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

Submission Number: 010

Date Authorised for Publication: 6 June 2023

Human Rights Law Centre

Standing Committee on Justice and Community Safety
ACT Legislative Assembly
196 London Circuit
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5 June 2023

Dear Committee members

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

Thank you for the opportunity to contribute to the inquiry into the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (the **Bill**).

No child belongs in prison. Currently, children as young as 10 can be arrested, charged with an offence, hauled before a court, locked away in detention and deprived of their liberty and ultimately their wellbeing. Reform is long overdue, and the Human Rights Law Centre strongly supports amendments to raise the minimum age of criminal responsibility (**MACR**) in the ACT to 14.

We recommend that the Bill should be passed with amendments. To properly give effect to the intention of reducing the number of children and young people who become involved with the criminal legal system, and improving outcomes for children with complex needs, four key changes to the Bill ought to be made to:

1. remove the schedule of offences for which children under 14 will still be held criminally responsible after the MACR is raised;
2. abolish police powers to arrest and detain children under the MACR;
3. remove the powers to detain children under the MACR in an 'intensive therapy place'; and
4. omit the provisions which seek to criminalise non-compliance with therapeutic orders for family members and other children.

Due to the limited timeframe for submissions to this inquiry, we do not address all aspects of the Bill, and have limited our comments to these four issues.

In addition to this brief submission, the Human Rights Law Centre also **endorses the submission of Change the Record** and supports the recommendations made therein.

1. The age must be raised to 14 with no exceptions

The Bill raises the MACR to 14 on 1 July 2025, but creates exceptions by maintaining a MACR of 12 for certain offences. This means that 12- and 13-year-old children will continue to be subject to the criminal legal system and can be arrested, charged, sentenced and potentially imprisoned if convicted of those offences.

Children under the age of 14 are undergoing significant growth and development, particularly neurocognitive development. For children this young, the areas of their brain responsible for executive functions including controlling impulses, judgement, planning and foreseeing the consequences of their actions have not fully developed and will not be fully mature until they reach their 20s. Medical experts, child offending experts,

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psychologists and criminologists agree that children under the age of 14 years have not developed the social, emotional and intellectual maturity necessary for criminal responsibility.[1]

Accordingly, the minimum age of responsibility should be consistent across all offences. No category of offending warrants departure from this minimum age threshold. The prevailing neuroscientific consensus as to the ability of children to understand and discern right and wrong does not distinguish between particular acts or behaviours. Exceptions to the MACR, which would limit the rights of children and their right to liberty, are not rationally connected to the protection of the community by deterring that child or others in future.[2]

The UN Committee on the Rights of the Child (**UNCRC**) has confirmed that countries like Australia should set a minimum age no lower than 14 years and that laws should ensure children under 16 years may not be legally deprived of their liberty.[3] The UNCRC has expressed concern about exempting certain offences from the MACR and, in General Comment 24, strongly recommended that State parties set a MACR that does not allow, by way of exception, the use of a lower age.

Children who are caught in the criminal justice system are overwhelmingly victims of trauma themselves. Creating carve outs to the MACR fails to acknowledge the link between challenging behaviours and the traumatic impact of abuse, neglect and unmet needs on children.

Further, the exceptions to the MACR set out in the Bill create a concerningly low threshold at which children may still be exposed to the criminal legal system. In particular:

- although the definition of 'grievous bodily harm' in the *Crimes Act 1900* (ACT) (**Crimes Act**) describes it as permanent or serious disfigurement, case law shows that the threshold for this offence can be as low as a broken bone; and
- there is no definition of the term 'act of indecency' in the Crimes Act. Under common law, indecent acts are acts that are contrary to community standards of decency or that would offend 'the ordinary modesty of the average person'. Acts of indecency include actions such as rubbing up and down legs and chest (*R v Khan* [2002] ACTSC 108), exposing oneself to children or in public, and sexting.

Given the vague nature and potentially low level of harm associated with these particular offences, it is entirely inappropriate to create exceptions to the MACR for such behaviour.

Moreover, maintaining any exceptions to the minimum age of criminal responsibility when the age is raised to 14 puts the ACT out of step with global minimum standards, and fails to meet the Bill's aim of providing alternative responses to addressing the underlying complex needs of children.

Recommendation 1: sections 25(2) and (3) (clause 92 of the Bill) and Schedule 1 of the Crimes Act (clause 94 of the Bill) should be omitted from the Bill. The MACR should be raised to 14 with no exceptions.

2. Police must not have powers to arrest and detain children

The Bill retains the existing powers of police to arrest and detain children who are under the MACR in certain circumstances. These powers are contained in sections 252A and 252B of the Crimes Act, which are amended rather than repealed by the Bill.

Police should not have any powers to arrest or detain children under the MACR in any circumstances. The Bill aims to reduce the number of young people who become involved with the criminal legal system and to reduce recidivism. But exposing children to the criminal legal process through interactions with police is criminogenic and reinforces the very behaviours and attitudes sought to be prevented. For example, a child who is arrested and taken into the custody of police is likely to be handcuffed, interrogated and searched. These by-products of early criminal legal contact for a young child can lead to victimisation (by adults and other children), stigmatisation and negative peer contagion.

In order for the raising of the MACR to reflect a true decriminalisation of young children, it is imperative that existing police powers which negatively impact and harm young children are also removed when the age is raised. The existing powers allow police to intervene in almost any situation involving a child, given the incredibly low thresholds in ss 252A and 252B.

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[1] Jesuit Social Services, Too much too young: Raise the age of criminal responsibility to 12 (October 2015), 4.
[2] ACT Human Rights Commission, Submission to Council of Attorneys-General review on age of criminal responsibility (200), 3.
[3] Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).

Instead, an alternative model which centres a therapeutic health response should be implemented. The creation or increased funding of services to enable a therapeutic health response whereby trained youth workers are first responders for children with complex needs should be prioritised, rather than retaining outdated and harmful police powers.

Recommendation 2: amend the Bill to repeal sections 252A and 252B of the Crimes Act.

3. Children should not be detained under an alternative response to unmet needs

The government recognises the need to provide an alternative response to support children who are too young to properly understand and be criminally liable for their actions, rather than criminalisation and imprisonment. The Bill therefore establishes a new Therapeutic Support Panel to advise on and coordinate therapeutic treatment and support for young people with complex needs. However, the Bill also introduces a new Intensive Therapy Order (**ITO**) regime, which allows the Children's Court to make orders directing a young person to undergo certain assessment or treatment. Most concerningly, the Children's Court may authorise the 'confinement' of a child at an 'intensive therapy place' for up to a total of six months, if confinement is necessary for assessment or treatment to take place.

This coercive and punitive approach to 'therapeutic' support of children with unmet needs is inappropriate and unlikely to be effective. Therapeutic benefits are unlikely to result from treatment or programs that children are forced to participate in against their will. Where a child is reluctant to engage with a program or service, coercion in the form of confinement is unlikely to change this. Focus would be better directed to improving services to ensure they are culturally safe and fit for purpose.

Forced assessment or treatment is not a justifiable purpose for the detention of a child in this context. Further, interim ITOs may authorise the confinement of a child in order to carry out assessment or treatment and to "prevent the child or young person from engaging in harmful conduct". Detention with a punitive or preventative purpose is akin to that of the criminal legal system. This is at odds with the recognition that children under 14 years of age should not be detained as a method of responding to complex needs.

The Explanatory Memorandum notes that an intensive therapy place is likely to be a secure facility. Given the standards applicable to an intensive therapy place are to be determined by the Minister, and no equivalent place appears to have been designated under the existing Therapeutic Protection Order regime, the nature of the secure facilities to which children will be confined is unknown. There are insufficient protections in the Bill to ensure that such places will not operate as a substitute for youth prisons. It does not appear that intensive therapy places will be subject to independent oversight and monitoring from the ACT's National Preventive Mechanism, under the Optional Protocol to the Convention Against Torture.

Given these concerns, the Children's Court should not have the power to authorise the confinement of a child who has not reached the MACR. Detention should not be used to force a child to comply with treatment. The United Nations Independent Expert on Children Deprived of Liberty, Manfred Nowak, observes that:

> "Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood."[4]

Further, the role of the new Therapeutic Support Panel in triggering applications that may result in detention should be reconsidered. Applications may be made to the Children's Court by the government upon referral by the Panel. The Panel will be comprised of members including police officers. Where the Panel has a history of involvement with a child, it is likely the Children's Court will place significant weight on the advice of the Panel in deciding whether to authorise confinement. There is a risk that this will impart the Panel with quasi-criminal functions, and it may be perceived this way by young people.

Subjecting children under 14 to court and court-like processes and depriving them of liberty is at odds with the purpose of the Bill and the rationale behind raising the MACR. Detention has no appropriate role in an alternative response to the unmet needs of children and young people.

Recommendation 3: amend the Bill to repeal the power of the Children's Court to authorise the confinement of a child under the MACR and omit the introduction of the new power to issue confinement directions.

[4] Manfred Nowak, Global study on children deprived of liberty GA Res 72/245, UN GAOR 74th sess, Item 68(a), UN Doc A/74/136 (11 July 2019) [3].

4. Family members should not be criminalised for non-compliance

The Bill creates two new offences where a person, other than the relevant young person, contravenes a provision of an ITO or an interim ITO. The offences may result in imprisonment of up to one year. Therefore, a child's parents, extended family, carers or friends, including other children, may be charged with an offence if they are suspected of causing or assisting a young person not to comply with an order.

Criminalising non-compliance will harm, rather than help, young people with complex needs who are subject to orders. The proposed offences would extend the effects of criminalisation beyond the child into their family and support networks. This is counterproductive to the stated aims of establishing alternative ways to address complex needs. Criminalisation of family and support networks can have knock-on effects for children's wellbeing, family stability, housing security, care arrangements and economic security, among other factors.

An ITO may include conditions about where a young person must reside or the programs or services they must attend. It is therefore possible that if a young person's family or carer moves house (for example due to financial distress or to flee violence) or fails to facilitate the young person's attendance at a program (for example due to illness or other caring or cultural commitments, or if the child refuses to attend) they could be charged with an offence.

A person will not commit an offence if they have a reasonable excuse for non-compliance. However, the Bill places the evidentiary burden on the person to prove that reasonable excuse. This means family members or carers may still have to participate in a criminal legal process and provide evidence of their circumstances.

Subjecting people to fines or imprisonment is not an effective way of ensuring young people and their support networks can understand and comply with a treatment plan. Rather, all efforts should be made to ensure that treatment plans are consensual, practical, flexible and fully understood by the young person and their networks.

Recommendation 4: new sections 548 and 553 of the *Children and Young People Act 2008* (ACT) be removed from the Bill.

We encourage the Committee to recommend that the Bill be passed subject to the above amendments. We would be pleased to provide further detail should it assist the Committee.

Yours sincerely,

[redacted]

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