Raising the age of criminal responsibility

position paper

November 2022

ACT Government

Introduction

What is the minimum age of criminal responsibility?

All Australian jurisdictions and countries around the world have mechanisms to distinguish the problematic behaviour of children from that of adults and ensure they receive an age-appropriate criminal justice or social service response. This includes through specialised institutions such as children's courts and youth detention facilities and through the application of concepts such as a formalised minimum age of criminal responsibility (MACR) and the *doli incapax* principle.

The existence of a minimum age in justice systems recognises that there is an age below which children are not able to form criminal intent in undertaking harmful behaviours, and that this means a criminal justice response is not appropriate.

A MACR not only refers to the age at which children can be incarcerated in a youth justice facility, but also the age at which they can become engaged in the broader justice system, including being arrested and subject to criminal proceedings in the Childrens Court.

The MACR is currently 10 years in all Australian jurisdictions. However, the nation's Attorneys-General have been considering whether this should be raised, the Northern Territory has recently introduced legislation to raise the age to 12 and has also committed to a two-year review of the legislation to ensure it has the necessary support structures in place to consider raising the age to 14 and Tasmania has announced that it will raise the minimum age of detention to 14, with exceptions for young people who commit the most serious offences.

The ACT committed to raising the MACR as an agreed Legislative Reform in the Parliamentary and Governing Agreement for the 10th Legislative Assembly (the PaGA). In 2021, the Government issued a discussion paper about the key legal and practical issues and commissioned an independent review of service system changes required to support an increase in the MACR. This Position Paper reflects the feedback received through these processes and provides further detail of the ACT Government's position on raising the MACR, how this reform will be implemented and what elements require further consultation and input from the community and relevant stakeholders.

Why do we need to make a change?

Across Australia, and in the ACT, there are growing calls from experts and the non-government organisations who work with children and families to raise the MACR. The neurological evidence that underpins advocacy for this reform suggests that 14 years is the minimum appropriate age of criminal responsibility because brain development in children under this age means they are generally unable to form criminal intent. This evidence is reflected in the inclusion of the *doli incapax* principle in our current legal system, but this approach does not prevent children under 14 being arrested, charged and held in detention on remand while awaiting consideration of their matters.

The MACR in Australian jurisdictions is considered low by international standards. The United Nations Committee on the Rights of the Child has noted Australia's 'very low' MACR and called on Australia to raise the age.

The primary motivation of the ACT Government in pursuing MACR reform is to ensure that children and young people who are undertaking harmful behaviour are provided with a response that supports them to address the underlying cause of this behaviour and sets them on a healthier path. This is, of course, the same aim of the existing youth justice system. While the Government is raising the MACR in acknowledgement that a justice response is not appropriate for children who are too young to form criminal intent, it is important that this is replaced by an alternative service response that improves on the existing youth justice system to respond to the needs of 10, 11, 12 and 13 year-old children who engage in problematic behaviours that can cause harm to others.

Ultimately, this reform can and should improve both the outcomes for children who engage in harmful behaviours and the community's sense of safety and confidence in the system. It will be important that the development of the service response takes both of these key factors into account.

The independent review of service system requirements was undertaken by a partnership between Emeritus Professor Morag McArthur, Curijo Pty Ltd – an Aboriginal consulting company – and Dr Aino Suomi from the Australian National University. The Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory (the McArthur et al Review) was received in August 2021.

The McArthur et al Review continues to inform our ongoing work. In line with its conclusions, rather than asking "what do we need to do to raise the MACR?", the Government is asking "what do we need to do to divert children and young people from engaging in harmful behaviour and to keep them and the community safe when harmful behaviour occurs without a criminal justice response?".

Raising the MACR is an important priority of the Government, but it is embedded in a broader focus on building a better system for all children, young people, families and the community, including (but not limited to) children aged 10-13. The importance of this aim is made clear in the McArthur et al Review, which concludes:

> *Based on the findings of the current Review, we argue for taking the legislative change as an opportunity for comprehensive systems reform. Unless broad-ranging service reform is undertaken, neither the legislative change nor the proposed therapeutic response will result in better outcomes for children... In the absence of systems reform, the legislative change is likely to result in failure to meet children's needs, but also to drive an increase in reporting to child protection services and – ultimately – to more children entering the justice system at [14].*

What should the age be?

While the Government committed to raising the MACR from its current level of 10 years through the PaGA, this commitment was not prescriptive about what the age should be raised to.

Since this commitment was made, there has been significant consideration within Government about what the new MACR should be. This has included consideration of commitments made in other jurisdictions, such as the commitment from the Northern Territory to raise the MACR to 12 and Tasmania's commitment to create a minimum age of detention of 14 (with exceptions for certain serious offences).

The cohort of children and young people aged 10 to 13 who may be impacted by a revised MACR include those who would otherwise have been apprehended and charged, estimated to be 40 to 50 children and young people per year. Of these 40 to 50 children and young people, fewer than a quarter (fewer than 10) are aged 10 or 11 years. It is also likely that many of these children aged 10 or 11 are already engaged with some level of support in the existing service system. It is therefore expected that raising the MACR to 12 would be a relatively simple reform, requiring a minimal additional service response. There is a greater service need for those young people aged 12 and 13 years who would be affected by raising the MACR to 14.

With due consideration to the available evidence, expert advocacy and the opportunity for broader system reform, the Government is developing a Bill to raise the MACR in a staged approach, with the following steps:

1. The MACR will be raised to 12 upon commencement of legislation; and
2. The MACR will be further raised to 14 as soon as practicable, but no more than two years after the commencement of legislation.

The staged approach to raising the MACR is intended to allow sufficient time for the Government, in partnership with the non-government sector, to develop and embed the elements of the service system which will be crucial for supporting better outcomes for 12 and 13 year-olds in particular, and ensure community confidence in the new system.

As is currently the case with children under the existing MACR of 10, it is proposed that police would retain a limited set of powers to deal with situations where young people are causing or at risk of causing harm. This includes the power to arrest a child under the MACR either with or without a warrant in certain circumstances. In these situations, the police officer must do the minimum necessary to stop the child's conduct. It is intended that the powers police currently have for interacting with children under 10 would extend to children under the revised MACR.

What about young people who engage in the most serious and harmful behaviours?

The Government's consultation on MACR reform to date has included discussion as to whether there should be any serious offences that are excepted from the new minimum age of criminal responsibility.

The Government acknowledges that the United Nations and many advocates oppose exceptions for serious offences. As a human rights jurisdiction, the Government appreciates the reasons for this position. However, it is also important that the community has confidence in the justice system and service framework. This may require that some serious offences, such as murder and serious sexual offences, continue to apply to young people under the MACR.

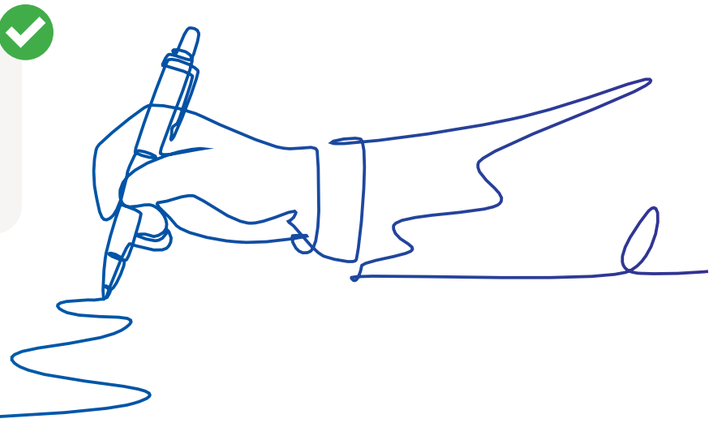
Consultation to date has indicated minimal community concern about serious harmful behaviour by 10 and 11 year old children. However, community feedback indicates that concern about the need to hold children to account for causing serious harm increases as they enter adolescence. While further engagement and detailed consideration is required to finalise the Government's position, the Government has made the following in-principle decisions:

1. There will be no exceptions for children under 12 years – they will be completely removed from the criminal justice system.
2. Legislation will be drafted to include the option for exceptions for 12 and 13 year-olds, enabling young people aged 12 or 13 to be charged only if they are alleged to have committed the most serious of offences.

It is important to note that instances of children under 14 committing serious harmful offences, such as those outlined above, are exceedingly rare. It is likely that exceptions for serious offences to the MACR would have minimal impact to the broader intent of the reform. However, it may be important to include exceptions to accommodate community expectation in the rare event that a very serious harmful act is commit by a 12 or 13 year old child.

While a very different model to that proposed for the ACT, New Zealand's youth justice system offers an example where children under 14 can be charged only in relation to serious offences, including repeated serious offending, with around 30 children aged 12 or 13 brought before a criminal court in 2021.

The ACT Government acknowledges that there is currently a campaign in New Zealand to raise the age but notes that advocates are proposing a staged approach, recognising that the service system needs to be able to respond appropriately to children who engage in very serious harmful behaviour. For a small jurisdiction like the ACT, there is a practical question of whether it is possible to establish an alternative pathway for an extremely small number of young people who may commit very serious harmful acts that would genuinely deliver better outcomes for them and the community.



What does a post-reform service system look like?

In working to raise the MACR, the Government is seeking to achieve three key objectives:

improve the experiences and outcomes for children aged under 14 years who are engaging in harmful behaviour that brings them to the attention of the justice system;

leverage this as an opportunity to improve the service system for a broader cohort of children and young people who face risk and engagement with youth justice;

increase community safety by intervening early and diverting children and young people onto a healthier pathway and away from later engagement in offending behaviour.

There are a number of important and complex considerations to be worked through to ensure the service system, developed in partnership with the community, meets this vital aim. For context, we have considered the pathway of engagement for children and their families who are facing risk . While this is generally not linear, it can encompass some or all of the following:

- Exposure to intergenerational trauma, early childhood trauma, developmental delay and/or learning challenges.
- Early signs of concern – poor engagement/ achievement in school, age-inappropriate behaviour, disconnection from school and/ or family, domestic or family violence, risk of homelessness, starting to experiment with alcohol or drugs, mental health challenges.
- Coming to the attention of Child and Youth Protection Services (CYPS) – over 20,000 child concern reports are received each year, with more than 16,700 counted as formal notifications in 2019 20 and reports relating to almost 1,400 children being investigated, most of whom are under 14 (which means that concern reporting is not necessarily an escalation point – it can be an early warning).
- Coming to the attention of Police, including for issues that are riskier for the child than community (such as going missing or being a victim) or for behaviour that harms others.
- Engagement with youth services, homelessness, mental health and/or alcohol and other drug services – noting that many youth services have a lower age eligibility of 12 years old.
- Escalation of harmful behaviour leads to arrest rather than caution – most children are subject to Police bail and returned home; a small number are remanded in the Bimberi Youth Justice Centre due to having no safe alternative (for the child or to prevent the child harming others); most are subsequently released on bail after appearing in court.
- Most matters are not prosecuted for children under 14; however, the child may still be subject to bail conditions until charges are dropped or the matter returns to court and may therefore be reported / arrested for breach of bail; CYPS and other services are mandated to report bail breaches to Police even where no harm has been caused.
- Where matters are prosecuted, most are either dismissed or the child is subject to a community order supervised by parent(s)/ guardian(s) or CYPS, with the onus on the child to comply with the order, rather than on services to engage with the child and/or family.
- Children are most likely to enter Bimberi on remand (11 to 13-year-olds are very rarely sentenced to a period of detention) and this can result in children "bouncing" in and out of Bimberi, reducing the opportunity for therapeutic engagement while they are there. Short periods of detention can be traumatising and disruptive for children – particularly when repeated.
- For those children who spend longer in Bimberi, it can be an opportunity for "time out" to feel safe, establish a routine, be away from negative influences, re engage in education and commence therapeutic work; however, longer periods of detention risk institutionalisation. Detention is not considered to be in the best interests of children.

To respond to this diversity of experience and need, the Government is investigating a number of service elements and associated legislative reforms. These include:

- Increasing access to family-led decision-making mechanisms, such as Family Group Conferencing, and to intensive family-based supports such as Functional Family Therapy and Multisystemic Therapy, as options to address harmful behaviour.
- Enabling earlier intervention, more intensive case management and wraparound support for children and young people who come to the attention of CYPS, Police and other services to prevent problematic behaviours from escalating.
- Establishing a therapeutic panel (similar to the multidisciplinary therapeutic panel recommended by McArthur et al) to respond to complex matters involving children and young people and their families.
- Developing a new Intensive Therapeutic Order that could be applied by the Childrens Court on application from the therapeutic panel, with the capacity for such orders to include that a young person reside at a therapeutic residential facility for a limited period.

It is important that these changes are integrated with the current services that aim to support families and keep children and young people safe. The Government is seeking to better align the service to children and young people's diverse needs, rather than further fragmenting it with a response that only supports the small number of 10-13 year-olds that come to police attention.

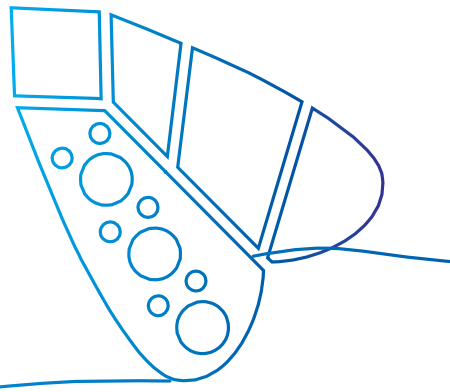
ACT Policing have noted that they currently have limited options to respond to children and young people who come to police attention and cannot safely be returned home. To respond to this existing service need, the Government is exploring options including the use of on-call youth workers, safe spaces and emergency accommodation to which police can take young people who cannot safely return home.

McArthur et al have also highlighted the need to make supports such as victims of crime payments and restorative conferencing available to ensure victims' needs are met while holding young people accountable for their actions in a way that is therapeutic and empowers them to make positive changes. Ideally, such a mechanism would be available for older young people without the need for criminal processes where these are unnecessary to achieve accountability and recompense.

Culturally safe responses for Aboriginal and Torres Strait Islander young people

Aboriginal and Torres Strait Islander young people are over-represented in the youth justice system. It is vital that the service system arising from this reform is underpinned by self-determination, the engagement of community-controlled services and culturally competent staff and practices.

The Government will engage specifically with the Aboriginal and Torres Strait Islander community and community-controlled organisations about these proposals and broader service system reform.



Conclusion

Since committing to raising the MACR in 2020, the Government has been exploring the complexity of delivering this reform in a way that maximises the benefit to young people and the community. This paper outlines key policy decisions taken by Government to date and matters which are subject to continued consideration and consultation.

> The Government intends to raise the minimum age of criminal responsibility to 14, no more than two years after first raising it to 12.

The Government welcomes further discussion with the community and with key stakeholders on the implementation of this reform, including the potential for exceptions to the MACR, the role of the service system in better responding to the needs of young people who are currently encountering the justice system, and ensuring community support and confidence in the reforms.

The Government appreciates the substantial advocacy and input received to date through this work, which has been instrumental in achieving progress to date.