



**Submission to the Council of Attorneys-General
Review of Age of Criminal Responsibility**

February 2020

About ACTCOSS

ACTCOSS acknowledges Canberra has been built on the land of the Ngunnawal people. We pay respects to their Elders and recognise the strength and resilience of Aboriginal and/or Torres Strait Islander peoples. We celebrate Aboriginal and/or Torres Strait Islander cultures and ongoing contributions to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) advocates for social justice in the ACT and represents not-for-profit community organisations.

ACTCOSS is a member of the nationwide COSS Network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS's vision is for Canberra to be a just, safe and sustainable community in which everyone has the opportunity for self-determination and a fair share of resources and services.

The membership of the Council includes the majority of community-based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

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Acronyms

ACT	Australian Capital Territory
ACTCOSS	ACT Council of Social Service Inc.
AEDC	Australian Early Development Census
AIFS	Australian Institute of Family Studies
AMA	Australian Medical Association
JRG	Justice Reform Group
MACR	Minimum Age of Criminal Responsibility
NDIS	National Disability Insurance Scheme

Introduction

Thank you for inviting the ACT Council of Social Service (ACTCOSS) to submit to the Council of Attorneys-General review of age of criminal responsibility.

ACTCOSS strongly advocates that the minimum age of criminal responsibility (MACR) throughout Australia should be raised from 10 to 14 years old, with no caveats. In addition, community services working with children and families should be properly resourced to support diversion and build resilience and protective factors.

There is substantial medical and social research to support raising the MACR. Criminalising children as young as 10 can lead to a lifetime of harmful consequences, including sustained contact with the justice system.

A MACR of 14 years old should be applied to all interactions with the justice system and children below 14 should not be in detention or community supervision. This submission will specifically discuss the Australian Capital Territory (ACT) context, but we note that a MACR of 14 should be national, and we draw your attention to the joint COSS Network submission to this review (attached).

This submission is based on consultation with a range of community organisations, services and oversight bodies in the ACT. ACTCOSS convenes the Justice Reform Group (JRG), the peak group for organisations in the ACT working on justice reform. In February, the JRG met to discuss this review with the ACT Children and Young Person's Commissioner. There was unanimous support for raising the MACR to 14.

Recommendations

- Raise the MACR to 14 years old in all states and territories, with no caveats. This should include all forms of supervision, including detention and community supervision.
- Invest in and reform non-justice system areas to better respond to the needs of children under 14 who would be diverted from youth justice. This includes the areas of early childhood, child protection, youth homelessness, psycho-social disability, and family violence.
- Fund community organisations to deliver early and alternative support services. This should include Aboriginal Community Controlled Organisations and recognise the benefit and necessity of whole-of-family supports to the wellbeing of children and young people.

Why we should raise the age

Meeting international obligations

Australia has an international human rights obligation to raise the MACR to at least 14 years old. The United Nations Committee on the Rights of the Child (General Comment 24) states that the MACR should be at least 14 and commends states with higher MACRs of 15 and 16¹. As a State party to the Convention on the Rights of the Child, the Council of Attorneys-General should recommend that all Australian states and territories meet this obligation. As noted in the 2019 Children's Commissioner report on children's rights, Australia's MACR of 10 years old is comparatively low².

Evidence-based policy

A MACR of 14 is supported by scientific research on child development and social research on offending. As noted by the Committee on the Rights of the Child, 'documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years'³.

The Australian Medical Association (AMA) also state that an MACR of 10 is 'out of step with medical consensus regarding child brain development'⁴. ACTCOSS affirms the AMA and Law Council of Australia position that the current *Doli incapax* legal presumption is not an adequate solution to science on child and adolescent brain development⁵. *Doli incapax*, which requires it to be proven that a child under 14 understands their criminal intent, is legally opaque and not an appropriate alternative to raising the MACR to 14⁶. If the MACR is raised to 14, *Doli incapax* would be redundant.

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- 1 United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, United Nations Office of the High Commissioner on Human Rights, 2019, accessed 20 February 2020, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/24&Lang=en.
 - 2 Australian Human Rights Commission, *Children's Rights Report 2019*, Australian Human Rights Commission, 2019, p.12, accessed 19 February 2020, available at <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>.
 - 3 United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, United Nations Office of the High Commissioner on Human Rights, 2019, accessed 20 February 2020, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/24&Lang=en.
 - 4 AMA and Law Council of Australia, *Minimum Age of Criminal Responsibility: Policy Statement*, AMA and Law Council of Australia, 2020, p.2, accessed 20 January 2020, available at <https://www.lawcouncil.asn.au/docs/7b6b5121-5220-4a11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>.
 - 5 *ibid.*
 - 6 *ibid.*

Positive life outcomes

A MACR of 14 will have significant social benefits. The current age of 10 years old exacerbates the likelihood of sustained contact with the justice system; Australian Institute of Health and Welfare data shows that the younger a child first encounters the youth justice system, the more likely they are to reoffend⁷.

The justice system is not a rehabilitative, therapeutic, or trauma-informed system to address the needs of children. Children who are placed under supervision are often disadvantaged and marginalised due to psycho-social disability, Aboriginal and/or Torres Strait Islander status, intergenerational trauma, and experience in the out-of-home-care system⁸. Overwhelmingly, they are sentenced for low-level crimes such as property crime and theft⁹.

It is a community failure when children are involved in crime, and we should respond with community solutions. We note that the MACR must be raised for all forms of supervision – detention and community – because all forms of sentencing contribute to sustained justice system contact. Raising the MACR will prevent criminalisation of children under 14 and incentivise responses that develop children’s health and wellbeing within the community.

ACT context

The ACT Criminal Statistical Profile (the Profile) gathers data on youth justice for children aged 10-14. These statistics include children aged 14, who would not be diverted from the justice system if the MACR is raised to 14. This means that the number of children aged 10-13 (inclusive) who we propose should no longer be captured within the age of criminal responsibility is likely to be even fewer than the already low numbers.

The Profile shows that admissions of young people age 10-14 to Bimberi Youth Justice Centre ranges from as low as 3 children in September 2013, to 35 children in December 2017¹⁰. In community-based supervision, the range was as low as 8 in September 2015, to 21 children in June 2017¹¹. The number of children in community-based supervision appears to be trending upwards.

This Profile also shows that Aboriginal and/or Torres Strait Islander children in the ACT are overrepresented in youth justice. There is no data on children with

7 Australian Institute of Health and Welfare, *Young people aged 10–14 in the youth justice system 2011–2012*, Australian Institute of Health and Welfare, 2013, accessed 21 February 2020, available at <<https://www.aihw.gov.au/publication-detail/?id=60129543944>>.

8 Jesuit Social Services, *Too Much Too Young: Raise the age of criminal responsibility*, letter to Attorneys-General, 24 October 2015, p.1, accessed 21 February 2020, available at <http://jss.org.au/wp-content/uploads/2016/01/Letter_to_AGs_Age_of_Criminal_responsibility.pdf>.

9 Australian Human Rights Commission, *Children’s Rights Report 2019*, Australian Human Rights Commission, 2019, p.244, accessed 19 February 2020, available at <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>>.

10 ACT Government Justice and Community Safety Directorate, *Appendix 1 - ACT Criminal Justice Statistical Profile – December 2017*, ACT Government, 2017, accessed 22 February 2020, available at <<https://justice.act.gov.au/standard-page/criminal-justice-statistical-profiles>>.

11 *ibid*.

disabilities, however, the National Children’s Commissioner’s 2019 report card states that children with disabilities are also overrepresented¹².

Overall, the data shows that the number of children aged 10-14 in the ACT involved in the youth justice system is relatively small. This as an asset that further compels action to raise the MACR; the ACT has the capacity to respond through alternative mechanisms and services. The number of children in detention or community supervision is manageable and should oblige us to act and implement legislative safeguards to prevent criminalisation of children under 14.

Early and alternative supports

In raising the MACR, state and territory governments must implement services that respond to the needs of children aged 10-13. Providing early and alternative supports to children and their families is likely to have better consequences for the individual, their family and the wider community, than responding through the youth justice system. Moreover, cost benefit analysis of intervention, compared to the cost of the youth justice system, shows significant cost benefits, as well as benefits to the lives of children and families¹³.

We also note that we should not wait for early and alternative supports to be in place before raising the MACR to 14. We should not wait for policies and service system responses before we act on human rights failures. Nevertheless, based on our consultation with organisations and services working with children, young people and families, ACTCOSS recommends that the ACT Government pursue investment and reform in the following areas.

Child protection

The intersection of child protection and youth justice is well recognised¹⁴. Australian Institute of Family Studies (AIFS) research found that from 2014 to 2016, 39.2% of young people under youth justice supervision were also involved in the child protection system¹⁵. Aboriginal and Torres Strait Islander young people were 16 times more likely to be involved in both systems¹⁶.

12 *ibid*, p.235.

13 Deloitte Access Economics, *Northern Territory Youth Justice Models: Fixing a broken system*, Deloitte Access Economics, 2017, p.78, accessed 21 February 2020, available at <<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-nt-youth-justice-models-241017.pdf>>.

14 Australian Human Rights Commission, *Children’s Rights Report 2019*, Australian Human Rights Commission, 2019, p.46, accessed 19 February 2020, available at <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>>.

15 Australian Institute of Family Studies, *The intersection between child protection and youth justice systems*, Australian Institute of Family Studies, 2018, accessed 24 February 2020, available at <<https://aifs.gov.au/cfca/publications/intersection-between-child-protection-and-youth-justice-systems/overlap-between-child>>.

16 *ibid*.

ACTCOSS is advocating for significant child protection reform in the ACT to reduce the numbers of children, young people and families struggling within an opaque and power-imbalanced system. Of concern is the overrepresentation of Aboriginal and/or Torres Strait Islander children, which the [Our Booris Our Way](#) review responded to. This review highlighted the need for greater family support, particularly early support, as current services are fragmented.

We welcome recent early support funding from the ACT Government, such as for the [Gugan Gulwan and OzChild Functional Family Therapy trial](#), which works with families to reduce the number of Aboriginal and/or Torres Strait Islander children being removed.

Early childhood

Unequal access to effective early childhood services can entrench health, social and economic inequalities¹⁷. The Australian Early Development Census (AEDC) collects and measures data on childhood development at their first year of school. In 2018, 24.6% of children in the ACT were developmentally vulnerable on one or more domains; and 12.4% were developmentally vulnerable on two or more¹⁸. ACTCOSS has called on the ACT Government to ensure that all children in the ACT have the best chance at accessing needs-appropriate, quality programs. This means privileging cultural safety and appropriateness, setting targets for participation of disengaged, vulnerable disadvantaged families, and offering a mix of structured and flexible settings.

Youth homelessness

In the ACT there are no accommodation services for children under the age of 16 experiencing homelessness. This leaves children at significant risk of harm, including a cycle of homelessness and poverty, and involvement with child protection and youth justice. ACTCOSS, together with the Youth Coalition of the ACT, Families ACT and ACT Shelter, have proposed a service model to meet this need. By providing safe, temporary or long-term accommodation, a youth homelessness service would be able to intervene before life trajectories have pushed children further towards involvement with youth justice.

Psycho-social supports

Children in the youth justice system often have unmet psycho-social disabilities. In the ACT there is currently a gap in the availability of ongoing therapeutic support for children with developmental delays or suspected but undiagnosed disabilities. National Disability Insurance Scheme (NDIS) pathways can be

17 M O'Connell et al., *Quality Early Education for All: Fostering, entrepreneurial, resilient and capable leaders*, Mitchell Institute, Melbourne, 2016, p.7.

18 Australian Early Development Census, *Data Explorer*, Australian Early Development Census, accessed 24 February 2020, available at <<https://www.aedc.gov.au/data/data-explorer>>.

lengthy processes that leave families' needs unmet during the wait for entry. Moreover, children who are ineligible are particularly unsupported. Although the ACT Government Community Services Directorate meets some needs through referrals or short-term assistance, the NDIS gap prevents access to long-term therapeutic support.

Family violence

Domestic and family violence services are a crisis point for children and young people. However, services in the ACT are not currently funded to offer adequate long-term, whole-of-family responses. Although many women's domestic and family violence services also assist women's children, they often must divert already low funding to do so. These families are often living on low incomes, with significant trauma and insecure housing – significant social determinants of contact with the justice system. ACTCOSS has called on the ACT Government to adequately fund programs that can offer whole-of-life, whole-of-family responses, to improve child and family wellbeing and protective factors that prevent unnecessary interactions with the justice system.