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

Member for Kurrajong

Mr Peter Cain MLA
Chair, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Our ref: PRO23/1753

Dear Mr ~~Cain~~ Pedro MLA

Response to Scrutiny Report No. 29

Thank you for Scrutiny Report No. 29 of 23 May 2023 in which the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) provides comments on the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (the Bill).

The Committee seeks a response on a number of its comments, which are outlined and addressed below.

Revisions to the Explanatory Statement and the making of a Therapeutic Correction Order

The Committee has requested further information about why the provisions in the Bill relating to amendments to the *Crimes (Sentencing) Act 2005* and the making of a Therapeutic Correction Order (TCO) may not limit the rights at sections 10 and 12 of the *Human Rights Act 2004* (the HR Act). I have outlined below an analysis of these potential limitations in accordance with section 28(2) of the HR Act.

The right to freely consent to medical or scientific experimentation or treatment (s10(2))

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 10(2) of the HR Act states that 'no-one may be subjected to medical or scientific experimentation or treatment without his or her free consent'. This right incorporates two distinct rights protected in international law.

The right not to be subjected to medical or scientific experimentation without free consent is drawn from Article 7 of the *International Covenant on Civil and Political Rights* and is considered to be an absolute right under international law, which cannot be subject to limitations.

The right not to be subjected to medical treatment without free consent is recognised as an aspect of the right to health in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*. The right to health was considered by the United Nations Committee on Economic, Social and Cultural Rights in *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000). The Explanatory Note stated that the right to health contains both freedoms and entitlements. The freedoms include, the right to be free from interference such as the right to be free from non-consensual medical treatment. This aspect of the right is also fundamental to human dignity and autonomy. Nevertheless, it is recognised that this right may be subject to limitations, where necessary, to achieve a legitimate objective, and where the limitation is reasonable and demonstrably justified. Such limitations must be proportionate and least restrictive of the right.

The Bill allows the court to make a TCO that requires the young offender to comply with conditions of the order. Conditions may include requiring the young offender to submit to medical, psychiatric or psychological treatment. If a young offender has been found to breach the conditions of the order, the sentencing court must take one of the following actions: no further action to be taken on the breach, giving a warning, amending the therapeutic correction plan, or cancelling the order and resentencing the offender.

Imposing TCO conditions requiring the young offender to submit to medical, psychiatric or psychological treatment may limit the right under section 10(2) of the HR Act because if the young offender does not consent to the medical, psychiatric or psychological treatment, an alternative sentence may have to be imposed, which may or may not be a community-based sentence. If the young offender refuses to undergo medical, psychiatric or psychological treatment as part of a TCO, one of the possible consequences is that their order may be cancelled and they may be resentenced.

2. Legitimate purpose (s 28(2)(b))

A TCO, as a new community-based sentencing option, will allow the Childrens Court to provide a more intensive therapeutic response to young offenders so that underlying needs can be met and the likelihood of continuing to offend will be reduced. When appropriate, imposing a condition requiring the young offender to submit to medical, psychiatric or psychological treatment will provide the young offender with the necessary support to address the root causes of their behaviour. The aim is to divert the young offender from the criminal justice pathway. Early intervention to address the underlying needs of all young people who commit criminal offences will support a reduction in re-offending and improved community safety.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

TCOs, particularly those enforcing conditions for the young offender to submit to medical, psychiatric or psychological treatment, will support a young offender to have their underlying needs met with a view to reducing re-offending and diverting young offenders from the criminal justice pathway.

A court- ordered rehabilitation (which may include medical treatment) as part of a sentence or a condition of sentence is an established practice in the ACT and Australia. The *United Nations Convention on the Rights of the Child* provides that the objective of sentencing a juvenile offender must be his or her 'reintegration' into society or 'rehabilitation' (article 40.1). The purpose of the TCO is to support this approach to sentencing young people so that they do not have to be incarcerated or be subject to other punitive sentences.

4. Proportionality (s 28 (2) (e))

Imposing a condition in the TCO for the young offender to submit to medical, psychiatric or psychological treatment, if indicated and necessary, is a proportionate means to achieve the aim of diverting the young offender from the criminal justice pathway to support a reduction in re-offending and improved community safety.

One of the safeguards to protect the right under section 10(2) of the HR Act, is that the court must order an assessment of the young offender's suitability for a TCO before making the order. The assessment must consider the degree of dependence on alcohol or a controlled drug, psychiatric or psychological condition, medical condition, response to previous court orders, participation and degree of compliance with therapeutic correction assessment, and personal circumstances.

Indications of unsuitability include a major problem with alcohol or a controlled drug that is unlikely to change under a TCO, a major psychiatric or psychological disorder likely to prevent compliance with a TCO, a medical condition likely to prevent compliance with a TCO, substantial noncompliance with previous court orders and therapeutic correction assessment, and personal circumstances that would render it potentially impracticable to comply with a TCO.

If the young offender is assessed as suitable for a TCO, a Therapeutic Correction Plan must be prepared for young offender. The Therapeutic Correction Plan must address any medical, psychological or psychiatric needs relevant to the offender's rehabilitation.

A young offender can choose not to comply with the conditions of a TCO and bear the consequences breaching a TCO. This supports the fact that a young person cannot be forced to receive medical treatment under a TCO and demonstrate that any limit on the right under section 10(2) is minimal as the most serious consequence that can occur as a result of refusal is resentencing.

Furthermore, a review of the operation and effectiveness of the amendments made by the Bill is legislated to commence as soon as practicable after the end of five years after commencing, and a review of the report must be presented to the Legislative Assembly. This statutory review will include a review of the new TCO scheme to assess its operation and effectiveness.

The Explanatory Statement to the Bill will be amended to include this analysis.

The right to privacy and reputation (s12)

I agree that the information sharing provisions in relation to a TCO in the Bill potentially limit the right to privacy at section 12 of the HR Act. I have outlined below an analysis of this potential limitation in accordance with section 28(2) of the HR Act.

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The right to privacy and reputation is contained in section 12 of the HR Act and states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This right includes the right not to have personal information collected, stored, used or disclosed unless it is for legitimate purposes and in accordance with the law. The right to privacy is engaged and limited by provisions of the Bill which allow for the assessor, for the purposes of a therapeutic correction assessment, to access personal information about a young person and provide that information to the Childrens Court. The right is also limited as the Bill provides that personal information about a young offender held by a member of the therapeutic correction team that was obtained as a result of therapeutic correction assessment or the administration or making of a therapeutic correction order can be given to another member of the therapeutic correction team.

2. Legitimate purpose (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))

The purpose of the information sharing is to support a therapeutic corrections assessment. Such an assessment considers whether a TCO is an appropriate sentence for the young offender in the circumstances and gives the court the relevant information required to make a decision concerning sentencing. The therapeutic corrections plan looks at the medical, psychiatric and psychological needs of the young offender and is intended to propose a course of action aimed at ensuring the young offender's rehabilitation. The purpose of the information sharing between members of the therapeutic correction team is to enable the members to consider all relevant information to ensure that any assessment provided to the Childrens Court is accurate and to ensure that all members of a therapeutic correction team are fully informed of the young person's circumstances to enable the team to administer any TCO effectively.

3. Proportionality (s 28(2)(e))

The disclosure of a young person's personal information under the Bill is only allowed to the extent necessary to enable effective therapeutic treatment and support. In particular, proposed new section 133XI of the *Crimes (Sentencing) Act 2005* (the Sentencing Act) provides that entities providing information to an assessor for a therapeutic correction assessment do not breach confidence, professional etiquette, ethics or a rule of professional misconduct if the information is given honestly and with reasonable care in response to a request by the assessor.

Where entities provide personal information about a young person to an assessor, they must do so in accordance with the *Information Privacy Act 2014*. In particular, Territory Privacy Principle 6 states that if a public sector agency holds personal information about an individual that was collected for a

particular purpose (the primary purpose), the agency must not use or disclose the information for another purpose (the secondary purpose) (Schedule 1, TPP 6.1).

Further, it is only members of the therapeutic correction team (defined as the court, the CYP director-general and an entity prescribed by regulation) who can share and receive the personal information under proposed new section 133XZ of the Sentencing Act. Members of the team can only share this information for the purpose of other members exercising their functions under the Act. The information cannot be shared for any other reason.

The Explanatory Statement to the Bill will be amended to include this analysis.

Exceptions to raising the MACR to 14

(a) The Committee requests further information about the necessity of the 'exceptions' to raising the MACR to 14. Specifically, the Committee states that: *'There is no evidence in the ES that suggests a child is more likely to cause harm to others after the commission of these particular offences than they would after commission of other violent offences, or that the therapeutic treatment otherwise provided under the Bill will be less [a]ffective [sic] in relation to these particular offences in providing for rehabilitation or otherwise protecting against further harm to the community.'*

These issues have been carefully considered in the Explanatory Statement to the Bill, which states that the four exceptionally serious and intentionally violent offences which are 'exceptions' to raising the MACR to 14 are necessary for the protection of public safety, and to support the right to life and right to security of person. While emerging evidence indicates that the criminal justice system is not the most effective response for rehabilitating young people in most cases, in some situations where a young person has intentionally committed extremely violent and harmful acts, the options provided in the criminal justice system may be necessary to ensure community safety.

The ACT Government would be remiss if it failed to provide a more cautious initial approach for these specific scenarios. Given the ground-breaking nature of these reforms, the Government is committed to ensuring that the changes provided by the Bill are rolled out in a way that supports successful outcomes for children and young people aged under 14 and also supports community safety.

It is reasonable to take a cautious initial approach in implementing the reforms in the Bill by retaining a youth justice system approach for these four exceptionally serious and intentionally violent offences, which can provide longer periods of secure care as needed to ensure community safety. If the alternative therapeutic system were to be re-oriented to provide facilities and levels of security appropriate for longer periods of secure care that might be needed in these types of exceptionally serious circumstances, this could potentially impact on the rights of other young people in the therapeutic system.

There are practical issues in a small jurisdiction that seeking to provide an alternative therapeutic approach for the very small number of young people who commit such exceptionally serious and intentionally violent offences could lead to individual young people being confined in isolation from

their peers in secure facilities that do not offer the same level of opportunities as a youth justice facility, including opportunities to participate in education and programs with other young people.

(b) The Committee seeks further information about why the provisions creating 'exceptions' to raising the MACR to 14 are proportionate, given the consequences of criminal culpability in those circumstances.

The Explanatory Statement to the Bill applies the test at section 28(2)(e) of the *Human Rights Act 2004* to determine whether the 'exceptions' provisions of the Bill are proportionate. Specifically, the Explanatory Statement outlines that:

The criminal justice system has the ability to determine culpability beyond reasonable doubt, and where the offence is proven, to provide for a range of sentencing options, including periods of detention in a secure facility, to protect the community from further harm. This system focuses on addressing the risk of harm as well as providing opportunities for rehabilitation.

The proposed approach includes a range of safeguards, including the presumption of doli incapax for young people under 14, which would require that there be evidence adduced by the prosecution regarding the capacity of the young person to understand the criminal nature of their actions.

Consideration has been given to the alternative of having a uniform MACR of 14 for all offences, which would mean that young people who commit these very serious offences would be dealt with by the alternative therapeutic system. For the reasons set out below, it is considered that this approach may not adequately achieve the objective of ensuring community safety and could create other limitations of rights for the young person and others in the alternative system.

The new alternative therapeutic system which is being established to respond to the behaviour of young people who are under the MACR is primarily focused on achieving therapeutic outcomes for individual young people.

While the system will make provisions for short periods of secure care under an Intensive Therapeutic Order, this system is not focused on providing periods of secure confinement for young people and does not involve a rigorous assessment of the young person's responsibility for a particular offence.

If the alternative therapeutic system were to be re-oriented to provide facilities and levels of security appropriate for longer periods of secure care that might be needed in exceptionally serious circumstances, this could potentially impact on the rights of other young people in the therapeutic system.

There are practical issues in a small jurisdiction that seeking to provide an alternative therapeutic approach for the very small number of young people who commit such exceptionally serious and physically violent offences could lead to individual young people being confined in isolation from their peers in secure facilities that do not offer the same level of opportunities as a youth justice facility, including opportunities to participate in education and programs with other young people.

There would also be concerns that subjecting young people to longer periods of secure care without conclusively establishing their involvement in such serious criminal activity would unreasonably limit their rights to liberty and security of person.

The exclusion of these 4 offences from the higher MACR of 14, but with an increased MACR of 12, represents a prudent approach to ensure community safety and the right to life and security of the person, given that the alternative therapeutic system is being newly established.

The Bill includes provision for a review after a 5-year period, which will allow the ongoing need for exceptions to be further considered and tested once the alternative therapeutic system is fully operational and risks can be more accurately assessed.

Henry VIII clauses

The Committee also sought clarification on why it is necessary to include proposed new: sections 623 and 635 of the *Crimes Act 1900*; sections 212 and 222 of the *Family Violence Act 2016*; and sections 211 and 221 of the *Personal Violence Act 2016*, which allow for the creation of transitional regulations.

While care has been taken to include adequate transitional measures in the Bill, due to the complexity of the reforms and the breadth of criminal justice and related services that are affected by the Bill, there remains a risk of unforeseen consequences during implementation that could negatively impact the provision of a range of essential justice services in the ACT. The inclusion of the transitional regulation-making power reflects the ground-breaking nature of the reforms in this Bill.

Some minor transitional issues may not emerge until implementation is under way and as such, greater flexibility in the legislation is preferred so that these issues can be quickly addressed to ensure uninterrupted criminal justice services in the ACT. In light of this, I consider the inclusion of the abovementioned new sections to be a necessary and appropriate safeguard to ensure the Government can quickly and flexibly address any unforeseen issues that may arise. The key alternative approach to addressing an unexpected implementation issue would be a further amendment bill. As you will appreciate, the development and passage of an amendment bill can be time consuming, resulting in a delay between the identification of an issue and action to remedy the issue. Noting that such an issue could impact on the ability of justice entities to provide services, this approach, with its risk of delay, was not preferred.

Thank you for your consideration of the Bill. I trust the information above is of assistance to the Committee.

Provision of Government amendments to the Committee

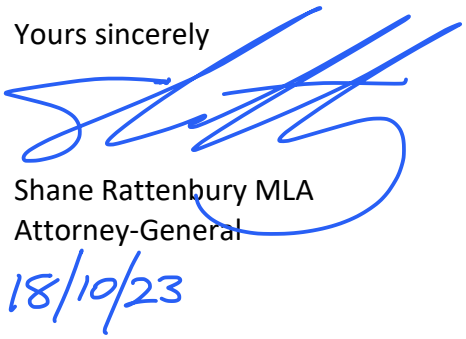
I note Standing Order 182A and the request on the Committee's website, that Government amendments be submitted to the Committee at least 14 days before the Tuesday of the sitting week in which they will be presented.

In accordance with the above, please find attached Government amendments to the Bill.

The amendments proposed are the result of recommendations made by the Standing Committee on Justice and Community Safety in its Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023, Report No. 18 (July 2023) and minor drafting issues identified after introduction of the Bill which provide opportunities for further clarity.

Thank you for your consideration of the Government amendments to the Bill.

Yours sincerely



Shane Rattenbury MLA
Attorney-General
18/10/23