



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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Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Dear Committee,

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

Thank you for the opportunity to comment on the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (the Bill). The ACT Law Society (the Society) has been a longstanding advocate of raising the minimum age of criminal responsibility and commends the ACT government for being the first Australian jurisdiction to introduce legislation that will raise the age of criminal responsibility to 14.

The Society notes that we were consulted by the Justice and Community Safety Directorate (JACS) during the development of the legislation and much of the feedback below echoes our earlier comments.

Proposed Scheme

The legislation provides for the age of criminal responsibility to initially be raised to 12 and then to 14 within two years. This will be supported by a new diversionary pathway involving a Therapeutic Support Panel, and an avenue for the Children's Court to impose Intensive Therapy Orders on children and young people, which may include the authorisation of confinement directions as a last resort measure. We also note the introduction of the new sentencing option for young people over the revised age of criminal responsibility; the Therapeutic Correction Order, which will combine features of community-based orders with therapeutic treatment conditions.

Exceptions

The Society has consistently advocated for the age of criminal responsibility to be raised to 14 without exception. The Society's primary concern in relation to the Bill, is the carving out of four serious offences that children aged 12 and above will be criminally liable for, after the age of criminal responsibility is raised to 14 for all other offences.¹

By amending Schedule 1 of the *Crimes Act 1900* (ACT), the legislation will carve out the following exceptions:

- Murder (section 12 of the *Crimes Act 1900*)
- Intentionally inflicting grievous bodily harm (section 19 *Crimes Act 1900*)
- Sexual assault in the first degree (section 51 *Crimes Act 1900*)

¹ Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT) cl 92.

- Act of indecency in the first degree (section 57 *Crimes Act 1900*)

In keeping with our earlier comments to JACS, the Society opposes the carving out of any exceptions. We consider that exceptions undermine the purpose and rationale of raising the age of criminal responsibility and note that excluding certain offences based on their severity, appears antithetical to the considerations which underpin the concept of a minimum age of criminal responsibility. We consider it deeply problematic that the legislation will implement an inconsistent minimum age of criminal responsibility across different offence types.

Despite the Society's strong objection, if the ACT government does proceed with carving out exceptions, we consider that this should be limited to murder or offences carrying a maximum penalty of life imprisonment. We note that the three remaining exceptions (intentionally inflicting grievous bodily harm, sexual assault in the first degree and acts of indecency in the first degree), do not meet this threshold. In respect of murder, a clear line should be drawn between the different degrees of murder, including attempted murder, as well as the different fault elements. We note our strong opposition to any further additions to the existing list of exceptions. We additionally note the potential for victims to be retraumatised, particularly in sexual offence proceedings, if proceedings are commenced and then ended on the basis of *doli incapax*, where the child offender is over 12 but under 14.

The Bill does not include the offences in Part 2.4 of the *Criminal Code 2002* (ACT) relating to extensions of criminal responsibility, or offences against section 717 (accessory after the fact) within the scope of the carved-out exceptions.² The Society supports this approach.

Doli Incapax

We note that children over the age of 12, but under 14, who commit a Schedule 1 offence, will only be criminally liable if they know that their conduct is wrong.³ The burden of proof will rest with the prosecution, reflecting the rebuttable presumption of *doli incapax*.

The Society notes the Law Council of Australia's extensive commentary on *doli incapax* in its submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review, which discusses the legal complexity surrounding the rebuttable presumption and concerns raised as to its application in practice.⁴ We note that the Australian Human Rights Commission has also reported that 'there is limited evidence that this principle is routinely applied in practice.'⁵ Moreover, it can take a significant amount of time to resolve the question of *doli incapax* and this has the potential to add to the trauma already experienced by the child.⁶

The Society considers that it would be ideal to remove the presumption of *doli incapax* entirely by raising the age of criminal responsibility without exception. If the legislation does proceed as currently presented, it is important that the presumption be applied consistently in Court. For these reasons, we reiterate the Society's longstanding position that there should be no exceptions to the minimum age of criminal responsibility.

² Ibid.

³ Ibid.

⁴ Law Council of Australia, Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group Review (2 March 2020) 20 – 27.

⁵ Australian Human Rights Commission, *Children's Rights Report* (28 October 2019) 244.

⁶ Law Council of Australia, Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group Review (2 March 2020) 26.

Diversionsary Pathway – Therapeutic Support Panel

The legislation will establish a multidisciplinary Therapeutic Support Panel which will be responsible for receiving referrals, assessing the child’s therapeutic needs and giving advice on appropriate therapeutic treatment and support. This may entail coordinating services, recommending that the Director-General proceed with an application for an Intensive Therapy Order, assisting with the development of therapy plans and providing advice and assistance to the Director-General as appropriate.⁷

Recognising that feedback surrounding the necessary service sector response to this reform extends beyond the Society’s area of expertise, we urge the Standing Committee to consider input from experts working in this space. However, we do note that the Society is generally supportive of a multidisciplinary panel approach.

We note that section 501Q provides a discretion for referring entities to decide whether to refer a child/young person to the panel. A referring entity may refer a child to the panel if they believe on reasonable grounds that the child has a genuine need for therapeutic support services.⁸ Further consideration as to whether it should be mandatory in those circumstances to refer a child to the panel may be warranted, in consultation with the service sector.

We also note that the Minister must appoint at least one person to the panel to represent the Aboriginal and Torres Strait Islander community and at least one person who is an Aboriginal and Torres Strait Islander person. The Society supports this approach.

Intensive Therapy Orders

The new legislation will empower the Director-General to apply to the Children’s Court for an Intensive Therapy Order for a child or young person where satisfied that a series of statutory conditions are met.⁹ The Court may authorise the Director-General to issue a confinement direction for a child where satisfied that this may be necessary as a last resort measure to enable the assessment of the child’s needs or to provide treatment in accordance with a therapy plan.¹⁰

The Society recognises that a mechanism to mandate compliance or deprive a young person’s liberty may be necessary in extreme circumstances, but notes that depriving the liberty of a young person should only be considered as a measure of last resort, after less restrictive measures have been exhausted.

Therapeutic Correction Orders

We note that the legislation will introduce a new sentencing option for young offenders who are over the minimum age of criminal responsibility, but under 18. The Therapeutic Correction Order will combine core conditions, similar to those imposed under a community-based order, alongside therapeutic conditions that will require the young person to complete a program of treatment set out in an accompanying Therapeutic Correction Plan. This must address the medical, psychological or psychiatric needs that are relevant to the young person’s rehabilitation.¹¹

⁷Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT) cl 10.

⁸ Ibid.

⁹ Ibid cl 12.

¹⁰ Ibid.

¹¹ Ibid cl 86.

The Society supports the introduction of this additional sentencing option, noting that it is directed towards addressing the complex needs of young offenders who may require additional support to take steps towards rehabilitation. We welcome the opportunity to comment further on any issues identified in practice, following the commencement of the legislation.

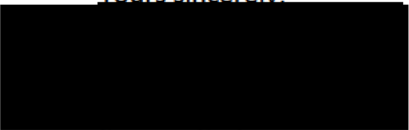
Interaction with Protection Orders

We wish to draw the Standing Committee's attention to the approach taken to existing protection orders and pending protection order applications, under the Bill. The Bill provides that when the age of criminal responsibility is raised, children below the age of 14 cannot be listed as respondents to applications for family violence orders under the *Family Violence Act 2016* or as respondents to applications for protection orders under the *Personal Violence Act 2016*. Existing applications for orders will be discontinued and recognised FVOs and personal violence orders made against a child under 14, will be revoked.¹²

The Society considers that children under the minimum age of criminal responsibility should be capable of being listed as respondents to protection orders. Criminal intent is not relevant to the issue of whether an applicant fears or requires protection from a child or young person. However, while we do consider that there should be scope to apply for a protection order against a child/young person, the question of whether a child should be held criminally liable for breaching the order is a separate matter. We do not consider it appropriate for criminal penalties to apply in this context; rather, alternative mechanisms for the enforcement of orders, other than simple criminal liability, ought to be explored. In this context, we note that access to the new diversionary pathway is not preconditioned on a child having committed a criminal offence. Therefore, this may be an appropriate mechanism for providing a therapeutic and rehabilitative response to a child who breaches an order, without attaching criminal liability, in keeping with the premise of this reform.

The Society appreciates the opportunity for consultation and notes that we would be interested in providing further comment following the implementation of the Bill, having had the opportunity to observe the practical outcomes of this reform for affected children and young people.

Yours sincerely,



Simone Carton
Chief Executive Officer

¹² Ibid cl 103 – 112.