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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Submission to the ACT parliament Standing Committee on Justice and Community Safety

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About Change the Record

Change the Record is Australia's only national First Nations-led justice coalition. We are a coalition of legal, health, human rights and First Nations organisations.

Change the Record has two key objectives - to end the mass incarceration of First Nations peoples and the disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander women and children.

Raising the minimum age of criminal responsibility (MACR) to at least 14, without exception, nationwide, has been a key focus of Change the Record's work since our formation more than 5 years ago. We are a founding member of the national Raise the Age Campaign Alliance and a member of the campaign steering committee.

We endorse the submissions and recommendations of our colleagues at the Aboriginal Legal Service NSW/ACT and the Human Rights Law Centre.

Our submission

Change the Record supports raising the minimum age of criminal responsibility in the ACT and nationwide to at least 14 years old, without exception. We support an end to the use of carceral responses to children with challenging, risky and/or dangerous behaviours.

The current minimum age of legal responsibility in Australia at 10 years of age harms children, and in particular Aboriginal and Torres Strait Islander children. It is discriminatory, out of step with domestic community expectations and the international community, human rights standards and medical science on child development.

The United Nations Committee on the Rights of the Child has called for countries to have a minimum age of legal responsibility set at 14 or higher and recommends that children under 16 should not be deprived of their liberty.

The laws that dictate the age of legal responsibility in all states, territories and the Commonwealth need to be reformed in line with the following principles held by the national Raise the Age campaign alliance:

1. The minimum age of legal responsibility must be raised to at least 14 years.
2. There must be no ‘carve outs’ to this legislation, even for serious offences.
3. The principle of doli incapax fails to safeguard children, is applied inconsistently and results in discriminatory practices. Once the age of legal responsibility is raised to 14 years, doli incapax would cease to be relevant and therefore be redundant.
4. Prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services including education, health and community services should be prioritised and expanded.
5. In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be self-determined and community-led.

We commend the ACT government for bringing legislation that brings the ACT closer to this goal, and recommend the bill be passed with amendments to make it consistent with these principles.

In its current form, the bill falls short in the following ways:

- The bill delays raising the MACR to 14 for most offences until July 2025;
- Post-July 2025, the bill maintains a MACR of 12 years old for certain offences;
- The bill does not remove police powers to arrest and detain children under the MACR;
- The bill creates new criminal offences related to non-compliance with 'intensive therapy orders', risking the criminalisation of families and carers;
- The bill creates a new form of deprivation of liberty for children in the form of 'confinement', and does not provide clarity on how places of confinement ('intensive therapy places') will be subject to oversight under the Optional Protocol to the Convention Against Torture;
- The bill does not adequately provide for First Nations self-determination over the care and support of our children.

As the first jurisdiction to commit to raising the MACR and to begin implementing this reform, the ACT sets an example for other jurisdictions. The ACT government is to be commended for its leadership, but should also be conscious of the risk that deficiencies and half-measures in its approach may be replicated in other jurisdictions. We fear failing to fully decriminalise young children in the ACT could militate against the full decriminalisation of young children elsewhere.

Summary of recommendations

Recommendation 1: that the bill be amended to ensure the MACR is raised to at least 14 without exception.

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

Recommendation 3: amend the bill to remove sections 548 and 553.

Recommendation 4: amend the bill to ensure all children under 14 cannot be detained or 'confined'. If this recommendation is rejected, the bill must be amended to ensure its confinement regime is OPCAT-compliant.

Raise the age to at least 14 without exception

In its current form, the bill maintains a minimum age of criminal responsibility of 12 for the offences of murder, intentionally inflicting grievous bodily harm, sexual assault in the first degree, and act of indecency in the first degree. This is inconsistent with the evidence provided to the ACT government over the course of several inquiries and consultation processes, and is a major deficiency of the bill. The bill is also staggered in its approach to raising the age, decriminalising children under 12 at first and only later raising the MACR to 14 by 1 July 2025.

The best medical advice is very clear - governments should raise the minimum age of criminal responsibility with no exceptions and no carve outs. Children under the age of 14 years old do not have the capacity to form criminal intent or comprehend consequences of their action - this applies just as much to serious acts as it does to less serious behaviour.

It's important to note that the medical evidence supports raising the age to at least 14 years old.[1] Nothing dramatic changes in a child's development at 14 years old, and many countries have raised the age to above the age of 14. But, what the evidence makes clear, is that 14 years old is the bare minimum one could expect a child to have sufficient neurological development to be held criminally responsible. Other comparable countries have raised the age to 15, 16 and 18.[2]

As well as the evidence regarding neurological immaturity, there is also extensive evidence about the emotional and psychological immaturity of children under the age of 14 years old and the long lasting harm that early exposure to the criminal justice system can inflict on children and young people. There is evidence that early contact with the criminal justice system results in a higher prevalence of mental and physical illness, homelessness and premature death later in life.[3] Delaying the decriminalisation of 12 and 13 year olds until 2025 endangers children of those ages who come in contact with the criminal legal system.

We are not aware of any children in the ACT having been charged with any of the offences the bill carves out. It is extremely rare that children under the age of 14 years old are arrested and charged with serious or violent offending. When children are, it is because something has gone

[1] For example, see the Law Council and the Australian Medical Association joint statement on the medical basis for raising the age to 14 years: Minimum Age of Criminal Responsibility
[2] For example, Norway, Finland and Sweden have adopted a MACR of 15; Portugal and Belgium a MACR of 16; and Luxembourg, Brazil, Peru and Uruguay a MACR of 18.
[3] Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW; AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra; Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017)

seriously wrong in that child's life. A child who engages in serious physical or sexual behaviour, for example, will almost invariably be a child who has been exposed to trauma, violence and/or has serious mental health and behavioural needs.

Carving out crimes on the basis of their severity in particular is the opposite of trauma-informed. The incoherence of this approach is made more stark when we consider the creation of 'intensive therapy orders' and provisions for the confinement of young children outside of Bimberi in 'intensive therapy places'.

The role of doli incapax

The recognition that children under 14 years old are not sufficiently mature to have the capacity to form criminal intent is well established in Australian law, and reflected in the doli incapax doctrine. However, it is our view, and the view of our legal member organisations, that the doli incapax presumption is ineffective in practice and fails to protect the rights of children. For example, children under the age of 14 years old are regularly remanded and held in prison cells while they wait for court hearings to debate matters of doli incapax even if they are then found not to have capacity and released.

If the MACR was raised with no exemptions or carve outs to at least 14 years old there would be no need for doli incapax in the bill.

Recommendation 1: that the bill be amended to ensure the MACR is raised to at least 14 without exception.

Police powers

The bill does not prevent police from arresting and detaining children. Raising the MACR requires not just an end to the detention of children, but an end to the active policing of children.

The medical evidence is clear that any engagement with the criminal legal system causes harm to a child - from police contact right through to deprivation of liberty in youth detention. While it may not be possible to completely safeguard against any engagement with police, consideration should be given to ways in which police engagement could be deescalated and minimised. For example, there are a number of programs in operation around the country and internationally which rely on highly skilled youth workers engaging with young people as first responders either

instead of police, or in collaboration with police. These options should be explored as a matter of priority.

Current police powers to arrest children under the age of 10 are too broad and do not adequately or appropriately ensure the arrest of such children is a measure of last resort. In its current form, the bill does not sufficiently curtail these powers. Any police interaction with children under the MACR should be limited to the exceptional circumstance where it is necessary to prevent an imminent risk of serious harm to another person or to the young person, and no alternative, appropriate first responder is in the vicinity.

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

New criminal offences - sections 548 and 553

We hold significant concerns about new criminal offences created in relation to a child's non-compliance with intensive therapy orders and interim orders. Sections 548 and 553 provide for significant fines and a term of imprisonment for 'engag[ing] in conduct that contravenes a provision of' an intensive therapy order or interim intensive therapy order. The explanatory statement doesn't provide a justification for the creation of these new offences, nor does it offer clarity about how they might be applied or enforced.

Creating these offences will criminalise families and carers, which is a particularly perverse outcome given the object of raising the MACR is decriminalisation and shifting institutional responses from punishment and coercion to care and harm minimisation. They pose a serious risk to the emotional wellbeing and relationships of non-compliant children whose loved ones are caught by these new offences, creating new potential for distress and trauma.

These provisions pose a disproportionate risk to First Nations children and families, who already experience discrimination and over-policing, lack of institutional understanding of cultural obligations, and intergenerational trauma and mistrust of agencies and institutions responsible for the removal and detention of our children.

These penalties also apply to contravention of interim orders, which is of great concern given the short timeframes involved with interim arrangements. We fear that in the circumstances of

an interim order families and carers may have even less capacity to understand their obligations under an order before they inadvertently commit this new, unreasonable crime.

While the bill provides for a defence of having a ‘reasonable excuse’, this is not sufficient to address our concerns. It is particularly inappropriate to place an evidentiary burden on the defendant rather than the prosecution in this respect.

Recommendation 3: amend the bill to remove sections 548 and 553.

‘Confinement’

The bill creates a new category of deprivation of liberty or detention which may be ordered by the Children’s Court, named ‘confinement’ in the bill. The bill provides that children under the MACR may be confined in an ‘Intensive Therapy Place’ (rather than a ‘detention place’), to be defined by the Minister in regulation.

It’s not clear what form these places will take, though the Explanatory Statement suggests they are likely to be secure facilities. It is quite clear to us that, despite the bill using an alternative word to detention, these places will be places of detention. This is inconsistent with the object of raising the MACR.

Engagement with therapeutic support and services should be voluntary and non-coercive. It's not appropriate, therapeutic or trauma-informed to use coercive measures and threats of punishment and detention to force compliance with a therapeutic program. If a child is hesitant to engage with or withdraws from support, it is because that support is not appropriately tailored to the child. The child is not deficient. This is a matter of principle which is particularly relevant to Aboriginal and Torres Strait Islander children who may be ordered to engage with mainstream services or confined in places that are culturally unsafe and non-responsive.

Consistent with our concerns above about the potential for disproportionate criminalisation of First Nations families and carers, we are also concerned that confinement will be disproportionately deployed against First Nations children. Our communities are over-policed and experience seriously disproportionate intervention by the child removal system in the ACT. We hold a reasonable fear that the disproportionate application of carceral responses to Aboriginal and Torres Strait Islander children will extend to the use of these new powers.

The bill is silent on whether and how these places will be subject to oversight by the ACT National Preventive Mechanism, and therefore how the government intends to fulfill its obligations under the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in relation to these places.

Recommendation 4: amend the bill to ensure all children under 14 cannot be detained or 'confined'. If this recommendation is rejected, the bill must be amended to ensure its confinement regime is OPCAT-compliant.

First Nations self-determination of and control over the care and support of our children

Part 14A of the bill establishes a 10-12 person Therapeutic Support Panel, who will receive referrals of children with support needs, assess those needs, coordinate and assist in the development of therapy plans, and have the ability to recommend a child be placed under an intensive therapy order. The bill requires the Minister to appoint at least one Aboriginal and/or Torres Strait Islander person, and one person to 'represent Aboriginal and Torres Strait Islander communities' (but who, on our reading, may or may not be Aboriginal or Torres Strait Islander). By our reading, the bill therefore requires that only one First Nations person be included on the panel.

We hold as a matter of principle that decisions about the care and support of First Nations children should be made by First Nations peoples. We share the concerns of the Aboriginal Legal Service NSW/ACT that the proposed composition of the panel does not adequately provide for First Nations self-determination over the care and support of Aboriginal and Torres Strait Islander children and young people. We also share the ALS' concerns about the low bar for appointment for a police representative.

We note the Aboriginal and Torres Strait Islander Children's Commissioner's role is limited to having their view on cases considered by the director-general, to have access to orders and therapy plans relating to a First Nations child, and to apply for amendment or revocation of an order. The involvement of the Commissioner is welcome but limited, and not sufficient in itself to address concerns about the panel's composition when making decisions about the lives of Aboriginal and Torres Strait Islander children.

Multidisciplinary panels and unmet housing need

Part 14 of the bill currently provides for the referral of a child to the Therapeutic Support Panel only ‘if the [referring] entity believes on reasonable grounds that a child or young person has a genuine need for therapeutic support services, and— (a) is at risk of harming themselves or someone else; or (b) has harmed themselves or someone else.’ It is appropriate and positive that ‘(m) a person who has daily care responsibility or long-term care responsibility for the child or young person’ is included in the definition of referring entity to enable families and carers to self-refer. However, there remains a need for easily-accessible multidisciplinary support pre-crisis, without the threat of coercion in the form of intensive therapy orders and possible confinement.

It is critical that harmful behaviour, or crisis, is not seen as a necessary trigger for the provision of support. That is how the criminal legal system currently operates and it fails our children and families by not responding adequately to individual and community needs until significant hardship has already occurred. The way government responds to, and funds, services needs to be reoriented to focus on prevention, early intervention and holistic responses rather than crisis response.

Change the Record has advocated for the establishment of a Multidisciplinary Panel to respond to these questions in an individualised, therapeutic and needs-based framework. There will not be a ‘one size fits all’ solution to the needs of children and their families. The panel proposed in the bill differs from those recommended by civil society and the independent report produced for the ACT government by Emeritus Professor Morag McArthur. We maintain there is a need for this form of service infrastructure which does not have the coercive powers of the proposed Therapeutic Support Panel, to be easily accessible before the point of crisis.

It is our view that the establishment of a multidisciplinary panel where children can be referred if they come into contact with police, or if their behaviour raises concerns within the home, community or school, is an essential part of both diverting a child away from the criminal justice system and ensuring that the appropriate assessments, identification of needs and referrals to relevant services occurs.

For this multidisciplinary panel to work effectively it is crucial that its primary role is to assist and strengthen families, and identify the needs of - and supports for - the child. The process should be confidential and limited to the service providers in the room (each of which must be there

with the consent of the child and family) unless consent is given for further referrals, and must not involve referrals to the child protection system. To do so, risks alienating families and children who fear their engagement will result in removal.

The services and systems that comprise the human services sector in the ACT (and that are likely to be called upon to facilitate access to the necessary supports) must be authorised to apply flexibility in respect of eligibility restrictions, and must be empowered to intervene early with adequately funded service responses that focus on both the child themselves as well as the environment within which the child is situated to best support children and young people to move through periods of crisis and have their needs met.

One example of currently unmet need which we are aware of is accommodation options (crisis, short and medium term) for 10 to 17 year olds. We have heard repeated concerns from police, for example, about the difficulty they face if they come into contact with a young person exhibiting challenging behaviours where that young person does not have a safe family environment they are able to return to, or where they do not have stable accommodation to which they are willing to return. Providing safe, supported accommodation for children and young people in this age bracket who may come into contact with law enforcement or other services, and require somewhere safe to stay, is essential.

Extinguishment of criminal records, removal of potential for children to be respondents to family violence orders and protection orders

We strongly support these provisions and applaud the government for their inclusion in the bill.

We thank the committee for the opportunity to contribute to this inquiry. Raising the MACR will be a significant step forward in advancing the human rights of children on this continent. We urge the committee to accept our recommendations and recommend the bill be passed with the suggested amendments. We urge the ACT government to amend the bill in line with our recommendations.