

Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
Canberra, ACT  
via email: LACommitteeJCS@parliament.act.gov.au

13 June 2023

To the Committee

#### DRAFT JUSTICE (AGE OF CRIMINAL RESPONSIBILITY) LEGISLATION AMENDMENT BILL 2023

ACTCOSS welcomes the opportunity to respond to the public consultation for the Draft Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023. As affirmed throughout our advocacy and feedback on this issue, ACTCOSS is strongly in favour of increasing the minimum age of criminal responsibility (MACR) to at least 14 years of age. It is essential for the wellbeing of the ACT community that the ACT government work to consistently reduce the number of children who are in contact with the justice system and eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system. As the first Australian jurisdiction to commit to legislating a higher age of criminal responsibility, the ACT must be an example to other jurisdictions of the positive impacts we can have on the lives of children, families and the whole community.

The purpose of the criminal justice system on a broad scale is well understood to be:

- protection of individuals and communities from harm, and
- protection of personal and/or private property from harm.

The scale, purpose and intended outcomes of punishment can be less clear. For adults, it is assumed that punishment for harms committed, dealt by the socially legitimised system of courts empowered by the state, is understood by the offender, victim(s) and stakeholders to deprive the offender of something of significant value. Full deprivation of liberty (imprisonment), partial deprivation of liberty (treatment orders, community corrections orders, protective orders) or money (fines and bonds) make up the landscape of punishments delivered by the criminal justice system in Australia.<sup>1</sup> The criminal justice system is expected to ensure that the offender has a reasonable understanding of:

- Their offence
- The impact of their offence
- Their role, rights and obligations in the trial process and
- The scale, length and purpose of their punishment.

The expectation contained in understanding of the offence itself and its impact is the concept of *mens rea*, which is best understood as criminal intent or criminal liability. The Australian Law Reform Commission cites this quote from ***Principles of Criminal Law***:

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<sup>1</sup> Australian Bureau of Statistics (ABS), [Crime and Justice: The criminal justice system](#), ABS, June 1997, accessed 1 June 2023.

*The essence of the principle of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences.<sup>2</sup>*

Setting the age of criminal responsibility at its current position of 10 years old indicates an acknowledgment from the ACT government that children below the age of 10 do not possess *mens rea*. By setting the MACR at 14 years, it follows that the government is acknowledging that children under the age of 14 do not possess *mens rea*. By setting the age of criminal responsibility at:

- 12 years of age for two years,
- then at 14 years of age
- except in the case of a 12- or 13-year-old committing:
  - murder,
  - sexual assault in the first degree,
  - intentionally inflicting grievous bodily harm,
  - or an act of indecency in the first degree,

The government is acknowledging that children under the age of 14 do not possess *mens rea*. Unless it is deemed to be in the interest of public safety that they do in which case 12- and 13-year-olds may possess *mens rea*. This is a significant evidentiary burden for this legislation to carry, as it is a “challenging and contentious area from a human rights perspective”.<sup>3</sup> It is essential that the government is able to show evidence that the public receives the benefit of improved safety in exchange for infringing upon the rights of children.

### **Exceptions**

ACTCOSS does not endorse the inclusion of exceptions as we believe they undermine the validity of the legislation. At a minimum, we urge the Government to consider the inclusion of a review clause for the exceptions with a clear pathway to removal if they are not demonstrated to have a positive or protective impact on young people or the ACT community. While *doli incapax* will continue to apply to young people under 14, we believe, as does the Australian Medical Association and the Law Council of Australia, that this legal presumption is not adequate to protect young people encountering the justice system.<sup>4</sup> Children often face lengthy wait times in remand and in custody while matters of *doli incapax* is debated and decided. This often relies on judicial discretion for implementation which can lead to an increase in racial bias. We are concerned that the breadth of exceptions listed in the legislation may also lead to racial bias, resulting in a higher proportion of Aboriginal and/or Torres Strait Islander young people in youth detention.

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<sup>2</sup> Australian Law Reform Commission, [A common law principle](#), Australian Government, accessed 29 May 2023.

<sup>3</sup> ACT Government, [Justice \(Age of Criminal Responsibility\) Legislation Amendment Bill 2023 – Explanatory Statement](#), ACT Government, 9 May 2023, accessed 29 May 2023.

<sup>4</sup> AMA and Law Council of Australia, [Minimum Age of Criminal Responsibility: Policy Statement](#), AMA and Law Council of Australia, 2020, accessed 29 May 2023.

### ***Therapeutic Supports***

While specific charges of children in the ACT are not publicly available, national ABS data shows that 15.5% of crimes committed by children and young people aged 10-17 years old are committed by children aged 12-13 years.<sup>5</sup> The ACT convicted a total of 223 youth offenders aged 10-17 years in 2021-22.<sup>6</sup> If the national statistics on the age range of crimes applies generally to the ACT, this would indicate that approximately 35 children aged 12-13 years are convicted of any offences in a year. We are strongly in favour of providing holistic and therapeutic supports as an alternative to the criminal justice system, and the very few, if any, children in this age group convicted of the exceptional offenses are likely to be more in need of therapeutic supports than children facing lesser charges. These statistics also speak generally to the small numbers of children and young people who face contact with the criminal justice system in the ACT in general, and that investment in and provision of alternatives to punitive responses should be in place quickly and efficiently.

According to feedback from members working in the space of alcohol and other drugs (AOD), children and young people who are exposed to AOD issues through personal or familial experience are at a higher risk of offending behaviour. The sector is seeking funding to improve services for children and young people who may require treatment, support and rehabilitation services as an alternative to criminal conviction.

Exposure to ATOD issues, either directly as a young person or in their families, is a significant risk factor for offending behaviours. ATODA has advocated in their [2023-2024 ACT Budget Submission](#) for additional funding for ATOD services, give people currently seeking treatment, care and support for ATOD issues are experiencing waiting lists in the ACT. Increasing funding to ATOD services will be a critical investment to achieve the individual, family, and community wellbeing objectives of the Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023. Increased investment in evidence-based programs that currently provide treatment and support to children will be essential to building a system of non-punitive alternatives to criminal justice for children and young people under the MACR.

Studies show strong links between youth contact with the criminal justice system and Adverse Childhood Experiences (ACEs), a term to describe abuse, neglect and traumatic life events experienced by an individual in childhood as well as their familial and community circumstances such as substance misuse, mental ill-health and community violence.<sup>7</sup> ACEs are understood to be cumulative, as each marker that applies to an individual increases their risk of negative long term outcomes, including criminal convictions. Aboriginal and/or Torres Strait Islander children are more likely to have multiple ACEs, which are also compounded by the higher likelihood of contact with statutory child protection agencies and placement in out-of-home care (OOHC).<sup>8</sup> For nearly every child (97%) who experienced an OOHC placement and a justice supervision order, their OOHC

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<sup>5</sup> ABS, [Recorded Crime - Offenders](#), ABS, 9 February 2023, accessed 1 June 2023.

<sup>6</sup> ABS, [Recorded Crime – Offenders](#).

<sup>7</sup> C Malvaso et al., '[Adverse childhood experiences and trauma among young people in the youth justice system](#)', *Trends & issues in crime and criminal justice*, 2022, no. 651, doi:10.52922/ti78610

<sup>8</sup> C Malvaso et al., 'Adverse childhood experiences and trauma among young people in the youth justice system'; E Colvin, A Gerard & A McGrath, '[Children in out-of-home care and the criminal justice system: A mixed-method study](#)', *Report to the Criminology Advisory Council*, September 2020.

placement preceded their conviction.<sup>9</sup> These studies, among a plethora of other available evidence, shows the importance of ensuring that the MACR is part of a broader proactive plan to ensure that children's rights and wellbeing are at the forefront of policy decisions. As Aboriginal and Torres Strait Islander communities are most evidently impacted by an ongoing lack of resources, control and self-determination over the wellbeing of children and families, it is essential that all levels of government, including police and statutory authorities, are making swift changes to align their practices with the aims of the MACR legislation.

Getting children out of prisons and courts is a goal that is reliant on the provision of broad, impactful and community controlled services focused on prevention, before children and young people have contact with police and criminal justice systems. This legislation must not allow services to be established that continue to traumatise and criminalise children under the guise of therapeutic support. At present, it is claimed that Bimberi Youth Justice Centre already operates under a therapeutic framework, however as we understand criminal justice concepts, imprisonment is very much a punishment through deprivation of liberty.<sup>10</sup> While therapy may be provided as a part of rehabilitation, the establishment of processes in the MACR legislation such as the Therapeutic Support Panel, intensive therapy order and intensive therapy place must not become alternative carceral sites. Assessment of needs, decision making processes and orders or placements made for children under the MACR must be understood to be a wholly alternative process to criminal proceedings to meet the needs of children and respect their rights. ACTCOSS opposes the involvement of police in these processes as these decisions should be left to suitably qualified professionals and community members who are not linked to the criminal justice system.

### **Conclusion**

ACTCOSS is committed to ensuring that the MACR legislation achieves the aim of minimising the criminalisation of children and youth, ensuring their rights are upheld and they are provided with all necessary supports and resources to grow into adults who are able to enjoy living freely in their communities. We hope to work alongside the ACT government and the community sector to deliver these aims and ensure a safer and more just community for all.

Yours sincerely

A handwritten signature in blue ink that reads 'Devin Bowles'.

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<sup>9</sup> Colvin et al., Children in out-of-home care and the criminal justice system.

<sup>10</sup> ACT Inspector of Correctional Services (ACT ICS), [Healthy Centre Review of Bimberi Youth Justice Centre](#), ACT ICS, 16 November 2021, accessed 2 June 2023.