2023

THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

TENTH ASSEMBLY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY REPORT NO. 18 INQUIRY INTO THE JUSTICE (AGE OF CRIMINAL RESPONSIBILITY) LEGISLATION AMENDMENT BILL 2023 – GOVERNMENT RESPONSE

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Introduction

The Standing Committee on Justice and Community Safety (the Committee) resolved to conduct an inquiry into the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (the Bill) on 19 May 2023. The Inquiry started on 22 May 2023.

Submissions closed on 5 June 2023. The Committee received 23 submissions to the Inquiry from members of the public, and Government and non-Government sectors.

The Committee released Report No. 18, *Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023* (the Report), on 14 July 2023. The Report contains 23 recommendations.

The Government Response will discuss the Government's position on each of the Report's recommendations.

ACT Government Response to Recommendations

Recommendation 1

The Committee recommends that the ACT Government raise the minimum age of criminal responsibility to 12.

Agreed

The ACT Government introduced the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (the Bill) on 9 May 2023. The policy objective of the Bill is to raise the age of criminal responsibility in the ACT to 14 years. First, upon commencement, the Bill will raise the age of criminal responsibility to 12 years. The age of criminal responsibility will then be further raised to 14 years within two years.

The ACT Government is committed to raising the age of criminal responsibility to 14 years, aligning with the recommendations of the United Nations Committee on the Rights of the Child that the minimum age of criminal responsibility should be 14 years. Raising the age of criminal responsibility is expected to:

- have a significant, positive impact on the long-term wellbeing of at-risk children and young people, their families and the broader community, improving the life trajectory of vulnerable children and young people;
- reduce the potential for life-long engagement with the criminal justice system, by diverting children and young people from the criminal justice system at a younger age;
- enable a better response to the complex needs of children and young people who engage in harmful behaviours, as these children and young people will be diverted to a new service system to assist in addressing their behaviour and underlying needs; and
- reduce recidivism among this cohort of children and young people, which will lead to improvement in safety for the broader community.

Raising the age of criminal responsibility provides an opportunity and creates an imperative to provide alternative responses to address the underlying complex needs of children and young people who engage in harmful behaviour, with the aim of fewer children and young people becoming involved in the criminal justice system.

Exceptions to raising the age from 12 to 14 are limited to four very serious and intentionally violent offences, to ensure a gradual and safety-focused approach as the new alternative therapeutic system is being established.

Recommendation 2

The Committee recommends that the ACT Government should then raise the minimum age of criminal responsibility to 14.

Agreed

See recommendation 1 for information on this position.

Recommendation 3

The Committee recommends that the ACT Government ensure that the statutory review of the bill is conducted in a timely manner and no later than as currently drafted.

Agreed

The ACT Government has committed to undertaking a review of all amendments in the Bill. The Bill contains a statutory review provision at clause 93.

Clause 93 will insert new section 801 (Review of amendments made by Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023) into the *Criminal Code 2002*. This provision states that:

> (1) The Minister must –
> (a) review the operation and effectiveness of the amendments to all Acts made by the *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* as soon as practicable after the end of 5 years after this section commences; and
> (b) present a report of the review to the Legislative Assembly before the end of 6 years after this section commences.

The review will be undertaken five years after the minimum age of criminal responsibility is raised to 12 years, and three years after the minimum age of criminal responsibility is raised to 14 years. This period will ensure that:

- sufficient time has passed to test the new laws and the new service system; and
- there will be sufficient data and evidence collected to inform a comprehensive and meaningful review, particularly given the low numbers of offending by children and young people aged 10-14 years.[1]

The ACT Government is currently working to determine which data will need to be collected over the coming years to assess the operation of the new provisions and ensure that a meaningful review can occur. One aspect for further consideration will be whether there is an ongoing need for the proposed Schedule 1 'excepted' offences[2] in the Criminal Code, once the alternative therapeutic system is fully operational and risks can be more accurately assessed.

[1] ACT data reported by Australian Institute of Health and Welfare shows that 10- to 13-year olds consistently make up a small proportion of the total number of children and young people in the ACT youth justice system. In 2019-20, of all 149 children supervised by Child and Youth Protection Services on youth justice orders, only 12 (8%) were below the age of 14 (see Emeritus Professor Morag McArthur's *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory* at page 26).

[2] As of the time of drafting, the Schedule 1 'excepted' offences are murder (section 12 of the *Crimes Act 1900*), intentionally inflicting grievous bodily harm (section 19 of the Crimes Act), sexual assault in the first degree (section 51 of the Crimes Act), and act of indecency in the first degree (section 57 of the Crimes Act). Once Schedule 1 is in force, a child under 14 years old is not criminally responsible for an offence unless the child is at least 12 years old, engages in conduct that is one of the offences mentioned, and knows that their conduct is wrong.

Recommendation 4

The Committee recommends that the ACT Government expand *Section 501Q (1), Part 14A.3 – Referrals to Therapeutic Support Panel* of the Bill to include additional behaviours, such as cruelty towards animals, arson, and starting bush fires, as a precursor for referral to the Therapeutic Support Panel.

Agreed

An amendment will be made to expand the referral criterion for the Therapeutic Support Panel (the Panel) in section 501Q to include reference to engaging in harmful conduct that is serious or significant. This will make it clearer that harmful conduct that is serious and significant but not clearly captured by the category of harm to a child or young person themselves or someone else, such as cruelty to animals, significant property damage like arson or starting bushfires, is a relevant criterion for referral to the panel.

This will allow referring entities to refer children and young people with complex needs as early as possible to receive therapeutic support services.

Recommendation 5

The Committee recommends that the ACT Government amend *Section 501R – Panel to act on referrals, part 2, (a)* of the Bill to mandate a specific timeframe, within 12 hours.

Not agreed

It is intended that all referrals to the Panel will be acknowledged within one business day and actioned promptly. However, the Panel is not designed to operate as an emergency response service.

The Panel needs to have appropriate information to inform its detailed work. Intake and assessment processes for referrals to the Panel must be undertaken prior to the Panel convening, including appropriate information gathering and sharing.

Further, the Panel is required to be stood up with specific Panel members and expertise selected to consider the needs of each individual child and family. For example, if an Aboriginal or Torres Strait Islander child or young person is referred, the Panel members selected to consider that matter will include Aboriginal and Torres Strait Islander members.

It is therefore not practicable to stand up the Panel on less than 24 hours' notice.

If an immediate, emergency response is required for the safety or a young person or someone else, ACT Policing, Child and Youth Protection Services or Canberra Health Services will be better placed to provide 24-hour support or take emergency action (if required). As part of the minimum age of criminal responsibility reform, embedded youth work services will also provide an immediate service response for children and young people aged under 14 years if they are in contact with ACT Policing.

Recommendation 6

The Committee recommends that the ACT Government amend *Part 14A.4 – Reporting by the Therapeutic Support Panel – Section 501T* of the Bill to mandate the production of administrative reports, similar to an annual report tabled in the ACT Legislative Assembly.

Agreed

Section 501T outlines that the Panel may prepare a report on any matter arising in connection with the exercise of the Panel's functions, and if a report is prepared, it must be provided to the Minister and the Legislative Assembly.

An amendment will be made to specify that the Panel must report at least annually to the Minister and Legislative Assembly. Any requirement for further administrative reporting by the Panel can be considered as part of the statutory review of the Act, including looking at the effectiveness of the functions and operation of the Panel.

Recommendation 7

The Committee recommends that the ACT Government amend Part 2 – *Children and Young People Act 2008*, Section 5 of the Bill to add provision of education services to the Director-General's functions in new section 22 (1) (ea) and (eb) as follows:

- **(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.**

Not agreed

The Panel will facilitate the provision of coordinated and holistic services and supports, including education, across government and community services for children and young people under the minimum age of criminal responsibility reform, meeting the intent of this recommendation.

Section 22(1) of the *Children and Young People Act 2008* outlines the Community Services Directorate (CSD) director-general's functions for all children and young people in the ACT. The Bill adds a broad function in section 22(1)(ea) and (eb) to clarify that the director-general has a role in providing or assisting in providing services to support the safety and wellbeing of children, including for children who carry out, or are at risk or carrying out, harmful conduct.

However, direct provision of school education services is out of scope for CSD's functions. The provision of education services for children and young people in the ACT is outlined in the *Education Act 2004*. Education providers under the Education Act, including the ACT Education Directorate, will continue to provide education services to children and young people in the ACT. This will continue to be supported by CSD under the minimum age of criminal responsibility reforms, including for children who are on care and protection orders such as Intensive Therapy Orders.

Recommendation 8

The Committee recommends that the ACT Government amend the Bill so that Cl 12 589 explicitly states that places can only be declared intensive therapy places if they have not formerly been used to accommodate young detainees and are not located in any part of a facility whose purpose is to house young detainees.

Agreed

The Bill states in section 589(2)(a) that the director-general may declare a place to be an intensive therapy place only if the place is not a detention place. An amendment will be made to further clarify that the director-general may declare a place to be an intensive therapy place only if the place is not a current or former detention place and is not located in any part of a facility that also accommodates young detainees.

An intensive therapy place only needs to be declared if there is a confinement direction as part of an Intensive Therapy Order. A child or young person may be subject to an Intensive Therapy Order but not also subject to a confinement direction.

Intensive therapy places will be declared on a case-by-case basis dependant on the needs and circumstances of individual children and young people. Such places may include a residential care home or other facilities that ordinarily support children and young people in a residential setting.

Recommendation 9

The Committee recommends that the ACT Government amend the Bill to explicitly provide that the ACT National Preventive Mechanism bodies, including the Office of the Inspector of Correctional Services, have unfettered access to intensive therapy places, in accordance with the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

Agreed in part

Determining which ACT National Preventative Mechanism (ACT NPM) bodies are the most appropriate to have oversight over intensive therapy places will be further considered as part of work being led by the ACT Attorney-General to review legislation, as outlined in response to recommendation 10. In this context, it is important to recognise that intensive therapy places will not be established for the purpose of "corrections" but for the provision of therapeutic support for children and young people who have not been charged or convicted of an offence. It would therefore be inconsistent with the current role of the Inspector of Correctional Services for it to have oversight of such places.

However, the ACT Human Rights Commission is one of the three bodies designated as the ACT NPM. The ACT Public Advocate, as well as any Commissioner exercising functions under the *Human Rights Commission Act 2005*, has right of access to intensive therapy places under section 578 of the Bill. Other independent oversight bodies for intensive therapy places include Official Visitors and the ACT Ombudsman. This is consistent with oversight arrangements for other therapeutic environments, including mental health facilities and therapeutic residential care services.

Recommendation 10

The Committee recommends that the ACT Government amend the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* to enshrine the requisite powers, privileges and immunities of the ACT National Preventive Measures bodies, in accordance with the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.*

Agreed

In January 2022 the ACT nominated the Office of Inspector of Correctional Services, the Human Rights Commission and the ACT Ombudsman as the ACT NPM. In the establishment phase, the ACT NPM is utilising the existing oversight powers of its agencies to undertake visits and provide oversight for places of detention in the ACT. Based on observations from the 2022 United Nations Subcommittee on Prevention of Torture (SPT) visit to Australia and consultation with the Commonwealth Attorney-General's office and ACT NPM, the Government intends to amend the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* to more clearly set out the requisite powers, privileges and immunities of the ACT NPM in accordance with the OPCAT. This will provide greater certainty in relation to these matters for the NPM bodies and those who interact with them. The Government will progress these amendments in consultation with the ACT NPM bodies.

Recommendation 11

The Committee recommends that the ACT Government amend the Bill to include the Inspector of Correctional Services under Cl 12 578 and 597(1).

Noted

This issue will be considered as part of work being led by the ACT Attorney-General to review legislation, as described in the response to recommendation 10.

Recommendation 12

The Committee recommends that the ACT Government amend *Division 16.3.3 – Visits by accredited people, section 578 – who is an accredited person* of the Bill to include a young person's general practitioner.

Agreed in principle

An amendment will be made to include a health professional providing care to a child or young person to the list of accredited people. This will provide additional clarity that health professionals such as a young person's general practitioner or mental health specialist are accredited people to visit intensive therapy places.

Recommendation 13

The Committee recommends that the ACT Government amend *Section 501E of Part 14A.2 – Therapeutic Support Panel for Children and Young People* of the Bill to support the inclusion of panel members regarded as elders within their own cultural groups.

Agreed in principle

To give effect to the intention of this recommendation, an amendment will be made to the Bill to include qualifications, experience, or expertise in "working with culturally and linguistically diverse children and young people" as relevant for panel membership, reflecting the existing provision nominating expertise in "working with Aboriginal and Torres Strait Islander children and young people".

According to the Bill in section 501E(2)(b), the Minister may appoint anyone to the panel with "other qualifications, experience or expertise or membership of an organisation relevant to exercising the functions of a panel member". This ensures flexibility so that if additional advisory expertise, such as an elder, is required for a particular family's circumstances, advice can be sought as needed. In addition, the Minister may appoint an adviser to the panel on the panel's recommendation, which provides flexibility where specific expertise may be required to support a young person or their family.

Recommendation 14

The Committee recommends that the ACT Government include a discretion in relation to the eligibility for the Working with Vulnerable People card that is in line with restorative justice practice.

Existing Government policy

The *Working with Vulnerable People (Background Checking) Act 2011* (WWVP Act) already includes discretion within the rigorous risk assessment process for people who committed disqualifying offences as children.

The framework for disqualifying offences in the WWVP Act supports the national approach to National Disability Insurance Scheme (NDIS) Worker Screening Checks and the National Standards for Working with Children Checks, as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.

This national approach is underpinned by the principle that people who are convicted as adults of certain serious criminal offences (Class A disqualifying offences) present an unacceptable risk of harm to children or people with disability, and should not be eligible to work in a regulated activity involving children or an NDIS activity. The WWVP scheme therefore imposes a reasonable limit on the rights of some people to work specifically in regulated activities involving children and in the NDIS.

However, automatic ineligibility only applies to a person who has an adult conviction or finding of guilt for a Class A disqualifying offence (WWVP Act section 17(2)). If a person was convicted of a disqualifying offence as a child (i.e. under 18 years), they are not automatically ineligible for WWVP registration to work in regulated activities involving children or in the NDIS, but must provide details of their criminal history for risk assessment. Risk assessment is a comprehensive process and considers a range of relevant circumstances including the age of the person and the victim at the time of the offence, whether the person's circumstances have changed since the offence was committed, and if the person has undergone a program of treatment or intervention for the offence (WWVP Act section 29).

Further, an applicant who cannot be registered to work in regulated activities involving children or in the NDIS due to a Class A disqualifying offence may still apply for a conditional or role-based WWVP registration to work or volunteer in other areas, such as drug and alcohol counselling for adults.

Recommendation 15

The Committee recommends that the ACT Government ensure protections are accessible to victims of domestic and family violence from children under the minimum age of criminal responsibility.

Agreed

The ACT Government remains committed to the protection of victims of domestic and family violence. ACT Policing, ACT Courts and Tribunal and other relevant entities will be able to refer a child or young person under the new, raised minimum age of criminal responsibility to the Panel where the child or young person has engaged in family violence behaviour, including (but not limited to) physical violence or abuse, sexual violence or abuse, emotional or psychological abuse, and stalking.

The alternative service response provided by the Bill has been constructed so that children and young people aged 10-13 who engage in harmful behaviours may be subject to measures to prevent them from causing harm to themselves and others, as necessary.

The Childrens Court, when making an Intensive Therapy Order, may include a 'confinement direction' where it is satisfied that confinement of the child or young person may be necessary for their assessment and/or for their treatment under a therapy plan. The effect of such a direction is to authorise the director-general of the Children and Young People Act to make a direction, or directions from time to time, which authorises the confinement or restraint of a child or young person to prevent harm to the child or young person themselves or to others.

The Intensive Therapy Order may result in confinement for up two weeks at a time, however, in certain circumstances where the length of the order is greater than two weeks, the director-general may (if appropriate and necessary and after undertaking a review of the circumstances of the young person) authorise an additional period of confinement (within the limits of the length of the order).

The director-general may bring an application (and the Childrens Court make an order) for the purpose of allowing the confinement and restraint of a young person for an extended period where that is necessary to prevent them posing a risk of harm to themselves or others.

Police will still have the same powers of immediate response as they currently have to intervene to protect victims, including powers to arrest and detain a child or young person aged between 10 and 13 where the child or young person is carrying out or is likely to carry out conduct that would be an offence or where the child or young person has already injured someone or there is imminent danger of injury to a person because of the child's conduct.

The ACT Government is committed to ensuring that these protections contribute to the creation of a clear, holistic and integrated service and justice system response to people who engage in family violence behaviour who are under the minimum age of criminal responsibility.

Recommendation 16

The Committee recommends that proposed Division 3A.3A from clause 129 be relocated to just prior to Division 3A.7 in the *Victims of Crime Act 1994*.

Agreed

Relocating the new Division will keep the Divisions relating to victims of crime as defined by section 6 together. The new Division would be inserted before Division 3.A7, which implements victims' rights. Amendments to address this recommendation will be considered as part of the statutory review of the Victims Rights Charter in 2024.

Recommendation 17

The Committee recommends that, to allow an appropriate degree of discretion to the Therapeutic Support Panel or Victims of Crime Commissioner in identifying whether a person is a secondary victim, the ACT Government amend the Bill to remove the word 'immediately' from paragraph (b) of the definition of 'victim' for the purposes of proposed Division 3A.3A of the *Victims of Crime Act 1994.*

Agreed

Removing the word 'immediately' will ensure all individuals who were dependent on the victim before the victim death are eligible to apply for support.

Recommendation 18

The Committee recommends that the ACT Government amend s 15CG(d) of the Bill to read:

• (d) how a statement may be used by the therapeutic support panel in carrying out its functions, including that—

• (i) a copy of the statement may be given to the child [if the maker of the statement agrees]; and

• (ii) the panel must consider the statement in carrying out its functions.

Agreed

The proposed amendment will reassure victims that any statement they provide will not be given to the child unless the victim agrees.

Recommendation 19

The Committee recommends that the ACT Government amend the Bill to remove the proposed amendment in Clause 132.

Not Agreed

Section 6 of the *Victims of Crime Act 1994* provides a broad definition of 'victim'. However, as amended by clause 132 of the bill, that definition specifically excludes the newly introduced category of victims of harmful behaviour caused by a person under the age of criminal responsibility. Removing clause 132 would result in victims of harmful behaviour

being excluded from certain protections in the Act, including the right to privacy protection. Retaining clause 132 will ensure all victims of crime are eligible to apply for support and assistance, including where the alleged offender is not identified, the matter is not prosecuted, or the harm was caused by a person under the age of criminal responsibility.

Recommendation 20

The Committee recommends that the ACT Government ensure timely practice of restorative justice practices in the ACT to allow for these practices to be offered as part of therapeutic interventions for young people.

Agreed in principle

The restorative justice process will continue to be available for children and young people aged 10-13 who engage in harmful behaviour, once the minimum age of criminal responsibility is raised.

Since family violence and sexual violence was included in the remit of restorative justice under the *Crimes (Restorative Justice) Act 2004* in November 2018, there has been a significant increase in the complexity and risk profile of the work of the Restorative Justice Unit (RJU). This has led to the implementation of a waitlist in 2020, which has remained in place since that time. The RJU has implemented a range of processes to mitigate the negative impacts of the waitlist, including a waitlist officer to keep young people and families informed and updated, prioritising children in out-of-home care, and facilitating access to support for First Nations clients as soon as possible after referral.

The Government agrees that facilitating timely access is, in most cases, helpful to young people's meaningful engagement with responsibility taking processes like restorative justice. As part of a 20-year review of the Restorative Justice Scheme, the Government will engage an external consultant to consider whether the current scheme responds effectively to the needs of clients and the justice system. The review will consider barriers to access and efficiency, including opportunities to minimise waiting times for clients.

Recommendation 21

The Committee recommends that the ACT Government amend the Bill to ensure that ACT Policing retain search warrant powers when interacting with the parents and guardians of young people under the age of criminal responsibility, so that property can be seized if required for public safety or to return stolen goods.

Noted

Police have a range of powers that they may currently use for children aged under 10, and which they can utilise in relation to 10 and 11 year olds when the MACR is raised to 12. The Government will consider whether additional powers are needed before the MACR is raised to 14 on 1 July 2025.

Recommendation 22

The Committee recommends that the ACT Government urgently put in place a throughcare case management program at Bimberi Youth Justice Centre.

Agreed

The ACT Government has provided $200,000 in the 2023-24 Budget to develop and co-design a Throughcare program for youth justice.

The co-design of the Throughcare program will include targeted consultations with young people with lived experience of the youth justice system to ensure their expertise is included in the design of the program. Aboriginal and Torres Strait Islander children and young people, and their families and carers, will also play a leading role in the development of the Throughcare program, supporting the Government's commitment to self-determination.

The Throughcare program will recognise the contemporary context, opportunities and challenges in youth justice. For example, it will focus efforts on the needs of young people over the new minimum age of criminal responsibility (MACR), as a new coordinated service response is implemented for children under the MACR.

Recommendation 23

The Committee recommends that, after considering and responding to the recommendations in this report, the Assembly pass the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023.

Agreed

The ACT Government will proceed to debate of the Bill. Raising the minimum age of criminal responsibility to 14 will bring the ACT into line with international standards, ensure the Territory continues to uphold its human rights obligations, and support positive and just outcomes for both vulnerable young people and the wider ACT Community.

The ACT Government thanks the Committee for its close consideration of the Bill and for the Report.