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Dear Shane, Rachel and Emma,

Thank you for inviting comments and feedback on the draft *ACT Government discussion paper: Raising the minimum age of criminal responsibility*. The Youth Coalition of the ACT and Families ACT welcome this opportunity and are providing a joint response.

Both organisations have long been advocating that the minimum age of criminal responsibility should be raised to at least 14 years of age and are members of a working group consisting of legal, community and academic stakeholders led by *Change the Record*. We have also previously met with yourselves, your officers as well as directorate staff to discuss this matter.

We have responded to the questions in the discussion paper relating to our expertise. If a question lies outside our expertise, we have referred to the stakeholder or organisations we believe might be appropriate to respond.

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 propose that the minimum age of criminal responsibility (MACR) be raised to at least 14 years in all circumstances with no 'carve-outs' to this legislation, even for serious offences. We argue that the treatment of young people should not solely focus on the young person's type of offence, but instead centre on identifying and treating the underlying causes of their offending behaviour (McCausland & Baldry 2017, McLaren 2000), the 'needs vs. deeds' approach.

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

We argue that there is no reason to retain the presumption of doli incapax when raising the MACR to 14. Raising the MACR to 14 would remove the need for courts to consider this confusing and complex presumption.

Our position on this issue is informed by research which asserts doli incapax is harmful and problematic for the following reasons:

- Its highly discretionary nature
- Its capacity to neglect specific psychosocial factors which impact on a young person's decision-making processes and understanding of moral responsibility
- A young person's chronological and mental age may differ
- The test of understanding under the doctrine of doli incapax may be subjective and unreliable
- Doli incapax can involve the inclusion of unfair prejudicial evidence
- Racial bias can be embedded in the process
- Doli incapax has been criticised by both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission (Australian Law Reform Commission 1997, Fitz-Gibbon & O'Brien 2019, Johnson 2006, Lennings & Lennings 2014, UN 2019).

For more evidence demonstrating the limitations of doli incapax and how its application differs across jurisdictions refer to barrister Matthew Johnston's response to the Children's Magistrates' Conference (Johnston 2006). Moreover, the case study of a 15-year-old male "M" outlined in *Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study* provides a detailed example that illustrates the incongruencies and ineffectiveness of implementing doli incapax in practice (Lennings & Lennings 2014, p. 795-796).

We are also concerned that some members of the judiciary seem to be making decisions in a vacuum without considering the expertise of community service workers and health professionals when assessing a child's need. Judges are experts in legislation and the law, but not in child and adolescent development and wellbeing.

Section two: An alternative model to the youth justice system

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?

Yes, we generally agree with the design principles listed on page 20 to underpin the development of an alternative model to a youth justice response in the ACT. However, we recommend also including the following principles:

- Child-centred considering their health and wellbeing including neurodevelopmental stage or any cognitive impairment
- Family-focused
- Strengths-based
- Trauma-informed.

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?

We welcome the consideration of an alternative model and agree with the idea of establishing a multidisciplinary panel as outlined on page 20 of the discussion paper.

However, we believe that such a panel needs to be legislated and complemented by some additional mechanisms facilitating the access to and engagement with specialist support services for children, young people and their families.

We recommend that the **multidisciplinary panel** be complemented by a **wraparound therapeutic response ‘program’¹ consisting of a wraparound coordinator, an embedded youth outreach worker** working with the police force and 4-6 **therapeutic care coordinators** who are assigned to work closely with the child/young person and their families. This wraparound therapeutic response requires a **well-trained and skilled team** of wraparound coordinator and therapeutic care coordinators.

The **multidisciplinary panel** will be able to provide specific advice on an individual case, supporting the assessment of the child’s needs and therapeutic care coordination undertaken by the wraparound coordinator. The panel will be regularly updated by the wraparound coordinator about the child/young person’s progress, allowing the panel to assess if the treatment plan is working or needs to be adjusted.

The **wraparound coordinator** conducts needs assessments and is available 24/7, allowing police and other first responders to refer a child or young person displaying harmful behaviour anytime day or night. Being available 24/7, the wraparound coordinator can be either contacted during a crisis, after a crisis, or when crisis continues to occur. Based on the outcome of the needs assessment, the wraparound coordinator will be responsible to assign the case to a **therapeutic care coordinator** who works closely with the child and family, supporting them to access the identified supports and services.

The wraparound therapeutic response should be overseen by a **statutory governance board** or committee consisting of community-based and government members, as well as Aboriginal and Torres Strait Islander representatives. Being independent and sitting outside Government directorates, the Board will have an **oversight function** identifying patterns, trends and emerging needs in the new service system. The Board needs to also be responsible for **workforce issues** within the existing support system allowing it to mandate prescriptive models of practice, workforce training and support requirements, as well as making workforce related recommendations. The Board will also provide **systemic advocacy** relating to all elements of the reformed service system.

We need to emphasise that this new model will not achieve its desired outcomes for the child and the wider community if there are no specialty secondary services available in the ACT to refer to. Any new service support system will be impacted by the ACT’s ongoing problem of scale. To address this, existing enhanced specialist services need to be appropriately funded to allow them to be drawn together by the wraparound therapeutic response into a coordinated care response comprising universal as well as specialist services.

The ACT government need to also consider if new specialist services need to be introduced in the ACT. Emeritus Professor McArthur’s review should provide enough detail as to whether there are currently any services operating in the ACT capable of providing the

¹ Programs similar to service models such as the PACER (Police, Ambulance and Clinical Early Response) model and the Embedded Youth Outreach Model (EYOM) which have a robust evidence base.

necessary specialist support or if new specialist providers from other Australian jurisdictions need to be invited to tender.

We recommend that any new service model be implemented during a **transition period** of six to twelve months, where any gaps and needs can be identified and responded to. This **transition period** should not delay the introduction and passing of legislation to raise the MACR, but could accompany a period of six to twelve months where the legislation is introduced but not yet enacted. This transition period should be overseen by the governance board providing some early indication on what works and what doesn't in the new system. The Board will need the authority to demand systemic changes to the new model based on its observations and feedback from participants. The transition period needs to also be evaluated by an external stakeholder/ organisation similar to the Safe and Connected Youth program's **developmental evaluation**. The evaluation should focus on the adequacy of the service landscape and whole of government response, rather than the lasting impacts of raising the MACR which will take some time to come to fruition.

We strongly recommend that this alternative service system be embedded into the legislation supporting the new MACR, allowing it enough time to establish itself and achieve the desired outcomes, without its existence being threatened by any future change in the political landscape in the ACT. This new approach will need sufficient resources, buy-in from all stakeholders involved, as well as adequate transition time. ACT Government needs to accept that change will be gradual and staggered because of its scope and scale. Given that the ACT is the first Australian jurisdiction to attempt this important reform, its success is critical.

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

We believe that all frontline service providers should be able to refer to the multidisciplinary panel as well as the wraparound coordinator when children and young people display harmful behaviour.

Families ACT and the Youth Coalition strongly believe that this expanded referral option should be further canvassed. The education sector at both primary and secondary school level needs to be included in such deliberations and encouraged to support this new model. The involvement of the whole education system is vital to the success of any alternative model as early intervention and prevention should occur when children and young people first show concerning and sometimes harmful behaviour in educational settings. We recommend that the Minister for Education, as well as the Education Directorate are required to support the new service model. Working holistically across all directorates is important to not only address any acute cases of harmful behaviour, but also to embed an early intervention and prevention approach under the new MACR.

We know that with the right early intervention programs, universal and secondary services provided to children and young people (aged 7-13) with concerning and/or harmful behaviours should prevent individuals from escalating. If the needs of a child or young person are being appropriately assessed and supported by universal and secondary supports as well as the education system, then this new model should be able to achieve real outcomes for children, young people and the community at large.

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?

The new model needs to allow for safe, therapeutic accommodation and emergency supports to which frontline responders such as the police can refer the child or young person any time of the day or night (2am test). The embedded youth worker and the wraparound coordinator will need to be alerted to the case at crisis point, allowing them to meet the child or young person at the accommodation facility and provide advice on what to do in the immediate aftermath of a crisis, as well as commencing the wraparound care of the child/young person.

However, we are concerned that any existing therapeutic accommodation services such as Ruby's for example might be unduly impacted by such a requirement. We therefore strongly recommend that a new accommodation alternative identified to avoid impacting on existing services which are often already stretched and at capacity without the MACR having yet been raised to 14. As an interim measure to fill this service gap, the ACT Government should consider providing the **multidisciplinary panel** with **access to brokerage funding** to source appropriate accommodation from existing providers.

We understand that some provisions in the Mental Health Act currently allow a child or young person to be restrained and admitted to a health facility if their behaviour warrants such action aiming to reduce any harm to themselves, others, and the wider community.

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

As explained above, under the new wraparound therapeutic response 'program', children and young people will be supported by the wraparound coordinator and the therapeutic care coordinator as soon as possible after a crisis point. The wraparound coordinator needs to be alerted as soon as possible (preferable at crisis or soon after). They then meet with the child and their family for assessment and to explain the available support options. The multidisciplinary panel needs to be available to consult on the care plan design for the child or young person as well as provide specific expertise if required.

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?

We recommend voluntary engagement for children and young people in this new wraparound therapeutic response model, because we know that 'mandated' measures are often not effective and are not aligned with the therapeutic aims of the new model. We hope that providing wraparound services to the child and their family which are child-focused, family-centred and trauma-informed will be successful, especially as each case will have the support of its own therapeutic care coordinator.

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?

With the new wraparound therapeutic response ‘program’, we recommend that every child and young person displaying serious harmful behaviour should only be deprived of their liberty as a last resort and only until the wraparound coordinator and the therapeutic care coordinators are able to attend.

Section three: Victims’ 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?

While we aren’t experts on victims’ rights and supports, we believe that the restoration and reconciliation aspect of a restorative justice approach isn’t only valuable for the victim but also for the young perpetrator. Having the opportunity to apologise and reconcile with the victim, provides a valuable mechanism for both parties to heal and grow. We believe this aspect of allowing growth and healing of the young person should not be underestimated and therefore carefully considered in their treatment plan, as long as it is deemed therapeutically appropriate for their level of cognitive maturity.

We also believe that the reforms to the MACR need to recognise that children with harmful behaviours are also often victims themselves and therefore protecting the rights of those children is also protecting the rights of victims. As explained in our response to question 1, we argue that the system needs to respond to these children in a way that recognises their experiences (trauma) and their needs, working to support them and not to punish them.

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?

No comment.

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 affected by harmful behaviour should be supported after crisis points as considered appropriate by relevant experts. We believe that the child or young person’s accountability for their behaviour should be assessed by the wraparound coordinator and therapeutic care coordinator when developing the child or young person’s care plan. While not the most pressing issue, accountability for one’s behaviour can be important to allow both parties to heal and grow in the longer term.

Section four: Additional legal and technical considerations

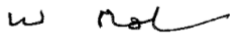
These legal and technical considerations are outside our area of expertise, and we therefore refer the ACT Government to the responses and advice given by *Change the Record*, Aboriginal and other legal services as well as the ACT Law Society.

However, we want to reiterate that raising the MACR is about protecting a child from the harms of the criminal justice system and providing opportunity for diversion and therapeutic intervention where needed. Raising the MACR **should not** be treated as simply delaying the criminal justice system's engagement with the child until they reach the age of 14. We need to revise and reshape our engagement with children to support them to learn from their mistakes, grow and thrive in our communities. These reforms are a unique opportunity to change our society's approach to supporting and improving outcomes for **all its children**.

In closing, we want to acknowledge that our submission to this discussion paper has been informed by the ongoing work of Emeritus Professor MacArthur, the *Change the Record* committee as well as our expertise. When Professor MacArthur's final report is complete, we trust that we will have another opportunity to provide feedback that is informed by detailed description of the proposed service model.

If you need further clarification, please don't hesitate to contact us.

Kind Regards



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