



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: 017

Date Authorised for Publication: 14 June 2023

6 June 2023

Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
Canberra ACT 2601

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

Dear Committee,

RE: Inquiry into 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'). Legal Aid ACT ('the Commission') provides vital services that cater to the ACT's most vulnerable young people involved with the justice and welfare systems. These services include legal assistance in relation to criminal law and care and protection matters, as well as non-legal support by way of our Community Liaison Unit.

The Commission strongly supports raising the minimum age of criminal responsibility (MACR) to 14 for all offences in the long term and refers to our submission regarding a previous draft of the Bill dated 20 February 2023 (attachment A). An elaboration on this position, as well as submissions in relation to various other elements of the Bill, can be found below.

1. Exceptions to the MACR for serious offences

Temporary exceptions to address practical concerns

A key concern for the Commission is that care and protection processes are not yet in a position to optimally address the needs of some young people affected by the raising of the MACR, particularly following subsequent to arrest/detention by the police. The corollary to raising the age is a well-established process for urgently managing the needs of young people and placing them in alternate (emergency) care. Likewise, clear protocols must be in place between CYPs and the AFP, so that the welfare of young people is protected in all circumstances. This practical concern may well sustain a graduated approach to the MACR implementation. However, any such exceptions made on practical, transitional grounds should only be temporary.

Opposition to long-term or ongoing exceptions to MACR

It is provided by the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* that the MACR should reflect “the facts of emotional, mental and intellectual maturity.”¹ Neurobiological research shows that adolescent brains are structurally different to that of a mature adult, particularly in areas related to impulse-control and decision-making.² The UN Committee on the Rights of the Child has argued in 2019 that the MACR should be set at 14 without exception, and commended parties that have a higher minimum age.³

Further, research demonstrates the criminogenic and detrimental impacts of early contact with the justice system. The Victorian Sentencing Council found in a study of 5,385 people sentenced in the Children’s Court of Victoria that the reoffending rate of young people first sentenced when aged 10-12 was 86%, more than double that of those who were first sentenced aged 19-20 (33%).⁴ In that study, each one-year increase in the age of first sentence and contact with the justice system was associated with an 18% reduction in the likelihood of reoffending within the next six years.⁵

Balancing principled objection to exceptions with practical concerns for implementation

To summarise, exceptions to the minimum age of criminal responsibility are, in the long term, at odds with both scientific understanding of young peoples’ development and criminological understanding of the effects of early exposure to justice procedures. However, we emphasise the need to ensure the existence of adequate support and management processes for young people as the MACR is raised, and as such consider some temporary exceptions may be justified for practical reasons.

2. Records of youth offence particulars

The Commission opposes an exception in amendment 56 allowing for records of youth offence particulars for the scheduled offences to be supplied to the court. The provision of such particulars in future criminal actions may well undermine the therapeutic focus of the Bill, by drawing focus away from the best interests of the child, and instead towards the potential for anything in the proceedings to work against them in the future.

¹ Standard Minimum Rules for the Administration of Juvenile Justice (‘Beijing Rules’), 29 November 1985, rule 4

² Judge Andrew Beecroft, ‘From Little Things, Big Things Grow: Emerging Youth Justice Themes in the South Pacific’ (Paper presented at the Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending, May 2013) p 5.

³ *General comment No 24 (2019) on children’s rights in the child justice system*’ UN Doc CRC/C/GC/24, p 6.

⁴ [Sentencing Advisory Council \(Victoria\) ‘Reoffending by children and young people in Victoria’ \(Report, December 2016\)](#) p 25.

⁵ *Ibid* p 26.

3. Legal representation throughout the intensive therapy order (ITO) process

It is worrying that the Bill suggests a young person will be unrepresented throughout the ITO process and in panel proceedings. A lack of legal advice and representation has the potential to create significant detrimental effects for children and young people through a lack of due process. Legal support would ensure the independence of the process, and is more consistent with the aims of human rights legislation, that underlines the protection of rights to due legal process where a person has their liberty impeded.⁶ Notably, the explanatory memorandum for this Bill notes that the right to a fair trial may be engaged and limited by the amendments, but does not elaborate on whether that limitation is reasonable and justified under the framework provided at s 28(2).⁷

The impacts of a lack of due process are particularly problematic given the capacity for an ITO to restrict a person's liberty (especially if not complied with), and the potential admissibility of evidence in ITO proceedings to future criminal proceedings under amendment 56. Legal advice should be available to enable young people to understand the impact of an ITO on their liberty, the impacts of breaching the order, and general advice about the proceedings.

If an advocate is not considered appropriate due to the therapeutic focus of the process, it may be appropriate to establish a role similar to that of the Independent Children's Lawyer in the *Family Law Act 1975* (Cth) so that young people's legal interests are not overlooked. Any such service will require adequate funding to properly represent and protect the rights of young people.

4. Warrants

The Bill makes amendments to apply the existing safe custody warrant scheme to the new ITOs.⁸ This warrant procedure may compromise the therapeutic focus by introducing criminal procedure, especially given this warrant can be applied for by a police officer. As noted above, early exposure to criminal justice processes has well-documented detrimental effects. The Commission submits that this warrant should require an additional safeguard which ensures it remains a last-resort safety option. This may be by way of, for example, a requirement for confirmation from a psychologist, doctor or CYPs case worker that on the information available, the young person is genuinely in danger (as opposed to merely missing their appointments).

Given the criminal character of the warrant process, another safeguard appropriate in circumstances where a young person may be detained under a warrant is the provision of legal advice. This is pertinent given concerns raised above regarding the importance of due process and the engagement of human rights of young people without representation.

⁶ *Human Rights Act* s 18, 21.

⁷ Explanatory Memorandum, Justice (Age of Criminal Responsibility) Bill 2023, 7.

⁸ Justice (Age of Criminal Responsibility) Bill 2023 Cl 12, amending *Children and Young People Act 2008* s 686.

5. Mental health referrals to ACAT

The Bill provides for referrals from the Children’s Court to ACAT in circumstances where a young person is known or suspected to have a mental disorder or illness.⁹ The Court has discretion to refer if satisfied a young person ‘may’ have a mental illness/disorder but is required to make a referral whenever satisfied that a young person does in fact have such a condition.

The new therapeutic support panel (TSP), which advises on the suitability of ITOs and development of therapy plans, will include members with expertise in paediatrics, psychology, and the specific needs of young people. By comparison, ACAT mental health hearings will generally include a presidential member of the Commission and a psychiatric expert, in a process which is not specifically designed to achieve rehabilitative outcomes for young people. As a result, the Commission submits that the TSP will be better equipped to assess and respond to the needs of young people, in comparison to ACAT.

Further, under the jurisdiction of ACAT, a young person may be subject to a psychiatric treatment order or community care order, along with further restriction orders, which approve the imposition of restrictions including detention at mental health facilities, confinement and use of restraints, involuntary seclusion, and forcible administration of medication.¹⁰ Such orders should not operate in a punitive fashion, eschewing the consequences that arise from institutionalisation of a young person.

To ensure that there is a primary focus upon rehabilitation and therapeutic care, the Commission submits that a young person should be given a chance to stabilise or improve their handling of their mental disorder or mental illness (through an ITO, or other means) *prior* to being sent to ACAT. The Bill allows for the Court to refrain from sending a child or young person to ACAT ‘if satisfied’ that an ITO is the best way to support a child or young person. In our view, the ‘bar’ for referral should be reversed such that referral may only be made if the Court is satisfied that an ITO or other recommendations of the TPS will not assist the young person, and referral is the best way to support them. This ensures that therapeutic approaches are the primary response, and exposure to orders allowing for institutionalisation arises only when less restrictive measures have failed.

6. No entitlement to compensation for criminal justice action

The Bill provides for amendment of the *Crimes Act 1900* to stipulate that a person who committed a youth offence before the commencement date of the Bill is not, because of the enactment of the Bill, entitled to compensation or damages as a result of any ‘criminal justice action’ for the offence.

⁹ *Justice (Age of Criminal Responsibility) Bill 2023* Amendment 12 – *Children and Young People Act 2008* s 575.

¹⁰ *Ibid* s 61, 65, 67, 73.

We submit that this division should be redrafted to clarify that there remains an ability to claim compensation for *unlawful* criminal justice actions. The impact that, for example, unlawful arrest resulting in unlawful detention and prosecution can have on a 10-12 year-old is immense, and the Commission submits it is appropriate that they be able to seek compensation for such occurrences.

7. Increasing availability of police diversions

It is important that raising of the MACR is paired with an increase in the availability of research-based diversions for young people. While the TPS and ITO scheme will allow for making of orders which therapeutically support young people, diversionary programs may allow for a young person's circumstances and actions to be addressed without needing to subject them to a formal panel and orders. Currently, the ACT has one key police diversion program, Restorative Justice, which may take referrals from Police, the DPP and Courts. However, Restorative Justice often has significant waiting periods, meaning that it is often not available as an immediate diversionary response to offending behaviour.

The Commission submits that additional early intervention options should be made available, both as an 'intermediate' step to account for young people who do not quite need the high level of engagement of a therapeutic order would entail, and as an additional option for orders being made at the stage of the panel or ACAT. These diversions should be funded to have timely capacity to maximise opportunities for engagement by young people and capture a variety of early intervention strategies in order to account for the many circumstances which contribute to youth offending. In other jurisdictions, success in reducing offending behaviour has been found in 'on country' programs,¹¹ drug and alcohol counselling services, cognitive behavioural therapy, anger management, family conflict resolution, and incentives related to school attendance.¹² Ensuring availability of such diversions alongside the ITO process will ensure that the increase to the MACR is paired with an array of measures to effectively address the complexity, variety, and differing extents of problems motivating problematic behaviours in children and young people.

8. Conclusion

The Commission appreciates the ongoing consultation in relation to the process of raising the MACR, and ensuring adequate support processes are available to young people in the ACT. We support a gradual transition which includes enhancing the availability of appropriate care and protection services for young people. In the longer term, once concerns about these services and processes have been addressed, a MACR of 14 without exceptions is supported.

¹¹ [For example, Queensland program to encourage Aboriginal and Torres Strait Islander young people to strengthen spiritual connections to community and land \(cyjma.qld.gov.au\)](https://www.cyjma.qld.gov.au)

¹² See e.g., Police Powers and Responsibilities Act 2000 (QLD) s 380; Caroline Harmon-Darrow et al 'Police Diversion at Arrest: A Systemic Review of the Literature' (2023) 50(3) *Criminal Justice and Behaviour* 307, 322.

Should you have any questions in relation to the above submissions, please do not hesitate to contact me at [REDACTED]

Yours sincerely

[REDACTED]

Dr John Boersig PSM
Chief Executive Officer
Legal Aid ACT

20 February 2023

Robyn Hakelis
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Dear Ms Hakelis,

RE: Consultation on the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

Thank you for the opportunity to comment on the draft of the above bill. Legal Aid ACT provides a number of vital services that cater to the ACT's most vulnerable young people who are involved with the justice and welfare systems. These services include non-legal support by way of the Community Liaison Unit, as well as legal assistance in relation to criminal law and care and protection matters.

Legal Aid ACT witnesses firsthand the effect early contact with the criminal justice and welfare systems has on vulnerable and disadvantaged young people. In keeping with our previous submissions on this issue, we strongly support raising the minimum age of criminal responsibility (MACR) to 14 for all offences.

Exceptions to the MACR for serious offences

Legal Aid ACT acknowledges the attraction of exempting some criminal offences from the increased MACR due to the capacity this may have to ensure children under the age of 14 in conflict with the law engage with appropriate support services.

Our primary position is that any increase to the MACR must be applied to all offences, regardless of the objective seriousness of the offence. The use of exceptions to the MACR fails to recognise the complex needs of children under the age of 14 in conflict with the law

(regardless of the severity of the behaviour).¹ The increase to the MACR reflects an understanding of the cognitive capacity and neurological development of young people, with focus being best directed towards the needs of each child and the intervention services that may serve those needs.

Adoption of an exceptions-based model would divert this focus and is a compromise away from the evidence-based principles of developmental maturity which underpin the raise in the MACR. It is unclear why the seriousness of an offence affects the capacity of a child to form the requisite intent for criminal responsibility, and why such capacity should be considered to exist for one offence but not another.

We note that in the community consultation process undertaken through the Territory's YourSay website, two-thirds of submissions took a similar position to the Commission on this issue, opposing exceptions or 'carve-outs' for the new MACR of 14.

Application for Intensive Therapy Orders

Where intervention programs have been unsuccessful in engaging and supporting young people under the age of 14, the Commission acknowledges that it may sometimes be necessary to deprive or place conditions on their liberty. This arises primarily in situations involving a risk of harm, and under the new scheme will be achieved by way of an Intensive Therapy Order (ITO). The gravity of this decision should be reflected by the exhaustion of all other intervention measures.

To this end, the Commission appreciates the requirement that the Director-General must have found less restrictive measures unsuccessful. Similarly, we support the requirement that the child or young person presents a 'significant risk of significant harm' which is 'imminent' before the Court may make an ITO.²

To further ensure that the making of an ITO is a last resort, we submit that the drafting of the new sections 540 and 549 *Children and Young People Act 2008* should require the Director-General, in making an application for an ITO, provide evidence of (rather than simply 'state') why less restrictive alternatives were not successful or were not considered appropriate. This will assist the Court in reaching a decision independently as to whether 'there are no less restrictive ways... to prevent the child or young person from engaging in harmful conduct' as required at s549(c).

¹ Lisa Rapp, 'Delinquent-Victim Youth—Adapting a Trauma-Informed Approach for the Juvenile Justice System' *Journal of Evidence-Informed Social Work* (2016) 13:5 492, 493.

² s 549

Composition of the ‘Intensive Therapy Panel’

The draft bill provides for creation of an ‘intensive therapy panel’ (though the name of this panel may change in later versions of the bill). Previously, the Commission made submissions indicating that MACR and the overrepresentation of Aboriginal and Torres Strait Islander individuals in the justice system are inextricably linked, and that as a result it would be appropriate that an elder from the community occupies a permanent position on the panel.³

A low MACR has a specifically adverse effect on Indigenous children – for example 2020-21, just under half (49%) of young people aged 10-17 in the justice system on an average day were Indigenous Australians.⁴ For the ACT specifically, 74.7 young Indigenous people per 10,000 were under supervision or detention, compared to just 11.6 per 10,000 for young non-Indigenous people.⁵ The proportion of Indigenous children is even greater when the age range is limited to children aged 12 years or younger.⁶

We are pleased to find that the draft bill includes a requirement that the Minister must appoint at least 1 person to the panel to represent ATSI people, and further that an area of qualifications, experience or expertise for which a person may be appointed as a member of the panel is ‘working with Aboriginal and Torres Strait Islander children and young people.’⁷

Beyond the requirement for having 1 panel member to represent ATSI people however, the Commission suggests that it may be appropriate to more broadly require that a qualification of all panel members is their experience and involvement in community work relating to young people generally, as well as specifically young ATSI people.

The resolution to systemic issues such as ATSI overrepresentation in criminal justice matters requires a wholistic approach. Though the presence of at least one ATSI representative on the board is a beneficial step in this direction, all panel members should be experienced in seeking understanding and resolution of the often-unique issues faced by young people, and particularly disadvantaged young people. In its current form, the Bill allows for appointment of panel members who may have expertise in areas such as psychology or criminology, but do not have pre-existing experience in applying this expertise to meet the actual needs of young people, including young ATSI people, in our community.

The requirement for this experience will also support the independent decision-making of the board, by ensuring that panel members have genuine experience working collaboratively in the

³ Legal Aid ACT, Submission to Minimum Age of Criminal Responsibility Reference Group (4 August 2021).

⁴ Australian Institute of Health and Welfare *Youth Justice in Australia 2020-21* (31 March 2022) 11

⁵ Ibid 12.

⁶ Chris Cunneen, ‘Arguments for Raising the Minimum Age of Criminal Responsibility’ (*Comparative Youth Penalty Project* Research Report, March 2020) 23.

⁷ s 501E

community to support young people experiencing various types of disadvantages. The Bill acknowledges the importance of such independence, which will be relevant in determining its success within the new scheme, through the inclusion of s501C(2).

Breach of Therapeutic Correction Order

The Bill creates a new Therapeutic Correction Order (TCO) which will allow the Court to require a young offender comply with certain conditions and undertake the completion of a therapeutic correction plan.

The Commission is concerned with the handling of breaches to these orders. More emphasis should be placed when handling breaches upon the reality of accessing some types of therapeutic treatments in the ACT. A young person should not be recorded as having breached their order, even where the Court decides to take no action in relation to that breach, merely because they were unable to secure a therapeutic appointment, or a spot at a detoxification facility. Further, many other factors which particularly affect young offenders (such as trauma) can make it particularly difficult to engage with these services in particular ways.

The Commission submits that it would be more appropriate to support amendment of TCO as an option to account for these circumstances, rather than taking a breach action and allowing the Court to review the TCO as a consequence of a breach action. This latter process, which is one of the orders available to the Court in the Bill's provision for breach, would still result in a breach being recorded on the young offender's record, creating lasting setbacks for them even where the breach may have been through no fault of their own.

A better system for handling breaches may be achieved through implementing a system of warnings and discretion, similar to that considered in s102 of the *Corrections and Sentencing Legislation Amendment Bill 2022*. This would allow officers to note minor breaches without reporting them, subject to a set of guidelines, reducing the number of unnecessary breach hearings which the Court is required to conduct. The Commission made a submission about that Bill which pointed out that, in determining how to respond to a potential breach, officers should be prompted to consider an application to review an offender's good behaviour obligations.⁸

Similarly, where discretion is given prior to a breach action arising in the sentencing Court, officers should be prompted to consider whether an application for review (s133XU) would be more appropriate, or whether the breach is so minor as to not warrant a court hearing. Excluding this discretion from the *Justice (Age of Criminal Responsibility)* bill currently results in an unnecessary inconsistency between the proposed handling breaches for TCOs and Good Behaviour orders, despite the similar objectives and conditions available for those orders.

⁸ [Submission 003 – Legal Aid ACT](#), Inquiry into the Corrections and Sentencing Legislation Amendment Bill 2022.

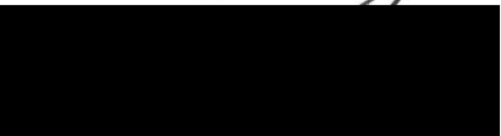
Conclusion

The Commission is broadly supportive of the drafting of the *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023*, other than for the four issues outlined above.

We appreciate the wide community consultation that has been undertaken in the raising of the MACR, and believe it represents a significant step towards supporting safe communities and the protection of children.

Should you have any questions in relation to the above submissions, please do not hesitate to contact me at john.boersig@legalaidact.org.au.

Yours sincerely



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