR is raised?

As in Victoria, South Australia's approach to the age of criminality follows a hybrid model that provides both a 'bottom floor' (through the provisions in the *Young Offenders Act 1993 (SA))*, which stipulates that a child under the age of ten years cannot commit an offence, and through common law which provides a rebuttable presumption that children aged between 10 and 14 'lack the capacity' to be criminally responsible for their acts – the presumption of *doli incapax*.

[1] United Nations' Committee on the Rights of the Child, General Comment No 24 (2019): Children's Rights in Juvenile Justice, UN Doc CRC/C/GC/24 (18 September 2019) paras 24-26 and General Comment No 10 (n 27) para 31.

In combination, this hybrid model means that children under ten years of age in South Australia cannot be held criminally responsible for offending conduct and, unless the prosecution can prove otherwise, those between 10 and 14 will be presumed to lack criminal capacity.[2]

Krishna and Moulds (2020) argue that, from a practical perspective, the *doli incapax* presumption is failing on a number of fronts and is having a detrimental impact on the right of a child to a fair trial: 'The case law suggests that the difficulty in proving a child's capacity at the time of the alleged offence has resulted in questionable legal reasoning, highly prejudicial material being included in proceedings, and a practical reversal of the onus of proof. These factors mean that the presumption is rarely raised (p. 315)'. This is compounded by the fact that children are regularly remanded and held in prison cells while they wait for court hearings to debate matters of *doli incapax.*

If the MACR was raised with no exemptions or exceptions to at least 14 years of age, the provisions of *doli incapax* would automatically fall away – this would result in legislation that is unambiguous and would advance the rights and best interests of children.

SECTION TWO: An alternative model

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

The principles listed in the Discussion Paper provide a strong foundation to support keeping children out of the criminal justice system, and to instead respond to their needs within the community through support services that adhere to the principles of non-punitive, trauma-informed, therapeutic responses to the child's needs. Given the number of children with disabilities who come into contact with the criminal justice system, ensuring that an alternative model is underpinned by principles of universal design and universal access is crucial.

In addition to the principles outlined above, it is essential that proper attention is given to children living with disability and their rights and needs for access and inclusion.

SACOSS supports the submission provided by the Youth Coalition of the ACT (dated 7th March 2021), in which it has advocated for the establishment of a Multidisciplinary Panel which would bring together the key service providers to support the needs of children and their families in a therapeutic way. The use of such a panel could include a combination of family, educators, support services, a GP or treating doctor, police and any other involved parties, and would play a

---

[2] Krishna, K and Moulds, S (2020) 'Old Enough to Know Better? Reform Options for South Australia's Age of Criminality Laws' in *Adelaide Law Review* (2020) 41(1) p. 313. https://law.adelaide.edu.au/system/files/media/documents/2020-08/Volume%2041%20Number%201.pdf

crucial role in identifying the needs of the child and providing them with appropriate supports that prevent formal engagement with the either the child protection or youth justice systems. As the Coalition has indicated in its submission, it is vital that the panel includes Aboriginal and Torres Strait Islander people when engaging with an Aboriginal or Torres Strait Islander child. Referral to the panel should occur at the earliest possible point of identifying a concern or if a child comes into contact with police – and would play an important role in diverting a child away from the criminal justice system and ensuring that the appropriate assessments, identification of needs and referrals to relevant services occurs. For this multidisciplinary panel to work effectively it is crucial that its primary role is to assist and strengthen families, and identify the needs of, and supports for, the child.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed – to better support this cohort?

SACOSS supports that the necessary attention is paid to the five key gaps that have been identified by the Youth Coalition regarding the ACT's service delivery landscape. These include:

a) The need to establish a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including further assessment as needed, and assistance and treatment for substance use;
b) The provision of Functional Family Therapy - Youth Justice and/or other evidence-based programs directed towards and made available to this group of children;
c) The need to address the limited availability of psycho-social services for young people, particularly those with disabilities;
d) The urgent need to address the lack of services and accommodation for children under the age of 16 years who are homeless or at risk of homelessness
e) A broad need for greater education across services to improve the identification of, and response to, disability support needs

In addition, SACOSS encourages that alternative accommodation is made available so that children who cannot return home, for whatever reason, are provided with appropriate accommodation, for example, while they await referral to the proposed multi-disciplinary panel in a location that is not police custody or within the youth justice centres.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

While the role of mandatory notification is acknowledged, this function is not currently adequately responsive or timely and is focused at the tertiary end, with an emphasis on child

protection and youth justice considerations. There is a need for a focus on a more community-based response that enables neighbours and others in the community to support and respond to families and children who may be facing challenges. Such a community response would be supported by the establishment of a Multidisciplinary Panel which would enable the early identification and response to the needs of children before crisis points are reached.

This will require a whole-of-government response and for all departments to proactively engage with a process to provide consistent and early support to families who are identified as having particular challenges. In particular, the Departments of Education, Health, Housing and Human Services are likely to be instrumental in ensuring that a child's ongoing needs for safety and stability are met.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

As far as possible, children and their families should have access to the necessary services and supports that enable them to live safely and well – criminal responsibility should, preferably, not be the necessary trigger for the provision of support services.

There are currently insufficient and inadequate accommodation options – in the form of either crisis, short, medium or long-term accommodation – for 10 to 17-year-olds. In the event that a child's home environment is not safe or stable, there are very few options of where police or support services can take a child who is in need of safe accommodation. Providing safe, supported accommodation for children and young people in this age bracket who may come into contact with law enforcement or other services, and require somewhere safe to stay, is essential.

7. How should children and young people under the MACR be supported after crisis points?

There is no universal or standardised solution or response to the needs of children and their families who have gone through periods of crisis or trauma. Crises and traumatic experiences are not short-lived events but invariably live on in the life of the child and how they experience their world – for this reason, they will require on-going and sustained support after crisis points have occurred.

As indicated above, the establishment of a Multidisciplinary Panel to respond to the needs of children and families in an individualised, non-punitive, therapeutic and needs-based manner

will put in place and refer the child/family to the necessary supports and protective arrangements.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

In the event that a child does something seriously harmful, they will often need interventions and support, which need to be delivered through a range of non-law-enforcement avenues. In the most serious cases, there are civil law provisions that already exist which allow for a judge to compel a child to participate in a program, reside in a facility or undergo various forms of health, cognitive or psychological assessment. Similarly, in very serious cases, there are provisions under the Mental Health Act which allow for the involuntary detention and administration of therapeutic interventions. While any form of coercive action, particularly relating to a child, should be an action of last resort, these forms of intervention are likely to be more appropriate and beneficial to the child than those of prescribed criminal interventions.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

In the event that a child does something seriously harmful, it is usually evident that the child has significant needs that have not been met or is living in an environment that has socialised or fostered harmful behaviour; thereby requiring the need for more intensive and therapeutic support and care.

As indicated, medical evidence is clear that children under the age of 14 do not have the developmental or cognitive capacity to fully comprehend the consequences of their behaviour and to be held criminally responsible – whether they be serious offences or minor ones. Furthermore, the medical evidence regarding the consequences of depriving a child of their liberty are consistent, irrespective of the seriousness of the conduct. The deprivation of a child's liberty, more especially in the form of detention, is likely to result in the child engaging in future offending behaviour, and the increased potential to suffer from mental ill-health, addictions, homelessness and even premature death.

Depriving a child of their liberty does not support the needs or best interests of the child, nor does it keep the community safe, and is likely to lead to a perpetuation of patterns of offending

that generate further safety concerns within families and communities. Wherever possible, children's needs should be met in the community, with family and through therapeutic and voluntary mechanisms, and not through the denial and deprivation of their liberty.

SECTION THREE: Victims' rights and supports

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

Responding appropriately to the needs of children and protecting the rights of victims to safety and recovery are inextricably linked. Community safety and the rights of citizens cannot be achieved in the absence of ensuring the safety and wellbeing of children. Primarily, the wellbeing and safety of the broader community is necessarily predicated on the wellbeing and safety of all children.

Secondly, any reforms associated with raising the age of criminal responsibility and the rights of victims, need to acknowledge that children are frequently victims too – either of their circumstance, socialisation, poverty, abuse, trauma or other factors. Safeguarding the rights of children is therefore also necessarily a matter of safeguarding the rights of victims.

Thirdly, raising the age of criminality and providing appropriate support to children and families will serve to promote and enhance community safety, prevent recidivism and ultimately contribute towards protecting the wellbeing of everyone in the community. The younger a child is when they come into contact with the criminal legal system, the more likely they are to have further engagements with the youth and adult justice systems, and to reoffend more violently, and to continue offending.[3] The Victorian Sentencing Advisory Council found that with each one-year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending.[4] Preventing young children from falling into the criminal justice system in the first instance, and providing them with the necessary support will contribute to promoting community safety in the longer term.

As proposed by the Youth Coalition in its submission, criminal responsibility is not a necessary pre-condition for government support being provided to victims – there are existing civil mechanisms through which community members can access compensation and other

[3] Victoria Sentencing Advisory Council, December 2016, *Reoffending by Children and Young People in Victoria*, p. 26 https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending_by_Children_and_Young_People_in_Victoria.pdf
[4] Ibid.

therapeutic support in the absence of any criminal conviction or even engagement. These mechanisms remain as options to be explored, as should no-fault based schemes, to ensure that the needs of all people who have experienced harm are met.

SECTION FOUR: Additional legal and technical considerations

SACOSS proposes that the points raised below and in relation to additional legal and technical considerations are premised on the recommendation that Aboriginal legal services, other appropriate legal services and the Law Society take the lead on developing these responses, in conjunction with relevant community and service organisations.

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

While it may be impossible to safeguard against any engagement with police, consideration should be given to ways in which police engagement could be minimised, de-escalated and made less punitive and more therapeutic. Where possible, rather than deploying police or in collaboration with police, trained youth workers could engage as first responders where children are involved.

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

Serious activities that would otherwise be crimes committed by children under the influence of, coercion or aided and abetted by adults are currently dealt with under provisions in criminal law, with the responsibility correctly lying with the adult involved.

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

SACOSS supports the Youth Coalition's submission that all children should be transitioned to an alternative model as soon as is practicable, irrespective of whether they are in detention or under community orders. Priority should be given to assessing each individual child's needs, the nature of the support they and their family require, and ensuring that they have adequate accommodation and supports in place to minimise disruption and promote continuity of services.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

Historical convictions should be spent automatically and universally as is consistent with the medical evidence underpinning the decision to raise the MACR.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

SACOSS concurs with the Youth Coalition's submission: As a reflection of the principles that underpin raising the MACR, the privacy of a child under the age of 14 should be protected and information regarding their behaviour should not be used for the purposes of criminal prosecution at a later time. This includes those children who have already been sentenced prior to the MACR being raised.

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

Police should not be allowed to use information previously gathered about a child. Given that the medical evidence is clear that a child under the age of 14 does not have the cognitive capacity to engage in criminal activity and therefore cannot be held criminally responsible for their actions, it would therefore be inconsistent and inappropriate for the behaviour of a child who is insufficiently mature to commit a criminal act, to be used against them at a later date.

Raising the MACR should not enable the delaying of the criminal justice system's engagement with the child until they reach the age of 14. This would undermine the core principle of engaging with children in such as way that supports them to learn from their mistakes and to develop and thrive.

Concluding remarks

In conclusion, SACOSS commends the ACT Government on its progressive stance and in taking the lead in developing a response to raising the age of criminal responsibility. We look forward to following the progress of this important work.

ACT Government Discussion Paper, *Raising the Age of Criminal Responsibility*

Submission by Professor David Hamer, University of Sydney Law School, and Professor Thomas Crofts, School of Law and Department of Social and Behavioural Sciences, City University of Hong Kong

12 August 2021

This submission focuses on the 'threshold issues' raised by Section One of the *Discussion Paper*:

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?
2. Should *doli incapax* have any role if the MACR is raised?

For reasons outlined below, we consider (1) that there should not be any exceptions to the increased MACR, and (2) the presumption of doli incapax should continue to play a role, or in the alternative, there should be a reverse burden defence of incapacity. These responses follow from a model for the proof of criminal capacity of children that we are developing in our current research. This model (currently unpublished) builds on previous of Professor Crofts on doli incapax,[1] and the previous work of Professor Hamer on burdens and standards of proof.[2]

Introduction

It is a long-standing and fundamental principle of criminal justice that a child defendant should not be convicted unless the child has criminal capacity. This element of criminal responsibility can be difficult to prove (though not uniquely so). This difficulty is reflected in the complexity of the proof rules and their variation between jurisdictions.

At common law children under seven are deemed to lack capacity, children over 14 are deemed to possess full capacity, while children between the ages of seven and 14 are rebuttably presumed to lack capacity. Between these ages the presumption of doli incapax applies and the prosecution bears burden of proving capacity beyond reasonable doubt.

Various jurisdictions have departed from this approach in different ways. In Australian jurisdictions the minimum age of criminal responsibility (MACR) has been raised to 10, and the presumption of doli incapax continues to operate between 10 and 14. In England and Wales, the MACR has been raised to 10 but the presumption of doli incapax has been abolished. At age 10 children are deemed to have full criminal capacity.

---

[1] eg T. Crofts, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (Ashgate 2002); T. Crofts, 'The common law influence over the age of criminal responsibility – Australia' (2016) 67 *Northern Ireland Legal Quarterly* 283; T. Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax' (2018) 40 Syd LR 339; T. Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 *Current Issues in Criminal Justice* 123; T. Crofts, 'Catching Up With Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 267.

[2] eg D. Hamer, 'The presumption of innocence and reverse burdens: A balancing act' (2007) 66 Camb LJ 142, 161; D. Hamer, 'Probabilistic standards, their complements, and the errors that may be expected to flow from them' (2004) 1 *University of New England Law Journal* 71; D. Hamer, 'Presumptions, standards and burdens: Managing the cost of error' (2014) 13 *Law, Probability and Risk* 221.

The choice of proof principles for the capacity of children turns upon empirical, moral and institutional considerations. It appears appropriate to deem children below a certain age to lack capacity where virtually no children below that age would have capacity. It appears appropriate to deem children above a certain age to have capacity where virtually no children above that age would lack capacity. While these are fundamentally empirical matters, they are also difficult questions on which determinative data may not be forthcoming. Where the data runs out, the upper and lower ages may be chosen in part from institutional considerations. In between those ages, where it appears some children would have capacity and others would not, it is appropriate that capacity be proven or disproven to an appropriate standard. Whether or not the prosecution or the defence bears the burden, and to what standard, depends primarily on the relative harmfulness of the two possible errors – a mistaken finding of capacity and a mistaken finding of incapacity.

Below we expand on these considerations and outline the shape we consider that the ACT reforms should take.

<u>The MACR should be raised from 10 years to at 14 years.</u>
As well as there being a wealth of empirical research that very few children under 14 would have developed sufficiently to be deemed criminally responsible, 14 is becoming the international accepted standard for the MACR (*Discussion Paper* [3]-[6], [23]).

<u>Children should not be deemed to have criminal capacity until the age of 18.</u>
Research indicates that cognitive development continues right through the teen years (*Discussion Paper* [8]-[9]) and 'even beyond'.[3] Further, as noted in the UN's *Beijing Rules* 'there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc)'.[4] In Australia, while children of 16 or 17 are treated like adults for some purposes (armed services, age of consent, driving), 18 is the age at which people can vote, drink, smoke, and marry without parental consent.

The ACT should not make the English error of abruptly shifting from deemed incapacity to deemed capacity at a particular age. While using 14 as the critical age would be less harmful than the English age 10, the approach is equally flawed. Clearly all children do not instantly gain criminal capacity on their 10th birthday; nor do they do so on their 14th birthday. As the Royal Society observes, '[t]here is huge individual variability in the timing and patterning of brain development.'[5] The law should take account of this variability. For children between ages 14 and 18, 'decisions about responsibility should be made on an individual basis'.[6]

As noted in the *Discussion Paper* [34], the UN Committee objects to 'the idea of individualized assessment of criminal responsibility [on the grounds it] leaves much to the discretion of the court and results in discriminatory practices'.[7] The Committee recommends that states just 'set one appropriate minimum age'.[8] We find this objection unpersuasive. Unless the MACR is set at a very high age – which arguably would result in a significant number of mistaken acquittals based on lack of capacity – this approach would bring about an unacceptably high rate of damaging wrongful convictions based on incorrect deeming of capacity. It is not clear what the UN Committee means by 'discriminatory practices'. It is appropriate for the court to discriminate between children that do and do not have capacity.

---

[3] Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* [26]. [22].
[4] *UN Standard Minimum Rules for the Administration of Juvenile Justice 1985* (the 'Beijing Rules') commentary to R 4.1.
[5] The Royal Society, *Brain Waves Module 4: Neuroscience and the Law* (2011) 13.
[6] Ibid.
[7] Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* [26].
[8] Ibid [27].

Of course, such discrimination may be difficult. A child's capacity is a mental quality and not directly observable. Further it changes over time and may be significantly affected by many factors including, for example, the child's charged misconduct and its aftermath. Perhaps the UN Committee's point is that requiring capacity to be proven in individual cases creates the risk of inconsistency.[9] This is a serious point that calls for proper consideration. However, for a number of reasons this objection does not provide a reason for the legal avoidance of individual determinations of capacity. As the High Court recently observed, 'it is not self-evident that the policy of the law is outmoded in requiring that the prosecution prove the child understood the moral wrongness of the conduct'.[10]

The first point to make is that the approach advanced by the UN Committee and adopted in England and Wales does not avoid inconsistency. While it provides formal equality – all children over age X are deemed to have capacity – it denies substantive equality. Unlike cases are treated alike. Children develop at different rates and some or many of the children over age X will not have developed to the point where it is appropriate to make them criminally responsible.

A second response to the UN's objection to individualised capacity determinations is that it proves too much. Yes, the capacity/incapacity of children is difficult to prove, but so are a lot of facts in issue in criminal trials. That is why evidence law is so complex and, in some areas in particular (eg, sexual assault), subject to ongoing reforms. It is why there are so many appeals on facts (as well as on evidence law), which are often successful, and not infrequently give rise to disagreement among appeal court judges. Consider, for example, the *Pell* case. The first jury was hung. The second jury convicted Pell. This was upheld by a 2:1 majority by the VCA. The majority – Fergusson CJ and Maxwell P, the two most senior judges of Victoria – not only said that a reasonable jury could have found guilt beyond reasonable doubt, they indicated that they themselves 'do not "experience a doubt" about the truth of [the complainant's] account or the Cardinal's guilt'.[11] However, Weinberger JA, dissenting, and then a unanimous judgment of seven justices of the High Court held that it was 'not reasonably open'[12] to find Pell guilty. There 'was evidence which ought to have caused the jury, acting rationally, to entertain a doubt as to the applicant's guilt'.[13] Juridical proof is a messy business. That is not a reason for courts to not engage with it. Justice demands that courts do difficult things.

This leads to a third point. This potential for inconsistencies can be investigated and addressed. This is not ruled out by the observation, often encountered, that each case turns on its own facts. Clearly, '[t]here is no prescribed formula for evidence sufficient to rebut the presumption; that will depend upon the circumstances in individual cases.'[14] But this does not preclude improvement in the understanding and operation of procedures and practices.[15] 'The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances.'[16]

<u>It is unprincipled and unnecessary to create exceptions to the increased MACR</u>

The *Discussion Paper* asks whether there should be exceptions to the increased MACR for 'very serious and/or repeated harmful behaviours'. ACT should not create exceptions. As the UN Committee suggests, such exceptions are 'usually created to respond to public pressure'.[17] We do not agree with the Committee that exceptions are entirely without a sound rationale. However, where these considerations provide a sound basis

[9] See also Wendy O'Brien and Kate Fitz-Gibbon, "The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform" (2017) 17 *Youth Justice* 134.
[10] *RP v The Queen* (2016) 259 CLR 641 [10].
[11] [2019] VSCA 186 [39].
[12] (2020) 268 CLR 123 [45] and see at [9].
[13] Ibid [127].
[14] *AL v The Queen* [2017] NSWCCA 34 [149].
[15] See Crofts (2018), which we are building on in our current research.
[16] *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).
[17] Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* [25] quoted in *Discussion Paper* [27].

for imposing criminal responsibility, this can be recognised in individual cases through the usual trial process (at least for children above the MACR). Blanket exceptions are not an appropriate principled response to these situations.

Courts have recognised that, where a child has engaged in similar misconduct on a past occasion, this may provide a basis for inferring that the child should have known that their behaviour is seriously wrong. Of course, whether this inference is appropriate depends upon the response that the previous misconduct elicited. If the previous misconduct was condoned rather than reproved then the inference clearly will not be open.[18]

Courts have also recognised that as a matter of 'principle'[19] and as a matter of 'logic or experience'[20] capacity may be inferred from the nature of the alleged misconduct. As a generalisation, the worse the misconduct the more likely it is that the child would have appreciated the wrongness of the misconduct.[21] Whether it is ultimately proven that the child did have this appreciation and should be held criminally responsible will depend upon the weight of all the evidence.

Retaining the presumption of doli incapax

As outlined above, ACT should increase the MACR to 14, and increase the age of deemed criminal responsibility to 18. Between ages 14 and 18 criminal capacity should be subject to proof in the individual case. In terms of established principle there are two possibilities as to how proof may be handled. The first, considered in this section, is to apply the presumption of doli incapax. The second, discussed in the next section, is to create a defence of incapacity. The choice between the two is a matter of principle and policy.

The presumption of doli incapax requires the prosecution to prove guilt to the usual criminal standard of proof – beyond reasonable doubt. This is a demanding standard. If the standard is properly applied, the expectation would be that this would result in a relatively low rate of convictions. However, it should be noted that the presumption, in effect, weakens as the age of child defendants increases. '[T]he nearer the child in question is to the age of 14, the less strong need the evidence be if the presumption is to be rebutted'.[22] The ALRC is correct in viewing 'the principle of doli incapax a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility.'[23]

To the extent that the presumption, with the demanding standard of proof, does present a proof challenge for the prosecution, this may be appropriate in order to avoid mistaken convictions. Traditionally, the demanding criminal standard of proof reflects a view on the relative harm of a wrongful conviction as against a mistaken acquittal. '[T]he searing injustice and consequential social injury which is involved when the law turns upon itself and convicts an innocent person far outweigh the failure of justice and the consequential social injury involved when the processes of the law proclaim the innocence of a guilty one.'[24] A similar relative assessment may be applicable to the issue of a child's criminal capacity. A child may suffer lasting harm if they are convicted: eg *Discussion Paper* [35]-[37]. This is particularly distressing where the child actually lacked criminal responsibility: they had not developed to the point of appreciating that their actions were seriously wrong. On

[18] *RP v The Queen* (2016) 259 CLR 641, 652-3; *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [18].
[19] *R v ALH* (2003) 6 VR 276, 281 (Callaway JA).
[20] Ibid 298 (Cummins AJA).
[21] *C v DPP* [1996] AC 1, 33, 39 (Lord Lowry).
[22] *B v R* [1958] 44 Cr App R 1, 3; *Whitty* (1993) 66 A Crim R 462 at 465; quoted in *R v B* [1997] QCA 486; *R v McCormick* [2002] QDC 343 [10]; *RH v DPP (NSW)* [2013] NSWSC 520. This has long been recognised. According to Hale 'if the law requires such an evidence where the offender is above twelve, and under fourteen, [then it requires] much more if he were under twelve at the time of the fact committed', Matthew Hale, *The History of the Pleas of the Crown*, vol 1 (1736), 26.
[23] Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.20].
[24] Van der Meer v R (1988) 82 ALR 10, 31 (Deane J); see also *Re Winship*, n above, 371–372 (Harlan J).

the other hand, with appropriate support services in place (as the ACT plans to provide) a child who has engaged in misconduct could gain real benefits from acquittal. Indeed, such services may equally benefit a child who appreciated the wrongness of their actions and were mistakenly acquitted. On this basis, a wrongful conviction on capacity appears far worse than a mistaken acquittal. As a matter of principle, it is certainly arguable that the ACT to retain the traditional presumption of doli incapax for children aged between 14 and 18.

The alternative approach: a defence of incapacity

Currently children over 14 are deemed to have criminal capacity. It may appear quite a radical reform to presume children between ages 14 and 18 to lack criminal capacity, and to require the prosecution prove capacity beyond reasonable doubt. In view of this, it should be noted that there is a less radical alternative: a reverse burden defence. It could be presumed that the child possesses criminal capacity, leaving it open to the defence to prove the contrary on the balance of probabilities.[25]

A defence of incapacity would resemble the common law defence of insanity.[26] The child did, ex hypothesi, deliberately engage in the misconduct knowing or intending the harmful consequences; the defence makes a claim about the child's mental state by way of excuse. A difference is that the child's lack of understanding is the more or less normal incident of their youth rather than the abnormal consequence of mental illness. The child would be expected to mature and gain greater awareness of the wrongfulness of criminal behaviour as time passed. The prospects for rehabilitation seem greater and society's need for protection less than in the case of an insane defendant. At the same time, to convict such a child would be extremely harmful to the child's prospects for rehabilitation. Having said that, as the *Discussion Paper* notes, this harm may be lessened for older children: [10].

[25] *Evidence Act 2011* (ACT) s 141(2).

[26] See also the partial defence of diminished responsibility: *Crimes Act 1900* (ACT) s 14(2).

CANBERRA COMMUNITY LAW

Canberra Community Law Limited
abn 70 806 964 913 | acn 008 590 485
t (02) 6218 7900 | f (02) 6247 2816
info@canberracommunitylaw.org.au
www.canberracommunitylaw.org.au
Mail: PO Box 337, Civic Square ACT 2608
Address: Level 1, 21 Barry Drive, Turner ACT 2612

12 August 2021

ACT Justice and Community Safety Directorate
GPO Box 158
Canberra ACT 2601

By email: macr@act.gov.au

RE: DISCUSSION PAPER – RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

About us

Canberra Community Law (CCL) is a not-for-profit community legal centre that has been providing free, independent legal services to people on low incomes or facing other disadvantage in the ACT for over 30 years. CCL has substantial legal practice experience and expertise in homelessness and social security law, as well as tenancy and disability discrimination law. CCL has developed this expertise through the provision of specialist legal advice, assistance and representation services to people in the ACT on low incomes.

CCL operates the following specialist programs:

• Street Law – legal generalist outreach service for people experiencing or at risk of homelessness;
• Night-Time Legal Advice Service – a general one-off legal advice clinic;
• Dhurrawang Aboriginal Human Rights Program – culturally appropriate legal service in specialist areas of law – social security, public housing and race discrimination; and;
• Socio-Legal Practice Clinic - provides a holistic service combining both legal and social work support.

CCL also provides a duty lawyer service at the ACT Civil and Administrative Tribunal for the residential tenancy list.

Dhurrawang is a specialist legal service of Canberra Community Law. Dhurrawang provides advice and representation to all Aboriginal and Torres Strait Islander communities in the

Canberra Community Law acknowledges the traditional custodians of the land on which we work in the ACT and surrounding region and pay our respect to the Ngunnawal elders past, present and future for they hold the stories, traditions, and the cultures of their people. We are grateful that we share this land and express our sorrow for the costs of this sharing to Australia's First Peoples. We will continue to acknowledge the legacy of our history and strive in our goals to empower our community through social justice. We hope that our efforts will contribute to a realisation of equity, justice and partnership with traditional custodians of this land.

Community Legal Centres Australia

ACT, as well as assisting Aboriginal and Torres Islander communities in south-east NSW with Centrelink matters.

The case for raising the age of criminal responsibility

We all want every child to be given the best possible opportunity to lead a healthy, happy and fulfilled life, and we all want to live in a safe and inclusive community. There is overwhelming evidence that these objectives go hand in hand, and they require looking after the most vulnerable members of our community - not locking them away.

Tragically, as lawyers who deliver frontline legal services to people within the Alexander Maconchie Centre (AMC), we know far too well the stories of our adult clients often began with contact with the criminal justice system when they were children. At least half of our current Aboriginal and Torres Strait Islander clients in the AMC have had interactions with the criminal justice system as children, some were as young as 11 years old. When we take children away from their family, community and culture and lock them away we not only steal their childhood, but we steal their futures from them.

The Australian Medical Association,[1] along with pediatricians, physicians, child clinicians, psychologists and other health professionals, have issued clear, evidence-based warnings that locking children away in prison can cause them lifelong harm, increase their risk of mental illness, disrupt their education and even increase their chance of premature death.

CCL welcomes the ACT Government's commitment to raise the age in line with the medical evidence to at least 14 years old. We particularly note the disproportionate impact that the criminal justice system has on Aboriginal and Torres Strait Islander peoples, and the avoidable tragedy that this trajectory often begins in childhood - either via the child protection system, or the criminal justice system.

We strongly urge the government to fulfill this commitment and act on the best evidence we have available, which calls for:

- Raising the age to at least 14 years old,
- Having *no* exemptions and *no* carve outs,
- Prioritizing voluntary, preventative, family-based, community-driven responses; and
- Investing in Aboriginal controlled community organisations and services

[1] For example, see the Law Council and the Australian Medical Association joint statement on the medical basis for raising the age to 14 years: https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf?21fb2a76-c61f-ea11-9403-005056be13b5

As previously raised, our lawyers interact with clients regularly who are in the AMC as adults but began the trajectory into the criminal justice system as children. These are predictable, harmful consequences that can be avoided with critical legislative reform like raising the age of criminal responsibility. One of our senior solicitors developed these two de-identified case studies that highlight the profound, and often lifelong, harms that involvement in the criminal justice system inflict on children:

Kaylee's story

Kaylee is a 13-year-old girl with serious behavioural problems who has been detained in youth detention. In Bimberi she gets good education and good support at school, but she is a child. She should not be in detention. On release, Kaylee's family try to help her return to her local high school but is told she can only return a couple of hours a day, a couple of days a week. Her high school says she is not welcome to attend more than that because of her history. There are programs she is meant to be able to participate in, but they are not providing her the education she needs. Kaylee's education was not only disrupted because of her time outside of school when held in detention, but it continues to be disrupted because of her ongoing inability to return to her local high school upon release.

Peter's story

Peter is an Aboriginal man who is detained in AMC. Peter has severe mental health disabilities and a background of unspeakable tragedy including being removed from his family at a very young age and being cycled through the foster system where he was sexually abused. He started using alcohol before he reached puberty and has been involved with the juvenile detention system since he was 11. Despite being in the custody of the state, Peter has never learned to read or write.

In jail his mental health condition was not adequately treated, and he started to act out and self-harm. Peter started to cut himself whenever he could find something sharp enough and tried to hang himself on several occasions. He is difficult to manage which leads to him getting on the wrong side of the corrections officers. He stops cooperating. In one attempt to stop him from harming himself, the corrections officers find him with a homemade knife (which he is using to cut himself), and which he threatens officers with when they try to stop him. He is charged with further criminal offences and his initial eight months sentence for driving under the influence slowly turns into four years as more and more charges are brought against him in relation to his behaviour in the AMC.

The failure to address Peter's childhood trauma and disabilities has led to the majority of his adult life being spent in jail.

No exemptions and no carve outs

The ACT prides itself on being both a human rights jurisdiction, and a jurisdiction that follows evidence-based policy. The ACT should adhere by these same principles of following the best medical evidence when designing its justice response to very young children. The advice is clear[2] - children under the age of 14 years old do not have the capacity to form criminal intent, and their neurological immaturity makes them particularly vulnerable to lifelong harm if exposed to the criminal justice system at any point under the age of 14 years. Early contact with the criminal justice system results in a higher prevalence of mental illness, unemployment, homelessness, and premature death later in life.[3] It is counterproductive to any aspirations of making the community safer or building community cohesion in the long term.

The Victorian Sentencing Advisory Council has confirmed what our lawyers anecdotally see through their work with clients - the earlier a child is drawn into the criminal justice system, the more likely it is they will become trapped and graduate into the adult criminal justice system. The Victorian Sentencing Advisory Council has found 'that the younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to imprisonment in an adult court before their 22nd birthday'. The likelihood of reoffending was substantially higher the younger a child was at first sentence, with an 86 percent reoffending rate for children aged 10–12-year-olds, more than double that of those who were first sentenced aged 19–20 (33%). The Victorian Sentencing Advisory Council also found that with each one-year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending.[4]

Consistent with the research in Victoria, the Australian Institute of Health and Welfare has confirmed the increased likelihood of reoffending and longer-term involvement in the criminal legal system the younger a child is when they come into contact. It found that the younger a child is when sentenced to a supervised order by a court, the more likely they are to return to

---

[2] Ibid.

[3] Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW; AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra; Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017)

[4] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (December 2016), 26

the legal system at some point before they turn 18. In relation to those children aged 10-12 years whose first supervised sentence was community-based, 90% of these children returned to sentenced supervision. The likelihood of return decreased with each one-year increase in age.[5] The likelihood was higher for children sentenced to detention as their first supervised sentence, with 94% of children aged 10-12 at the start of this sentence returning to some type of sentenced supervision before they turned 18. This rate of return decreased with each year of age.[6]

This evidence makes it clear that if the ACT Government is committed to the dual goals to protect the human rights of children, and promoting community safety for everyone, one of the key strategies to achieving these objectives will be to keep children out of the criminal justice system for as long as possible.

Further, as the tiny number of children in Bimberi is evidence to, it is extremely rare that children under the age of 14 years old are convicted of serious or violent offending. Even when they do engage in these harmful behaviours, what *is* clear is that placing them in a criminal justice setting is harmful and counterproductive to the rehabilitation of that child, and the objective of changing the trajectory of that child's behaviour for the better. Children who exhibit seriously harmful or challenging behaviours require therapeutic support. Supporting these children is in the best interests of the child, any victim who may have been harmed by their actions, and the broader community.

If the MACR was raised with no exemptions or carve outs to at least 14 years old there would be no need for doli incapax. It is our view that the doli incapax doctrine as it operates currently affords insufficient protection for children under the age of 14 years old. Children under 14 are still arrested and charged (which causes harm quite separately from the question of detention) and are held on remand while waiting for doli incapax hearings.

Principles for reform

The principles listed in the Discussion Paper are a strong basis for reform. Dhurrawang delivers culturally safe, specialist services to Aboriginal and Torres Strait Islander peoples in the ACT region. Our lawyers see the harmful impact of the criminal justice system on First

---

[5] The return was 79% for those children aged 13, 67% of those aged 14, 49 % of those aged 15, 25% of those aged 16, and 4% of those aged 17- see further Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW

[6] The rate of return was around 91% of those aged 13, 84% of those aged 14, 75% of those aged 15, 47% of those aged 16, and 18% of those aged 17- see further Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW

Nations peoples and believe that any solution must involve First Nations leadership at a community level. This means:

- Government investment in Aboriginal controlled community organisations, programs and early intervention initiatives
- Supporting First Nations families to reduce child removals by providing culturally safe services and supports
- Developing a whole-of-government response to chronic housing shortages, improving educational participation and holistic health outcomes to address the drivers of young people into the criminal justice system
- Increasing disability awareness education across key services (such as education, primary healthcare providers, housing) so that disabilities in children can be identified and referred for diagnosis and treatment early
- Investing in a multidisciplinary response as a key part of the Raise the Age reform package to bring together the departments and services that have contact with a child to provide the best, wrap-around support in the community

Gaps and needs

CCL refers the ACT Government to the ACT Raise the Age Coalition's Position Paper on gaps and needs within the Territory. As part of the ACT Raise the Age Coalition, we have identified five key gaps in the service delivery landscape in the ACT:

1. The lack of a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse.
2. The absence of Function Family Therapy - Youth Justice and/or other evidence-based programs targeted to this cohort of children.
3. The limited availability of psycho-social services for young people, particularly those with disabilities.
4. The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness.
5. A broad need for greater education across services to improve the identification of, and response to, disability support needs.

These are key areas of need which should be addressed by the ACT Government in its development of an alternative system to the criminal justice system. Any response should be culturally safe, family orientated, therapeutic and wherever possible, voluntary. We

particularly note the importance of services being culturally safe and community led. Given the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system in the ACT, it is vital that First Nations organisations are adequately funded and resourced to provide alternative services, interventions, and programs.

Identifying and responding to the needs of children and young people

One helpful way to understand how children come into contact with the criminal justice system, is to look at their life trajectory from early childhood, through to adolescence (and right up to adulthood). There are numerous opportunities for support and intervention in a child's life as they grow up. When they are driven into the criminal justice system, it's because these opportunities have been missed, or harmful interventions have been prioritised over therapeutic ones.

For example, before the age of 10 years old, a very young child may have contact with a GP for routine checkups or vaccinations, the Department of Housing if they are living in public housing, teachers and various adults through the school system, perhaps other service providers if the family has any particular vulnerabilities or needs additional supports. These all represent opportunities for positive intervention and support should a child's needs be identified before behaviours escalate to a level that comes to the attention of police or the criminal justice system.

The establishment of a Multidisciplinary Panel would allow for the early identification, and response, to the needs of vulnerable young people before crisis points are reached. This will require a whole-of-government commitment and for all departments to proactively engage with a process to provide consistent and early support to families who are identified as having particular vulnerabilities. For example, education, health and housing are all likely to be instrumental in ensuring that a young person's ongoing needs for safety and stability are met. We know that one of the greatest risk factors to a child's engagement with the criminal justice system is disengagement from school (formal or informal) so bringing together education with family and any other service providers to identify early if a child is having learning or attention difficulties, if there may be an underlying disability, circumstances at home that require support, bullying or any number of factors on a spectrum of seriousness that can be addressed early and holistically is critical.

Pre, during or post-crisis responses

Wherever possible, the ACT Government should invest in programs, services and the provision of public services (such as housing) as protective, preventative measures - rather than building a system of responses that relies on serious behaviour or a crisis as a trigger

for support. The disproportionate investment of government funding nation-wide into police and prison systems, rather than the services and community-led initiatives that prevent and de-escalate challenging or harmful behaviour, is a key driver of Aboriginal and Torres Strait Islander peoples and children into the criminal justice system. Our lawyers particularly emphasise the critical need of stable housing to provide a child or young person with a stable home environment that allows them to thrive at school and in the community.

CCL has joined the calls of the ACT Raise the Age Coalition for the establishment of a Multidisciplinary Panel to both respond to the needs of children as they arise in an individualised, therapeutic and needs-based framework, and to be a mechanism that can identify systemic issues or gaps that require a government or systems response. There will not be a 'one size fits all' solution to the needs of children and their families.

Particularly when considering the engagement of First Nations families and children with the Multidisciplinary Panel, the ACT Government should ensure:

- Cultural safety and that an Aboriginal or Torres Strait Islander person has a leading role in facilitating the meeting of the panel with the young person and their family;
- Consent, those invited to participate in the Multidisciplinary Panel should be invited with the consent of the child and the family, with the clear purpose of identifying and meeting the child's needs, not punishment or admonishment;
- Confidentiality, and that information shared is limited to the service providers in the room to ensure the child and their family can speak freely and safely;
- No referrals to the child protection system. To do so, risks alienating families and children who fear their engagement will result in removal; and
- Adequate funding and staffing to ensure follow up and follow through from the Multidisciplinary Panel with the service providers / departments to ensure the agreed actions are taking place and the child's needs are being met.

Voluntary, therapeutic engagement

Raising the Age is one (legislated) component to changing the way government, services and law enforcement respond to children and young people. In our view, a key principle that needs to guide this new approach is to prioritise voluntary, therapeutic interventions / support except - as an absolute last resort. The ACT Government should always be guided by what is in the best interests of the child, responding to a child's 'needs' rather than 'deeds' and a recognition that supporting children and families to grow and thrive will itself lead to safer and more cohesive communities.

CCL reiterates the well-established fact that it is extremely rare that children in that young age cohort of 10 - 14 engage in seriously wrong or violent behaviour. When they do, it is often the result of substantial trauma, disadvantage, unmet physical or psychological needs and in some cases their own status as a victim of serious wrongdoing. The needs of these children should always be sought to be identified and met by the relevant service providers in a collaborative, culturally safe and voluntary way.

On the rare occasion that voluntary engagement is not possible, and there is a serious risk of harm posed to the child or the broader community, it *may* be appropriate for a mandated or coercive response to impose on the child or young person. These responses should be separate to the criminal justice system, therapeutic in design and only used as a last resort. An existing mechanism that could be modified in the ACT for this purpose are the Therapeutic Protection Orders. (We note, this would require amendment - for example, removing the requirement that a child reside at a particular place or that the Director General automatically assume daily care of the child.) Wherever possible these orders should be used to require therapeutic treatment only and not deprive the child of liberty. Where a child's liberty is deprived, this should be for the shortest possible time, in a therapeutic not punitive environment, close to family and community, and subject to regular review and a right of appeal.

We urge the ACT Government to act on the clear evidence that children's needs should be met wherever possible in the community, with family and through therapeutic and voluntary mechanisms.

Ending the false dichotomy between victim's rights and children's rights

CCL provides legal services and community legal education to the women and men in the ACT's correctional facility. Our work with incarcerated peoples has made it extremely clear that the people who become caught up in our criminal justice system are often also victims themselves. There is extensive evidence that the vast majority (up to 95%) of women in prison have themselves been the victim of family or sexual violence, people who have been the victims of violent assault are far more likely to come into contact with the criminal justice system as offenders as well as victims, and children who have suffered trauma are more likely to come to the attention of police and law enforcement than those who have not. Therefore, responding to the needs of children and protecting the rights of victims to safety and recovery go hand in hand. The ACT Government must recognise that when it talks about 'victims rights' often the children who are accused of harmful behaviours, are also victims in their own rights.

This submission has outlined the need for meeting the needs of children to promote greater community safety. Separately, CCL is of the view that the ACT Government should provide support for victims of crime that is not conditional on establishing criminal responsibility - rather, the precondition should relate to the harm experienced by the victim. This would allow for additional support to be provided to victims notwithstanding a child being under the minimum age of criminal responsibility. There are existing schemes in the ACT which provide compensation for victims (e.g. victims of sexual assault) upon which similar support can be modelled.

It *may* be appropriate for other restorative processes to be available that involve the child and the alleged victim but it's extremely important that any response of this nature should only be undertaken if it's a) voluntary and b) in the best interests of the child. Without any criminal process, there is no finding of guilt against a child for alleged wrongdoing. It would be wrong to impose a process that assumes wrongdoing without any process for fact finding or denial. Further, in many instances a child who is not of the minimum age of criminal responsibility (14) who does not have the cognitive maturity to be found criminally responsible, may also not have the cognitive maturity to participate in a restorative process.

Policing

Our Street Law service providers frontline legal services to people experiencing homelessness who may come into contact with police, and have made representations in the past about the need for police to be trained to deescalate and receive appropriate training when interacting with people who often have complex mental health and other needs.

The need for specialist, therapeutic frontline responders is arguably as great when it comes to children whose behaviour attracts the attention of law enforcement. In the first instance, it is CCL's position that the ACT Government and ACT Policing should explore alternative first responder options - some jurisdictions deploy youth workers either in lieu of, or accompanying, police to respond to children and young people. Aboriginal and Torres Strait Islander community interventions should be funded to engage with First Nations young people who may come into contact with law enforcement. The goal should always be to deescalate and respond to the needs of the child to ensure their safety, and community safety, is maintained.

Information collected on a child

Raising the minimum age of criminal responsibility reflects the medical evidence that children under the age of 14 years old are not sufficiently cognitively developed to be held

criminally responsible. It is therefore inconsistent with this principle to collect any information on a child's behaviour while they are under the MACR and use it against them in criminal prosecutions at a later time. This includes for children who have already been sentenced prior to the MACR being raised. This would create an unacceptable situation where a child's engagement with the criminal justice system is effectively only being *delayed* until they are 14 years old, rather than all efforts being made to support and divert that child *away* from the criminal justice system altogether.

There should be strict regulations surrounding the Multidisciplinary Panel and any information sharing agreements that require information to only be collected and used for the purposes of therapeutic interventions entered voluntarily by the child and/or developed by the Multidisciplinary Panel through the participatory process.

Transitional arrangements

Finally, all children should be transitioned as soon as is practicable to an alternative model irrespective of whether they are in detention or in the community under orders.

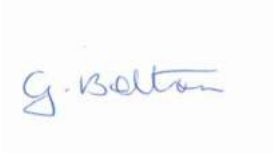
Every day a child spends in detention is causing them harm.

Historical convictions under the old MACR should be spent automatically and universally as is consistent with the medical evidence underpinning the decision to raise the MACR.

The Multidisciplinary Panel, when established, should be tasked with coming up with care plans for children currently under community orders or in Bimberi who need ongoing support.

If you have any queries or require further information, please do not hesitate to contact Ms Emma Towney on 0411 168 034 or by email at etowney@canberracommunitylaw.org.au

Yours faithfully,
CANBERRA COMMUNITY LAW LIMITED



Genevieve Bolton
Executive Director/Principal Solicitor

Emma Towney
Dhurrawang Aboriginal Human Rights Solicitor/Program Manager

ALS
Aboriginal Legal Service (NSW/ACT) Limited

50+ YEARS STRONG

Shane Rattenbury
MLA Attorney-General
Minister for Consumer Affairs
Minister for Water, Energy and Emissions Reduction Minister for Gaming

12 August 2021

Dear Mr Rattenbury

Raising the Minimum Age of Criminal Responsibility

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) and thank you for the opportunity to respond to the ACT Government's Discussion Paper on Raising the Minimum Age of Criminal Responsibility. The ALS welcomes the role the ACT Government has taken in leading this necessary reform.

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS undertakes legal work in criminal law, as well as children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as broader service support such as tenant advocacy.

We provide this submission based on our direct involvement with and representation of Aboriginal and Torres Strait Islander children and young people who are too often forced in the quicksand of the criminal justice system.

We note our endorsement of the submission made to the public consultation by Change the Record and of the Position Paper previously provided to Government, prepared by a coalition of youth, legal, human rights and service organisations (the Coalition), outlining our shared understanding of the key service gaps and needs that have been identified through our work.

The ALS would welcome the opportunity to discuss this issue further.

Your sincerely

Nadine Miles
A/Chief Executive Officer
Aboriginal Legal Service, NSW/ACT

Please reply to Head Office
Level 4, 261-265 Chalmers St, Redfern NSW 2010
Telephone: (02) 9213 4100 | Fax: (02) 8303 6688
Email: nadine.miles@alsnswact.org.au
Web: www.alsnswact.org.au

ALS
Aboriginal Legal Service (NSW/ACT) Limited

50+ YEARS STRONG

Raising the minimum age of criminal responsibility

The Importance of Raising the Age

Aboriginal children and young people are over-represented at every stage of the criminal justice system and the current minimum age of criminal responsibility (MACR) already has a disproportionate impact on them. As the discussion paper acknowledges, on an average day in 2019-2020, 22 % of the youth population under supervision were Aboriginal or Torres Strait Islander, despite only representing 3% of the general population of the same age. Aboriginal and Torres Strait Islander youth were also nine times more likely to be under supervision than their non-Indigenous counterparts in the same period.

The ALS submits that to address this we need to raise the age of criminal responsibility. We need to support children and young people to thrive in community and culture, not separate them from their families by locking them up in harmful prisons. Rather than harming, stigmatising and marginalising children, we need to change the law so that we give kids every possible opportunity to succeed. There is also a clear policy imperative to raise the MACR and divert children and young people from custody. We know that detention has adverse effects on an individual and only serves to compound existing issues for vulnerable children and young people.[1] The families and communities of children or young people in custody bear additional social and economic costs. And research tells us that children who encounter the criminal justice system at an early age tend to go on to have further and more severe interactions with police and courts than young people who have similar experiences at a later age.[2]

Australia is lagging behind the rest of the world. Currently, the MACR in all Australian jurisdiction is 10 years, compared to a global median MACR of 14.5 years. This is despite overwhelming evidence - from Aboriginal organisations and our communities, medical experts, legal experts and human rights bodies - that detention, as well as any other interaction with the criminal justice system, harms children.[3] There is a critical need to raise the MACR to at least 14 years of age in all Australian jurisdictions, without delay and without exceptions.

---

[1] Novack, M. (2019). UN Global Study on Children Deprived of Liberty, p. 8, https://undocs.org/A/74/136.

[2] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing S Chen et al, 'The Transition from Juvenile to Adult Criminal Careers' (2005) 86 Crime and Justice Bulletin 1; Jason Payne 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Series No 80, Australian Institute of Criminology, 2007); L McAra and S McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315.

[3] Organisations that support raising MACR to 14years include: Law Council of Australia, Law Society of NSW, Queensland Law Society, Law Society of South Australia, Office of the NSW Advocate for Children and Young People, Federation of Community Legal Centres, Royal Australasian College of Physicians, Australian Medical Association, Australian Indigenous Doctors' Association, National Aboriginal and Torres Strait Islander Legal Services, Lowitja Institute, Change the Record Coalition, Australian Human Rights Commission, Australian and New Zealand Children's Commissioners and Guardians, Amnesty International, UNICEF Australia, Save the Children, Human Rights Law Centre, Jesuit Social Services, National Legal Aid, and the Smart Justice for Young People coalition.

No carve outs

ALS takes the position that there should be no exemptions or exceptions to the new MACR. This is the only option consistent with best medical evidence and a just legal system.

An age threshold for criminal liability reflects the uncontroversial acceptance that children who do not have the capacity to be criminally liable should not be held criminally liable. This is a central tenet of a just legal system. It follows that this threshold must be based on best evidence regarding child development and capacity. Since the threshold was first set at 10, there have been significant advances in our knowledge in the areas of neurodevelopment science. Best medical evidence now tells us that the development of the frontal lobe, the area of the brain associated with rational decision making and judgment has not fully developed by 14 and continues to develop into adulthood.[4] Instead, children tend to use the part of the brain associated with impulse, emotions, and aggression to make decisions. Put simply, children under 14 do not have sufficient maturity to exercise the judgement, control and intent that would justify holding them criminally liable. This evidence-based conclusion applies to the behaviour and actions of children, it does not delineate between 'very serious, harmful' behaviours and less serious behaviours, or between repeated or single instances of behaviour.

As stated, Aboriginal children and young people are over-represented at every stage of the criminal justice system and the current MACR already has a disproportionate impact on them. We know that Aboriginal children and young people are vulnerable to negative outcomes in the exercise of police discretion.[5]

The ALS is concerned that exemptions and exceptions will disproportionately impact Aboriginal children and young people, with young people being charged with offences that fall within the exceptions where there is an available alternative.

Exemptions and exceptions are predicated on the suggestion that they are necessary to support community safety. However, an appropriate model that sits outside the criminal justice system and provides for a therapeutic and rehabilitative response without the criminogenic impact of a traditional criminal justice response, is compatible with community safety.

The role of doli incapax

The existence of the presumption of *doli incapax* in ACT legislation, recognises that children who do not have criminal capacity should not be criminally responsible. It follows that if the presumption does not operate to protect these children from criminal sanctions, the Government must consider an alternative means of doing so. We note that even with reform of the presumption, children would still be drawn into the criminal justice system.

The presumption of *doli incapax* fails to protect children for a number of reasons:

1. Unlike a minimum age of criminal responsibility, it does not prevent children being charged

[4] Australian Government, 'The amazing, turbulent, teenage brain' (20 February 2017) https://www.learningpotential.gov.au/the-amazing-turbulent-teenage-brain

[5] For example, NSW Police Suspect Targeting Management Program (STMP) is used disproportionately against Aboriginal young people (https://rlc.org.au/article/policing-young-people-nsw-study-suspect-targeting-management-plan?fbclid=IwAR2tMWMfsg0fDeKIPbfUlhve1SqqdhQO6Yvd_n2fy3It-Uavcq3tiPeUzxI)

2. Current policy ensures that children who are *doli incapax* are nonetheless brought into the criminal justice system, arrested, charged, detained and in effect subject to criminal sanctions even if their matters are ultimately diverted or dismissed
3. It results in children who are *doli incapax* pleading guilty to offences despite not being criminally culpable to avoid remand
4. It is applied inconsistently and unfairly between and within jurisdictions
5. It ensures intervention in the form of remand and detention, but not in the form of support and treatment that is required

If the Government wants to have an impact, in a manner the presumption seeks to, it must raise the age of criminal responsibility to at least 14 years of age. If the MACR was raised with no exemptions or carve outs to at least 14 years, there would be no need for the *doli incapax* presumption.

Principles underpinning an alternative model

The ALS broadly supports the principles outlined in the Discussion Paper. The inclusion of community-controlled design and delivery is a fundamental inclusion given the history and ongoing impacts of colonisation, dispossession and discrimination on Aboriginal and Torres Strait communities.

Aboriginal community-controlled services focused on health, family support, education, disability, cultural connection, healing and other support services must be adequately resources to support their communities. Aboriginal and Torres Strait Islander legal services must be adequately resourced and supported to provide communities with culturally appropriate and safe legal advice and assistance.

We further note the following:

- The proposed principles require that any alternative model "use restorative and culturally appropriate practices to respond to harmful behaviours by children and young people." The ALS supports the requirement that any alternative model uses "culturally-safe and trauma responsive" practices.
- The proposed principles require that any alternative model "only mandate a child or young person to receive support if it is in their best interest, and only as a last resort." The principles should also require that any alternative model recognises that children and young people have a right to be heard and a right to participate in the processes that lead to decisions that affect them.

Detention of children is damaging and harmful

Putting children into detention at such a young age has been found to have adverse impacts on their development, including severe and long-term impacts on children's health and well-being.

Numerous studies have shown that any period of incarceration increases a child's risk of mental illness, including increased rates of depression, suicide and self-harm.[6] A a recent global study noted that "in some cases, the state of psychiatric disorders of children during detention as compared with the mental health of the same children prior to detention increases tenfold."[7]

[6] Novack, M. (2019). UN Global Study on Children Deprived of Liberty, p. 8, https://undocs.org/A/74/136.
[7] Ibid.

Detention has also been found to reduce educational outcomes, lead to poor social and emotional development, disrupt family relationships and been linked to higher rates of early death in children.[8] This injustice is further compounded by the fact that many children currently in detention have not been sentenced. Currently, on an average day, around 60% of children in prisons are waiting on remand.[9] Further, on an average night, 58% of the total number of young people in unsentenced detention are Aboriginal or Torres Strait Islander.[10]

In recognition of the damaging and harmful impact that detention has on children, the UN Committee to the Convention on the Rights of the Child (CROC) has recommended that "no child in conflict with the law below the age of 16 years old be deprived of liberty, either at the pre-trial or post-trial stage. Even above that age, deprivation of liberty should only be used as a measure of last resort and for the shortest period with the child's best interests as a primary consideration."[11]

ALS strongly supports a model with no exceptions or carve-outs. Rarely, there may be circumstances in which a serious risk to the community necessitates the secure detention of a young person. The ALS recommends that there be a legislative requirement underpinning any alternative model that no child should be deprived of liberty, except as a measure of last resort and for the shortest possible time, if they present a serious risk to the community.

Police powers

In considering the powers of police to arrest children and young people who fall below the age threshold of criminal liability, the starting point must be the recognition that in a just legal system, young people who cannot be held criminally liable, should not be subject to any criminal justice sanction, in process or outcome. Further, that the harm done to young people, and the resulting impact on community, follows *any* contact with the criminal justice system.

The ALS is of the view that the current powers of police to arrest children under the age of 10 are too broad and do not adequately or appropriately ensure the arrest of such children is a measure of last resort. The ALS submits that if police are to have arrest powers regarding children and young people below a revised age threshold of criminal liability, consideration should be given to limiting the power as a measure of last resort, for the shortest possible time, and to circumstances where necessary to prevent an imminent risk of serious harm or the occurrence or continuance of a serious offence.

Police action following an arrest of a child under the current age threshold is provided for pursuant to section 252C of the *Crimes Act 1900* (ACT). This provides that the police officer must "do the minimum necessary" to prevent or stop the conduct that warranted the arrest and return the child to a parent, carer or, if neither is appropriate or practicable, to a designated agency. If this section was to be extended to children under a revised age threshold, further specificity would be required.

The Discussion Paper states that "the level of police investigation powers needed will depend on the model selected and whether or not there are exceptions to the revised MACR." The current investigative powers of police as provided under the *Crimes Act 1900* (ACT), should not be extended

[8] Ibid.
[9] AIHW, Youth Detention population in Australia. 2018. https://www.aihw.gov.au/getmedia/55f8ff82-9091-420d-a75e37799af96943/aihw-juv-128-youth-detention-population-in-Australia-2018-bulletin-145-dec-2018.pdf.aspx?inline=true
[10] Ibid.
[11] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st session, UN Doc CRC/C/GC/24 (18 September 2019), [89].

to children and young people under any age threshold of criminal liability. However, any model that included mandated involvement of a child or young person in an intervention process necessitates a process whereby the child or young person can dispute the allegation of behaviour. It may follow, for example in the rare circumstance where very serious behaviour allegedly occurs, that an investigation is required.

The ALS suggests that further consultation is required when there is a firmer outline of a model proposed. Furthermore, with our position expressed as to carve outs or exceptions, there should no need for specific investigative powers to cover exceptions.

As stated, ALS is concerned that a model that incorporates exceptions will have a disproportionate impact on Aboriginal children and young people. It is inevitable that investigative powers provided with respect to specified offence exceptions will be utilised with respect to allegations that ultimately do not fall within this category.

As to the collection and use of a child or young person's personal information by police (or other stakeholders), we note that any alternative model that seeks to provide support, diversion and rehabilitation to children and young people who cannot be held criminally liable, will be limited by a failure to adequately ensure special measures are put in place for the handling, collection and distribution of personal information.

Reflecting the principles that underpin raising the MACR, information obtained through the processes of an alternative model should not be used against a child or young person for the purposes of later criminal prosecution. To provide otherwise will impact on a child or young person's fulsome engagement in such processes.

No new offences

As the Discussion Paper notes, there are existing offences within the *Criminal Code 2002* (ACT) that act to criminalise behaviour that recruits, induces or incites another person to engage in offences or criminal activity. Amendment of the legislation may be required to ensure these sections cover offending or activity that is not an offence or criminal by virtue of the age threshold of criminal liability. ALS takes the position that there is no requirement for the introduction of new offences.

Existing convictions should be spent

ALS is of the view that existing convictions of children and young people under a revised MACR should be spent automatically and universally as is consistent with the medical evidence underpinning the decision to raise the MACR and a focus on rehabilitation.

The Royal Australian & New Zealand College of Psychiatrists

Your Health in Mind

ACT Government Justice and Community Safety Directorate and Community Services Directorate

Raising the Age of Minimum Criminal Responsibility

August 2021

Improve the mental health of communities

309 La Trobe Street, Melbourne VIC 3000 Australia
T +61 3 9640 0646 F +61 3 9642 5652
ranzcp@ranzcp.org www.ranzcp.org
ABN 68 000 439 047

About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises governments on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and as a bi-national college has strong ties with associations in the Asia-Pacific region.

The RANZCP has over 6700 members including more than 4800 qualified psychiatrists and over 1600 members who are training to qualify as psychiatrists. Psychiatrists are clinical leaders in the provision of mental health care in the community and use a range of evidence-based treatments to support a person in their journey of recovery.

Key findings

- The minimum age of criminal responsibility should be raised to 14 years in line with neurodevelopmental research and international human rights standards
- The minimum age should be raised to allow more young people to avoid detention and be diverted away from the youth justice system
- Following an increase to the minimum age of criminal responsibility, prevention and early intervention programs should be expanded
- Diversionary and rehabilitative approaches are most beneficial for the mental health of young people in the youth justice system

Introduction

The RANZCP welcomes the opportunity to respond to the questions of the ACT Government's Discussion Paper Raising the Age of Criminal Responsibility. The recommendations contained within this submission are based on extensive consultation with the RANZCP's ACT Branch, Section of Child and Adolescent Forensic Psychiatry Committee, Faculty of Forensic Psychiatry, Faculty of Child and Adolescent Psychiatry and Section of Youth Mental Health. The RANZCP is well positioned to provide advice about this issue due to the breadth of academic, clinical, and service delivery expertise it represents.

The RANZCP has provided advice and information to other states and territories and the Council of Attorneys-General in relation to increasing the age of criminal responsibility on several occasions and most recently in February 2020. We have also made submissions to several inquiries into youth justice, including:

- Council of Attorneys-General – Age of Criminal Responsibility Working Group review (ranzcp.org)
- the Inquiry into youth justice centres in Victoria
- a submission in relation to the Youth Justice Strategy in Queensland and
- the Royal Commission into the Protection and Detention of Children in the Northern Territory

The RANZCP has consistently advocated for the age of criminal responsibility to be increased at both federal and state and territory levels. We have also emphasised the importance of ensuring that child and youth justice strategies, programs and infrastructure are established and operationalised in a way which encourages young people to rehabilitate and rejecting purely punitive approaches. The RANZCP continues to advocate for these changes to policy in this submission.

This submission will respond to the relevant consultation questions, as published on the Discussion paper.

Responses to Discussion Paper Questions

Threshold issues for raising the MACR

1. **Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?**

   The RANZCP strongly advocates for the minimum age of criminal responsibility to be raised across Australia, for all federal and state and territory criminal offences. It is strongly recommended that the minimum age of criminal responsibility is raised to 14 years. Adolescents are neurodevelopmentally immature and, as such, we regard that they should not be held criminally responsible for actions which, if perpetrated by adults, would be considered criminal. This is also consistent with the recommendations of other professional medical bodies, such as the Australian Medical Association and the Royal Australasian College of Physicians.[1]

   Seriousness of offence has little to do with developmental immaturity in the context of *mens rea*. Children aged 12 to 13 years are limited in their capacity for abstract reasoning, meaning that they are unlikely to comprehend the true effect of their actions.[2] Children should be protected by a higher minimum age of criminal responsibility, preventing them from entering the criminal justice system and experiencing the harms that are associated with detention.[3] This is consistent with the September 2019 recommendation set out in General Comment No. 24 issued by the Committee on the Rights of the Child, namely that Australia should 'bring its child justice system fully into line with the Convention [on the Rights of the Child] and to raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14'.[4]

2. **Should doli incapax have any role if the MACR is raised?**

   Doli incapax recognises that children are not sufficiently mature to have the cognitive capacity to form criminal intent. Raising the age to 14 years avoids the problem of children being remanded in prison while they wait for Court hearings to debate the rebuttable presumption of doli incapax.

   The ACT could lead the way by synthesising a novel defence of developmental immaturity to replace the rebuttable presumption of doli incapax which considers a more robust and scientific approach to describe the capacities of the brains of children.

An alternative model to the youth justice system

3. **Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?**

   Offending behaviour when it occurs from 10-13 years of age should be considered to be a child protection issue. Prevention, early intervention, and diversionary responses linked to culturally safe and trauma-responsive services including education, health and community services should be prioritised and expanded.

   Alternative models should also focus on empirically-determined protective factors (like those found in the Structured Assessment of Violence Risk in Youth, a tool used to help describe the risk of both violent and non-violent offences, or the Structured Assessment of Protective Factors for violence risk – Youth Version) which may suggest evidence-based areas on which it would be efficacious to devote time, money, and resources.

4. **What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?**

   Existing frameworks and services should be able to meet the need of what will probably amount to a small number of children who nevertheless will have high needs in several domains specifically, welfare, education, and health. Providing extra resources for welfare services and supporting care and protection including Family Group Conferences would be a helpful way forward, supporting the already-existing infrastructure. Although the numbers of young people this affects in the ACT are small, most of the young people aged under 14 years who are offending are already known to CYPS or are actively case managed by CYPS or an out of home care agency.

   Additional resources to enable these young people to access health, disability, and social services by external private sector providers, is thus essential. This is particularly relevant in a Canberra context where there is already very limited access to public sector child health and mental health services.

5. **How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?**

   The correlations between mental ill health and incarceration are well documented.[5] Epidemiological studies show a correlation between those who experience psychiatric disorders in childhood and adulthood, with children and young people with conduct disorder at particular risk of developing further mental health problems later in life.[6] The RANZCP ACT Branch affirms the significant benefits of a justice reinvestment approach to criminal justice involving measures to decrease rates of incarceration and recidivism by investing in services in the community. It is likely that the best return for investment is likely to come from an increased focus on early childhood interventions such as the First 2000 Days Framework in NSW.[7]

   Youth offending is a symptom of a problem which frequently starts at or even before birth with intrauterine drug and alcohol exposure, intergenerational trauma,

malnourishment, and exposure to stress hormones. As such the solutions are to be found in investment in programmes to help families, avoid abuse of children and foster a healthy relationship with professional agencies. The earlier the intervention, the better the outcome – youth inclusion programmes starting from age 6 have been run successfully in other countries. Focus on family projects which are culturally informed should be considered, like the UK's "Troubled Families" project.[8]

6. **What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?**

   There is a significant body of evidence documenting the links between mental health issues and incarceration, as well as between childhood trauma and future psychosocial problems.[9] In a Canberra context, there are very few emergency accommodations options available for young people under 14, who require emergency placement. There is also an absence of secure care services, and few providers of out of home care placements. Wherever possible, children who have engaged in offending behaviour should be managed in community settings with primary caregivers to ensure their attachment relationships are not threatened. When this is not possible, there needs to be an assessment of the impact of family separation and the availability of alternate attachment figures. This is particularly important for Aboriginal and Torres Strait Islander peoples given the complexity of their family relationships arising from systems of kinship.

   Safeguards are necessary to preserve the rights of the developing child within the civil law system, especially where their freedom is being curtailed, and there will necessarily be a requirement for greater allocation of resources for welfare and health services. When young people are identified as being at risk of offending, such as those with antisocial behaviour, families should be offered immediate and intensive support. Many families reportedly struggle to obtain assistance in such circumstances. Support could include parent education, in-home support workers and respite care for children with severe behavioural problems and disabilities. One example of an evidence-based approach to supporting vulnerable families and children is multisystemic therapy (MST). This type of therapy is an intensive, family-focussed, community-based intervention for families with children with significant and enduring behavioural problems. MST is recommended as the most effective intervention for children who have enduring and serious behavioural problems. This approach involves intensive, reactive, community delivered family therapy.

7. **How should children and young people under the MACR be supported after crisis points?**

   Existing frameworks could be used to support children (and their families and local community) after crisis points but would require greater resources to do this successfully. Neurodevelopmental evidence demonstrates that adolescence brings with it increased impulsivity and sensation-seeking behaviour, as well as a heightened vulnerability to peer influence, [9] both of which affect decision-making capacity.[10] Additionally, the brain continues to develop physically until a person enters their early twenties including the frontal lobe.[11] Given that the frontal lobe plays a key part in various elements of cognition including judgement, empathy, consequential thinking,

the inhibition of impulses and coherent planning, the under-development of the frontal lobe in adolescents also contributes to immaturity in decision-making.

8. **Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?**

   The RANZCP ACT Branch has specific concerns about the potential labelling effect of any such mandatory intervention. Mandatory measures can already be employed by welfare and mental health services. When done by the youth justice system this has the potential to give the individual a sense of themselves as a criminal.[12] As such, some work needs to be done in relation to the public image and access to service providers and agencies that provide these support services.

9. **Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g., murder, manslaughter, or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?**

   The RANZCP Section of Adolescent Forensic Psychiatrists is of the view that there are circumstances under which children should be deprived of their liberty. This can be done under a civil framework using either existing care and protection needs or the mental health system if there is a mental disorder associated with serious risk. The current legislation allows for sufficient deprivation of liberty as a result of serious harmful behaviours in the mental health legislation. Any intervention must as always be in the best interests of the child and be informed by principles of rehabilitation and be individualised in a manner which is empirically likely to support each child.

Victims' Rights and Supports

10. **How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?**

    Rights of victims of offending by young people under the MACR should, in general terms, not differ from those who are above the MACR.

    There should not, however, be a right of access to information about children who have engaged in offending behaviour. Access to such information would not likely be in the best interests of the child nor would it serve the interests of rehabilitation.

11. **What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?**

    Victims of offending committed by children under the MACR should not have a right to access information about that child with specific concerns about the potential labelling effect of intervention outside health and community professionals.

Where appropriate The RANZCP considers that youth justice group conferencing programs have been effective in diverting young people away from the youth justice system and assisting in their rehabilitation. Group conferencing programs which are based on restorative justice principles and aim to raise a young person's understanding about the impact of their offending (including on the victim) as well as improving their integration into the community and negotiate a plan for 'making amends' for their offence/s. [13] The Northern Territory's program is tailored to the needs of Aboriginal and Torres Strait Islander young people, and Aboriginal Elders are often present at group conferences. [14] Research has demonstrated that conferencing as a diversionary measure is more effective in reducing recidivism in youth offenders than traditional adversarial measures.[15] There may also be benefits for victims, including feeling empowered to voice how the offence affected them.[16]

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people and victims?

If it is determined that the MACR be raised to 14 years, this should be absolute in meaning that the child under 14 is considered not culpable. In the same way as a 5-year-old would be deemed unaccountable, this approach should apply to all children under the MACR. It is important to make the point that these children are not escaping sanctions of any kind – for serious risk behaviour they may be removed from their family and local community and placed in secure accommodation under existing or revised civil mechanisms.

Additional legal and technical considerations

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

The RANZCP Section of Adolescent Forensic Psychiatrists is of the view that police powers to arrest children currently under the age of 10 should be extended to cover children under the revised MACR. Often arrest is a means of removing a child from a challenging situation and protecting them from further harm (even when that harm comes from their own behaviour). Children under a MACR still need to be protected in the same way they always have been by the police.

Alternative models should also focus on empirically-determined protective factors (like those found in the Structured Assessment of Violence Risk in Youth, a tool used to help describe the risk of both violent and non-violent offences, or the Structured Assessment of Protective Factors for violence risk – Youth Version) which suggest evidence-based areas on which it would be efficacious to devote time, money, and resources

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?

Police should have no additional powers but also no fewer powers than they currently have for children under the MACR. Police are usually the first point of contact for anyone who has allegedly committed an offence and in many circumstances, are able to recommend diversion away from Courts and the Youth Justice system. It is important

that police diversions incorporate a focus on early intervention and rehabilitation, by providing appropriate referrals, such as to drug and alcohol rehabilitation programs, and/or diversion programs such as youth justice conferencing. Family involvement is also essential, as outlined below in relation to MST.

Evidence suggests that police do increasingly divert children away from court. National trends from 2012 to 2017 show that the rate of young people under supervision on an average day fell steadily. The fall in the number of young people under supervision reflects the fact that, in recent years, the numbers of young people who have been the subject of legal action by police and who had charges finalised in the Children's Court, has fallen.[17] Police should ensure that their response is reasonable and proportionate to individual circumstances.

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce, or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

The RANZCP ACT Branch is of the view that no additional law is intuitively required aside from the existing Sections 47 and 655 of the Criminal Code 2002.

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

Children under the revised MACR should be transitioned into the alternative model. There must be existing resources via welfare and health services to meet the needs so the change in the MACR will need to be carefully timed to ensure that children in transition receive continuous support and appropriate access to services including healthcare. Whenever possible, children and young people should be supported to remain in mainstream schooling. The RANZCP encourages schools to offer flexibility for different learning styles and be inclusive of all children with disabilities and mental health needs.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

The RANZCP is of the view that transitional arrangements should operate for children in detention and children on community orders. Public opinion is likely to be a barrier to this process so early public education about the process will be crucial. A justice reinvestment approach is required, especially targeting Aboriginal and Torres Strait Islander communities. We recommend the ACT Government fund and develop a range of relevant and appropriate community-based rehabilitation programs which are accessible throughout ACT. The RANZCP ACT Branch strongly supports pathways for police to refer to children and young people transitioning to an alternative model to community services and allied health support.

Wherever possible, children who have engaged in offending behaviours should be managed in community settings with primary caregivers to ensure their attachment relationships are not threatened. When this is not possible, there needs to be an assessment of the impact of family separation and the availability of alternate attachment figures. This is particularly important for Aboriginal and Torres Strait Islander peoples given the complexity of their family relationships arising from systems of kinship

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

There should be no exceptions based on the type of offence committed and such convictions should be automatically and universally spent.

19. Should any special measures be put in place for the handling, collection, and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

The current provisions for information sharing in the Children and Young People Act 2008 and the Information Privacy Act 2014 are sufficient.

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

Police are usually the first point of contact for anyone who has allegedly committed an offence. Police may start legal action via court or non-court actions. Non-court actions include cautions, conferences, counselling, or infringement notices. Diversion (from court) is an important aspect of the criminal justice system in Australia. The police should be able to use information gathered about a child under the revised MACR after that child has reached the MACR but only in circumstances where the child is placing him- or herself at risk and all agencies would need to remain cognisant of the notion that the child was not criminally responsible for their behaviour at the time.[18]

Conclusion

The RANZCP urges the age of criminal responsibility be raised in the ACT, to the age of 14. With this change, it is important to ensure that all young people who fall below that age can access programs which will divert them away from becoming involved in the youth justice system, including preventing and early intervention programs. It will also be crucial to support those young people who enter the youth justice system in their rehabilitation and reintegration journeys through diversion and restorative justice measures. The age of criminal responsibility in Australia should be in line with neurodevelopmental realities and youth justice systems should reflect the needs of children and seek to rehabilitate them, rather than punish them.

References

1. Australian Medical Association. AMA calls for age of criminal responsibility to be raised to 14 years of age [Internet]. 25 March 2019. Available from: https://ama.com.au/media/ama-calls-age-criminal responsibility-be-raised-14-years-age
2. Baird, A., Fugelsang, J., & Bennett, C. What were you thinking?'': An fMRI study of adolescent decision making. Poster presented at the annual meeting of the Cognitive Neuroscience Society. 2005. Steinberg L. Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science. Association for Psychological Science. 2007; 16(2).
3. McAra et al (2007), "Youth justice? The impact of system contacts on patterns of desistance from offending", European Journal of Criminology, Vol. 4, No. 3; Farrington, D. P., S. G. Osborn & D. J. West (1978): The Persistance of Labeling Effects. British Journal of Criminology, vol. 18, s. 277-284.
4. Committee on the Rights of the Child. General (2019) on children's rights in the child justice system. Geneva: United Nations; 18 September 2019. 19.
5. White LM, Lau KSL, Aalsma MC (2016) Detained Adolescents: Mental Health Needs, Treatment Use, and Recidivism. The Journal of the American Academy of Psychiatry and the Law 44: 200-212.
6. Kim-Cohen J, Caspi A, Moffitt TE, Harrington H, Milne BJ & Poulton R (2003) Prior Juvenile Diagnoses in Adults with Mental Disorders: Development of a Follow-Back of a Prospective Longitudinal Cohort. Archives of General Psychiatry 60(7): 709-717
7. The First 2000 Days Framework (nsw.gov.au)
8. The Troubled Families programme (England) - House of Commons Library (parliament.uk)
9. Murray, J., A. Blokland, D. P. Farrington & D. Theobald (2014): Long-Term Effects of Convictions and Incarceration on Men in the Cambridge Study in Delinquent Development. In Farrington, D. D. & J. Murray (ed.): Labeling Theory. Transaction Publishers, New Brunswick, s. 209-235.; Krohn, M. D., G. Lopes & J. T. Ward (2014): Effects of Official Intervention on Later Offending in the Rochester Youth Development Study. I Farrington, D. D. & J. Murray (ed.): Labeling Theory. Transaction Publishers, New Brunswick, s. 179-207;
10. Steinberg L, Monahan K. Age differences in resistance to peer influence. Developmental Psychology. 2007; 43(6).
11. Sebastian C. Social brain development and the affective consequences of ostracism in adolescence. Brain and Cognition. 2010; 72(1).
12. van Leijenhorst L, Moor B, Op de Macks Z, Rombouts S, Westenberg P, Crone E. Adolescent risky decision-making: neurocognitive development of reward and control region. Neuroimage. 2010; 51(1): 345-55.
13. Petrosino A, Turpin-Petrosino C, Guckenburg S (2010). The impact of juvenile system processing on delinquency. Labeling Theory – Empirical Tests, Advances in Criminological Theory Volume 18, Chapter 6
14. Larsen JJ. Restorative justice in the Australian criminal justice system. Canberra: Australian Institute of Criminology; 2014. Available from: https://aic.gov.au/publications/rpp/rpp127/impact-restorative justice
15. Cunneen C. Arguments for raising the minimum age of criminal responsibility. New South Wales: University of New South Wales; 2017.
16. Australian Institute of Health and Welfare (2018) *Youth Justice in Australia 2016-17.* Canberra: The Australian Institute of Health and Welfare.
17. The Royal Society. Brain Waves Module 2: Neuroscience: implications for education and lifelong learning. London: The Royal Society; February 2011. 22.

18. Sowell, E.R., Thompson, P.M., Tessner, K.D., & Toga, A.W. Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: Inverse relationships during post-adolescent brain maturation. Journal of Neuroscience. 2001; 21.

Response to *'Raising the minimum age of criminal responsibility'*

by Frances Rose OAM and Ross Dunn OAM

13 August 2021

Our response is informed by:

- legal definitions of *'crime'* and *'criminal responsibility'*;
- our experience as victims of serious crime committed by a young offender;
- knowing redemptive effort as a continuing process despite setbacks; and
- our communications with concerned community members, including other crime victims.

For us the most important components in this discussion are:

- the young offender, and their future as a drain or a contributor to society;
- the victim(s); in some cases they will suffer the effects of the offence for life;
- the community, which needs security and expects that there will be consequences for offending, including attempts at remediation; and
- dispassionate assessment of the cost/benefit of making any change.

Clear definitions are needed from the outset.

'Crime' in Australia can be defined as:

- a wrong punishable by the state. A crime generally involves both an *actus reus* (guilty act) and *mens rea* (guilty mind). However, where the offence is one of strict or absolute liability, there is no need to prove *mens rea*: *He Kaw Te v R* (1985) 157 CLR 523. *(Butterworths concise Australian legal dictionary);*

  in that Full Bench decision of the High Court, Brennan J. at [3] said that the purpose of the criminal law was: *'… to deter a person from engaging in prohibited conduct. The penalties of criminal law cannot provide a deterrent against prohibited conduct to a person who is unable to choose whether to engage in that conduct or not, or who does not know the nature of the conduct which he may choose to engage in or who cannot foresee the results which may follow from that conduct (where those results are at least part of the mischief at which the statute is aimed).*

- an offence punishable by the State on behalf of the general public whose standards do not permit the offending behaviour.
  (Blackstone's Australian legal words and phrases)

'Criminal responsibility' is the concept that individuals with the capacity to make voluntary and intentional choices to act criminally, understanding the significance of the choice, should be accountable to the criminal law for those choices. A person is criminally responsible if he or she performed a criminal act voluntarily and intentionally, and he or she understood the significance of the act: *Vallance v R* (1961) 108 CLR 56.

Offences

The existence of an offence that is a crime is not diminished or erased if a perpetrator is judged or deemed to be not criminally responsible. This is especially true for the victims. The community expects that there should be consequences for committing a crime.

Raising the MACR to age 14 should not mean that offences committed by children aged 10 to 13 should be immune from investigation and prosecution. There remains the need to identify, investigate, prosecute and judge the culpability of any offender, and in many cases offences carry both criminal and civil implications. MACR should only be relevant when considering the consequential treatment of the offender.

'Judge the culpability' was underlined above because if MACR were raised to 14 years, children aged 10 to 13 could not be convicted in the way convictions work now. The consequences of offending would be treatment and management rather than punishment; even incarceration would be ordered on the basis of protection of either the individual or the public, rather than as punishment.

A new form of assigning 'guilt' (for lack of a better word right now) would be appropriate as well as a new way of hearing and determining charges against children. We suggest that rather than modifying the existing adversarial court system to manage remediation of child offenders who cannot be convicted, this is an opportunity to lead the way in designing a new way of hearing and evaluating evidence and assigning appropriate consequential interventions if 'guilt' is proved.

A non-adversarial system would be more intimate and less intimidating, and probably less expensive than the current court processes, where the magistrate or judge is a kind of referee between combatant lawyers.

We think that a blanket erasure of all criminal responsibility based only on age is illusory, wishful thinking. People develop differently. Some children are capable of *mens rea* well before the age of 14; some other people will never be capable of it.

Nevertheless we support raising the MACR in relation to minor offences. Raising the MACR might be wishful, but it nevertheless offers the chance to improve on the way we do things now. Conviction and incarceration has had few success stories, and generally produces more hardened and skilled junior criminals.

A precondition for raising the MACR must be the production of a suite of interventions mandated by legislation. This must include a clear method for measuring results such as reduction in recidivism, acceptance of responsibility, engagement with diversionary activity, etc.

We need to keep open the option to respond to serious crime under the current system. The car that killed our daughter could well have been driven by the 13 year-old passenger rather than the 14 year old who was convicted. He took part in the theft of the car (not his first car theft), smoked marijuana (not for the first time), and as driver he would have refused a police order to stop, exceeded the speed limit and continued at speed through the Civic bus interchange at midnight. The presumption of *doli incapax* would be strongly rebuttable, and for some of those offences, *mens rea* would not even need to be proved.

The MACR project should be robust enough to withstand hard cases that will inevitably arise in the future, offences like the Bolger case in the UK. The new system needs to be able to cope with serious crime, e.g. where 10 to 13 year-olds are involved in arson, grievous bodily harm, sexual assault, manslaughter and even murder:

> *'Five teenagers, including two as young as 13, have been charged with murder after the death of a 16-year-old boy found with severe injuries in Sydney'*
> AAP Saturday, 07 August 2021

We think that in every case of serious crime the presumption of *doli incapax* needs to be challenged, and either confirmed or rejected in light of the circumstances of each individual accused person.

Rebutting the presumption of *doli incapax*: *'...directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.'* (The majority of the High Court of Australia: Kiefel, Bell, Keane and Gordon JJ. in *RP v The Queen* [2016] HCA 53, [12]).

Where *doli incapax* is rejected, *mens rea* is determined and a normal conviction occurs, what then? We submit that, even then, incarceration of a 10 – 13 year-old person should be a last resort, where other interventions have failed or where there is need to protect the community. Nevertheless, the sentence following conviction should

be strong enough to meet the expectations of the community, even if suspended to allow remedial interventions a chance.

Victims

The rights of victims of young offenders, whether they are convicted or otherwise found culpable, must continue be protected in victims' legislation and the *Charter of Victims' Rights*.

- Ensure there is no reduction in rights or care for victims of offences under the revised MACR.
- Ensure that the revised MACR does not result in two classes of victims.
- Offer victims a role in redemptive programs accompanying revised MACR.
- We think too much reliance is placed on RJ for change in young offenders. Overall RJ outcome compared with effort needs cool assessment of the evidence. We need to enhance RJ's effectiveness with more new or improved techniques to instil in young offenders awareness of the harm they do, and better choices they could make.

Pragmatic implementation

The government needs to bring the public along. The ACT is not immune to a strong conservative strain across the nation. On issues like law and order it transcends political allegiance, and is inflamed by conservative media

If only for that reason the goal of raising the MACR to 14 years without qualification should be attempted progressively, rather than as a revolution. The latter approach carries significant political risk: it could pre-empt a backlash that would see a 'law and order' opposition take government and throw out the entire concept.

We suggest starting with a model that makes exceptions to the increased MACR for serious crime. A review after (say) two years would assess results, e.g. comparing outcomes with the current system, cost/benefit, public acceptance, etc.
With that evidence a sensible decision to progress, modify or revert could then be made.

Any alternative to criminal or mandatory intervention must be fully articulated, tested and costed before adoption.

QUESTIONS and ANSWERS

Section One: Threshold issues for raising the MACR	
1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences shouldbe captured?	Yes. See discussion above. An exhaustive list is not preferable, but includes arson, GBH, sexual assault, manslaughter and murder. Also chronic repeat offenders for any offence.
2. Should *doli incapax* have any role if the MACR is raised?	Yes, see above. It is presumed for minor offences and tested for serious ones.
Section two: An alternative model to the youth justice system	
3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included? i. *We should not erase offences, their effect on victims, nor punishment as ultimate sanction. The principles should unequivocally state that committing an offence carries consequences, and the revised MACR does not confer blanket immunity from consequences, whether criminal conviction or other mandatory intervention* ii. *No comment.* iii. *At end add 'by' and merge iv from 'supporting' to end.* iv. *Delete* v. *With victims, there is more to it than just safety. The consequences of an offence can continue indefinitely. A new dot point is suggested at viii below.* vi. *We agree.* vii. *We disagree. Some vestige of rigour is needed if we are going to abolish sentencing and similar court orders. Support is presumed to be in their best interest, and all reasonable interventions should be attempted, mandated if necessary.* viii. *We, Frances, Ross and Zoe, suffer life-long impact from*	Comment on the seven principles is in italics opposite. An additional principle is at viii

juvenile crime. We suggest an additional principle; 'ensure that offenders acknowledge the effects of their offending on their victims and the community.'	
4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented orrepurposed - to better support this cohort? *The words on p.21:* '...an alternative model to the youth justice system.' *are alarming taken at face value. We need to modify and enhance the existing system to cope with raising MACR. For serious crime, most of what we have should still operate.* *We suggest:* • *improving youth/police engagement, e.g. the Maranguka initiative in Bourke, NSW;* • *24/7 crisis accommodation for any child, including 'walk-ins;* • *Youth workers teamed with police for call-outs;* • *Regular supervised and supported participation in education.*	RJ needs enhancement. We need justice reinvestment going beyond RJ. There must be new obligations on offenders as a quid pro quo for raising MACR. Suggestions are in italics opposite
5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?	MACR does not change this need.
6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?	We don't know much about this. CYPA Act rules. If this part is based on general *doli incapax*, we don't agree, nor does the High Court
7. How should children and young people under the MACR be supported after crisis points?	ditto

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific andtherapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?	Yes Age, repeat offending, lack of voluntary engagement or serious harmful behaviours.
9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences)and/or as escalation to address underlying needs that have led to repeated harmful behaviours?	Yes, but not as punishment
Section three: Victims' rights and supports	
10. How can the ACT Government's reform to the MACR consider the rights of victims? *Initially there will need to be a lot of selling of the revised MACR system to victims.* *Victims should be offered the opportunity to participate, with the agreement of the offender.*	They should not be diminished. Offences should be investigated and charges laid, etc as they are now, Offenders should remain accountable
11. What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them? *The revised MACR erases criminal conviction for minor crime at least, not the offence. Public recognition of harm to victims is very important, and their rights should not be diminished.*	*VOC Act* 1994, s6 (1) (a). See discussion above. The offence occurred. Harm was done. This is independent of conviction.
12. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?	RJ. Opportunity to engage in redemptive activity.

Section four: Additional legal and technical considerations	
13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?	Yes. Little change is needed to arrest and charge practice. Age is more relevant to conviction and sentencing.
14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?	Enhance police intelligence. Arrest into protective custody for 10 – 13 year olds out unsupervised late at night.
15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?	No. Yes There must be no advantage to Fagins via MACR Seek police advice on penalty or other restraint.
16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?	Yes. Legislation is needed to legitimise change in sentencing.
17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?	Replace it all, lock, stock and barrel. Need case by case assessment of community safety. Protective custody might still apply.
18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?	Yes, automatically, but only after cases by case evaluation. New obligations under revised MACR might be substituted. See 8 & 17 above.

19. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?	Yes. Change CYPA Act if necessary
20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?	Yes. Change the CYPA Act if necessary

Frances Rose OAM

13 August 2021

Ross Dunn OAM

creating a better life
for children and young
people in care

ACT Raising the Minimum Age of Criminal Responsibility

Submission to the ACT Government

August 2021

CREATE Foundation
A Cnr Cooyong Street and Scotts Crossing
Civic Square, ACT 2601
T 02 6232 2409
E act@create.org.au

Introduction

CREATE Foundation appreciates the opportunity to respond to ACT *Raising the minimum age of criminal responsibility* (MACR).

CREATE applauds the ACT Government's leadership in announcing its intention to raise the minimum age of criminal responsibility from 10 to 14 years old in line with the overwhelming medical, legal, and international evidence. CREATE believes such a decision would improve both the safety and well-being of children and young people, reduce long term offending, and increase community safety.

Studies show that the earlier a young person has engagement with the criminal justice system, the more likely it is that the young person will have long-term involvement in crime (Australian Institute of Health and Welfare, 2020). CREATE advocates that instead of punishing children and young people with legal action, an outcome that can adversely affect their development and alter their entire life's trajectory. They deserve treatment focusing on early prevention and providing diversionary supports that will not impede their possibility of future success. particularly when considering children as young as 10 years of age.

Research shows that children and young people who have been abused or neglected are at greater risk of engaging in criminal activity and of entering the youth justice system (Atkinson, 2018). Oftentimes, these children and young people also have an out-of-home care experience and CREATE believes the over-representation of young people with a care experience in the youth justice system is unacceptable (CREATE, 2018a).

As the national peak body and systemic advocate representing children and young people with a care experience, we would like to highlight their voices. Our submission is based on the experiences of those who have participated in CREATE's consultations and research reports, and is supported by additional literature.

Disproportionate Impact on Young People in Care and First Nations Children and Young People

The over-representation of children and young people that interact with both the out-of-home care and youth justice systems is a common concern across Australia. The Australian Institute of Health and Welfare (2021) reported that there were 46,000 children and young people living in out-of-home care in Australia between 30 June 2019–2020. Of this number, 18,900 children identified as Aboriginal and/or Torres Strait Islander.

Further data reported by the Australian Institute of Health and Welfare (2020) found that 22% of young people under youth justice supervision had been placed in out-of-home care in the last five years, and that 61% of Indigenous young people under youth justice supervision had also received child protection services in the last five years. For young people in youth detention, over 26% had been in out-of-home care. A majority of these children were also found to have been placed in residential care and had lived in five or more placements (Australian Institute of Health and Welfare, 2020).

Findings from CREATE's latest report, *Transitioning to adulthood from out-of-home care: Independence or interdependence?*, presenting data from 325 care leavers, showed that 37% of respondents had been involved with the youth justice system whilst in care, and 21% were involved after exiting care (McDowall, 2020). Aboriginal and Torres Strait Islander care leavers were also more likely to have been involved with youth justice after leaving care (31%) compared to non-Indigenous care leavers (18%).

Experiences of placement instability, particularly being placed in residential care, and criminalising of behaviours that would be tolerated in a family home but can escalate to involve the police in care

facilities are several factors that increase the likelihood of offending by a care-experienced young person (CREATE, 2018a; McDowall, 2020; Victorian Comission for Children and Young People, 2021). Because children and young people with both an out-of-home care and youth justice experience present with more complex needs that often arise due to past trauma, they face greater social disadvantage than the general youth justice population (Mendes, Baidawi, & Snow, 2014).

> *We are not really treated like kids, we are held to greater responsibility than anybody else. If another young person living at home has a fight with their sibling they are not held to the same responsibility.* (Female, 25)
>
> *They made me feel like a bad person, I don't know why someone didn't just sit down and talk to me about what was going on and why. I had no support, no one cared. If they had asked me why [I was offending] I could have told them why I was doing it and it might have been able to be fixed earlier.* (Male, 24)
>
> (CREATE, 2018b)
>
> *If I had the right carer and didn't get kicked out, I wouldn't commit crime. I did it to survive, eat and sleep. Child Safety Officers may not have kids [of their own]. It's my 9th time in here [youth detention]. I haven't been in resi care since 13, I have been living on the street. It's up to the kid. If he needs support he should be able to come back [to the Department].* (Male, 17)
>
> (CREATE, 2021b)

CREATE advocates that there needs to be a prioritisation of prevention strategies across state and territory governments that address the root causes of youth offending to ensure the needs of these young people are met. This includes raising the MACR from 10 years to at least 14 years of age, and additional strategies such as greater investment in diversionary strategies that utilise existing community-based services, increased collaboration between youth justice and child protection systems, and the adoption of a trauma-informed youth justice system. Such reform will assist young people achieve their best outcomes, but also lead to reduced recidivism and increased safety for communities (CREATE, 2018a).

Rationale for Raising the Minimum Age of Criminal Responsibility

CREATE believes that governments must raise the minimum age of criminal responsibility with **no exceptions**. Medical evidence has determined that children under the age of 14 years old do not have the capacity to form criminal intent or comprehend consequences of their actions, including the severity level of their behaviours (Australian Medical Association, 2020). Because of a lack of sufficient neurological development, these children and young people should not be held criminally responsible.

Children under the age of 14 years are also incredibly vulnerable to developmental harm when they come into contact with the criminal legal system, which may contribute to higher instances of poor mental health or illness, unemployment, homelessness, and premature death later in life (Australian Medical Association, 2020).

Calls for Australia to raise the MACR age have been strongly voiced both locally and internationally, (Australian Medical Association, 2020; Change The Record, 2021; Human Rights Law Centre, 2021) after the United Nations made a recommendation in 2019 to raise the MACR to at least 14 years. Recommendation 27.1 stated in the final *Royal Commission into the Protection and Detention of Children in the Northern Territory report* (2017) also recommended that the age of criminal responsibility be raised, but no progress has been made to date since that report was released.

CREATE strongly supports the need to raise the MACR as it is in the best interests of the child, and their community. CREATE also advocates that the needs of the child must be met in a therapeutic and rehabilitative manner, rather than the child being exposed to further harm through the criminal justice system.

Prevention and Early Intervention Strategies

Raising the MACR should protect children and young people under the age of 14 from the criminal justice system, and should provide the opportunity for diversion and therapeutic intervention. However, CREATE notes that this reform should not be treated as simply delaying the criminal justice system's engagement with the child until they reach the age of 14 as this undermines the intent of supporting children and young people to learn from their mistakes and be able to grow and contribute positively to society.

CREATE firmly advocates that efforts should be put towards helping children learn from their mistakes, not harming them for life. Community-driven solutions, intensive family support programs, trauma-informed mentorship and on-country learning are all alternative programs that work and support children and young people to redirect their lives for the better, instead of being locked away.

> *[I am] conflicted as I have a 10 year old sister and know that she needs to be held accountable [for her actions] but I do not believe that being locked up is the answer. But [I] believe that their actions needs some consequence and that there is some steps that need to be looked into before lock up (i.e., PCYC and other services) to find out what led the young person to this and also look at distractions as people don't misbehave for no reason… At 14 I feel the young person is more able to be able to held to the consequence of what they have done*. (Female, 21)

CREATE recommends that various frameworks should be used when adopting alternative models to the youth justice system (CREATE, 2018a). These frameworks include using human rights, child rights, and trauma-informed perspectives when working with children who may come in contact with the youth justice system. CREATE also believes that children and young people must be supported to be aware of their rights (CREATE, 2021b).

Based on the key findings from CREATE's *Youth Justice Report* (2018b), which is supported by broader information gathered through our work with young people (McDowall, 2020), CREATE specifically calls for:

1. Increased training and resources provided to residential workers, foster, and kinship carers regarding how to manage challenging behaviour within a trauma-informed framework. This can include the development of protocols and MOU's between OOHC service providers and police, clearly outlining what contexts require the police to attend, and supporting the use of diversionary responses. This will ensure young people in OOHC are not disproportionately having contact with police that would not occur in a non-OOHC environment;

2. The adoption of a trauma-informed youth justice system which promotes policy and practice that better manages challenging behaviours, develops a young person's resilience and strength, and ultimately leads to increased cooperation with youth justice staff and reduced recidivism (Elwyn et al., 2014). Practices aligned with a trauma-informed approach include screening for trauma exposure, using non-judgemental language, and ensuring judicial processes are explained in a developmentally appropriate manner (Branson et al., 2017);

3. A high proportion of young people with a care experience are unsupported during their justice system contact. There is a need for greater clarity regarding the roles and expectations of caregivers and professionals in supporting young people through the justice system. Child protection, youth justice, and community service agencies who provide placements for young people in OOHC need to work together to develop clear protocols about how best to support young people who may have contact with the youth-justice system at each stage, and support the sharing of necessary information to facilitate this;

4. Increased public education and awareness of the impact of negative language and stereotyping on young people in OOHC, and a need to promote positive images of young people in OOHC to reduce internalisation of negative perceptions.

(CREATE, 2018a)

Early intervention for children and young people in care who are exhibiting trauma-based behavioural issues has the potential to minimise involvement in the youth and adult justice systems (Atkinson, 2018). Having appropriate and positive social support from positive peers and social networks could also assist in diverting young people from engaging in criminal activity (CREATE, 2021b).

> *I don't think they get trauma or behaviours expressed by children and young people in care so there isn't a lot of understanding towards them. It's a lot about punishment rather than rehabilitation. It's more you did the wrong thing regardless of the reasons behind it.* (Female, 22)
>
> (CREATE, 2018b)
>
> *If a child is committing crimes like this and haven't had the opportunity to explore all resources (counselling etc.), then I think that there should be a chance for rehabilitation in the community before taking such a drastic measure as this could cause mental distress and illness. And feelings of worthlessness in the community.* (Female, 16)
>
> (CREATE, 2021b)

CREATE supports the principles listed in the Discussion paper for alternative models to the youth justice system (ACT Government, 2021). We would also like to highlight the five key areas of need as identified by Change The Record (2021) to consider for addressing current service delivery gaps in the ACT landscape. These include:

- The lack of multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including further assessment, and assistance and treatment for drug and alcohol misuse;
- The absence of Function Family Therapy – Youth Justice and/ or other evidence-based programs targeted to this cohort;
- The limited availability of psycho-social services for young people, particularly young people living with disabilities;
- The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness;
- A broad need for greater education across services to improve the identification of, and response to, disability support needs.

Strengthening Supports for Victims of Young Offenders

CREATE believes that victims of young offenders should also be able to have ongoing access to emotional and mental health support services. As the majority of children and young people who come into care have experienced past abuse and trauma, CREATE believes that additional specialised

therapeutic supports should be made available, accessible and without cost (CREATE, 2021a). Not only will this support victims of young offenders, but this approach also acts as a preventive measure that can support young people with their social, emotional and mental health challenges and channel these positively, rather than engaging in youth crime.

Young people have consistently voiced their concerns for mental health support, however accessing these services are often difficult due to a limited number of sessions with psychologists or counsellors, feeling as though their counsellor is not the right fit, and the associated financial costs involved (CREATE, 2019; 2020; 2021a; McDowall, 2020). CREATE believes there should be an unrestricted amount of counselling sessions or other identified therapeutic services available for those with a care experience background, and that referrals should be streamlined to avoid challenges in navigating service systems.

> *Counselling (after using up the free sessions it's really expensive). Help to get a diagnosis (I don't know the process and it's really expensive). Feeling like you have no one to go to, who won't need you to tell your story over for them to understand you.* (Female, 20)
>
> (McDowall, 2020)

Conclusion

Thank you again for the opportunity to respond to *Raising the minimum age of criminal responsibility*. CREATE welcomes the leadership the ACT Government is taking with this significant reform. Youth justice is a complex field, but reforms to raise the MACR from 10 to 14 years is the first step in safeguarding the wellbeing and development of young children whilst also ensuring community safety.

Should you have any questions or require additional information, please do not hesitate to contact Lisa Wylie, CREATE's ACT State Coordinator on 0439 764 163 or email lisa.wylie@create.org.au.

References

ACT Government. (2021). *Discussion Paper: Raising the minimum age of criminal responsibility.* ACT Government. Retrieved from https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4516/2433/2390/Discussion_Paper_-_FINAL.pdf

Atkinson, B. (2018). *Report on Youth Justice.* Queensland Government. Retrieved from https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/reform/youth-justice-report.pdf

Australian Institute of Health and Welfare. (2020). *Young people under youth justice supervision and in child protection 2018-19.* AIHW. Retrieved from https://www.aihw.gov.au/getmedia/8442b61a-f3b9-4741-a5d7-75023cb0cd19/aihw-csi-28.pdf.aspx?inline=true

Australian Institute of Health and Welfare. (2021). *Child protection Australia 2019-20.* AIHW. Retrieved from https://www.aihw.gov.au/getmedia/c3b0e267-bd63-4b91-9ea6-9fa4d14c688c/aihw-cws-78.pdf.aspx?inline=true

Australian Medical Association. (2020). *AMA submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review.* AMA. Retrieved from https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a3909581227361c423d773/1621332118103/AMA.pdf

Branson, C. E., Baetz, C. L., Horwitz, S. M., & Hoagwood, K. E. (2017). Trauma-informed juvenile justice systems: A systematic review of definitions and core components. *Psychological Trauma: Theory, Research, Practice, and Policy,, 9*(6), 635-646.

Change The Record. (2021). *Submission to the ACT Government: Raising the Age .* Change The Record.

CREATE. (2018a). *Position Paper: Youth Justice.* CREATE Foundation. Retrieved from https://create.org.au/wp-content/uploads/2021/08/PP_Youth-Justice.pdf

CREATE. (2018b). *Youth Justice Report: Consultation with young people in out-of-home care about their experiences with police, courts and detention.* CREATE Foundation. Retrieved from https://create.org.au/wp-content/uploads/2021/04/Youth-Justice-Report-Standard-2018.pdf

CREATE. (2019). *Submission to the Royal Commission into Victoria's Mental Health System.* CREATE Foundation. Retrieved from https://create.org.au/wp-content/uploads/2019/07/CREATE-Submission-to-the-Vic-Royal-Commission-on-Mental-Health.pdf

CREATE. (2020). *Supported out-of-home care placement to 21 in Queensland: Perspectives of young people with a care experience. [Consultation Report].* CREATE Foundation.

CREATE. (2021a). *National Children's Mental Health and Wellbeing Strategy: Submission to the National Mental Health Commission.* CREATE Foundation. Retrieved from https://create.org.au/wp-content/uploads/2021/03/CREATE-NAT_Submission_National-childrens-mental-health-and-wellbeing-strategy_2021-FINAL-1.pdf

CREATE. (2021b). *Submission to the Legal Affairs and Safety Committee: Youth Justice & Other Legislation Amendment Bill 2021.* CREATE Foundation. Retrieved from https://create.org.au/wp-content/uploads/2021/03/QLD_2021_Submission_Youth-Justice-Ammendment-Bill_2021-FINAL.pdf

Elwyn, L. J., Esaki, N., & Smith, C. A. (2014). Safety at a girls' secure juvenile justice facility. *Therapeutic Communities, 36*(4), 209-218.

Human Rights Law Centre. (2021). *Major UN human rights review highlights need for Australia to raise the age of criminal responsibility.* Human Rights Law Centre. Retrieved from https://www.hrlc.org.au/news/2021/1/20/un-review-highlights-need-for-aust-to-raise-the-age-criminal-responsibility

McDowall, J. J. (2020). *Transitioning to adulthood from out-of-home care: Independence or interdependence?* CREATE Foundation. Retrieved from https://create.org.au/wp-content/uploads/2021/05/CREATE-Post-Care-Report-2021-LR.pdf

Mendes, P., Baidawi, S. H., & Snow, P. C. (2014). *Good practice in reducing the over-representation of care leavers in the Youth Justice system: Leaving Care and Youth Justice: Phase 3 Report.* Monash University.

Royal Commission into the Protection and Detention of Children in the Northern Territory. (2017). *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory: Findings and Recommendations.* Royal Commission into the Protection and Detention of Children in the Northern Territory. Retrieved from https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf

Victorian Comission for Children and Young People. (2021). *Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system: summary and recommendations.* Comission for Children and Young People. Retrieved from https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Summary-Final-090621.pdf

About CREATE

CREATE Foundation is the national peak consumer body for children and young people with an out-of-home care experience. We represent the voices of over 45,000 children and young people currently in care, and those who have transitioned from care up to the age of 25. Our vision is that all children and young people with a care experience reach their full potential. Our mission is to create a better life for children and young people in care.

To do this we:

- **CONNECT** children and young people to each other, CREATE and their community to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.

We achieve our mission by providing a variety of activities and programs for children and young people in care, and conducting research and developing policy to help us advocate for a better care system.

Raising the Minimum Age of Criminal Responsibility Consultation staff
Justice and Community Safety
Via email: macr@act.gov.au

Thursday 12 August 2021

Dear Colleagues,

Raising the Minimum Age of Criminal Responsibility

ADACAS is a human-rights focussed, independent advocacy service providing individual advocacy to and working with people with disability, people who experience mental ill health, older people and carers. We have been operating in the ACT for 30 years, and more recently commenced working also with people with disability living in specific parts of NSW.

We state at the outset: ADACAS' firm view is that **the minimum age of criminal responsibility (MACR) should be raised to at least 14 years of age, and that there should not be any exceptions**.

Please see in the pages following, ADACAS' more detailed response.

Please do not hesitate to contact our office, as per the contact details with my signature below, should there be any questions in relation to this submission.

Yours sincerely,

Wendy Prowse
CEO
ADACAS
Ceo@adacas.org.au
Phone 6242 5060 / 0417 141 049

Section One: Threshold issues for raising the Minimum Age of Criminal Responsibility (MACR)

1. We state at the outset: ADACAS' firm view is that **the minimum age of criminal responsibility (MACR) should be raised to at least 14 years of age, and that there should not be any exceptions**.

Raising the MACR to at least 14 years and providing any alternative needed supports, would align with Australia's obligations under the United Nations' Convention on the Rights of the Child[1], with recommendations from the Committee of the Rights of the Child[2]. It would also align with responsibilities under the UN Declaration on the Rights of Indigenous Peoples[3], and respond to calls from the UN to raise the current minimum age, including by the Committee on the Elimination of Racial Discrimination (especially given the disproportionate rates of Aboriginal children and young people in contact with the ACT justice system[4]).

Raising the minimum age of criminal responsibility to 14 years is also supported by medical evidence about neurological development[5] (including as it relates to decision-making abilities) and medical evidence about how children and young people grow.

It furthermore addresses the fact that the children and young people who are more likely to be most strongly affected by a MACR set at 10 years, are likely to be those with greater exposure to the impacts of trauma, mental ill health, disability, abuse, systemic discriminations[6]: situations in significantly improved supports, protections and accommodations should instead be being provided and/or in which much broader and extensive societal changes are needed.

The evidence that children/young people who are in contact with the justice system before the age of 14, are more likely to have further contact with the justice system later in life (as cited in the discussion paper for this consultation), adds to the urgent imperative to divert children/young people to more appropriate supports and toward rehabilitative (as opposed to punitive approaches).

Given all of the above, as a human rights organisation, ADACAS strongly supports efforts to raising the minimum age of criminal responsibility to at least 14.

---

[1] United Nations (1989), Convention on the Rights of the Child, available via: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed in August 2021.

[2] Australian Human Rights Commission (2016), *Children's Rights Report 2016* by the National Children's Commissioner, page 189, available via: https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016, accessed in August 2021.

[3] United Nations (2007), *United Nations Declaration on the Rights of Indigenous Peoples,* available via: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html, accessed in August 2021.

[4] ACT Government (2021), Discussion Paper: Raising the minimum age of criminal responsibility, by the Justice and Community Safety Directorate, and the Community Services Directorate, available via: https://yoursayconversations.act.gov.au/raising-minimum-age-criminal-responsibility accessed in June 2021.

[5] Farmer, E. (2011) 'The age of criminal responsibility: developmental science and human rights perspectives' *Journal of Children's Services*, 6(2), 86-87, available via: https://www.researchgate.net/publication/337114143_The_age_of_criminal_responsibility_Developmental_science_and_human_rights_perspectives, accessed in August 2021.

[6] ACT Human Rights Commission (2020),

2. ADACAS also considers that if the MACR is raised to 14 without exceptions, that the ***doli incapax*** principle (the legal principle that "children under 14 years of age cannot be held criminally responsible, unless it is proven that they knew what they were doing was seriously wrong"[7]), would no longer be needed. Whilst this is a useful development, given the significant challenges of adequately implementing this principle in an equitable way, in making this suggestion, we are **not** recommending that a child or young person's wrongdoings be minimised, or that the impacts of that wrongdoing on others are any less. We will return to this point later in this submission.

Section Two: Responses to Alternative models to the Youth Justice System

Simply replacing a youth justice system with an alternative model (that also seeks mainly to intervene once harmful actions have occurred) would do a grave dis-service to our community. As has been forecast later in the discussion paper, it is imperative to have a model which seeks to change the trajectories which lead to harmful actions occurring in the first place. This means – much stronger and earlier evidence-based supports for children, young people, their families and networks, which can respond in tailored ways that meet the intersectional needs of children/young people and their families.

We suggest re-consideration of the framing of the design principles accordingly. We have still however responded to those included in the current framing below.

3. We welcome inclusion within the principles of the fundamental need to assess and respond to the needs of children and young people. As the experiences of children and young people are so often intertwined with their families and/or others around them, assessing and responding to the needs of children and young people, may also, by necessity involve working with, assessing and responding to the needs of their family and/or broader networks. Given this interconnectedness – we would recommend that the wording of the principles be altered to more explicitly outline the responsibility of responding (in an individualised way) to the needs of families/networks as appropriate (not just, as is currently written to support families, communities, schools and health services).

We would also like to see the wording of the first principle expanded, such that it is more explicit about having a support and rehabilitative focus (whilst also continuing to include the statement, "rather than focusing on offending and punishment").

We note the need for any alternative model to a youth justice response to be based in human rights, and would welcome this being directly included.

We suggest that the principles should include a requirement to take a strengths-based approach in responding to the needs of children, youth, family, and/or other networks as appropriate. A strength based-approach does not preclude conscious awareness of and action to address and manage risks as needed.

[7] ACT Government (2021), Raising the Minimum Age of Criminal Responsibility Discussion Paper, available via: https://yoursayconversations.act.gov.au/raising-minimum-age-criminal-responsibility, accessed in July 2021

Unit 14 – 6 Gritten Street, Weston Community Hub, Weston ACT 2611 PO Box 3167 Weston Creek ACT 2611
Ph 02 6242 5060 Fx 02 6242 5063 TTY 133 677 (National Relay Service) adacas@adacas.org.au
http://www.adacas.org.au/

There should be a principle spelling out the opportunity for the voices of all parties (including the child or young people, family members, victim/survivor) for consideration as part of processes to respond and find ways forward.

As flagged earlier – whilst we strongly support a move to raise MACR, we are aware that for those that have the abilities to achieve this, part of growing up is learning to take responsibility for your actions/behaviours and their impacts. Having a system that can take due recognition of this, and work with the child/young person concerned to achieve the right balance of support but also (when the age/time/ability is appropriate) recognition of harm, is important. We strongly also endorse the approach of restorative and culturally appropriate approaches to finding ways forward (to the extent possible/appropriate).

4. Service system gaps/needs:

ADACAS highlights that at present there are significant gaps in relation to the following topics: early identification and access to appropriate and coordinated (intensive when needed) supports around and across topics of mental ill health, chronic health issues, disability, trauma, alcohol and/or substance use and experiences of violence/abuse/sexual assaults), no matter who is most directly experiencing the issues and affected (whether a young person or a parent or both etc). Many children, young people and families are dealing with multiple challenges simultaneously, and often have intersectional life experiences. At present the service system is ill-equipped in many areas.

Some of the particular challenges include:

- Early identification and support for disability not sufficiently available. At the present time, in ADACAS' experience, there is limited awareness of disability, disability rights, disability supports and the services available, outside of the disability sector. There are many possible disability types, and they can be visible or invisible. If there is a chance that disability might be present for one or more people (whether this be the child, young person and/or parents or family members or friends), there can be significant benefits to this being identified early, and to people being connected to supportive pathways to obtain information and consider diagnostic processes and relevant supports, if they decide and choose to engage with such pathways. Given that engaging with the possibility of disability can be confronting and stressful for those concerned, it is important that services/systems across the board have the knowledge and skills about how to supportively encourage people to access information and supports if needed, and also the knowledge and skills around how to make reasonable adjustments as needed, and to practice supported-decision-making approaches when appropriate. It is also imperative that people have sufficient skills to respond in a strengths based way, to where people are at, regardless of whether there is diagnostic clarity. Strengthening awareness and skills in how to respond if disability is a possibility, across all the key systems and structures where a child, young person and/or family might be interacting is important: whether this be in early childhood and/or educational settings, but also across all other types of community service settings (including but not limited to: child, youth and family services, housing and homelessness services, health and mental health services, financial and emergency relief services, alcohol and other drug services, women's' and anti-violence/abuse services, LGBTQIA+ services, veterans services, older persons' services etc).

- NDIS impacts and assumptions: When the National Disability Insurance Scheme was introduced, it was envisaged that of the approximately 4 million people with disability across Australia, that approximately 10% of people with disability (those with the highest levels of functional impact) would be eligible for individualised NDIS funding packages, and that the remainder of people with disability would have access to services that continued to be block funded (at that time, they were called Tier 2 services). In reality, in ADACAS' observation there has been an underinvestment in Tier 2 services (Information, Linkages and Capacity services), and as such, there are many people who experience disability who are not eligible for an individual funding package, but at the same time, do not have access to key and needed services and supports in the community. In the ACT, whilst Community Assistance and Support Program (CASP) services[8] and/or family or other supports, can help in some instances, in many instances, the type of support that is needed, is not easily available. Many people also assume that for those that need NDIS funding package assistance, that gaining access to the NDIS is straightforward. This is not the case, as was demonstrated clearly via submissions to the Inquiry into NDIS Planning[9]. There also continue to be assumptions that most people with disability can access the NDIS, when there was only ever to be approximately 10% of people who would receive an individualised funding package.
- Early support around mental ill health not sufficiently available/accessible: The need for increased awareness and support by services/systems across the board around identifying and connecting to support for mental ill health is a similar need in relation to that identified for disability (mental ill health can result in disabling impacts: psychosocial disability in some instances, and mental ill health can also co-occur with disability). There is a need for continued work to ensure that the right mix of supports is easily available to children, young people and families when needed. Whilst the gaps in support are sometimes at the clinical level of support, in other instances, the types of support are those best provided via community mental health services. We note the need for support to be available in the way that suits best for the child/young person/family concerned: whether this be individual support for certain people, or support at the family level.

Services where expansion is needed (or where services don't exist):
By virtue of the ways that funding and systems have been developed, demand exceeds supply of support in many of the community services sector areas. At present, additionally, in ADACAS' view, the balance between services that specialise, versus those that can offer more general assistance across a variety of domains is not yet right. There are also silos that need to be structurally addressed between even the available supports.

We hope that the work in relation to improving commissioning mechanisms, also work arising from the Early Support by Design, and the First 1000 days (and that arising from Sexual Assault Reform efforts, and increased focus on topics such as early support for mental health, etc) all assist.

---

[8] ACT Government (2020), *Community Assistance and Support Program Service Directory*, available via: https://www.health.act.gov.au/sites/default/files/2020-06/CASP%20Directory_Updated_022062020.pdf and accessed in July 2021.

[9] Various (2020), Submissions to the Joint Parliamentary Commission into the NDIS: Planning Inquiry. Available via: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDISPlanning/Submissions, accessed in 2020.

Some specific examples:

- **Housing**: as per the reports recently launched by ACT Shelter[10], there is a significant demand for safe and suitable public and community housing in the ACT. Emergency/crisis accommodation is also an area where demand is higher than availability, and where the services available are not currently always able to meet needs (for example if a family needs to leave together, or there is a pet/support animal which needs to attend, or if an accessible emergency option is required).
- ADACAS notes **ongoing case coordination/ case management supports are sometimes needed** especially in complex situations to seek to ensure that individuals and families receive supports in ways that work best for them.
- ADACAS would like to see an expansion in the availability of **therapy types designed to support entire families**, such as Functional Family Therapy (or similar evidence-based modes of therapy), and the supports around those therapies to enable people to maintain engagement. We note that there are some families where a longer term, relational structure/model of support is needed/required.
- **Prevention and response services for people who are at risk of, or have experienced abuse/violence/exploitation/sexual assault or violence**. Whilst Canberra has some important services in this arena such as the Domestic Violence Crisis Service, Canberra Rape Crisis Centre and others, there is continued work needed to ensure that prevention and response services are available, and accessible to all (including people with disability), and that the demand for services can be met.
- Alcohol and/or other substance use supports: at present, as is highlighted in the ATODA submission to the Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021[11], there is much greater demand than availability of supports.
- Structured mechanisms to divert families where there is a **parent with disability in need of tailored individual support to build parenting skills** (or added supports to overcome discrimination or barriers). (At present, there are some limited group type supports for those for whom that suits post birth (e.g. Newpin, case support through Uniting, some coordination services (e.g. IMPACT, Maternal and Child Health nurses)), but little in the way of tailored, individualised, services designed to, for example, help prospective parents with intellectual disability, prepare for pregnancy and to build parenting skills), and no structured mechanism to ensure that referrals to supports occur for such families.

It is also important that responses are not solely formulated in terms of the formal service systems/structures: what a school does, what formal support services do. Informal supports can also be hugely influential and important (and sometimes creative solutions which support informal supports being able to be activated or interact differently) can be far more effective.

---

[10] ACT Shelter and AHURI (2021), Reports, available via: https://www.actshelter.net.au/news/64-act-shelter-and-ahuri-release-new-housing-research, accessed in August 2021.

[11] ACT Government (2021), Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021, available via: https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/select-committee-on-the-drugs-of-dependence-personal-use-amendment-bill-2021/inquiry-into-the-drugs-of-dependence-personal-use-amendment-bill-2021#tab1703349-2id accessed in August 2021.

ADACAS also advises there is a limit to the amount of formal community/health/other services that any individual or family can interact with and that an approach of expecting all people experiencing X issue to receive support from Y service in Z way, does not and cannot always work. Children, young people and families experiencing challenges must be able to connect with people and services that they trust. Trust develops over time, and in different ways. More services must be encouraged to be flexible, responsive and to offer generalist supports (backed up by services which specialise when this is needed).

5. Identifying and responding before crisis

Whilst accepting that identifying concerns and responding before crisis are ideal, we appreciate it is also complex and that multiple approaches are needed simultaneously.

- Self-identification: We note the importance of the child/young person or any member of the family being able to self-identify for support.
- Informal identifications: We highlight the value in people that know a child/young person/family being able to (with their permission), highlight and connect people to support.
- Community development and specialised outreach: We note also the importance of community development (building community and relationships of trust before they are needed) and specialised outreach (being able to go to people where support might be needed, build relationships and connect to support).
- Universal services: We note the importance of universal services open to everyone (maternal and child health nurses, playgroups, early childhood services, schools, but also health services, housing/community services etc) having a broad brief, to be alert to areas where children/young people/family might need additional assistance (and being trained in being able to support the building of relationships with those who can assist).
- Formal service system connections: we note also the importance of formal service systems: whether non-government or government, public or private, having the right knowledge and skills to able to connect people to supports as required.

6. and 7. Responding during and post crisis:

We would envisage there would typically be a need for flexible respite assistance in situations where crisis has occurred. Perhaps a child/young person (or some other family member/s) needs to stay somewhere else for a short period. Or extra support at home is needed for a period of time, whilst a new support plan is devised. Tailored, individualised options are key.

Unit 14 – 6 Gritten Street, Weston Community Hub, Weston ACT 2611 PO Box 3167 Weston Creek ACT 2611

Ph 02 6242 5060 Fx 02 6242 5063 TTY 133 677 (National Relay Service) adacas@adacas.org.au
http://www.adacas.org.au/

8. and 9. Mandated services/supports, and Deprivation of Liberty:

In terms of disability: as has been demonstrated through the Royal Commission into Aged Care Quality and Safety, and the Disability Royal Commission, people with disability are more likely to experience abuse, violence, sexual assaults etc. We highlight the risk that if there were to be "therapeutic" mandated alternatives to youth justice, that such approaches if not done well, could result in people with disability being disproportionately affected or indefinitely detained: purportedly for either their own safety or to assist in perceived community safety.

We refer you to the report by the Senate Inquiry into "Indefinite detention of people with cognitive and psychiatric impairment in Australia"[12], and note that there has been an example of this exact situation: an Aboriginal woman who has been detained for over two decades, often in solitary confinement, highlighted via the Disability Royal Commission, and in the media in recent weeks[13].

In the ACT, there has been much work beginning to address the harmful and inequitable experiences of people with disability in interacting with justice systems[14]: it is imperative that any alternatives to justice systems are designed to be truly rehabilitative, and person centred and to avoid inadvertent negative impacts arising from mechanisms intended to be therapeutic.

In terms of deprivation of liberty – as a signatory to the UN Convention on the Rights of the Child Australia is obliged to ensure that "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The 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"[15]. One of the key purposes of raising the MACR is to seek to avoid situations where children are deprived of liberty. As such, we would strongly encourage alternative approaches, rather than deprivation of liberty wherever possible. In our view - deprivation of liberty should not be a default response, even as a result of seriously harmful behaviour (murder, manslaughter or serious sexual offences) and/or as an escalation to address underlying needs that have led to repeated harmful behaviours.

Section Three: Victims/survivor rights and supports

10-12.

ADACAS recognises that when harmful act/s occur, that the person/people who experience harm/hurt (victims/survivors) can be greatly affected, regardless of whether the act was by a child/young person or an adult, and regardless of whether the harmful act is considered a crime.

---

[12] Senate Standing Committee on Community Affairs (2016), *Report into Indefinite detention of people with cognitive and psychiatric impairment in Australia,* available via: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report, accessed in August 2021.

[13] Campanella, N and Edmonds, C (2021), "Disability royal commission told of efforts to help Indigenous woman locked away for 20 years", *ABC News online*, published 14 August 2021, available via https://www.abc.net.au/news/2021-08-14/disability-royal-commission-hears-of-efforts-to-help-melanie/100372018, accessed in August 2021.

[14] ACT Government (2019), *Disability Justice Strategy 2019-2029* and related reports, available via: https://www.communityservices.act.gov.au/disability_act/disability-justice-strategy, accessed in August 2021.

[15] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, available via https://www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed August 2021.

In preparing to raise MACR, it is thus also imperative to prepare such that victim/survivor rights can be maintained, and that negative unintended impacts for victim/survivor rights are avoided. ADACAS endorses the need to make the legislative, policy and practice changes that will be required to ensure that victim/survivor voices are heard in responses processes, to ensure that victim/survivors are not unduly affected by raises in MACR, and that victim/survivors have access to any needed supports to assist in their own recovery. We endorse the need to make Restorative Justice processes available when appropriate (even when a crime has not occurred). We endorse the need for there to be ways such that the rights victims experience under the Charter of Rights for Victims of Crime, and via the Youth Justice Victims Register and Victims support services etc can still be accessed, even when a harmful act is no longer labelled a crime.

Whilst recognising the right to privacy of the child/young people/family, we would see a situation where a victim/survivor has been harmed, as a situation where there are multiple sets of human rights to be balanced. The extent to which information should be shared would depend on the situation: although in general: a greater amount of information should be shared in situations where the harm was very significant (i.e. resulting in serious assault, injury or death), or where the information is needed for the victim/survivor's own safety/wellbeing. ADACAS considers that any alternative models to youth justice must engage with concepts of accountability for behaviour (when appropriate), and find ways to build growing understanding of that topic (in age appropriate ways) whilst also maintaining a rehabilitative approach.

Section Four: Additional Legal and Technical Considerations

13. In ADACAS' view: the police powers that apply to arresting of children currently under the age of 10 should be extended to cover children and young people under the revised MACR. We would recommend however that the views of the child/young person on where they are taken/to whom, should be taken into account. We strongly agree that children/young people must not be subject to a strip search nor an identification parade.

14. The discussion paper posits that depending on the alternative models of response to youth justice, that additional powers may be needed, on top of those that apply to the arresting of children under the age of 10. We will be happy to comment further on police powers once more is known about alternative models chosen. We urge careful consideration however of whether police are the most appropriate body to respond, given that the harmful act being considered will no longer be considered a crime. There is enormous value in police working alongside community organisations in diversional activities, for example, some of the activities that have been undertaken together with the PCYC and together with Gugan Gulwan over time. We note the need for police to have additional expertise when working with children/young people. Whilst we would encourage efforts to increase the skills of all police, we also note the value of teams such as Community Liaison team within police in situations where more tailored police responses are needed.

15. In terms of exploitation by adults – we encourage the need for further consideration of this topic, but do not wish to express views at this time, aside from highlighting the need to strengthen an array of safeguards (not solely legal ones) with a view to protecting all children and young people, especially those who experience mental ill health, cognitive or intellectual disability (or other forms of disability), or those who have experienced trauma or abuse, from exploitation by adults.

16. and 17.: ADACAS considers that all children and young people under the revised MACR who have not yet been sentenced at the time MACR is raised should be transitioned into an alternative model.
We also consider that all sentenced children and young people should be transitioned into the alternative model, both children in detention and children on community orders. We can envisage that there would be a series of complex barriers and logistics to work through, and would encourage taking especial account of disability identification and support, and mental illness identification and support as part of the process of working through next steps.

18. ADACAS considers that historical convictions for offences committed by children when they were younger than the revised MACR should be spent or extinguished, universally, given the negative and undesirable impacts that having a criminal record (even if acquired as a child/young person), can still have on education, employment, and life chances as an adult.

19. ADACAS would envisage that there might be changes needed to the way information is handled/collected/distributed for children who display harmful behaviours in response to the need to also balance the rights of victims/survivors harmed by the child/young persons' behaviours. We recommend very careful consideration of any proposed changes, to ensure that they are best practice and in line with international human rights obligations.

20. Police should not be able to use information gathered about a child under the revised MACR after that child has reached the MACR.

Unit 14 – 6 Gritten Street, Weston Community Hub, Weston ACT 2611 PO Box 3167 Weston Creek ACT 2611

Ph 02 6242 5060 Fx 02 6242 5063 TTY 133 677 (National Relay Service) adacas@adacas.org.au
http://www.adacas.org.au/

Raising the minimum age of criminal Responsibility in the ACT

Barnardos Australia

To:	Justice Policy Futures Taskforce, Justice Reform Branch, Justice and Community Safety Directorate, ACT Government
Email:	macr@act.gov.au
From:	Barnardos Australia
Contact:	Dr Robert Urquhart Head of Knowledge, Outcomes and Research rurquhart@barnardos.org.au
Subject	Raising the minimum age of criminal responsibility
Date submitted:	16 August 2021

Barnardos Australia (Barnardos) thanks the Australian Capital Territory (ACT) Government's Justice and Community Safety Directorate for the opportunity to provide a submission on its Discussion Paper exploring the key issues that need to be addressed before, during and after raising the minimum age of criminal responsibility (MACR) in the ACT.

Background: Barnardos knowledge of this area

Barnardos is a not for profit children's social care organisation, providing family support and out-of-home care (OOHC) to approximately 15,000 children and their families in the Australian Capital Territory (ACT) and New South Wales (NSW) each year. In our family support work, we aim to reach vulnerable children at risk of separation from their families, and homelessness is a strong feature of this work. For close to 100 years, we have been working together with children, young people and families to break the cycle of disadvantage, creating safe, nurturing and stable homes, connected to family and community. Barnardos has provided services in Canberra and ACT suburbs since 1965 and our Canberra Children's Family Centre which is currently located at Atherton Street Downer has a high profile within the local domestic and family violence and homelessness sector.

Threshold issues for raising the MACR (*Section One*)

1. *Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?*

- Yes. We agree that the only exceptions to MACR should be reserved for very serious violent behaviour where they are strictly indictable matters including murder and serious sexual assault and/or children who pose considerable risk to community safety. In addition, the exceptions need to be clearly identified and the courts should have the power to mandate these young people's involvement in therapeutic interventions.
- However, these children should have faced a significantly different criminal justice process than adult offenders focusing on their rehabilitation and thorough assessment of their individual developmental needs and discretionary decision making.
- We note, for example, Ireland, where a court can send children charged with serious crimes to a therapeutic centre, not a youth detention centre, coupled with strategies to intervene early with children identified as being at risk of becoming involved in very serious crime. However, the former approach would require significant investment to establish a high level of therapeutic care distinct from either residential out-of-home care or youth detention facilities such as Bimberi Youth Justice Centre with resourcing for appropriate wrap around services.
- We would also emphasise that in our experience, children displaying very serious and/or repeated harmful behaviours are rare, and their behaviours are highly atypical for their age cohort. For example, most children aged 10-13 years old do not seriously offend.

2. Should doli incapax have any role if the MACR is raised?

- No. Barnardos shares the concerns of the United Nations Committee on the Rights of the Child (the UN Committee) that the application of processes such as *doli incapax* is

challenging to do consistently and may well result in practices that disadvantage some children in the criminal justice system.

- Nevertheless, if *doli incapax* is to have any role, it needs the underpinning resources to make it work effectively requiring careful mapping of the proposed assessment process and a tiered approach.

An alternative model to the youth justice system (*Section Two*)

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

- Barnardos strongly supports the centrality of upholding the rights of children under the new MACR reform and that children and young people have a say in the design and implementation of any solutions (*Section 2; paragraph 36*).
- We agree that raising the MACR provides the opportunity to redesign the ACT's approach to understanding and responding to the harmful behaviour of children and young people.
- We agree with the proposed set of principles for any alternative model (*Section 2; paragraph 41*).
- Barnardos strongly endorse the principle of ensuring self-determination of Aboriginal and Torres Strait Islander communities in service delivery and design.
- We support an additional principle that any alternative model needs to keep the child connected to the family, so the intervention does not disrupt their connection to family.
- Of particular importance is the strengthening of relationships with the Aboriginal community to ensure decisions for children and young people are culturally appropriate, help the child and young people to stay engaged or reengage with their community and make the community safer.
- The onus should be clear on the wider service system that surrounds specific interventions to be responsive to the individual needs of the child and provide them with the supports and services they need to prevent harmful behaviour. This could be articulated by including system-wide principles and a mandate for all essential service providers.
- Barnardos would welcome the opportunity to work collaboratively with the ACT Government on options for access to early supports and therapeutic care and accommodation. We are keen to share our expertise in any further consultation processes to develop robust and reliable service system responses for children with risky, unsafe and harmful behaviours.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

- We note there are significant existing service gaps to better support this cohort which include:

- Mental health inpatient services for youth. There is currently one service (STEPS) and what required is services across the continuum, including inpatient services for young people with acute mental health problems.
- Continuity of support for young people exiting detention – after leaving Bimberi services are typically no longer available in the community.
- Multifaceted services that can support children and young people with comorbidity (e.g AOD; mental health difficulties).
- Resources for schools to identify children who are at risk of offending early and more full-time counsellors and psychologists positions located in schools to intervene earlier.
- Sufficient family support intervention services for conflict resolution (there are long waiting lists).
- Affordable mental health services– there are long waiting lists currently for free services.

- Our client families perceive that they are often treated like adjuncts when planning discharge from detention facilities. Services need to be underpinned by principles including family being central to planning and decision-making.
- When a Young Person enters OOHC there is a significant risk of losing the opportunity to work in a reparative way (getting the child home) because of the loss of the 'family environment' making them ineligible for many services.
- Services need to carefully consider their accessibility criteria to minimise the opportunity for 'at risk' children falling through the gaps.
- Universal Support Services need to be appropriately resourced and accessible with significant geographical coverage so young people can get access to them at an earlier age.
- Overall there is a need to strengthen available services ensuring they are accessible to communities and free to access so they can focus on the needs of children and young people at risk of offending and harmful behaviour before they exhibit harmful behaviours.
- Placing resources in community based services and schools (e.g. co-locating family support and referral services in educational settings) increases the opportunities to identify children at risk at an earlier age and to engage with the family as a whole before Child and Youth Protection Services (CYPS) become involved (with the consequent risk of children entering care which may in turn lead to an escalation of behaviour and further disconnection from their family).

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

- Child Care and educational settings need to be viewed as a community. They are a critical arena for early identification of at-risk children and provide optimum opportunity for engagement and intervention.
- In our experience, our client families find the service system confusing, hard to understand and difficult to navigate. Investment in a strong community hub approach (one stop shop) would reduce the navigation complexity and assist families get the supports they need when they need them.

- There is scope for assertive outreach models with the flexibility to adapt (recognising a one size fits all approach will not meet individual needs) and respond to reach socially isolated families and communities.
- A focus is required on strengthening engagement and relationships with Aboriginal Community Controlled Organisations to ensure responses to Aboriginal children, young people and their families are culturally informed and safe.
- Enabling flexibility for service provision will ensure supports are available for as long as they are needed thereby providing maximum opportunity for the reduction in the risk of harmful behaviour to be sustained.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

- In our view, crisis services and supports need to give priority to strengthening the family.
- Once child protection services become involved, and where younger children are present, we have seen evidence that parents perceive they are under pressure for the older offending child to leave home or risk having their younger children removed from their care.
- Provision of flexible accommodation options where the offending child could still live with a family member would keep the connection with family and kin whilst children received treatment.
- In school settings, counsellors and student engagement workers would benefit from training in detecting early signs of disruption at home, what services are available to reduce family conflict and how to link the young person to services.
- Wrap around service for supporting parents to reengage the family to work together and strengthen family functioning have an important role.
- Family Functional Therapy (FFT) and Safe and Connected are two such services working to strengthen families.
- An evidence review of current best practices that strengthen families and improve family involvement for children and youth with emotional, behavioural and other disorders who are at risk of offending should be undertaken to guide and shape service planning under the MACR.

7. How should children and young people under the MACR be supported after crisis points?

- Barnardos believes that services should not be withdrawn at the point where it is thought the crisis has subsided. The underlying causes of behaviour need to be identified and addressed. Supports should be determined by the work undertaken during the crisis including the assessment of what is needed to ensure ongoing stability.
- To achieve better outcomes ‘end to end’ planning for the young person, including defined check in points.
- Flexible criteria are required to ensure at risk children are not ’missed’.
- Diversionary accommodation services/youth after hours bail services are required for children who cannot stay at home and do not meet the criteria for existing residential

rehabilitation services (e.g. Ted Noff Foundation Program for Adolescent Life; STEPS) to provide a safe place for them to go (rather than the streets or entry to residential OOHC).

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

- We note that mandating a teenager's behaviour is challenging irrespective of the circumstances.
- The current processes that are in place around trying to mandate behaviour (i.e. bail conditions), often do not work. Whilst the young person may understand that there are consequences of breaking the conditions, they continue to do so, get charged and then bailed again and it is a vicious cycle. If mandates are to be considered as part of the model, there would need to be evidence that mandating engagement works.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

- Yes. Barnardos believes there is a role for secure placement which should be considered for the safety of the community. We note that the young person still has a right to whatever support they need to help them make changes in their harmful behaviours including therapeutic rehabilitation.

Victims' rights and supports (*Section Three*)

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

- Government has a pivotal role in communicating to community the process and long-term gain of the reform for the community as a whole. As part of this messaging support for community members who have been impacted by harmful behaviours should be explained as well as highlighting the benefits of the restorative justice practices that are embedded throughout the ACT justice system.
- Community members who have been impacted by the harmful behaviour of a child under the revised MACR should have access to the same breadth of support for victims of crime including access to financial assistance and support services.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

- The most meaningful option for participation in our experience is the youth justice conference model which can have benefits for both the child and the people affected by the harmful behaviours.

- We note that currently some young people are deemed not eligible to participate due to an assessment of 'lack of empathy', however, participating in such processes (with appropriate support) could help empathy development.
- Successful examples of boosting young offender's capacity for empathy include the work in Bimberi in engaging young people in custody in healing conversations around the victim's perspective as well as the innovative use of Aboriginal art apology programs.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

- We note the effectiveness of Victim Liaison Officers with ACT Police in providing a linking role to broader community supports.
- Community members who are impacted by harmful behaviour will need access to counselling services.

Additional legal and technical considerations (*Section Four*)

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

- Yes (noting the need for certain exceptions to MACR concerning serious harmful behaviour, refer Q1). Police need to have the power to investigate harmful behaviour as a matter of community safety.

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?

- Barnardos supports provision for additional police powers to allow for investigations into specific incidents, where the alternative model requires any fact-finding processes.

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

- Barnardos strongly supports the principle of disincentivising adults to seek to involve children or young people under the MACR in crimes in order to avoid prosecution.

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

- In our view, ideally, the courts should have the option to apply principles of the new model in decisions about sentencing.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

- Whilst consideration of existing legislative provisions is needed, the overall approach should be that once the principles and elements of the new approach are decided they need to be adopted as much as possible for all children already in the system.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

- Barnardos does not have a view on if and how, convictions are spent or extinguished under a revised MACR.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

- Yes, where this required to maintain information sharing arrangements that will enable service providers to comprehensively assess and respond to a young person's needs and understand their history of their harmful behaviours, noting this a complex area. We note also that a mechanism may be needed to determine whether or not relevant information should be included in a criminal record certificate for working with vulnerable people background checks (*Section 4, paragraph 110*).

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

- Barnardos does not have view on the use of specific information.

We would welcome the opportunity to discuss any aspect of our submission. Please feel free to contact Dr Robert Urquhart, Head of Knowledge, Outcomes and Research on (02) 9218 2392 or rurquhart@barnardos.org.au.

Human Rights Law Centre

Raising the age in the ACT

A submission to guide the ACT government's approach to raising the minimum age of criminal responsibility

August 2021

Prepared by Amala Ramarathinam 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: meena.singh@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 **5**

2. Stop locking up children **5**

2.1 Neurologically, there can be no exceptions 5

2.2 Exceptions are discouraged by International Human Rights law 5

2.3 Setting a minimum age of detention 6

3. Doli doesn't work in the ACT or anywhere else **7**

4. Ending the over-imprisonment of our children through self-determined solutions **8**

4.1 Early intervention is key 9

Education 9

Child Protection 10

4.2 Keep children connected to country, culture and community 10

5. If a child is in prison, the government has failed **12**

6. Accountability goes both ways **13**

6.1 Accountability can, and must be, age appropriate 14

7. Police as 'last-resort' responders **14**

8. Choosing to build futures, not prisons **15**

1. Summary

The minimum age of criminal responsibility in the ACT is just 10 years old. 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. Aboriginal-led alternatives to detention work because they connect children with culture, country and community.

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 ACT Department of Justice and Community Safety has released a discussion paper seeking consultation from interested and experienced individuals and organisations to guide the ACT Government's approach to raising the minimum age of criminal responsibility.

This document is the Human Rights Law Centre's responses to that discussion paper.

2. Stop locking up children

Question 1: Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

We recommend that the minimum age of criminal responsibility (MACR) be raised in the ACT to at least 14 years of age, with no 'carve outs' or exceptions for certain offences.

2.1 Neurologically, there can be no exceptions

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 rights of 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),

---

[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.

[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].

Hungary (at 14 years) and Belgium (at 18 years)[6]. In New Zealand, the MACR is 10 years, although a child aged 10 or 11 years may only be arrested and prosecuted and sentenced in the High Court for murder or manslaughter[7]. This MACR was, in fact, criticised as regressive by the UNCRC in 2011[8]. These exceptions were criticised to "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[9].

In 2019, the UN Committee has 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[10]. 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 the ACT out of step with global minimum standards.

2.3 Setting a minimum age of detention

The UNCRC has stated that laws should be changed to ensure that children under the age of 16 years would not be legally deprived of their liberty. This is 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 justice system.

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.[11] In these circumstances, children in detention are particularly susceptible to victimisation (by adults and other children), stigmatisation by the criminal justice system and negative peer contagion.[12]

We recommend implementing a minimum age of detention of 16 years old, alongside building up and creating programs, interventions and supports that focus on supporting rather than punishing children.

3. Doli doesn't work in the ACT or anywhere else

Question 2: Should doli incapax have any role if the MACR is raised?

Doli incapax fails to safeguard children aged 10 to 13 years, is applied inconsistently and results in discriminatory practices. Once the age of criminal responsibility is raised to 14 years with no exceptions, doli incapax would become redundant.

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 the ACT the presumption has been codified and is contained in s26 of the Criminal Code 2002 (ACT). Section 26 states that a child "can only be criminally responsible for an offence if the child knows that his or her conduct is wrong."

---

[6] John Muncie, *Youth and Crime* (Sage Publications, 2nd ed, 2004) 251.
[7] *Children, Young Persons, and Their Families Act 1989* (NZ), s 272 (amended by the *Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010*, s 14).
[8] UNCRC, Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: New Zealand, 56th sess, 1588th and 1589th meetings, UN Doc CRC/C/NZL/CO/3-4 (11 April 2011) [55].
[9] 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).
[10] 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].
[11] 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.
[12] 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.

In the recent case of *Williams v IM*[13], Chief Justice Murrell confirmed that in the ACT, the Criminal Code, not the common law, governed issues concerning criminal capacity. As such, a child who is doli incapax is placed in the position of having to satisfy an evidential burden before the onus then falls to the prosecution to prove otherwise.[14]

The Aboriginal Legal Service (NSW/ACT) has previously reported that this may place pressure on children to plead guilty to avoid the delay and cost that is likely associated with the potential need to obtain psychological reports.[15] The Children and Youth People Commissioner in the ACT reports that the limited number of cases in which doli incapax arises in the ACT and limited availability of experts able to meet required timeframes may also act to compromise the consistent application of doli incapax in the ACT[16].

In the case these barriers are overcome, and doli incapax is asserted by a child aged 10-13, a trial or summary hearing must then 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[17].

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.[18]

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.*[19]

The UNCRC has also expressed concern as to inconsistency in the operation and discrimination in the application of such so called protective systems, particularly those with a rebuttable presumption for certain aged children. 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.*[20]

Whilst there is no role for doli incapax to play in the youth justice, the HRLC endorses previous recommendations by the Aboriginal Legal Service (NSW/ACT) to develop separate legislative protections

---

[13] 2019 ATC SC 234

[14] *The Criminal Code 2002* (ACT) s 58(2) requires an accused who wishes to assert a lack of criminal responsibility to satisfy an evidentiary burden

[15] Aboriginal Legal Service (NSW/ACT) *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General* (2020).

[16]ACT Human Rights Commission, S*ubmission to Council of Attorneys-General review on age of criminal responsibility* (200).

[17] 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.

[18] 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.

[19] Australian Law Reform Commission, Seen and Heard: Priority for Children in the Legal Process, Report 84 (1997) [18.19].

[20] 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].

to ensure that children and young people between 14-17 are appropriately diverted from the criminal justice system at every stage possible.[21]

4. Ending the over-imprisonment of our children through self-determined solutions

Question 3: Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

HRLC supports the principle of "only mandating that a child or young person receive support if it is in their best interests and only as a last resort". However, it is recommended that this should be strengthened to make it clear that mandating intervention should only be used as a measure of last resort, and only if all other alternatives have been exhausted.

HLRC also recommends including a stronger commitment to ensuring Aboriginal self-determination in all aspects of the development and implementation of an alternative youth justice response, and not just with respect to "service design and delivery" as it currently reads. In view of distinct cultural rights and the unacceptable overrepresentation of Aboriginal and Torres Strait Islander children in contact with the youth justice system, the planning, design and implementation of prevention, early intervention and diversionary responses for these children must be community controlled and Aboriginal and Torres Strait Islander led[22].

In addition, empowerment should be at the heart of the design and delivery of services[23]. This is particularly important given the history and ongoing impacts of colonisation, dispossession and discrimination on Aboriginal and Torres Strait communities.

HRLC recommends the inclusion of another principle to ensure self-determination with respect to Aboriginal and Torres Strait Islander children subject to a proposed multidisciplinary panel. Such a principle must ensure there is appropriate First Nations representation on any panel, so Aboriginal communities are choosing what happens to their children.

Question 4: A What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

It is noted that the ACT Government commissioned an independent review of the service system needs and implementation requirements for raising the MACR in the ACT, with a final report due in August 2021. This should appropriately map existing service pathways and needs for children and young people aged 10—13, identify gaps in the ACT service system, and provide recommendations for non-criminalised statutory mechanisms to replace the current youth justice system.

Broadly speaking, there should be a range of preventative programs and early intervention initiatives which are accessible and available at the earliest point of contact with a child or young person at risk. In terms of developing prevention and early intervention initiatives, these should be the least intensive required in the circumstances and be developmentally appropriate, human rights compliant and evidenced based. The most effective initiatives are those that build or enhance protective factors and positive skills development rather than risk mitigation. For example, family or parental training programs, structured preschool education programs, centre-based developmental day care, home visitation services, and family support services. Many of the interventions that reduce the likelihood of a child's later involvement in the criminal justice system are the same as those identified to protect children from harm and promote their wellbeing in the child and family domain.

TheACT Raise the Age Coalition's Position Paper has also identified five key gaps in the service delivery landscape in the ACT:

- The lack of a multidisciplinary panel or board that can identify, assist and refer a child to receive the wrap-around services and support they may need, including for further assessment as needed, and assistance and treatment for drug and alcohol misuse

[21] Aboriginal Legal Service (NSW/ACT), *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General* (2020), 8.
[22] ACT Human Rights Commission, S*ubmission to Council of Attorneys-General review on age of criminal responsibility* (200), 3.
[23] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 7, 247-248.

- The absence of Function Family Therapy - Youth Justice and/or other evidence-based programs targeted to this cohort of children
- The limited availability of psycho-social services for young people, particularly those with disabilities
- The lack of services and accommodation for children under the age of 16 years old who are homeless or at risk of homelessness
- A broad need for greater education across services to improve the identification of, and response to, disability support needs

In terms of specific programs which should be re-orientated or expanded, the Aboriginal Legal Service (NSW/ACT) have outlined a range of existing programs and services within both NSW and ACT which should be built upon, which HRLC supports and endorses. There should be a focus on Aboriginal community control and leadership, as well as consideration for the accessibility and cultural safety of these programs and initiatives for Aboriginal children and young people.

4.1 Early intervention is key

Question 5: How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

Responsibility for ensuring early intervention should be shared across Government in a whole-of -government approach, along with appropriate coordination, training and resourcing for service providers and community.[24] Two key early intervention points are education and child protection.

Education

There is a clear link between disengagement from school and a child's entry into the youth justice system. School environments therefore present an ideal opportunity to identify children who are at risk of entering the criminal justice system and provide targeted support.

In this regard, education agencies should move away from opaque behavioural management practices that can lead to the suspension and expulsion of children exhibiting challenging behaviours from school towards providing an inclusive school environment with policies and practices that are supportive of all children, and are responsive to the unique experiences and needs of children with health, disability and learning issues.

Child Protection

The failure to identify health needs and understand the link between challenging behaviours and the traumatic impact of abuse and neglect on children can lead to children known to child protection and welfare services being pipe-lined into the criminal justice system.

There is a clear link between a child's contact with the child protection system, including out of home care, and their engagement with the youth justice system. This is consistent with more recent reporting in other jurisdictions. For example, the Sentencing Council of Victoria in its 'Crossover Kids' report found that, in its study group, 94% of cross over children were involved with child protection services *before* they became involved in the youth justice system.[25]

In light of this, child protection agencies are uniquely placed to identify and respond to children at risk of contact with the youth justice system through appropriate assessments and referrals to supports that could ensure individualized and culturally responsive interventions.

There are also significant lessons which can be learnt from international jurisdictions where the MACR already falls above the 14-year-old threshold. For example, Finland has a a MACR of 16 years, and no juvenile criminal court[26]. Interventions in Finland are centred around social welfare, with a focus on the best interests of the child. This helps to ensure children are kept out of the criminal justice system. In other countries such as Sweden, Norway, Belgium, France and the Netherlands the focus is also on how

[24] ACT Human Rights Commission, S*ubmission to Council of Attorneys-General review on age of criminal responsibility* (200), 3.
[25] Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 2: Children at the Intersection of Child Protection and youth Justice across Victoria* (2020), Victorian Government, p xvi, accessible: https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover_Kids_Report_2.pdf.
[26] 9 Marttunen, Matti, "Finland / The basis of Finnish juvenile criminal justice", Dans Revue internationale de droit pénal 2004/1- 2 (Vol. 75), pages 315 – 335.

the welfare system, rather than criminal courts, can support children and young people to address the root causes of their behaviour[27].

These strategies could be drawn upon in the ACT context, but with a focus on ensuring any intervention are place-based and context specific. Additionally, any civil responses to an increased MACR must also examine the adequacy of existing interventions and safeguards within care and protection processes in the ACT[28].

4.2 Keep children connected to country, culture and community

Question 6: What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

The best way of ensuring the safety of the community is by ensuring the needs of children and families are being met through services which are place-based and designed to respond to the local context of the community they work within.

The Youth Coalition of the ACT reports that there are insufficient crisis, short and medium term accommodation options for 10 to 17 year olds. There is also anecdotal evidence about the difficulty police face if they come into contact with a young person exhibiting challenging behaviours, where that young person does not have a safe family environment or stable accommodation they are able to turn to.[29]

There is likely to be some diversity amongst communities in relation to the factors that contribute to or protect against anti-social or potentially criminal behaviour by children and the types of services and levels of social capital, resources and funding.

It is critical that accommodation and emergency support responses are place-based and tailored to local context. As much as possible, programs and interventions should be Aboriginal community controlled and led. As noted by Queensland's previous review into youth justice;

> *"In our consultations, there was wide support for place-based approaches that are driven from community and supported by genuine partnerships between community members, non-government organisations, police, courts and government service providers. There was a consistent view that genuine local partnerships, where community members, local businesses and opinion leaders contribute to a holistic response to youth offending, underpin the success of local solutions".*[30]

Similarly, the Productivity Commission draft report on Expenditure on Children in the Northern Territory noted that:

> *"[G]overnments need to adopt a place-based approach to the design and delivery of services and programs for families and children. In essence, a place-based approach involves flexible service provision to find fit for-purpose solutions that reflect the needs of local communities. This means recognising that different communities have different histories, languages and social, political and cultural dynamics — and hence different strengths, opportunities, priorities and service needs. By its nature, a place-based approach relies on engagement between governments and the community to understand the specific issues faced by the community".* [31]

One example of an alternative program is the Youth on Track program in NSW. Another example is Ruby's model, which is intended to provide crucially needed accommodation and 24/7 therapeutic support. The model involves working with children, young people and their entire family to support the child/young person to stay out of the criminal justice system and avoid homelessness.

The Aboriginal Legal Service (NSW/ACT) are also best placed to recommend what crisis accommodation and emergency supports should look like in the ACT's local context.

---

[27] Neal Hazel, The University of Salford, "Cross-national comparison of youth justice", Youth Justice Board for England and Wales, 2008, page 3.
[28] ACT Human Rights Commission, S*ubmission to Council of Attorneys-General review on age of criminal responsibility* (200), 3.
[29] Submission from the Youth Coalition of the ACT to this discussion paper. (2021).
[30] Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, p.82, https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf
[31] Productivity Commission, Expenditure on Children in the Northern Territory, Draft Report, Canberra (2019), p.50, https://www.pc.gov.au/inquiries/current/nt-children/draft/nt-children-draft.pdf

Question 7: How should children and young people under the MACR be supported after crisis points?

In addition to the above, the HRLC supports the Aboriginal Legal Service's submission that there is a need for a holistic approach which is focused on ensuring that children's needs are appropriately responded to. This should include consideration of initiatives that provide for individualised responses, including case management and targeted programs and services[32].

In order to create trust in this process, it is vitally important that alternative processes and referrals, especially those connected with a proposed multi-disciplinary panel, be confidential and kept separate from any child protection processes.

The HRLC supports the submission of the ACT Youth Coalition for the ACT human services sector to be authorised to flexibly apply eligibility restrictions, and be appropriately empowered to intervene early with adequately funded service responses that focus on the child and their environment in order to best support them move through periods of crisis.[33]

5. If a child is in prison, the government has failed

We know that children who are locked up are overwhelmingly Aboriginal and Torres Strait Islander children, disadvantaged children, children with disability and children who have been removed from their families. If a child is in prison, there has been a failure to address these social injustices and provide culturally safe supports.

Question 8: Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

No, there should not be a separate mechanism that mandates children to engage with residential programs or specific accommodations. This is detention under another name. Such an approach is also inconsistent with the draft principles outlined in Section Two of the discussion paper.

On the very rare occasions that a child engages in harmful behaviour which is more serious or continued in nature, there are existing civil law and Mental Health provisions which adequately cover instances where a child may need to be compelled to undergo assessment, involuntary detention or therapeutic intervention. As all forms of coercive action on a child should be a measure of last resort, it is appropriate that these powers lie in the framework of welfare and health interventions, instead of criminal interventions.

9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

No. It is important to remember that very few children and young people ever come into contact with the criminal legal system. On the very rare occasion that a child does do something seriously wrong, it means that something has gone seriously wrong for that child and they are in even greater need of therapeutic supports. The ACT Government should be focussed on addressing the things that have led to the child's behaviour, and help children learn from their mistakes, develop responsibility and engage in school. This approach will lead to lower rates of future offending.

Where children continue to have ongoing contact with law enforcement and the legal system, this is largely linked to environmental and social factors that are largely the same as those that can lead them into child protection – family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage[34]. Children who are aged 14 years or younger at the time of their first youth justice order are more likely to come from disadvantaged communities and have higher rates of missed maternal and child

[32] Aboriginal Legal Service (NSW/ACT) *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General* (2020).
[33] Submission from the Youth Coalition of the ACT to this discussion paper. (2021).
[34] Joint Australian Children's Commissioners and Guardians submission to the Australian House of Representatives Inquiry into the over representation of Aboriginal and Torres Strait Islander young people in the justice system (2010), 6.

health appointments and developmental vulnerability on two or more domains of the Australian Early Development Index.

In relation to repeated anti-social or problematic behaviours by particularly young children, there should be a range of responses that are proportionate to the behaviour and identified risk or need, as well as the age of the child, taking into consideration their development. The answer is not, and never will be, sending children to detention.

The United Nations Independent Expert on Children Deprived of Liberty, Manfred Nowak, observes that:

> *"Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood."*[35]

Depriving a child of their liberty does nothing to support the needs of the child, nor does it keep the community safe. It is this outdated model of responding to behaviour that has led to the cycles of offending that create safety issues within our communities.

6. Accountability goes both ways

The Australian prison system has been designed to oppress and harm First Nations children and young people since colonisation. Early prisons like on Wadjemup (Rottnest Island) imprisoned Aboriginal slaves, including children. Aboriginal and Torres Strait Islander communities are still experiencing the effects of colonisation, including the intentional over-incarceration of children.

The ACT government, along with all state, territory and commonwealth governments, are accountable for reducing the rates of youth detention in accordance with Target 11 of the Closing the Gap National Agreement. Raising the MACR to 14 is one action that the ACT government can take right now that will have an immediate and generational impact to end the over-incarceration of First Nations children and young people.

Question 10: How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

Raising the minimum age of criminal responsibility is a measure which is essential for the protection and long-term wellbeing of the community, and should be seen as such.

Children caught in the legal system are most often victims of abuse, trauma and neglect, and any offending behaviour tends to follow earlier or continuing experiences of serious crimes in which they have been the victims. As such, raising the MACR is a measure which inherently considers the rights of some of the most vulnerable victim cohorts in the community, whilst working to support instead of punish them.

There are also existing civil schemes in which acceptance of criminal responsibility is not a necessary precursor for access to compensation and other support. These schemes should be examined and expanded to ensure that all people who have experienced loss or harm are able to seek redress and have their needs met.

Question 11: What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

Consistent with the medical and legal basis for raising the MACR, children should not be involved in any alternative processes with affected people, and any personal or identifying information about a child should not be disclosed to affected persons.

People affected by a child or young person's harmful behaviour should certainly be assisted with information that:

- Children who are exposed to violence and have experienced trauma are far more likely to come into contact with the criminal legal system
- Exposing children to elements of a criminal legal system and locking them up creates a vicious cycle of disadvantage and traps children in the quicksand of the criminal legal system.

[35] Manfred Nowak, Global study on children deprived of liberty GA Res 72/245, UN GAOR 74th sess, Item 68(a), UN Doc A/74/136 (11 July 2019) [3].

- To support those children aged below the minimum age of criminal responsibility, governments and communities are providing programs and interventions that focus on supporting rather than punishing children.

Viewing a child's impulsive, peer-influenced or welfare-related behaviour through the punitive prism of crime and punishment is an ongoing legacy of colonisation which continues to permeate community views. All opportunities should be taken to educate the community around why raising the age of criminal responsibility is crucial for the safety and long-term wellbeing of the community.

6.1 Accountability can, and must be, age appropriate

Question 12: How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

Raising the MACR should not be viewed as reducing accountability for children who engage in offending or other anti-social behaviours. Teaching children about behaviour and responsibility should not only be the domain of the criminal justice system. In fact the NT Royal Commission found that "relying on formal charging as a means of responding to youth offending is not developmentally appropriate for the majority of children and young people and is counterproductive in most cases." As a result they recommended that there be a greater emphasis placed on alternative approaches which support children and young people and address the root causes of their behaviour.

Children should be held accountable for their actions in a way that is age-appropriate and focuses on supporting them and addressing the underlying causes of a child's behaviour. Socio-educational pathways to accountability and rehabilitation within a family setting already exist and have been shown to have positive outcomes. Criminalisation and detention are much more likely to entrench such behaviours rather than spur responsibility.[36]

As stated above, existing victim assistance schemes should be examined and expanded to ensure that community members affected by harmful behaviour are adequately supported. For example, the current operation of the Victims of Crime Financial Assistance Scheme extends to people injured through violent behaviour exhibited by children under 14, as eligibility for the scheme does not rely on an individual being charged, convicted or found guilty of a crime[37].

7. Police as 'last-resort' responders

Question 13: Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

Serious consideration should be given to a different model of response where police are not used as first-responders in incidents involving children. Consistent with the medical and legal rationale for raising the MACR, all attempts should be made to ensure that children do not come into contact with police and that welfare-based therapeutic responses are available to deal with incidents involving children. Arresting a child or young person, even for a short period of time to transport them, is enough to cause that child harm and affect their future.

Police's designated role in incidents involving children should be as 'last-resort' responders, only to be utilised if all other therapeutic response alternatives have been exhausted.

Question 14: What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?

There is no need for additional police powers for children under the revised MACR, especially considering that any exercise of police powers extends the operation of a criminal justice response to children.

In particular, it is crucial that children and young people under the revised MACR are not subject to harmful police practices including strip searching, questioning without a parent or responsible adult present, forensic procedures or any procedures to take identification material. The HRLC strongly opposes additional police powers that would allow this.

---

[36] ACT Human Rights Commission, S*ubmission to Council of Attorneys-General review on age of criminal responsibility* (200), 18.
[37] *Victims of Crime (Financial Assistance) Act 2016*, section 7

Question 15: Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

It is not necessary to introduce any new offences or increase the existing provisions for maximum penalties. The Human Rights Law Centre is unaware of any evidence suggesting that raising the MACR in the ACT will lead to an increase in adults seeking to involve children or young people in crimes to avoid prosecution. There is also no evidence suggesting that the existing provisions and maximum penalties are an insufficient deterrence.

Consistent with the principle that law reform should be anchored in an appropriate evidence base, it is not recommended that new criminal offences be introduced at this stage. As the ALRC commented:

> *"Deprecation of the legal system and failed efforts at reform often proceed on the basis of anecdote and assumption. This can include both untested and unfounded criticism of some current practices, procedures and institutions, as well as uncritical acceptance of alternatives"*[38]

8. Choosing to build futures, not prisons

Question 16: Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

No child or young person under the revised MACR should be subject to the current youth justice system once the age is raised. This includes any court, police, forensic or bail processes and orders. The new bill should ensure that any existing prosecutions, including applications for forensic procedure, against children and young people are under the revised MACR be discontinued. This could occur by way of charges being deemed "struck out" by the Children's Court for lack of jurisdiction, or some other statutory mechanism. It is insufficient to rely on the police and DPP to initiate the withdrawal of charges, as this can take weeks or even months.

Whilst all children in the youth justice system who have not been sentenced (either because they have not entered a plea or because they have not yet been sentenced by the court) should no longer be subject to any youth justice processes, it is likely to be unnecessary to transition every child to the alternative model.

For example in instances where the alleged offending was not serious, where a child is asserting they did not commit behaviours which amount to an offence (i.e maintained a plea of "not guilty" prior to the MACR being raised), or where being "dealt with" by the alternative model is not consistent with the principles of mandating intervention as a last resort, it will be more appropriate to take no further action.

Question 17: Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

As stated above, it may be more appropriate to "take no further action" for most children on community-based sentence orders. For example, it is unnecessary for a child on a good behaviour bond to be transitioned to the alternative model. It is important that children on community-based sentence orders do not have their sentence hearings 'revisited' or rehashed in the sense of having to fulfill more requirements than they otherwise would have, had they remained on the sentence order.

All children serving sentences of detention should be transitioned to the alternative model. This should include releasing them from detention as soon as possible. Underpinning any transition process should be the understanding that these children and young people have already been punished for behaviour that occurred when they had not developed the social, emotional and intellectual maturity necessary for criminal responsibility.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or

[38] Australian Law Reform Commission, Managing Justice: A Review of the Civil Justice System, Report 89 (2000), [1.36].

should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

All historical convictions for offences committed when a person was younger than the revised MACR should be automatically deemed 'spent' and removed from criminal histories. This should include not only convictions, but any findings of guilty and 'without conviction' sentences recorded on criminal histories, and should apply to all children and adults.

In addition, any breaches of bail or offences committed by a child or young person when they were under the revised MACR should not be included in 'bail consideration forms'. This should apply to everyone, regardless of their age or subsequent criminal history.

Question 19: Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the Children and Young People Act 2008 and the Information Privacy Act 2014 sufficient?

Yes. Current legislative provisions should be examined to ensure that all personal information of a child, especially if they were dealt with previously under youth justice system processes, is adequately protected. This is especially relevant for transitioning to the alternative model, where information barriers should exist to keep a child's personal and other information confidential from police and child protection. It may also be necessary to introduce new provisions which require police and courts to get rid of any material, including official records they may have, relating to children who are now aged below the revised MACR.

Question 20: Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

No. Information regarding their behaviour should not be collected at all, and any such information should not be used for the purposes of criminal prosecution at a later time. One of the many rationales for raising the MACR is preventing the harmful effects of stigmatisation by the criminal justice system and police.

Raising the MACR should be a genuine measure to protect children, and to provide them with therapeutic diversions. It should not be treated as simply delaying the criminal justice system's engagement with the child until they reach the age of 14.

Raising the Age of Criminal Responsibility

Discussion Paper Submission

The following points are designed to help support approaches to raising the age of minimum responsibility:

1. ***Recidivism rates***
    - It would be beneficial to understand the rate of recidivism when considering the numbers of children and young people on youth justice supervision orders.
    - Tracking individual cases and mapping these pathways would also be beneficial in understanding why children and young people offend.

2. ***Serious harmful behaviours and mandated responses***
    - We need to understand how to best manage children who start to develop challenging behaviours and would ordinarily encounter the law.
    - Generally, harmful behaviours in the context of family homes may not stop until the child is placed in another residential care context. We need to discuss how to provide an 'enforceable pathway' for these children and young people, to avoid continuing and escalating behaviour against their family, while also avoiding the young person living on the street.
    - Generally, when attendance at therapeutic services is mandated by court order, the success rate is not as high as voluntary engagement. However, when attendance has been encouraged (with ongoing monitoring and support) by a strong parental figure or involved police officer, there have been some successes.
        - Having involved case officers with small case numbers (i.e., 10 children and young people) who provide 'warm referrals' to service pathways and have time to support engagement would be beneficial, as is a level of consequence if the child does not engage with an organisation.
        - Parental engagement is also key to rehabilitation; assuming the parents are themselves not struggling with similar issues. Support by the parent (and of the parent by services and policing) is really important.
    - Rehabilitation organisations could provide wraparound services for children and young people using harmful behaviour, and increased funding for a range of full-time therapeutic professionals would be beneficial and effective.
    - FFT (Functional Family Therapy) which engages the entire family has been proven to work with families in which adolescents are engaging in violence or anti-social behaviour. OzChild is providing the service in Canberra.
    - Community organisations would be effective in providing these services as they are able to maintain an ongoing close relationship.

3. ***Victims' Rights***
    - It is imperative that we keep our current and potential victims safe.
    - There are some cases where detention/accommodation options outside of the home are the only way to protect victims, particularly in relation to coercive/controlling relationships between children and young people and their parents.

- We can consider alternative rehabilitative options for these children and young people. Remote therapeutic accommodation options have been successfully used in the past. ACT Parks do have a remote property – Gundengby Homestead in Namadgi National Park – could be used in this regard. Odyssey House uses a successful model for drug rehabilitation whereby former drug addicts run a farm and provide supportive therapeutic services delivered by people with lived experience (ie street cred).
- We need to provide further support for victims, including ensuring that there are consequences for breaching apprehended violence orders and personal protection orders.
- Anecdotally, up to 9/10 perpetrators of violence are also victims of crime; often experienced as children.

4. ***Difficulties of a two-system approach – different justice responses for those under the minimum age and over***
    - At present, law enforcement and the justice system can often take a "soft" approach to young people (under fifteen) who are using harmful or destructive behaviours, with the focus on deterrence and support rather than incarceration (but with incarceration available as a last resort).
    - Is there a risk that, if young people's first experience of the justice system is at age fifteen, that the justice response is more likely to be punitive than it would have been if introduced earlier. For example:
        - If young people (at fifteen) are more physically like adults, and their behaviour more entrenched, are police and the courts more likely to treat them harshly (ie like adults) than they would have at a younger age. If so, will this harsh introduction be more likely to cause additional harm to the young person and result in entrenched recidivism with significant ongoing costs to the young person and the community
    - Younger children and teenagers may be more easily engaged for interventions in comparison with young people in their middle teen years. Our experience is that 10-12 year olds are far more willing to engage in supportive programs and actually change their behaviours and attitudes than older teenagers.
    - If both systems come together (criminal justice and services/supports), services will be wrapped around and more involved which will be more effective. This has proved very effective in the current Warrumbul Children's Circle Sentencing Court.

5. ***Alternate Accommodation Options***
    - Need to consider options when a child is a threat to their family or when a family is neglectful, manipulative and/or violent (ie the family home is damaging to rehabilitation prospects).
    - There may be situations where these children and young people need to be separated from the community, especially for issues such as serious and repeated assaults and/or sexual assaults. In these circumstances, voluntary accommodation options may not be enough to ensure the safety of other family or community members