



Submission:

**Raising the minimum age of criminal
responsibility: Discussion paper response**

August 2021

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

ACTCOSS	ACT Council of Social Service Inc.
AFI	Advocacy for Inclusion
MACR	Minimum age of criminal responsibility
UPR	UN Human Rights Council periodic review

Introduction

Thank you for the opportunity to respond to the Discussion Paper on raising the minimum age of criminal responsibility.

The ACT Council of Social Service (ACTCOSS) strongly advocates that the minimum age of criminal responsibility (MACR) in the ACT should be raised from 10 to at least 14 years old, with no exceptions or carve outs. In addition, community services working with children and families should be properly resourced to support diversion away from engagement with the justice system and help build resilience and protective factors as and *before* crisis arises.

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.

We support submissions to this discussion from our member organisations, including Advocacy for Inclusion (AFI), Youth Coalition of the ACT, and Families ACT. ACTCOSS is also part of the ACT Raise the Age Coalition which strongly supports raising the minimum age of criminal responsibility.

In this submission, we focus on responding to questions in Section Two on an alternative model to the youth justice system.

Context

In Australia our legislation, regulations and social rules reflect an understanding that young people under the age of 14 are not yet developmentally responsible enough to vote, drink alcohol or drive cars. Yet, we hold children as young as 10 accountable to a criminal justice system that often leaves them traumatised and caught in cycles of recidivism.

MACR of 14 is supported by scientific research on child development and social research on offending. In the UN Human Rights Council periodic review (UPR)

released in January, more than 30 countries called on Australia to raise the minimum age of criminal responsibility¹.

Raising the age of criminal responsibility is particularly important for Aboriginal and/or Torres Strait Islander children and families who are hugely overrepresented in youth justice systems. In the ACT, Aboriginal young people are detained at 18 times the rate of their non-Indigenous peers.² Community controlled organisations must be consulted and prioritised throughout the implementation of this legislation.

Similarly, young people with disabilities are overrepresented in the ACT youth justice system, and people with disabilities and disability advocacy organisations must be given adequate support to respond to the MACR discussion.

Section One: Threshold issues for raising the MACR

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?

No, we must raise the criminal age of responsibility with no exceptions and no carve-outs. The evidence clearly shows that young people under the age of 14 do not have the capacity to form criminal intent. If we agree that children cannot be held responsible for minor offences, we must agree that they are not criminally responsible for more serious offences.

Further, the very small number of young people under the age of 14 who might be arrested and charged with serious or harmful offending is highly likely to have experienced trauma or violence themselves. These children must also be protected and cared for through adequate, targeted, and therapeutic service provision, rather than incarceration.

Children under the age of 14 are particularly vulnerable to the harm arising from early contact with the justice system, which can result in high rates of disadvantage throughout life, including continued and sustained contact with the justice system. Keeping these kids out of prison, no matter the offence, is the best way to protect them, their families and the whole ACT community.

¹ Human Rights Council, [Report of the Working Group on the Universal Periodic Review: Australia](#), United Nations General Assembly, 24 March 2021, accessed 1 August 2021.

² Report on Government Services, [Youth Justice](#) Australian Government Productivity Commission, 2021 accessed 25 May 2021

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

No. ACTCOSS affirms the Australian Medical Association (AMA) and Law Council of Australia position that *doli incapax* legal presumption is not adequate to protect young people encountering the justice system.³ Children often face lengthy waits in remand and in custody while matters of *doli incapax* are debated and decided. *Doli Incapax* is legally opaque and raising the MACR to 14 would remove the need for such a provision.

Criticisms of *doli incapax* are well documented and we refer you to the joint submission from Youth Co and Families ACT on this matter. As they point out, *doli incapax* relies on judicial discretion for implementation, which can lead to an increase in racial bias.

Section Two: An alternative model to the youth justice system

3. Are these 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?

ACTCOSS agrees that the principles listed on page 20 offer a good starting point for the development of an alternative model to a youth justice response.

Given the high rates of children with disabilities in the youth justice system, we also recommend that universal design and universal access underpin service design and delivery.

Each of these principles must be implemented through non-punitive, trauma-informed and therapeutic responses to a child's needs.

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed – to better support this cohort?

ACTCOSS endorses the idea of establishing a multidisciplinary panel as outlined on page 21 of the discussion paper. This panel will bring together service providers and agencies to identify and respond to the needs of a child to prevent engagement with the youth justice system.

³ AMA and Law Council of Australia, [Minimum Age of Criminal Responsibility: Policy Statement](#), AMA and Law Council of Australia, 2020, accessed 1 August 2021.

We support the response from Youth Coalition and Families ACT in relation to the structure of this multidisciplinary panel. In particular, the panel must feed into a wrap-around service consisting of a wrap-around coordinator, an embedded youth outreach worker working with the police force and four-six therapeutic care coordinators who are able to work closely with the child and their family.

This system, consisting of the multidisciplinary panel, the wrap-around coordinator and therapeutic care providers should be overseen by a fully funded statutory governance board consisting of community-based and government members as well as Aboriginal and Torres Strait Islander representatives. The Board will provide systemic oversight and advocacy on all elements of the reformed service system. The separation of the Governance Board and the Multidisciplinary Panel will enable systemic advocacy and practical, individual advocacy to occur simultaneously.

Beyond the multidisciplinary panel, the ACT needs to see an expansion of the Functional Family Therapy – Youth Justice program similar to the Functional Family Therapy – Child Welfare partnership with Gudan Gulwan.

We also need an expansion of psycho-social services for young people, especially those with disabilities, as well as greater education and training across services to improve responses to disability support needs.

ACTCOSS continues to advocate for adequate accommodation services for children under the age of 16 experiencing homelessness. The development of 'Ruby's' therapeutic accommodation service will be beneficial, however there are concerns that the service will be at capacity without the added demand of raising the MACR. As per Youth Co/Families ACT's recommendation, the multidisciplinary panel should have access to funding to source appropriate crisis accommodation from existing providers on the rare occurrence that this is required.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/crisis occurs?

The Multidisciplinary Panel would create a new early referral pathway, prior to points of crisis. Frontline service providers including in the community sector, as well as in education, health, or housing, will be able to refer young people and families to the Panel and the wrap-around coordinator for further support and intervention.

This system will require cross-directorate support, and whole of Government responses. If problems can be identified and referred early, without necessitating a justice or a child protection response, we will be much more able to engage young people in the services they need to steer them away from harmful behaviours.

The Multidisciplinary Panel would also need to be responsive to the needs of potential parents and pregnant women who seek help in the prenatal period. Families must be supported from the beginning, not just when harmful behaviour begins to be noticed in a young person or child. Protections must also be in place to ensure that families who come forward for support must not be inappropriately directed into the child protection system.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

As a priority, the ACT Government should fund the Ruby's model of accommodation for 10–17-year-olds. This must be coupled with investments in 24/7 therapeutic support targeted toward young people and families. The lack of a youth housing model in the ACT means that police have nowhere safe to send children after hours if they do not have a safe family environment to return to.

As per Youth Co/Families ACT's submission, the new model would include an embedded youth worker and wrap-around coordinator that would be alerted to the case at crisis point and able to respond and provide advice immediately. Professor McArthur's report will likely contain more details of how this would work and where funding would need to be allocated for success and sustainability.

7. How should children and young people under the MACR be supported after crisis points?

The establishment of the Multidisciplinary Panel will be able to respond to individual cases of crisis with a needs-based framework. As cases are referred to the Panel after immediate crisis points, appropriate assessment and referrals to relevant services could occur. This process would be managed by the wrap-around coordinator.

Service engagement would be family-driven, confidential, and limited to the providers in the room. This process must avoid referrals to Child Protection Services where possible so that voluntary engagement is sustainable. Human services and the community sector *must be* adequately funded and resourced to respond to harmful behaviour and to support and protect children and young people as they move through periods of crisis.

- 8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?**

Service engagement is most successful when it is done voluntarily.

In serious cases, where the safety of the child is at risk, it is our understanding that there are already provisions in ACT legislation which allow a judge to compel a child, regardless of the minimum age of criminal responsibility, to participate in a program or reside in a facility. Similar provisions exist in the Mental Health Act which allow for involuntary detention for therapeutic reasons.

Though these provisions exist, they should be considered a last resort, and they should not be an avenue of criminalisation. Mandated measures are often unsuccessful, and the Panel and Wrap-around service are adequately funded, we hope that mandatory engagement will be unnecessary.

- 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?**

Children should not be deprived of their liberty. Young people's needs can and should be met in the community with support, empathy and well-funded service provision. As mentioned in response to the previous question, there is precedent to mandate service engagement or *temporary* detainment for medical or mental health reasons. Children under 14 should never be deprived of their liberty as a punitive measure, nor have any temporary detainment for medical reasons recorded as a criminal offence.

Section Three: Victim's rights and supports

- 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?**

Criminal responses are not always the best ways to recognise and respond to the traumas and experiences of victims. Nor should a recognition of criminal responsibility be the only mechanism through which government support is offered to victims. Compensation and therapeutic support should be offered on an as-needed basis, to those that can demonstrate harm as occurred, regardless of fault. Other options such as restorative justice processes are also important to ensure the experiences of victims are recognised and addressed.

We also know that children who engage in problematic behaviours are also often victims. Young people who experience trauma and violence are more likely to come into contact with the criminal justice system. Responding to children who are victims of trauma and violence should encompass compassionate and non-punitive responses.

Supporting young people in this way protects the whole community and decreases the likelihood of recidivism. According to the AIHW, early engagements with the criminal justice system entrench criminal behaviour.⁴ The younger a child is when they enter the justice system, the more likely they are to reoffend. This puts the whole community at risk of harm, including children.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

This is beyond the scope of our expertise. However, it is important to maintain age-appropriate and therapeutic responses to children that may have caused harm. Given that we are advocating for non-criminal responses, privacy of the young people involved should be protected. Any restorative or conciliatory processes should be entered into voluntarily and with adequate support for the young person involved.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

Community members should be supported on an as-needed basis. Accountability can be important for addressing trauma and harmful

⁴ Australian Institute of Health and Welfare, [Young people returning to sentenced youth justice supervision 2017-2018](#), AIHW, 2019, accessed 4 August 2021.

behaviour, though the mechanisms to enact this should be determined by the wrap-around coordinator and the Multidisciplinary Panel.

Section Four: Additional legal and technical considerations

Legal considerations are beyond our expertise. We refer the ACT Government to submissions from Aboriginal legal services as well as advice given by *Change the Record*.

The evidence is clear however, that engagement with the criminal justice system in any form can cause harm. This means that police engagement with children under the age of 14 must be minimised. Where this is not possible, this engagement must be therapeutic and involve the proposed embedded youth workers and wrap-around coordinator as first responders.

This legislation should not be about delaying engagement with the criminal justice system, but rather reshaping our approach to caring for children who display potentially harmful behaviours. If we invest sufficiently in the community sector and youth service providers in the ACT, we will make a substantive difference in the lives of young people and give them an opportunity to thrive.

Priorities

As a priority, we call on the ACT Government to;

- Raise the minimum age of criminal responsibility to at least 14 years old
- Have no exceptions or carve-outs
- Adequately fund services to support and protect young people from engagement with the criminal justice system
- Invest in Aboriginal community-controlled organisations
- Prioritise voluntary, preventative, and community-focused responses to potential harms.

We would be happy to discuss this response in further detail. Please contact me at emma.campbell@actcoss.org.au, or our Senior Policy Officer for children, young people and families, Dr Gemma Killen at gemma.killen@actcoss.org.au.