



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

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

Submission Number: 021

Date Authorised for Publication: 14 June 2023

12 June 2023

Standing Committee on Justice and Community Safety
ACT Legislative Assembly
196 London Circuit
Canberra ACT 2601

By Email: LACommitteeJCS@parliament.act.gov.au

Dear Committee Members,

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

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) and thank you for the opportunity to provide a submission to the Inquiry into the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023.

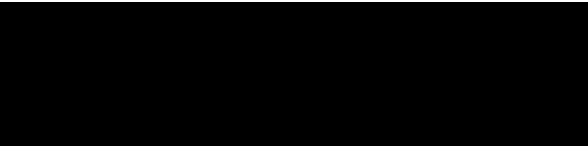
The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people, families and communities.

More than 280 ALS staff members based at 26 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, and court representation in criminal law, children's care and protection law, and family law.

Increasingly, we represent Aboriginal and Torres Strait Islander families in Coronial Inquiries, provide a variety of discrete civil law services including tenants advocacy, and undertake policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander communities.

The ALS would welcome the opportunity to discuss our feedback further. If you have any further questions, please contact ALS Policy Officer, [REDACTED] via email at [REDACTED] and our general policy inbox at policy@alsnswact.org.au.

Yours sincerely,



Nadine Miles
Principal Legal Officer
Aboriginal Legal Service (NSW/ACT) Limited

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

13 June 2023

Background

The ALS made a submission on 21 August 2021 in response to the ACT Government's Discussion Paper on Raising the Minimum Age of Criminal Responsibility. The ALS made a further submission on 24 February 2023 in response to the draft *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023* (the Draft Bill).

Our response to the Inquiry into the Justice (Age of Criminal Responsibility) Legislation Amendment Bill (the Bill) 2023 draws from both submissions.

The proposed Bill raises several complex issues. We note that our submission is made within the limitations of a tight timeframe for responses and welcome the opportunity for further consultation.

The ALS welcomes the amendments made to the Draft Bill following our submission on 24 February 2023. We hope that further changes will be made to the Bill in light of the submissions made by the ALS and other members of the multi-agency Raise the Age campaign.

1. Importance of raising the age

The ALS welcomes the change to the minimum age of criminal responsibility (MACR) to 14 years of age in the ACT. Aboriginal and Torres Strait Islander young people are overrepresented at every stage of the criminal justice system; this is particularly so for the youngest children involved in the criminal justice system. Raising the MACR aligns with a commitment by the ACT Government to Closing the Gap (Target 11). The ALS also welcomes positive changes regarding family violence orders for children and the extinguishment of past convictions of children under 14.

We reiterate our concern that the Bill delays raising the MACR for 12 and 13-year-old children. Inadequate justification is provided in the Explanatory Statement as to why these children should remain exposed to a system that the ACT government concedes is inappropriate and harmful. Their lives are precious. They cannot wait for change.

2. No carve outs

We reiterate our core position that the inclusion of carve outs for some offences alleged to have been committed by children between the ages of 12 and 14 is fundamentally inconsistent with the principles underpinning the Bill.

We refer to our 24 February 2023 submission regarding the implausibility of including the Schedule offences as exceptions and note the inadequacy of the justification in the Explanatory Statement, *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023*. We reiterate our firm view that the United Nations Committee on the Rights of the Child's indication that a MACR of 14 is appropriate without exception and cannot be dislodged by the countervailing considerations outlined in the Explanatory Statement. This is particularly where the Bill creates a therapeutic, alternative system for responding to the complex needs that a child charged with a Schedule offence may present with. To exclude children from this system due to an age demarcation that has no meaning in the medical literature is unacceptable.¹

¹ United Nations Office of the High Commissioner, Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) *Youth Justice* 13(2) 102-110.

We note that the Explanatory Statement refers to children above the age of 12 charged with a Schedule offence may be detained in the youth justice system ‘if found guilty or convicted of these scheduled offences’.² This statement misrepresents the reality that the Bill allows a child charged with a Schedule offence who is presumed innocent to be remanded in a youth detention centre while their matter is proceeding. Such an incarceration is of particular concern considering the prospect that a child may be found not guilty of such an offence, possibly due to the presumption of *doli incapax*. In these circumstances, a child as young as 12 will experience the adverse impacts of early-life incarceration for a matter that they are ultimately found not guilty of due to their inability to appreciate the wrongness of their conduct due to their young age. Such a situation is a grave outcome of our present system and is not remedied by the reforms proposed by the Bill.

The ALS does not accept the argument in the Explanatory Statement that given the small jurisdiction of the ACT, the very small number of young people who *allegedly* commit Schedule offences would ‘miss out’ on the opportunities offered by a youth justice facility if they were placed in a therapeutic placement. Such a characterization does a disservice to the Bill’s ambitions regarding establishing a therapeutic framework that meaningfully responds to the welfare needs presented by young people with concerning behaviours.

The argument that ‘therapeutic containment’ without proof of guilt for serious offences presents a human rights concern again elides the fact that the Bill allows for the incarceration of these children without a finding of guilt.

We also hold concerns that allowing for some exceptions to raising the MACR creates a precedent for expanding the number of exceptions in the future. Given the inconsistent inclusion of those offences in the Schedule and their rareness in the ACT community, it is not clear on what basis further offences will not be added.

3. Therapeutic support panel

The ALS is concerned by the risk that the Intensive Therapy Panel may involve up to 10-12 representatives but only one Aboriginal or Torres Strait Islander person. This is particularly the case where decisions are being made about the imposition of an Intensive Therapy Order (ITO) for Aboriginal and Torres Strait Islander children. For these children, self-determination requires that Aboriginal and Torres Strait Islander people are meaningfully involved in decision-making, and not have their views outweighed by the presence of a significant majority of non-Aboriginal and Torres Strait Islanders. To have meaningful representation, an Intensive Therapy Panel making decisions regarding Aboriginal and Torres Strait Islander young people should sit with an Aboriginal Community Controlled Organisation or have representation of a majority Aboriginal and Torres Strait Islander people. Such an approach would be consistent with section 10 of the *Children and Young People Act 2008*. The ALS is also concerned by the lower standard for appointment to the Panel for a police officer, as compared to other agencies (pursuant to section 501E(2)(c)).

4. Intensive Therapy Order (ITO) and Coercion

We maintain our concerns regarding the use of coercion in ITOs. The ALS recognizes the focus on voluntariness in the Bill, and the recognition that for interventions to be therapeutic, they must be voluntary.

² Explanatory Statement, Page 18.

The ALS welcomes the high standard of ‘significant risk of significant harm’ that must be met prior to an ITO being made by a Children’s Court. We are however concerned that it is not required for an order to be made to demonstrate that less restrictive measures have been tried due to the inclusion of s 549(b). It is not clear on what basis the director-general can consider that less restrictive measures are not appropriate. There is also no provision for requiring that there must be an attempt to use less restrictive measures that are culturally appropriate and genuinely trauma-informed. Defaulting to coercion in the absence of genuine, culturally appropriate, non-coercive therapeutic responses exposes Aboriginal and Torres Strait Islander children to harsher treatment, including confinement.

There is similarly no consideration of whether the use of non-voluntary treatment and/or confinement is likely to lead to greater harm, as opposed to merely being likely to reduce harmful conduct (see s 549(f)). Given the literature on the experiences of children in detention,³ the risk that involuntary medical treatment and/or confinement will adversely affect a child must be weighed against any possible benefit gained by involuntary treatment.

We have seen widespread use of measures that are said to be a ‘last resort’ be used against Aboriginal and Torres Strait Islander children in an excessive and disproportionate way. The Bill should not be complacent about the utility of a ‘last resort’ consideration absent strict, mandatory requirements. The ALS proposes further restrictions on the use of these coercive powers, as well as the inclusion of explicit indications of what behaviour is not considered ‘significant risk of significant harm’, such as indicators of poverty, residing at multiple addresses and non-criminal behaviour such as truanting or absconding. We also note that the test for interim containment in section 544(b)(iii)(A) refers to preventing the child from engaging in harmful contact, not ‘significantly harmful conduct’. We also note that the test for interim containment is not carried across to the imposition of a final ITO involving containment per section 549(d). The Bill must ensure that the high bar to use of these coercive provisions is consistent across the legislation.

Punishment of Families

The ALS strongly opposes the creation of new offences pursuant to sections 548 and 553 of the Bill. Creating a criminal penalty that carries significant fines and possible incarceration is not appropriate to assist children and those around them to follow a treatment plan. That such a penalty will be administered by the police further heightens concerns of disproportionate punishment and criminalization of Aboriginal and Torres Strait Islander families. It will punish Aboriginal and Torres Strait Islander families who may not be aware of the terms of an ITO, may lack the material means to fulfill the ITO and may have cultural obligations that conflict with the terms of an ITO. This is particularly the case for urgently imposed interim ITOs. There will also undoubtedly be occasions where the circumstances of a child subject to an ITO change abruptly. Subjecting those caring for a child to possible criminal sanction where they are unable to comply is deeply counter-productive and may produce adverse outcomes for the children involved. The provision of a statutory defence of a ‘reasonable excuse’ with a reverse burden of proof on the person charged is not an adequate protection against families charged in these circumstances.

³ See e.g. Shiv R Desai, ‘“Hurt People, Hurt People”: The Trauma of Juvenile Incarceration.’ (2019) *Urban Rev* 51, 638–658; Brenda Lin, Garner Clancey, Sindy Wang, ‘Youth justice in Australia: Themes from recent inquiries’ (2020) *Trends and Issues in Crime and Criminal Justice*, 605, 1-19.

5. Intensive therapy place

The provision of an Intensive Therapy Place is a significant aspect of the coercive features of the Bill. The ALS is concerned about the lack of detail regarding the Intensive Therapy Place and how it will be differentiated from a youth detention centre. We emphasise the need for any such placement to allow family to be present, to reside with any children at the placement and for the Place to allow as far as possible for a child to continue to be in the community. The child must be able to have frequent and meaningful contact with their family, community and any legal representation. The establishment of the Place must involve the input of Aboriginal and Torres Strait Islander communities and families and be responsive to the needs of children and families, beyond simply providing confinement. Such involvement, both in planning and practice, is critical to ensure compliance with sections 18 and 27 of the *Human Rights Act 2004*.

It is not clear in the present Bill what oversight mechanisms exist for the Intensive Therapy Place. This includes whether the Intensive Therapy Place falls within the remit of the ACT's National Preventive Mechanism, and meets the ACT's obligations pursuant to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the apply. It is the ALS' position that, as a place of involuntary detainment, the Intensive Therapy Place must be subject to these oversight mechanisms.

The ALS welcomes the consideration given to the need to have limits on how long a child is confined. We are concerned that a two-week confinement in the first instance is unduly long, particularly if the relevant behaviours are acute. We are also concerned that there is no cap on how long a child can remain confined pursuant to a final ITO, beyond the six-month limit imposed on ITOs generally.

6. Arrest of children under the MACR

The ALS opposes the maintenance of police powers to arrest a child under the MACR under ss 252A and 252B of the *Crimes Act 1900*.

The Bill misses an opportunity to ensure that no child under the MACR is subject to the trauma of arrest by police. The earlier a child interacts with the criminal justice system, the greater their chances of further recidivism and incarceration.⁴ That a child arrested under sections 252A and 252B of the *Crimes Act 1900* cannot be taken to a police station does not mean that their arrest is not a criminal justice response.

The present legislation, while requiring the minimum amount of force to be used, does authorise the use of force against very young children. The low threshold for using the power is concerning given the incursion it authorises by allowing arrest where there is merely a possibility of a breach of the peace or non-serious injury. The repeal of sections 252A and 252B of the *Crimes Act 1900* aligns the ACT's legislative framework with all other jurisdictions in Australia which do not have an arrest power for children under 10. It ensures that young children with behavioural concerns are supported by a therapeutic health response, not a quasi-criminal response. Investment should be made in non-police first responders with appropriate qualifications in health or youth work who can provide a non-

⁴ See, for example, Weatherburn D. *The problem of Indigenous over-representation in prison. In: Arresting Incarceration: Pathways Out of Indigenous Imprisonment* Aboriginal Studies Press; 2014.

stigmatising response. Such an investment is consistent with the goals of the Bill and the acknowledged benefit of non-police response.⁵

⁵ See research on principles of diversion in Cunneen C, Russell S, Schwartz M in 'Principles in diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction' in *Current Issues in Criminal Justice*. 2020:1-21. doi:[10.1080/10345329.2020.1813386](https://doi.org/10.1080/10345329.2020.1813386)