



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into Justice (Age of Criminal Responsibility)
Legislation Amendment Bill 2023

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AFPA

Australian Federal
Police Association

***Inquiry into Justice (Age of Criminal Responsibility)
Legislation Amendment Bill 2023***

Standing Committee on Justice and Community Safety

Submission by the Australian Federal Police Association

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Introduction

The Australian Federal Police Association (AFPA) welcomes the opportunity to participate in the *Inquiry into the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (the Bill)* and thanks the Standing Committee on Justice and Community Safety (**the Committee**) for their consultation.

The AFPA permits the Committee to make this submission publicly available if they wish to do so.

The AFPA

The AFPA is a registered organisation and an autonomous sub-branch of the Police Federation of Australia. The AFPA represents the industrial, political, and professional interests of members of the Australian Federal Police ("the AFP"), law enforcement officials in the Australian Criminal Intelligence Commission, and members of the Department of Parliamentary Services.

Our members provide an essential service to Australia. They are the backbone of the Commonwealth's principal law enforcement agency, performing crucial investigative, intelligence, and national security functions.

The AFP is responsible for the following:

- providing community policing services to the Australian Capital Territory and other territories, including Christmas Island, Cocos (Keeling) Islands, Norfolk Island and Jervis Bay,
- enforcing Commonwealth laws that combat complex, transnational, serious and organised crime, child exploitation, fraud, corruption, and cybercrime,
- protecting Australians and Australian interests from terrorism and violent extremism,
- removing wealth and property from criminals that have been illegally obtained,
- protecting Commonwealth infrastructure, including designated airports, Parliament House, and embassies,
- protecting domestic and foreign dignitaries, including the Governor-General, Prime Minister, and ambassadors,
- protecting at-risk individuals,
- representing Australian police and law enforcement at an international level, and
- developing unique capabilities and exploiting advanced technology to support Australia's national interests.

Background

The *Justice (Age of Criminal Responsibility) Legislation Amendment Bill* was tabled in the ACT Legislative Assembly on 9 May 2023 and then referred to the Committee for consultation.

The Bill would raise the minimum age of criminal responsibility (**the MACR**) in the Australian Capital Territory (ACT) from 10 to 14 years, except for 12- and 13-year-olds committing severe and purposefully violent offences.

The MACR would be raised in two stages under the proposed legislation — first to 12 in 2023, then to 14 in 2025.

After the second accretion to the MACR in 2025, a schedule of offences would be introduced to keep the MACR at 12 for specific offences. Additionally, it would introduce several sanction and penalty alternatives for children and teenagers, such as Therapeutic Correction Orders (TCO) and Intensive Therapy Orders (ITO) and make provisions for victim support for persons harmed by a child under the MACR.

Today, children as young as ten can be sent to jail in Australia, with Indigenous children disproportionately affected.

Medical data suggests that children younger than ten may not have the necessary capacity to be judged criminally responsible. As well as this, there has been growing support from social, medical and judicial voices for the Australian MACR to be aligned with the worldwide level of 14.

At a federal level, a review of the MACR has been a several-year focus of the Standing Council of Attorneys-General (SCAG). In a draft report made public in December 2020 by the SCAG Age of Criminal Responsibility Working Group, it was recommended to raise the age of criminal responsibility to 14 without exception.

AFPA position on criminal age of responsibility

The AFPA notes the ACT Government's good intentions in introducing the Bill but maintains some reservations about its effectiveness in its current form.

Raising the MACR in isolation will not solve the issue of youth crime in the ACT. Raising the MACR would remove some responsibility for poor behaviour but would not necessarily address the underlying causes of youth crime. The AFPA is concerned that raising the MACR could facilitate a generation of children having no sense of personal responsibility; it must be incumbent on the Government and judiciary to ensure that justice and court outcomes remain a deterrent against criminal behaviours.

The AFPA acknowledges that one of the main driving factors driving the Bill is extensive evidence showing that Aboriginal and Torres Strait Islander children are disproportionately involved in the criminal justice system. Another such factor is awareness of the general harm that incarceration brings to a young person, with the effects of this harm extending throughout their life.

Children enter the criminal justice system for a multitude of reasons, including mental health conditions, cognitive disabilities, intergenerational trauma and socioeconomic disadvantage. Of significant note is that many children suffer from a combination of these risk factors.

Lack of support, diversion programs and strategies in the ACT

The AFPA has concerns about the ACT Government's ability to provide effective support and diversion strategies and programs to young people, especially recidivist offenders and people under 14 who come to the attention of the police.

The AFPA believes any strategies must have a focus on prevention, diversion and support — with these areas long being neglected by the ACT Government.

ACT Policing officers today often struggle to locate alternative accommodations for people, including young people, who may be victims of crime or need time away from an unsafe environment¹. While community organisations do a good job with limited funding and resources, police are often left without any options to house someone temporarily. These issues are expected to further compound without additional funding and support from the ACT Government.

A highly visible example of this is the recent funding concerns surrounding the University of Canberra's WOKE (wise knowing, skilful behaviour and effectiveness) program². The WOKE program is in danger of being unable to continue by June 2023 due to a lack of government funding³.

Programs like WOKE are scarce in the ACT, yet they relieve ever-increasing pressures from the police, first responders, and other mental health agencies.

Early intervention would be better than cutting already limited services, which causes young children to enter an already stretched public health or criminal justice system.

The AFPA is adamant that the ACT Government must devote more funds and resources, including education and support organisations, to helping children and teenagers who commit crimes.

Doli incapax

In Australia, children aged between 10 and 14 are subject to criminal law but are protected by the doctrine of *doli incapax*⁴: Young people are held to be incapable of committing a crime unless the prosecution can prove that the child actively knew their behaviour was criminally wrong.

The AFPA questions how police and/or other youth justice agencies would reasonably defer to *doli incapax* if the Bill were enacted in its current form.

The current judicial and prosecution conventions with respect to ACT Policing's interactions with young criminal offenders **should** endure for the express benefit of those offenders. Only the judiciary and Director of Public Prosecutions (DPP) should be concerned with *doli incapax* (and other factors) as a potential mitigator of criminal charges upon receiving a brief of evidence to

¹ Example: an intoxicated young person comes home, and the parent/guardian who isn't intoxicated doesn't want the young person staying at the location. No criminal offence has occurred, and to ensure that one doesn't occur, police can attempt to relocate the young person for a short period of time.

² <https://www.canberra.edu.au/about-uc/media/newsroom/2019/october/empowering-young-people-to-create-positive-mental-health-trajectories>

³ https://www.afpa.org.au/wp-content/uploads/2023/05/AFPA-Media-Release_AFPA-SUPPORTS-FUNDING-FOR-UNIVERSITY-OF-CANBERRA-FINAL-1.pdf

⁴ https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0011/56729/230313-For-info-hub-Doli-incapax-The-Criminal-Responsibility-of-Children-Matthew-Johnson-and-Rose-Khalilizadeh.pdf

determine if the matter progresses to court. Police members should not be so concerned about the potential for *doli incapax* being declared that such concern overrode other (potentially more pressing) concerns of child welfare or the commission of crimes.

Minimum age of detention

Tasmania has recently introduced legislation to raise the minimum age of detention while maintaining the age of criminal responsibility at 10.

Importantly, in raising the minimum age of detention, the Tasmanian Government ensured that the powers of police relating to the arrest, searching, and holding of young people aged ten and over **were unchanged**.

The AFPA would strongly encourage the ACT Government to conduct a due-diligence review of these Tasmanian legislative changes before raising the ACT age of criminal responsibility to 14.

Organised crime

The AFPA is cognisant of the potential effects of organised crime on young people, especially between the ages of 12 and 14.

With the recent changes to cannabis laws in the ACT, there have been examples where people have exploited the legislation to support their criminal enterprises.

It is certainly not outside the realms of possibility for organised crime or offenders to employ young people to commit crimes for them to support illegal drug enterprises (organised shoplifting gangs pay 12- and 13-year-olds to shoplift, knowing the young person can't be charged).

Recidivist offending

The AFPA is concerned by the high likelihood of youth recidivism resulting from the Bill and seeks clarity from the ACT Government around their plans to address this probability. The AFPA does acknowledge the introduction of TCOs and ITOs; however, it is important to understand that they won't completely preclude recidivism in the long term.

Impact on Victims of Crime

The introduction of the Bill is likely to negatively impact victims of crime in the ACT. Diverting young people from a cycle of reoffending is crucial for the safety of individual victims and the wider community. However, it would be counter-intuitive if this diversion came at the expense of victims' rights (the right to be heard during court proceedings and involved at the crucial points of an investigation) or their eligibility for victim support services and financial aid (usually requiring a crime number).

Further considerations for the Committee

Some of the questions that the Committee must explore include:

- What alternatives would there be if no space in intensive therapy places is available?
- Does the ACT realistically have enough intensive therapy places to support this legislative change?
- What options are there for the judiciary to employ if a young person continuously breaches a TCO or ITO?
- What does the judiciary do if the young person commits a crime while subject to the conditions of a TCO or ITO?

- Will ACT Policing officers have access to therapy plans and intensive therapy history when interacting with young offenders?
- What, if any, are the penalties for failure to maintain the Intensive Therapy Register?

AFPA assessment of the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

The AFPA has reviewed the Bill and acknowledges the ACT Government's intention to legislate an adjustment of the age of criminal responsibility from 10 to 12, and then lastly to 14 years of age, along with penalty alternatives for children and teenagers.

The AFPA also acknowledges the ACT Government's intention to introduce diversionary outcomes such as TCOs and ITOs.

The AFPA is concerned that the final progression from 12 to 14 will be undertaken without reviewing or analysing relevant data obtained from the two-year transition period before the move to 14 years of age.

Recommendation 1:

That the decision to move the age of criminal responsibility to 14 years of age be reserved until a report on the prior move to 12 years of age is prepared and publicly disseminated. Furthermore, additional consultation be undertaken to establish whether moving the age to 14 is actually warranted and whether any amendments to the legislation are required.

Recommendation 2:

That the Director-General's functions be amended to include references to "education", specifically within *Section 5, Part 2 – Children and Young People Act 2008*.

Proposed AFPA amendments to Section 5, Part 2 – Children and Young Person Act 2008

5 Director-general's functions New section 22 (1) (ea) and (eb)

insert

(ea) providing, or assisting in providing, services including education for the safety and wellbeing of children and young people;

(eb) providing, or assisting in providing, services including education for the safety and wellbeing of children and young people who carry out, or are at risk of carrying out, harmful conduct.

Recommendation 3:

That *Section 501E of Part 14A.2 – Therapeutic Support Panel for Children and Young People* is amended to support the inclusion of panel members regarded as elders within their own cultural groups (subsections of the broader Canberra community).

Such people could offer valuable insights into why young people offend or behave a certain way while being dealt with by the police.

The AFPA generally supports the establishment of the Therapeutic Support Panel (TSP) for Children and Young People but opines that the currently proposed panel makeup wouldn't completely reflect the diverse cultures and heritages of ACT citizens.

The AFPA acknowledges the proposal for the panel to comprise at least one Aboriginal or Torres Strait Islander person and one person to represent Aboriginal and Torres Strait Islander People. The AFPA suggests that this proposal should be expanded to offer similar representation for other culturally and linguistically diverse (**CALD**) people living in the ACT.

Recommendation 4:

That *Section 501Q (1), Part 14A.3 – Referrals to Therapeutic Support Panel* be expanded to include additional behaviours, such as cruelty towards animals, as a precursor for referral to the TSP.

Cruelty to animals can be an indicator of serious mental disorder or illness. Psychological and criminological studies have shown that many individuals who abuse animals later turn their attention to other human beings. Robert K. Ressler, a serial killer profiler working for the Federal Bureau of Investigation (FBI)⁵, has said that murderers "very often start out by killing and torturing animals as kids."

Other studies show that violent and aggressive criminals are likelier than non-aggressive criminals to have abused animals as young people⁶.

There have been notable instances of animal cruelty being committed by young people in the ACT. An example is a 16-year-old charged with killing at least three dogs by setting them on fire and then dismembering them.

Proposed AFPA amendments to section 501Q – Referrals to Therapeutic Support Panel (1) (a) (b)

501Q Referrals to therapeutic support panel

- (1) *A referring entity may make a referral to the therapeutic support panel if the entity believes on reasonable grounds that a child or young person has a genuine need for therapeutic support services and—*
 - (a) *is at risk of harming themselves, or someone else, or an animal; or*
 - (b) *has harmed themselves, someone else or an animal.*

Recommendation 5:

That *Section 501R – Panel to act on referrals, part 2, (a)*. be revised to mandate a specific timeframe, preferably under 24 hours.

Proposed AFPA amendments to section 501R – Panel to act on referrals - (1) (a) (b)

501R Panel to act on referrals

- (1) *This section applies if the therapeutic support panel receives a referral.*
- (2) *The chair of the panel—*

⁵ Daniel Goleman, "[Experts See Parallels Between Dahmer, Previous Serial Killers,](#)" New York Times News Service, 11 Aug. 1991.

⁶ Sara C. Haden and Angela Scarpa, "[Childhood Animal Cruelty: A Review of Research, Assessment, and Therapeutic Issues,](#)" *The Forensic Examiner* 14 (2005): 23-33.

- (a) must consider the referral within **24 hours** of receiving the referral;

Recommendation 6:

That Part 14A.4 – Reporting by the Therapeutic Support Panel – Section 501T be revised to mandate the production of administrative reports (similar to an annual report tabled in the ACT Legislative Assembly).

Proposed AFPA amendments to section 501R – Panel to act on referrals - (1) (a) (b)

501T Report to Minister

- (1) The therapeutic support panel may at any time prepare a report for the Minister on any matter arising in connection with the exercise of the panel's functions.
- (2) The panel must give the report to the Minister and may also give the report to any other Minister who is responsible for a matter dealt with in the report.
- (3) The panel must not include in the report any information that would—
 - (a) disclose the identity of a child or young person; or
 - (b) allow the identity of a child or young person to be worked out.
- (4) The Minister must present the report to the Legislative Assembly within six sitting days after the report is given to the Minister.
- (5) Each Minister who receives a report under subsection (2) must, within three months after receiving it, give information to the therapeutic support panel about any action the Minister has taken or will take in relation to the matters raised in the report.
- (6) The director-general, for a reporting year, prepares a report about the operation of the administrative unit during the reporting year (a **director-general annual report**).
- (7) The report must include a statement describing the measures taken by the administrative unit during the reporting year to respect, protect and promote human rights.

Recommendation 7:

That Division 16.3.3 – Visits by accredited people, section 578 – who is an accredited person be appended to include an addition to the list, namely a young person's general practitioner.

Division 16.3.3 Visits by accredited people

578 Who is an accredited person?

In this division:

Accredited person, for a child or young person in intensive therapy, means each of the following:

- (a) the director-general;
- (b) a representative of an entity providing a service or program to the child or young person at an intensive therapy place;
- (c) a lawyer representing the child or young person;
- (d) an official visitor;
- (e) the chair of the therapeutic support panel;

- (f) the public advocate;
- (g) a commissioner exercising functions under the *Human Rights Commission Act 2005*;
- (h) if the child or young person is an Aboriginal or Torres Strait Islander person—the Aboriginal and Torres Strait Islander Children and young people commissioner;
- (i) the ombudsman;
- (j) a person prescribed by regulation;
- (k) the General Practitioner of the young person

Conclusion:

The AFPA again thanks the Committee for the opportunity to consult on the Bill.

The AFPA is available to participate in public hearings if the Committee wishes further to explore our opinion and thoughts on this vital topic.