



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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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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ACT Legislative Assembly  
Standing Committee on Justice and Community Safety  
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## **Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023**

The Justice Reform Initiative (JRI) welcomes the introduction of this legislation and commends the ACT Government on its leadership in this critical justice policy space.

We welcome the thoughtful approach to policy development, the recognition of the gaps in the service landscape for children that need to be filled, and the consultative approach of the development of this Bill over the past years.

We see this legislation and associated policy reform as critical in improving support processes for children and young people in the ACT. We see this process as having the potential to influence the policy and service delivery settings significantly in the ACT, and facilitating the kinds of reforms that will enable the ACT Government to truly start breaking the cycle of inter-generational criminal justice system involvement.

Whilst JRI largely supports the proposed legislation, we have outstanding concerns that this legislation lacks some coherency with regard to the principles and evidence that are driving the need to raise the minimum age of criminal responsibility to 14.

### **Offences where MACR will remain at 12 years, once the MACR is further raised to 14 years**

We continue to have concerns that this Bill proposes what are commonly known as 'carve-outs' for particular offence categories for 12-13 year olds.

JRI is of the view that there should **not** be any exceptions on the minimum age of criminal responsibility (MACR), on the basis of the 'type' or severity of the offence or behaviours. The frame around which decision-making should be made with regard to the minimum age should be medical and developmental – not political. This is reflected in the explanatory statement to the Bill which outlines the medical evidence which suggests that children under 14 years are unlikely to understand the gravity of a criminal offence and the need therefore to raise the MACR.

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.

We find it concerning that the criminal justice system approach is still considered necessary for the most intentionally violent and harmful conduct caused by children. The reasons given for this in the explanatory statement are the need to ensure public safety and to allow enough time to ‘effectively rehabilitate’ (p.20). There is a need to untangle this. Protection of the community and rehabilitation are two separate reasons for incarcerating children, both of which require separate analysis, in light of the principles driving the legislation.

With regard to public safety, it is unclear why (for these particular offence categories) the use of a youth detention centre is considered more appropriate than therapeutic detainment. Both approaches limit the ability of a child to cause additional acts of harm, if they are considered at risk. One is a youth justice setting. One is a therapeutic setting. If the key intent is to immediately protect the community, then it is difficult to understand why this therapeutic approach would not also be used for children who have been charged with the serious offence categories.

Feedback from the Government’s 2021 community consultation showed that the majority of submissions (35 out of 52 submissions) “told us that the use of exceptions is inconsistent with the medical evidence that children under the age of 14 are developmentally and neurologically unable to form criminal intent, so should not be held criminal responsible for their actions.”<sup>1</sup> Concerningly, this Bill seems to ignore this community response.

Only four submissions were in favour of the use of exceptions, and that was due to a belief that this was the only tool available for protecting the community. As outlined above, JRI believes that the use of secure therapeutic settings will also provide the same level of community protection. Given that the basis of raising the MACR is an acknowledgement that children need to be supported therapeutically, rather than through a criminal justice lens, it is illogical that children who commit more serious crimes should not also be treated therapeutically.

The evidence is clear that children aged between 10 and 14 years of age are not at a cognitive stage of development where they are able to be held criminally responsible. This creates significant doubt on the capacity for children of these ages to appropriately reflect before embarking on a course of action involving criminal behaviour.<sup>2</sup>

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<sup>1</sup> Listening Report on ACT Government consultation on raising the MACR in the ACT, Oct 2021, p.3, [https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2916/3589/7082/Report\\_-\\_MACR\\_Discussion\\_Paper\\_-\\_Listening\\_Report.pdf](https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2916/3589/7082/Report_-_MACR_Discussion_Paper_-_Listening_Report.pdf)

<sup>2</sup> Richards, K. (2011), ‘What makes juvenile offenders different from adult offenders?’. *Trends & issues in crime and criminal justice* No. 409; Steinberg, L. (2007), ‘Risk taking in adolescence: new perspectives from brain and behavioural science’. *Current Directions in Psychological Science*, 16, 55-59; See also

As the United Nations Committee on the Rights of the Child notes:

*Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence.*<sup>3</sup>

The consequences of imprisoning young children extend well beyond the futility of this, in terms of what we know about children’s developmental capacity. By criminalising the behaviour of children who may not be aware of the consequences and nature of their conduct, a dangerous cycle of disadvantage is initiated, causing children to become entrenched in the criminal justice system. Several studies confirm that when children are drawn into the criminal justice system at a young age, there is a significantly higher likelihood of subsequent reoffending and a lower likelihood of that child completing their education or securing employment. As is well known, the experience of youth detention is one of the key predictors of longer-term justice system involvement.<sup>4</sup>

**Recommendation 1: That the provisions that allow four exemptions for ‘serious offences’ (murder, intentionally inflicting grievous bodily harm, sexual assault in the first degree and act of indecency in the first degree) for 12-14 year olds be removed from the Bill.**

We note that there is a provision in the Bill for a review of these exceptions after 5 years and we hope that if the exceptions cannot be removed now, that this 2028 review will find that these exceptions are considered unnecessary and will be removed after that review. JRI would prefer to see this review brought forward. Given that the MACR will be raised to 12 in 2023, a 2026 review would allow for 3 years of this and one year of the age being raised 14 to be evaluated.

**Recommendation 2: That if the Bill is passed with the proposed exemptions, the legislated review of the need for these exemptions be brought forward to 2026.**

### **The ACT’s role in national MACR legal changes**

JRI welcomed the ACT Government’s early commitment to raise the age of criminal responsibility and notes the significance of this in the context of the national landscape at the time the ACT Government made this announcement. Since then, the NT has since raised the

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Farmer, E., (2011), ‘The age of criminal responsibility: developmental science and human rights perspectives’, *Journal of Children’s Services*, 6(2), 86-95; Chris Cunneen, C., (2017), ‘Arguments for raising the minimum age of criminal responsibility’. University of New South Wales.

<<http://cypp.unsw.edu.au/node/146>>; Australian Medical Association (2019), *AMA submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review*.

<sup>3</sup> United Nations Committee on the Rights of the Child. 2019. *General comment No. 24: Children’s rights in the child justice system*, CRC/C/GC/24 (18 September 2019). [22].

<sup>4</sup> Australian Institute of Health and Welfare (2016), *Young people returning to sentenced youth justice supervision 2014–15*.

MACR to 12, the Tasmanian Government has committed to raising the age of detention to 14, and the Victorian Government has confirmed that they will raise the MACR to 12 by the end of 2024 and to 14 in 2027. We are pleased to see that the NT legislation, whilst only raising the MACR to 12, does not allow for any carve-outs.

The ACT will be the first jurisdiction to move to raise the MACR to 14. This is an important precedent for Australia, however, we are very concerned that the carve-outs that this Bill sets out will create a lower benchmark that other states will also accept.

As already stated, we do not believe that the creation of exemptions provides a coherent and logical framework if the system is being reformed in order to support children, rather than punish them. The principle must be to support children through a therapeutic environment and process. This will be difficult to do if children are still being sent to youth detention at 12 and 13 years old.

### **Intensive Therapy Panel and Intensive Therapy Order**

JRI is supportive of the proposal to establish an Intensive Therapy Panel, to enable an Intensive Therapy Order (ITO) to be put into place, with care and consideration of the individual circumstances. We also note ACT Policing's support for therapeutic interventions in serious circumstances, as is reflected in the Listening Report. We support the need to expand the definition of family through those orders, to enable children to receive the best support available to them, by people who love them. We know that taking children away from their places of safety and security and into detention has most deleterious effect on their long-term mental health and should be avoided in these situations.

Wherever possible, voluntary engagement in wrap-around therapeutic support provision is preferred. However, in cases where this is not an option, an ITO is supported.

We also support the establishment of minimum standards for therapeutic protection places and we are pleased to see that these places will be visitable by the relevant commissioners, official visitors and other relevant accredited people.

The JRI also strongly supports access to restorative justice as a supplementary process alongside therapeutic interventions, noting that this would be voluntary for the child or young person.

### **Extinguishment of convictions**

The JRI is pleased to see that the bill extinguishes all convictions committed by children and young people who are under the MACR (see p.73 of the explanatory statement), although we are concerned that this will not be the case for the purposes of Working with Vulnerable People (WWVP) checks. We do not believe that offences by 12 year old children, for example, should continue to be a potential lifelong barrier to employment. We believe that the WWVP process, while absolutely vital to protecting vulnerable people in our community, needs to also provide

for people to rehabilitate and not prevent them from employment or volunteer work when they are no longer a risk to our community.

**Recommendation 3:** That the Government consider a more nuanced approach to convictions committed by children and young people in relation to Working with Vulnerable People checks to ensure it does not create lifelong barriers to employment.

### Other supports for young people

Alongside the legislative reform, we also note the importance of additional investment in long-term, holistic and wrap-around supports for children with complex and intersecting disadvantage. We recognise that considerable investment will be required by the ACT Government, to ensure that therapeutic places and systems will be created to increase our care for children and young people. However this form of investment will have significant long term economic and whole of community benefits, and will ultimately result in a reduction of justice system costs, as well as potential savings in health and education.

To put the ACT's legislation and youth justice system in context, the committee may find a recent report by Save the Children<sup>5</sup> of interest, which highlights some of the key points in the youth justice system where changes can be made. The ACT is well on the way to improvements in many of these areas, but still has many areas and processes that can be improved.

We would also like to highlight a recent report that looks at the social determinants of justice.<sup>6</sup> This report by Associate Professor Ruth McCausland and Professor Eileen Baldry from UNSW brings together the broad range of factors that can contribute to people being involved in the criminal justice system.<sup>7</sup> Their analysis shows that your chance of being imprisoned is greatly increased by:

1. having been in out of home (foster) care
2. receiving a poor school education
3. being Indigenous
4. having early contact with police
5. having unsupported mental health and cognitive disability
6. problematic alcohol and other drug use
7. experiencing homelessness or unstable housing
8. coming from or living in a disadvantaged location.

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<sup>5</sup> Save the Children (April 2023), Putting children first: A rights respecting approach to youth justice in Australia: [https://www.savethechildren.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-children-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savethechildren.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-children-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)

<sup>6</sup> The Conversation (April 2023), The social determinants of justice: 8 factors that increase your risk of imprisonment: <https://theconversation.com/the-social-determinants-of-justice-8-factors-that-increase-your-risk-of-imprisonment-203661#:~:text=It%27s%20the%20idea%20that%20social,incredible%20advances%20in%20medical%20care.>

<sup>7</sup> Ruth McCausland and Eileen Baldry, *Who Does Australia Lock Up? The Social Determinants of Justice*, International Journal for Crime, Justice and Social Democracy, April 2023.

Whilst we recognise that these comments are outside of the remit of this legislation, we would like to highlight that social service and infrastructure investments such as housing are critical to the success of the increase to the MACR.

Other significant investments that should be made, in order to better support children and young people at risk of entering the criminal justice system, include screening and support for young people with disability, including those with significant learning difficulties, neurodiversity, foetal alcohol spectrum disorder or acquired brain injuries. This screening can occur in primary schools and, if those children and their families, wherever appropriate, are well supported, we can work to reduce offending behaviours at a much earlier age. The use of functional family therapy (which is already being used in the ACT) and/or family conferencing in such situations would likely be of benefit, and investment in this should also be increased.

There is a particularly strong need to ensure that we are providing sufficient culturally appropriate wrap-around supports to First Nations children who are in need of therapeutic approaches, and this should be done at a younger age and certainly as soon as it is evident that it is needed. All too often, our system allows for a long list of offending behaviours to occur, before any supports are put in place. The Yarrabi Bamirr program plays some role in this work already and the results from this program<sup>8</sup> have shown that a family-centred approach is the best way to support children within their families. This model should be expanded through a broader range of service providers if possible, to best support all First Nations families who need additional options to keep their children out of the child protection system and out of the youth justice system. Given the alarming continuous increase in the number and proportion of First Nations children in our child protection system, this should be a government priority.

Funding for functional family therapy and other evidence-based models should also be made available for non-Indigenous families, where children are found to be engaging in serious or violent harmful behaviours.

Two areas of unmet service provision that would also support most of the young people entering the youth justice system are mental health support and drug and alcohol support. We know this is not news for the ACT Government, but focused investments and efforts need to be continued in these areas.

Another key area the Government should invest in is housing. Although the data has not been well collated in the context of young people, the links between offending behaviour and homelessness generally are well established.<sup>9</sup> Children and young people who do not have stable housing need to have accommodation options, which are still unfortunately inadequate

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<sup>8</sup> Payne, J. and Fogarty, M. (2019). *The ACT justice reinvestment trial: A process and outcome review of Yarrabi Bamirr at Winnunga*. Australian National University.

<sup>9</sup> For a recent discussion, in the ACT adult context, see eg Doyle, C., Yates, S., Bartels, L., Hopkins, A. and Taylor, H. (2022), "'People say you're going home, but I don't have a home': Housing after prison', *International Journal of Offender Therapy and Comparative Criminology*. <https://doi.org/10.1177/0306624X221132226>.

in the ACT. Given that the Government has now created the position of Housing Coordinator-General, there should be continued focus on increasing housing availability for people on public housing wait lists, as well as increasing the amount of housing available to the Justice Housing Program.

For those young people who will still be entering Bimberi after this legislation has passed, JRI recommends creating a throughcare-type model, to best support young people exiting detention akin to the Throughcare model available to some people leaving the AMC. This should not be seen as an optional extra, rather as a necessary part of the detention process.

**Recommendation 4: That the Government establishes a post-release support service for children and young people leaving Bimberi.**

We would be pleased to provide further information if required.

Yours Sincerely,

Dr Mindy Sotiri      and      Indra Esguerra  
Executive Director                      ACT Campaign and Advocacy Coordinator