actlawsociety

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ACT Justice and Community Safety Directorate
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By email: macr@act.gov.au

RE: DISCUSSION PAPER – RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The ACT Law Society (the Society) welcomes the opportunity to comment on the Discussion Paper: Raising the Minimum Age of Criminal Responsibility (the Discussion Paper). We have sought input from several of the Society's specialist committees that have an interest in this area and the following comments are provided.

Section 1: Threshold Issues

Question 1 – Exceptions

The Society supports the view taken by the Law Council of Australia that there should be no carve-outs or exceptions.[1] We consider that having exceptions will defeat the purpose of raising the minimum age of criminal responsibility (MACR).

While we do not agree with having exceptions, if any exception is to be considered, it should be limited to murder or offences with the maximum penalty of life imprisonment. If murder is considered an exception, a clear line must be drawn between different degrees of murder including attempted murder and manslaughter as well as different fault elements.

Question 2 – Doli Incapax

Doli incapax refers to the rebuttable presumption that a child between the age of 10 and 14 cannot commit a crime unless the child can distinguish between right and wrong.[2] This concept has been criticised as out of date and difficult to prove in court.[3]

The presumption will be redundant if the MACR is raised to 14 without exceptions. If there are to be exceptions, the principle of *Doli Incapax* remains relevant for these cases. Care should be taken to ensure that *Doli Incapax* is applied consistently in court, the onus of proof must always be on the prosecution to rebut the presumption. We note that concerns have been raised that the defence often has to informally initiate adherence to the presumption.[4] In our view, it would be ideal to remove the presumption completely by raising the MACR without exceptions.

[1] Law Council of Australia, 'Council of Attorney-General – Age of Criminal Responsibility Working Group Review' (2 March 2020) 9.
[2] Australian law Reform Commission, *Seen and heard: priority for children in the legal process,* Report No 84 (1997) [18.19].
[3] Law Council of Australia, above n 1, 5. See also Thomas Crofts, 'Will Australia Raise the Minimum Age of Criminal Responsibility' (2019) 43 *Criminal Law Journal* 26, 35-38.
[4] Ibid 23.

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Section 2: Alternative Model

The Society does not have expertise on support services for children at risk and urges the government to consider input from experts working in that area. However, we would support an alternative model that:

- Supports facilitated collaboration between victims, offenders and families;
- Establishes a new authority to deal with children under the MACR; and
- Establishes a mechanism to mandate compliance in serious cases or cases of repeat offending or lack of engagement.

Any alternative model should have a focus on being trauma-informed, non-punitive and with a focus on therapeutic responses to a child's needs.

Youth Justice Conferencing

The Society supports the continued use of restorative justice conferences in the ACT for children under the revised MACR,[5] or a conferencing scheme more specifically designed for children and young persons. We note that Youth Justice Conferencing (YJC) is in other jurisdictions such as New South Wales, Queensland and internationally.

YJC provides a forum for the young offender to take responsibility for their actions and enhances victims' rights and participation in the decision-making process. Through YJC, an appropriate action plan and support mechanisms can be identified, which may include a letter of apology or undertakings from the young offender to repair damages, make repayments or to engage with community services or support programs (including counselling, drug and alcohol rehabilitation programs etc.). There will be circumstances where YJC is not appropriate such as when:

- The offence is too serious;
- Either party is not willing to attend the conference; or
- The young offender does not admit to the offence or has previously participated in a conference and there is no improvement in behaviour.

If a similar scheme is adopted in the ACT, it should be clearly established under statute; the *Young Offenders Act 1997* (NSW) can be used as an example. There will also need to be an appropriate authority to monitor and manage the child's compliance with the action plan post conference.

Other types of conferences can also be explored, for example, a conference between the offender and members of the offender's family to discuss the circumstances and reasons behind the offending and how they may be addressed. Providing support to the whole family (as opposed to just the young offender) should be considered. For Aboriginal and Torres Strait Islander children, Elders from community and extended kin should be included and consulted in these conferences to ensure that support is provided in a culturally safe manner.

Authority Responsible for the Alternative Model

The Society considers a multidisciplinary case management panel an appropriate approach to monitor and provide support to children under the revised MACR. Children involved in the criminal justice system often come from disadvantaged and marginalised communities and have complex needs, which may include (among other things) mental health issues, disability, drugs and alcohol abuse, exposure to family violence.[6] A multidisciplinary approach would assist in assessing needs and facilitating information sharing between relevant organisations. The Society strongly supports the inclusion of members of the Aboriginal community on the panel.

[5] See *Crimes (Restorative Justice) Act 2004* (ACT).
[6] Alasdair Roy, Brianna McGill and Lisa Fenn, 'Children & Young People with Complex Needs in the ACT Youth Justice System' (Report, ACT Human Rights Commission, 2016).

Establishment of a new authority/organisation also avoids putting further strain on existing resources.

Mechanism to Mandate Compliance

A mechanism to mandate compliance or to deprive the liberty of the young person under the revised MACR may be necessary in extreme circumstances, such as when there is a risk to public safety.

We note there are already civil law provisions that allow the court to order involuntary detention or participation in a program or community service, such as in the *Mental Health Act 2015* (ACT).[7] A similar scheme could be considered for children under the revised MACR. Matters to be considered on a case-by-case basis may include:

- The seriousness of the offence;
- Repeated harmful behaviour
- A lack of voluntary engagement;
- Past failures to comply with warnings and cautions.

Depriving the liberty of the young person should only be considered as a last resort measure after other less restrictive forms of supervision and isolation have been exhausted. Such coercive power should only be exercised by the court. If decision-making power is given to an authority other than the court, clear pathways for merits and judicial review for those decisions must be established.

Further, the following must also be considered:

- Clear maximum time limits on the use of any forms of isolation;
- Facilities to support a therapeutic and educational approach (for example, small-scale facility with well-trained multidisciplinary staff);[8]
- Access to education;
- Family visitations (if appropriate); and
- Conditional release options.

Section 3: Victims Rights and Supports

Question 10 – Rights of Victims

Raising the MACR supports future rehabilitation and outlook for children, and these efforts can be undertaken alongside supporting victims. Victims' rights are best considered via the previously mentioned Youth Justice Conferencing scheme. YJC provides a forum for victims to discuss the impact of the offender's behaviour on their lives. Victims' input is also considered in making decisions regarding the support programs and community services the young offenders should engage with. The *Victims of Crimes (Financial Assistance) Act 2016* (ACT) may also be relevant.
Question 11 – Should victims be given access to information about the child?

Access to this information should be heavily restricted. If victims are provided the opportunity to participate in the decision-making process during mediation/facilitation, their involvement should end at the conclusion of the conference. It is not appropriate for victims to access personal information about the young offender post conference.

[7] *Mental Health Act 2015* (ACT) ss 58, 66.
[8] See for example the Diagrama Foundation, Save the Children Submission No 60 to the Victorian Parliament Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria,* April 2017, attachment 8.

Section 4: Technical and Legal Considerations

Question 13 – Power to Arrest

Being put under arrest is a form of engagement with the criminal justice system and as such, it may have a negative impact on the young person and accordingly, care needs to be taken to ensure such power is used appropriately.

We note that there is already a power for police officers to arrest children under the age of 10 in the ACT.[9] Arrest can be made on reasonable grounds when:

- The child's conduct makes up the physical elements of an offence: or
- A person has suffered physical injury because of the conduct; or
- There is an imminent danger of injury to a person or serious damage to property because of the child's conduct; and
- It is necessary to arrest the child to prevent the conduct or to protect life or property.

We consider that the above principles form a good starting point. Arrest of children under the revised MACR should only be used as a last resort and be strictly limited. Imminent danger to the child should also be captured as a trigger for use of power (to take the child into protective custody). Children should only be detained for the shortest amount of time before being referred to a parent/guardian or an appropriate authority. An option for an appropriate authority (under the new model) or a parent or guardian to be contacted prior to (or simultaneously with) police engagement should also be explored.

Question 14 – Other powers

Investigative powers such as the power to conduct questioning or to conduct searches should be retained. There may be circumstances where a child will not admit to the crime and in the interest of justice and to protect the young person's presumption of innocence, investigative powers are necessary to establish facts.

Safeguards and restrictions on use of investigative powers should be established. Under current law, children under the age of 10 cannot be stripped searched,[10] have identification materials taken,[11] or participate in an identification parade.[12] Children cannot be interviewed without an appropriate person present such as a parent or a social worker, or when appropriate, the Aboriginal Legal Service should be contacted.[13] Accordingly, these safeguards should also apply to children under the revised MACR.

Question 15 – Inducement and Incitement

The Society opposes the creation of a separate offence to specifically deal with children under the revised MACR. We consider that the current offences, such as commission by proxy and incitement are sufficient to cover this type of conduct.[14] It is also well recognised in common law that adults can be convicted for their involvement in the criminal acts even if another person, such as a child carried out the physical element of the offence.[15] Creating a new offence will unnecessarily duplicate existing offences and is unlikely to achieve a different outcome.

[9] *Crimes Act 1900* (ACT) ss 252B-C.
[10] *Crimes Act 1900* (ACT) s 228(1)(e).
[11] Ibid s 230A(1).
[12] Ibid s 234(1).
[13] Ibid s 252G.
[14] *Criminal Code 2002* (ACT) ss 46-7.
[15] See e.g., *Pickett v Western Australian* [2020] HCA 20.

Question 16-17 – Transition for children who have and have not been sentenced.

We consider that children who have *and* have not been sentenced should be automatically transitioned to the alternative model as soon as the MACR is raised. Considering that raising the MACR supports the principle that children under the age of 14 are incapable of committing crimes, it would seem extraordinarily unjust to exclude certain child under the MACR from the scheme merely because of the timing of the offence.

Question 18 – Historical Convictions

Under the *Spent Convictions Act 2020,* a juvenile conviction (that relates to a sentence of imprisonment of no longer than 6 months) can be automatically spent after 5 years of crime-free period.[16] We suggest that this wait period be waived on application to support the transition process. Each case can be considered on merits. The same process should apply to all offences including serious offences such as sexual offences.

Question 19 – Personal Information

We note that Chapter 25 of the *Children and Young People Act 2008* deals with information secrecy and sharing, however, this largely relates to information in care and protection matters. On the other hand, the *Information Privacy Act 2014* deals with protected personal information in general. Special measures may be necessary to protect personal information of children under the revised MACR in relation to its handling, collection and distribution.

Question 20 – Should the police be able to use information gathered about a child under the MACR after the child has reached the MACR?

The police and the appropriate authority under the new model (such as a multidisciplinary panel) should continue to have access to this information for the purpose of monitoring the child's behaviour and to provide further support as necessary. The information may also be useful for statistical and evaluation purposes.

These records cannot be used as evidence in future trials or sentencing hearings for further offences, or in any other way adverse to the young person. Records should only be retained for a limited period, we consider that 5 years is appropriate.[17] Alternatively, an approach similar to that taken by the Warrumbul Circle Sentencing Court, Drug and Alcohol Court and the Therapeutic Care Court in the ACT can be considered.

Yours sincerely,

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Chief Executive Officer

[16] *Spent Convictions Act 2000* (ACT) ss 11, 13.

[17] See Australian Law Reform Commission, above n 2, recommendation 254.