Youth Law Australia, Law Building
UNSW Sydney NSW 2206
Email: admin@yla.org.au
Phone: (02) 9067 6510

Submission of Youth Law Australia to the ACT Government Minimum Age of Criminal Responsibility (MACR) Discussion Paper

Acknowledgment of Country

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation as the custodians of the land on which we work. Youth Law Australia also acknowledges the Ngunnawal people as the original and ongoing custodians of the land now known as Canberra. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

Introduction

Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time and receive free and confidential legal advice and help. We are also dedicated to addressing the human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

We welcome the work of the ACT Government on the important issue of raising the minimum age of criminal responsibility. We are delighted to have the opportunity to respond to the questions raised in the Discussion Paper.

Raising the minimum age of criminal responsibility is not only consistent with international human rights law, it also has the potential to result in a new approach to dealing with children and young people who engage in problematic behaviour in a way that is focused on their welfare.[1] Such an approach has the potential to deliver great benefits not only to young people and their families, but to society more generally.

In this submission, we have responded to seven of the twenty discussion questions. However, we would like to note at the outset that despite the detailed questions raised in the Discussion Paper, there is no question that relates specifically to Aboriginal and Torres Strait Islander children and young people. This is disappointing, particularly given that Aboriginal and Torres

[1] This is foreshadowed in paragraph 16 of the Discussion Paper.

Strait Islander children and young people are disproportionately represented in the ACT youth justice system. We have included some additional observations about this at the conclusion of this submission.

Raising the MACR to 14 years

We note that the Discussion Paper refers to the decision in Scotland to raise the minimum age of criminal responsibility to 12, instead of 14. The Discussion Paper doesn't appear to suggest that this approach should be adopted in the ACT, although it does note that preliminary evidence suggests that young people who currently interact with the justice system require the most support when they are over the age of 13.[2]

We acknowledge that raising the minimum age to 14 will require significant reform and expansion to the services and interventions available to young people. However, we consider that as a society, we owe it to our young people to provide these supports. We encourage the ACT Government to be courageous, and to raise the minimum age to 14.

We note also that the Discussion Paper refers to various challenges that arise from the ACT having a different MACR to other states and territories, and to that under Commonwealth legislation.[3] We strongly encourage all other jurisdictions to follow the ACT's lead and raise the MACR to at least 14 as a matter of the highest priority.

Question 1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

Youth Law Australia considers the minimum age of criminal responsibility should be raised to 14 for all behaviour that constitutes a criminal offence. There should be no exceptions.

The reasons which support raising the minimum age apply equally to serious offences.[4] It should be noted that the offences commonly raised in support of creating this 'exception' are things like murder, manslaughter, and sexual assault. However, existing research and publicly available data suggest it is extremely rare that a young person under the age of 14 commits a very serious offence such as murder.[5]

---

[2] Discussion Paper, paragraphs 23-24.

[3] See for example paragraphs 91-94 and 104-105 of the Discussion Paper.

[4] *United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system,* paragraph 25. See also paragraphs 7-10 of the Discussion Paper.

[5] Kelly Richards, '*What makes juvenile offenders different from adult offenders?*', Trends & issues in crime and criminal justice no. 409, Australian

Harmful sexual behaviour by children and young people, such as a sexual assault, is a complex issue. Unsurprisingly, research suggests that many (but not all) children who engage in harmful sexual behaviours have experienced prior trauma or abuse.[6] Such behaviour should be viewed as a health and welfare issue for children and young people under 14, with social services rather than legal institutions determining the appropriate response.

Youth Law Australia agrees with the observations of the United Nations Committee on the Rights of the Child that:

> *The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.*[7]

The Royal Commission into Institutional Responses to Child Sexual Abuse considered how to respond to children with harmful sexual behaviours in its final report. The Commissioners were of the view that the public health approach – encompassing three tiers of intervention – can be applied to preventing these behaviours.[8] It noted that research suggests that therapeutic interventions can reduce or eliminate children's harmful sexual behaviours. The best practice principles developed by that Royal Commission provide a useful guide to addressing this behaviour.

In very serious cases, there are already existing legal frameworks in place for protecting young people and the community (including child protection and mental health frameworks). While these could undoubtedly be reformed and improved, additional frameworks should only be added when supported by a strong evidence base. With reference to paragraph 29 of the Discussion Paper, there may be ways in which a court could mandate involvement in therapeutic interventions if this was considered necessary in exceptional circumstances, other

---

Institute of Criminology February 2011) 409, Canberra: Australian Institute of Criminology. See also paragraph 24 of the Discussion Paper.

[6] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 20.

[7] See research into brain development and maturity of children, and capacity to engage with the criminal justice system. For example: Elly Farmer, *'The age of criminal responsibility: developmental science and human rights perspectives'* (2011) 6(2) Journal of Children's Services, pages 86-87.

[8] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 10, Children with harmful sexual behaviours, page 13.

than through the criminal justice system. We do not however consider this to be a sufficient justification for creating exceptions to the MACR.

Question 2. Should *doli incapax* have any role if the MACR is raised?

In our view, *doli incapax* has no role in the youth justice system, even if the MACR is raised.

The problems with the presumption of *doli incapax* (including its statutory manifestations) have been well-documented, and were the subject of a submission by Youth Law Australia to the Australian Council of Attorneys-General in February 2020.

In practice *doli incapax* operates unevenly, inconsistently and results in children remaining remanded in detention for longer periods of time. In our view, the impact of the intractable practice issues in applying *doli incapax*, is that the principle is an inadequate justification for refusing to increase the minimum age of criminal responsibility in Australia. For the same reasons, we also don't consider that *doli incapax* should play a role if the MACR is raised.

In addition, one of the insurmountable problems with this principle, however formulated, is that it does not prevent children from becoming involved in the criminal justice system in the first place. Commentators note that: 'while the presumption is in itself designed to remove children who lack the necessary capacity from the justice system, for this to be an effective safeguard such a response must occur at the earliest point and without requiring the child to spend prolonged periods of time within the bounds of the criminogenic justice system institutions'.[9]

We note also the comments of the United Nations Committee on the Rights of the Child that *doli incapax* and similar presumptions:

1. were initially devised as a protective system, but have not proved so in practice
2. leave much to the discretion of the court, and can result in discriminatory practices
3. risk becoming a retrogressive position regarding the minimum age of criminal responsibility.[10]

[9] Wendy O'Brien and Lauren Renshaw, *'Bail and remand for young people in Australia: A national research project'*, Research and public policy series no. 125, Canberra: Australian Institute of Criminology.

[10] United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, paragraph 25.

Question 3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

In general, Youth Law Australia considers the principles outlined in paragraph 41 of the Discussion Paper to be appropriate. However, we consider that these principles appear to adopt a child welfare approach. We consider that a child rights approach should also be reflected in the principles underpinning an alternative model.

A child welfare approach does not guarantee that an individual child will not have very poor outcomes. Nor does it provide a remedy when they do. Child rights bring a focus on minimum standards and the justification for a violation of a young person's rights. They also provide a mechanism for holding duty-bearers accountable for individual violations.[11]

Importantly, a child rights-based approach 'demands that the views of children have an impact on decisions regarding matters affecting them'.[12] We consider that the right to participation, reflected in article 12 of the United Nations *Convention on the Rights of the Child*, in particular, should be given prominence in these principles. Free and accessible independent advocacy services for children and young people who are exhibiting harmful behaviours will be an important aspect of ensuring the effective implementation of these rights.[13]

Question 9. Should children and young people under the MACR ever be deprived of their liberty as a result of serious harmful behaviour (e.g. murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

Youth Law Australia considers that no children under 14 should *ever* be deprived of their liberty for criminal justice purposes as a result of serious harmful behaviour. As previously stated, very few young people in the ACT, and in Australia more broadly commit serious harmful behaviour and our view is that these behaviours are better addressed by therapeutic (encompassing health, education and wellbeing aspects) rather than legal means.

It is not clear from the Discussion Paper whether this question contemplates a deprivation of liberty in situations other than criminal justice (for example, under mental health legislation). In

[11] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017).
[12] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017), pages 48-49.
[13] See for example United Nations Committee on the Rights of the Child, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child.

any event, consistent with human rights law, any deprivation of liberty should be as a last resort, and for the shortest period of time possible.[14]

International research confirms that 'the particular circumstances of detention are directly harmful to the mental and physical health of children across all situations of deprivation of liberty'.[15] It is also worth repeating the comments of the *Global study on children deprived of liberty* that:

> *Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.*[16]

We do not consider that criminal justice responses are required as a means of escalating the response to underlying needs that have led to repeated harmful behaviours.

Question 10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

Youth Law Australia considers it important that the rights of victims of harmful behaviours by children and young people who are under the MACR be protected. We do not consider that raising the minimum age removes the reasons for the application of victims' rights. Clearly, a victim has no say in the age (or indeed the mental capacity) of a person who harms them.

We consider it particularly important that support, including financial assistance, provided to victims of crime remain accessible to victims of harmful behaviours by young people. Such a change would not appear to require complex legislative reform. Indeed existing measures could be applied to victims of behaviour that would, but for the age of the perpetrator, constitute an offence.

Question 18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent' or 'extinguished'? If yes, should such

[14] See for example United Nations Convention on the Rights of the Child, article 37(b).
[15] United Nations, Global study on children deprived of liberty, United Nations General Assembly, 74th session, 11 July 2019 at paragraph 26.
[16] United Nations, Global study on children deprived of liberty, United Nations General Assembly, 74th session, 11 July 2019 at paragraph 3.

convictions be spent/extinguished automatically and universally, or should they be spent only under application? How should the approach differ if there are exceptions to the MACR?

Currently in the ACT, not all convictions against children and young people are automatically spent, and some never become spent.[17]

Youth Law Australia considers that historical convictions for offences committed by children when they were under the revised MACR should be automatically and universally extinguished. This is primarily for reasons of fairness, as well as to give all young people under the revised MACR who have been in contact with the criminal justice system the opportunity to avoid the prospect of being treated differently on account of their record.[18]

We do not see any justification for a system whereby people should have to apply to have these convictions extinguished (or spent). Such a process is likely to introduce unnecessary bureaucracy, and to disadvantage those who are already most disadvantaged (including because of disruption in education and a consequent lack of functional literacy). We consider that it should be a relatively straightforward administrative process to identify those convictions that should be extinguished. This situation is very different to the introduction of the scheme for extinguishing convictions for historical homosexual offences, which inevitably requires an assessment to be made of individual circumstances.[19]

As previously stated, Youth Law Australia does not consider that there should be exceptions to the MACR. The difficulties that are likely to arise from the introduction of such exceptions, which are flagged in the Discussion Paper,[20] provide a further reason why this approach should not be adopted.

However, we note that records of offences committed against children (particularly but not limited to sexual offences) should be considered as part of a person's working with vulnerable people (or equivalent) check.[21]

Question 19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including

[17] *Spent Convictions Act 2000* (ACT), Part 2.

[18] Although discrimination on the basis of irrelevant criminal record is protected in certain areas under section 7 of the *Discrimination Act 1991* (ACT), discrimination cases can be notoriously difficult to prove, particularly in areas such as employment.

[19] See *Spent Convictions Act 2000* (ACT), Part 3A and Explanatory Statement, Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015 (ACT).

[20] See paragraphs 101-103 of the Discussion Paper.

[21] See *Working with Vulnerable People (Background Checking) Act 2011* (ACT). It appears that the provisions of this Act are already broad enough to encompass information that may be held by agencies about behaviour that may not have been the subject of a conviction - see for example section 18(2) of the Act.

for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act 2008* and the *Information Privacy Act 2014* sufficient?

Information sharing laws that enable relevant agencies to share information about the safety and wellbeing of children and young people within the ACT, and between the ACT and other jurisdictions, are required:

- to ensure risk factors for children and young people are identified early, and that they are connected with appropriate early intervention services
- to ensure services for children and young people who exhibit harmful behaviours or who may be at risk work collaboratively and effectively[22]
- to protect children and young people from those who may pose a risk (including children and young people exhibiting harmful sexual behaviours).[23]

For these reasons, we consider that nationally consistent information sharing laws will be an important component of the effectiveness of MACR reforms, as well as other child protection-related schemes.[24]

The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that the Commonwealth and state and territory governments make nationally consistent arrangements for sharing information about the safety and wellbeing of children, which can operate in and across all Australian jurisdictions. It also recommended that governments work together to support the implementation of this recommendation with education, training and guidelines.[25]

These recommendations were accepted in principle by the ACT Government.[26] In its second annual report in December 2019, the ACT Government noted it was part of a national Working

[22] See for example Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, pages 221-222.
[23] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, pages 219-221.
[24] See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, page 140.
[25] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Recordkeeping and information sharing, Vol 8, recommendations 8.6-8.8. We note the ACT's information sharing arrangements in the *Children and Young People Act 2008* (ACT) appear to be more limited than those recommended by the Royal Commission - see for example page 163 of Vol 8 of the Final Report.
[26] The ACT Government Response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, pages 34-35.

Group that is responsible for promoting consistent national approaches to four focus areas, including information sharing.[27]

Over three years have passed since the Royal Commission's recommendations were handed down, and there does not appear to have been any notable publicly reported progress in implementing the information sharing recommendations through this forum, or otherwise.[28]

We assume the ACT Government continues to participate in the interjurisdictional working group that is considering these reforms. We encourage the ACT Government to work with other jurisdictions through this forum, as well as other available channels, to progress information sharing reforms as recommended by the Royal Commission.

Aboriginal and Torres Strait Islander children and young people

As the Discussion Paper acknowledges, Aboriginal and Torres Strait Islander children and young people are disproportionately represented in the ACT youth justice system. The paper states that on an average day in 2019-20, 22 per cent of the youth population under youth justice supervision were Aboriginal or Torres Strait Islander, despite only representing three per cent of the general population of the same age.[29] We note also that Indigenous Australians who are involved with the criminal justice system experience poorer outcomes than Indigenous Australians outside the justice system and non-Indigenous people in the justice system.[30]

The minimum age of criminal responsibility should be raised for these reasons alone.

The overrepresentation of Aboriginal and Torres Strait Islander children and young people in the justice and care and protection systems in the ACT points to the need to give specific and careful consideration to the response to Aboriginal and Torres Strait Islander children and young people who may be at risk or who exhibit harmful behaviour.

We are pleased to read that the independent review will work in partnership with an Aboriginal consultancy and in consultation with Aboriginal and Torres Strait Islander representatives.[31] We are also pleased to see that the self-determination of Aboriginal and Torres Strait Islander communities in service design and delivery was identified as one of the principles that should

[27] The ACT Government Second Annual Progress Report Responding to the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, December 2019, page 5.
[28] We note that The ACT Government Third Annual Progress Report Responding to the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (March 2021) does not mention this work.
[29] Discussion Paper, paragraph 13.
[30] Australian Institute of Health and Wellbeing, *Improving mental health outcomes for Indigenous Australians in the criminal justice system*, 2021, at page 38.
[31] Discussion Paper, paragraphs 18-19.

underpin the development of an alternative model to responding to harmful behaviours by children and young people.[32]

We note the importance that Aboriginal and Torres Strait Islander communities are at the centre of the design and delivery of interventions and services, and that these should be tailored to the specific social and cultural circumstances of that community. The implementation of approaches imposed by external decision-makers or that have been implemented effectively in another community which may have different circumstances, should be avoided.[33] This is consistent with a child rights-based approach, which is one that is 'culturally sensitive and locally owned'.[34]

We consider that these principles, and the disproportionate impact of criminalisation on Aboriginal and Torres Strait Islander children and young people, should inform each of the reform questions raised in the Discussion Paper. That is, these principles should underpin not only the approach to service design and delivery, but extend to the legal and administrative frameworks developed as part of the raising the minimum age reforms.

[32] Discussion Paper, paragraph 41.

[33] Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation*, commissioned by the Bugmy Bar Book 2021.

[34] See for example John Tobin, "The Development of Children's Rights" in Young et al (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd edition, 2017), pages 51-52.