Amnesty International Australia

Marque Lawyers

Raising the minimum age of criminal responsibility – potential ACT reform

Joint submission

1. This submission is made in response to the Discussion Paper (**Paper**) regarding the question of whether the minimum age of criminal responsibility (**MACR**) in the Australian Capital Territory (**ACT**) should be raised from 10 years of age to 14 years of age in accordance with the United Nations' (**UN**) recommendation, with no limitations for children under this age.

2. These submissions do not seek to address every issue raised in the Paper, however, will address the following issues.

    (a) That the MACR should be raised from 10 to 14 years of age, with no exceptions for young people this age.

    (b) That the presumption of *doli incapax* be abolished and alternatives, such as 'developmental immaturity' be enshrined in legislation.

    (c) The impact of the current MACR and Indigenous youth.

    (d) The policing of young people, including the powers afforded to police.

    (e) That alternatives to the criminal justice system (**CJS**) are appropriate and preferable when dealing with young people.

3. Further to the above is the policy makers' responsibility to ensure that the needs of young offenders are balanced with the public interest and, in particular, victims' entitlement to justice. For the reasons outlined below, preventing young people from coming into contact with the criminal justice system is beneficial for all stakeholders.

Raising the MACR

4. ACT's current MACR of 10 years of age is at odds with international standards.[1] The United Nations Committee on the Rights of the Child (UNCRC) has said that countries should be working towards a MACR of 14 years or older.[2] Over the past decade, the United Nations, and other international organisations, have called upon Australia to increase its MACR.

[1] Justice François Kunc (ed), 'Increasing the Minimum Age of Criminal Responsibility' (2018) 92 *Australian Law Journal* 71.
[2] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system; CRC/C/GC/24, 9.

5. By way of background, between 2018 and 2019, almost 8,353 young people between the ages of 10 and 13 came into contact with the CJS, with 573 young people under the age of 14 in detention.[3]

6. This is particularly concerning, in circumstances where:

   (a) around 50 percent of crimes committed by young offenders are theft, burglary and property related crimes;

   (b) just over 20 percent of crimes committed by young people are acts intended to cause injury; and

   (c) other crimes include public order offences, drug-related offences, traffic offences and fraud.[4]

7. We submit that the ACT's MACR contributes to this, permitting young people from the age of 10 to come into contact with the CJS, notwithstanding that these young people may lack the requisite intent for a finding of criminal culpability.

8. We have the benefit of extensive scientific research on young people and their neuropsychological and social development.[5] The research shows the following.

   (a) Young people, at least until around the age of 14, have immature frontal lobes of the brain,[6] meaning that they lack the requisite capacity to distinguish between right and wrong. However, this can vary depending on the individual young person.

   (b) Young people are more likely to act on impulse or emotion and therefore, may be unable to appreciate the likely consequences or impact of their actions.[7]

   (c) Young people are influenced and/or affected by environmental factors which can affect the development of their brains.[8] This can affect a young person's propensity to engage in antisocial behaviour.

9. Further, the statistics show that a great proportion of young people in contact with the CJS, have, for example:

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[3] Australian Bureau of Statistics (ABS), Recorded Crime - Offenders, 2018-19, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra and 2020, Australian Institute of Health and Welfare (AIHW), Youth Justice in Australia 2018-19, 'Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2018–19'.

[4] Australian Bureau of Statistics, Criminal Courts Australian 2017-2018, 'Table 3 DEFENDANTS FINALISED by Sex and age by principal offence and court level', 2019, accessed 12 February 2020.

[5] Elly Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) Journal of Children's Services 86.

[6] Kate Fitzgibbon, 'Protections for children before the law: An empirical study of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales' (2016)16(4) *Criminology and Criminal Justice*, 391.

[7] Learning Potential- Australian Government, *'Learning and the teen brain'* (2017).

[8] Australian Early Development Census, '*Brain Development in Children'* (2019).

(a) mental health disorders;

(b) cognitive disabilities;[9]

(c) inhibition of emotional responses;[10]

(d) a higher likelihood of:

(i) falsely confessing to crimes than older offenders;[11] and

(ii) being in contact with the child protection system;[12] and

(e) poorer educational attendance and outcomes,[13]

and as such, are the very young people most in need of protection by the law. Further, we submit that the ACT's CJS is ill-equipped to adequately provide for the varying needs of young people (especially those that are high risk).[14]

10. The matters outlined in the preceding paragraphs are particularly concerning in circumstances where, once a young person comes into contact with the CJS, it is likely that they will have increased interaction with the CJS throughout their lifetime.[15] There are many reasons for this, for example, stigmatization and trauma.[16]

11. By reason of the matters articulated above, we submit that the current MACR is inappropriate and should be raised from 10 to 14 years of age. We further submit that no exceptions should exist to hold young people under the age of 14 criminally culpable, as to do so would be contrary to the purpose of raising the MACR.

12. Further, the increase in the MACR should be accompanied by an enhanced welfare-based regime which seeks to identify and/or address why young people under the age of 14 engage in antisocial behaviour, which would be beneficial to all stakeholders.

13. In addition to increasing the MACR, consideration should be given to sentencing alternatives, as well as reviewing police powers (detailed below), in order to ensure that young offenders above the age of 14 are not detained unless absolutely necessary (i.e. they are at risk to themselves and/or others).

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[9] Above, n1.
[10] Above, n5, 87.
[11] Ibid; Lisa Bradley, 'Age of Criminal Responsibility Revisited' (2003) 8(1) *Deakin Law Review, 80.*
[12] *Margaret White, '*YOUTH JUSTICE AND THE AGE OF CRIMINAL RESPONSIBILITY: SOME REFLECTIONS' (2019) 40 *Adelaide Law Review,* 260.
[13] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Comparative Youth Penalty Project Research Report, University of New South Wales, 2017), 5.
[14] Above, n1.
[15] Above, n5, 90; Thomas Crofts, 'Will Australia Raise the Minimum Age of Criminal Responsibility?' (2019) 43, *Criminal Law Journal,* 32.
[16] Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1), *Current Issues in Criminal Justice 123*, 127.

Reformation of doli incapax

14. *Doli incapax* is the rebuttable presumption that young offenders between the ages of 10 and 14 do not understand that their conduct is seriously wrong and not *"merely naughty or mischievous"*.[17] It serves to protect young people aged 10 – 14 from the full force of the CJS.[18]

15. In practice, however, it appears that more often than not the onus falls upon the defence to prove that the accused did not understand their conduct was wrong.[19] The defence is often required to prove that the accused young person lacked the requisite intention capable of being criminally culpable at the time of committing the alleged offence (usually by having a psychological assessment undertaken on the young person).

16. For many young people, particularly those who rely on public defenders, proving that a young person lacked the requisite understanding that their conduct was wrong is overly burdensome (and resource dependent).[20] As such, *doli incapax* fails to afford protection to young people consistently.

17. In circumstances where it has been accepted that the development of young people's brains can affect their ability to appreciate the outcome of their actions, the failure of *doli incapax* to protect young people is unsatisfactory.

18. Further, evidence suggests that the inconsistent application of the *doli incapax* principle can also result in highly prejudicial evidence being led against young people, in order for the prosecution to displace the presumption.[21] For example, the Courts have held that prior criminal history is admissible to rebut the presumption of doli incapax.[22] This adversely affects minorities, for example, Indigenous young people.

Other protections

19. In addition to raising the MACR to 14 years of age, it is our submission that there needs to be some form of safeguard for young people, aged 14 to 16, which replaces *doli incapax* and is enshrined in legislation.

20. The basis for this submission is simple. It would be against logic to submit that a young person, the day before they turn 14 lacks the requisite capacity to commit a criminal offence, however, the following day, on their fourteenth birthday, has the requisite capacity to be held criminally liable.

21. As stated above, the principle of *doli incapax* currently does little to ameliorate the low MACR in Australia.[23] As such, new defences and/or presumptions for young people, for example, a

[17] *RP v The Queen* [2016] HCA 53.
[18] Above, n16, 127.
[19] Above, n13; Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134.
[20] Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134, 140.
[21] Above, n13; Lisa Bradley, 'Age of Criminal Responsibility Revisited' (2003) 8(1) *Deakin Law Review,* 85.
[22] *R v M* [1977] 16 SASR 589; *Ivers v Griffiths* (NSW Supreme Court, 22 May 1998).
[23] Above, n13.

defence or presumption of 'developmental immaturity' could seek to replace the principle of *doli incapax*.

22. It is our submission that a new defence, with young offenders in mind (such as developmental immaturity), would be most appropriate (rather than making pre-existing defences, such as diminished responsibility, available to young offenders). This could assist with the CJS adapting to the nuances between young people and adults.

Disproportionate effect on First Nations' young people

23. Further to the matters above, a low MACR disproportionately affects Indigenous young people.[24]

24. Indigenous young people are more likely to experience trauma than their non-Indigenous peers because of the cumulative effect of historical and intergenerational trauma, which can be traced back to colonisation. This trauma can lead to some or all of the following.

    (a) Increased rates of drug and alcohol use and/or addiction.

    (b) Violence directed at themselves and others.

    (c) Antisocial and/or criminal behaviour and interaction in the justice system.

    (d) Gang membership.

    (e) Homelessness.

    (f) Early departure from school.[25]

25. The matters outlined in the preceding paragraph, in addition to those articulated above, put Indigenous young people at a very high risk of having ongoing contact with the CJS.

26. At present, just over 50% of young people in detention in Australia are Indigenous young people, notwithstanding that Indigenous young people make up only 6% of the Australian population aged 10-17.[26] That is, Indigenous young people are 18 times more likely than their non-Indigenous counterparts to be incarcerated and around 16 times more likely than their non-Indigenous counterparts to be under supervision.[27] There are a number of reasons for this. They are as follows.

    (a) Disproportionate imprisonment of Indigenous youth for fine default.[28]

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[24] Justice François Kunc (ed), 'The Case for Adopting the Uluru Statement on its Second Anniversary – a Guest Contribution by Arthur Moses SC, President of the Law Council of Australia' (2019) *Australian Law Journal* 339, 340.

[25] Aboriginal and Torres Strait Islander Healing Foundation, 'Growing our children up strong and deadly: Healing children and young people', accessed 1 February 2020 2013.

[26] Australian Institute of Health and Welfare, *Youth justice in Australia 2019 - 2020* (Report, 2021).

[27] Ibid.

[28] Above, n1 249, 340.

(b) Over-policing in Indigenous communities and a lack of specialised training.[29]

(c) Indigenous young people may be less likely to receive a caution or diversionary option than their non-Indigenous counterparts and are more likely to be arrested (rather than receive a Court Attendance Notice).[30]

(d) Indigenous youth are more likely to have their bail refused and their matter determined in Court.[31]

27. In respect of the matters outlined at paragraph 26(c) above, the evidence suggests that the trend by Children's Courts is to impose custodial sentences for young offenders brought to Court by way of arrest as opposed to those who are summoned to Court by way of Court Attendance Notices or summons.[32] It is clear from the matters articulated above that this adversely affects Indigenous young people.

28. By reason of the matters articulated in the preceding paragraphs, it is evidence that the current MACR results in Indigenous young people being grossly overrepresented in the CJS.

29. Raising the MACR would greatly assist in curbing the mass incarceration of young Indigenous people, as it would prevent young Indigenous youth from coming into contact with the CJS, at least until the age of 14 and, therefore, diversionary methods or reinvestment projects (detailed below) could be adopted or implemented to understand and mitigate criminal behaviours.

Justice Reinvestment projects for Indigenous young people

30. Extensive research has been conducted on Indigenous young people and their responsiveness to alternatives to the CJS (for example, reinvestment projects). The research shows that for Indigenous people including children, early intervention and diversion programs run by Indigenous-led organisations and leaders are most effective.

31. Numerous reports have been authored, recommending that these programs:

(a) use a trauma informed therapeutic approach;

(b) be locally run place-based programs; and

(c) are run and controlled by Indigenous people,[33]

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[29] Ibid, 341.

[30] Above, n13, 25; Allard et al, 'Police Diversion of Young Offenders and Indigenous Over-Representation' (Trends & Issues in Crime and Criminal Justice Research Paper No 390, Australian Institute of Criminology, March 2010), 2; Chris Cunneen, "Bringing them home and the contemporary criminalisation of Indigenous young people' (2008) 12(SE) *Australian Indigenous Law Review* 46, 49-50.

[31] Chris Cunneen, "Bringing them home and the contemporary criminalisation of Indigenous young people' (2008) 12(SE) *Australian Indigenous Law Review* 46, 49-50.

[32] Ibid; John Walker 'Prison Cells with Revolving Doors: A Judicial or Societal Problem' in Kayleen Hazlehurst (ed), Ivory Scales: Black Australians and the Law (1987) 106, 110–111.

[33] Royal Commission into the Protection and Detention of Children in the Northern Territory, Recommendations 7.1, 7.2, 7.3; Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, (2017) ALRC Report 133, 262, 333-336 and 368-370, Recommendations 4.1, 4.2, 5.2, 7.1, 7.3, 10.1, 10.2, 10.3, 11.1, accessed 11 February 2020.

to appropriately cater for the needs of Indigenous people and to increase effectiveness and engagement.

The Maranguka Justice Reinvestment Project

32. The Maranguka Justice Reinvestment Project is a grass-roots justice reinvestment project and one of the first of its kind (**Project**). The Project is partnered with JustReinvest NSW and aims to empower the Indigenous community in Bourke to assist with making positive change in the community. This is done by redirecting resources, which would ordinarily be allocated to incarceration, back into the community to address the underlying causes of antisocial behaviour and/or imprisonment and provide support to vulnerable young people and families.[34]

The Projects outcomes

33. In 2018, KPMG undertook an impact assessment of the Project, over the 2017 calendar year, and found that the Project resulted in the following outcomes.

    (a) A 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of re-offending.

    (b) A 31% increase in year 12 student retention rates.

    (c) A 38% reduction in charges across the top five juvenile offence categories.

    (d) A 14% reduction in bail breaches.

    (e) A 42% reduction in days spent in custody.

    Whilst the above statistics are for the Bourke Indigenous community, it is evident that the Project benefits young Indigenous people.

34. Further, KPMG estimated that the program had an economic impact of $3.1 million in 2017, with a forecasted economic impact exceeding $7 million (with low operational costs).[35]

35. By reason of the matters articulated above, it is evident that alternatives to the CJS, such as reinvestment programs are extremely effective in dealing with Indigenous young people.

36. As such, it is our submission that there be increased allocation of government funding to Indigenous community-led and controlled organisations, to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of Indigenous young people.[36] This would assist Indigenous-led organisations and programs in addressing the overrepresentation of Indigenous young people in the CJS.

[34] Australian Indigenous HealthInfoNet, 'Maranguka Justice Reinvestment Project', 2020.
[35] KPMG, *'Maranguka Justice Reinvestment Project Impact Assessment'*, (2018), 6.
[36] Amnesty International, 'From the Ground Up' (2018).

Police powers

37. The Paper foreshadows that the level of police investigation powers in dealing with young people may no longer be available for use by the police (if the MACR is raised to 14).

38. For the reasons set out below, our submission is that police powers ought to be revised for young people under the MACR and only deployed in exceptional circumstances (i.e. to protect personal and public safety). We outline the bases for this submission below.

39. Police officers are usually the first point of contact for young people exhibiting antisocial behaviours and have the ability to determine whether young offenders will come into contact with the CJS.[37] This is because police have broad discretion when dealing with young people, such that they are able to respond to antisocial behaviour by:

    (a) issuing cautions;

    (b) referring young people to restorative justice conferences;

    (c) issuing Court Attendance Notices;

    (d) issuing fines; and

    (e) arresting young offenders,

    which, as articulated above, can impact whether a young person will be convicted of an offence and can influence whether they will be held on remand or be granted bail.[38]

40. The broad discretion afforded to police in respect of policing young people is problematic. This is because a police officer has the discretion to either arrest a young person or issue a caution.

41. In the ACT, police have broad discretion to arrest young people (including young people under 10 years of age) without a warrant if they hold a reasonable belief of the following.

    (a) There has been conduct that makes up the physical elements of an offence, or a breach of the peace is being or likely to be carried out.

    (b) A person has suffered an injury by way of a child's conduct.

    (c) There is an imminent danger of injury to a person or serious damage to property.

    (d) That it is necessary to prevent the conduct or repetition of conduct or to protect life or property.[39]

42. In respect of the matters articulated at paragraph 41(a) above, the legislation does not provide any guidance about what needs to be satisfied for a police officer to hold a 'reasonable belief'

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[37] Harry Blagg; Meredith Wilkie, 'Young People and Policing in Australia: The Relevance of the UN Convention on the Rights of the Child' (1997) *Australian Journal of Human Rights* 3(2) 134.

[38] Ibid.

[39] *Crimes Act 1900* (ACT), 252B.

that a breach of the peace is likely to be carried out. Could 'mere suspicion' satisfy the threshold of 'reasonable belief'? This uncertainty is problematic, particularly for young people in minorities who are more likely to be arrested than cautioned. [See: paragraphs 26 and 27 above]

43. Raising the MACR should reduce the chances of young people under the age of 14 being arrested, due to their inability to commit a crime until the age of 14, however, the *Crimes Act 1900* (ACT) should be revised to ensure that safeguards are implemented to ensure that police do not have broad discretion to arrest young people, particularly under the age of 14.

44. Further to the above, in the ACT, police can currently question a young person, with an adult unknown to them, if the police officer has taken reasonable steps to have that young person's:

    (a) family member;

    (b) guardian; or

    (c) lawyer,

    attend an interview, however, it was not practicable for that person to attend within 2 hours of the police officer's request.[40]

45. We submit that these powers could result in unethical practices such as intimidation and/or inappropriate questioning techniques being adopted when interviewing young people (and which could result in a young person falsely admitting to committing an offence).[41] This is particularly problematic given the current low MACR.

46. Our submission is that police officers should only be permitted to interview young people with a known adult present.

47. By reason of the matters articulated above, police powers should be revised to reflect the increased MACR, and police should be prevented from arresting young people under the age of 14 altogether (save for in the exceptional circumstances outlined above). Further, police officers should be adequately trained to identify problematic behaviours in young people and have resources available to them to deter antisocial behaviours and refer young people to diversion programs early.

Additional Recommendations

48. If the MACR is raised to 14, and young people between the ages of 10 and 13 no longer have the capacity to commit an offence, the government should undertake a review of the current demographic of young people in juvenile detention centres and remove young people under the age of 14 from detention. This could be managed by ensuring at-risk young people have access to therapeutic, age-appropriate health care services and prevention programs to address the issues faced by young people.

[40] *Crimes Act 1900* (ACT), 252GA.
[41] Above, n38.

49. Further to the above, the government could allocate funding to psychologists and other mental health professionals to assist with at risk young people who display behaviours that may result in future offending. Increased mental health support provided to young people at risk is recommended.

Conclusion

50. For the reasons articulated above, the MACR should be increased to 14 to ensure that young people, who lack the capacity to form criminal intent do not come into contact with the CJS. This should be accompanied by a reformation of *doli incapax* principle, by providing a statutory defence and/or rebuttable presumption of 'developmental immaturity' available for young people between the ages of 14 – 16 to ensure that young people are safeguarded from the full force of the CJS. Further, police powers should simultaneously be revised to ensure that the policing of young people is not contrary to raising the MACR. Finally, increased government funding is required to ensure that at-risk young people have the support required.

Addendum

Amnesty International Australia ACT and Southern NSW Committee

51. This addendum seeks to address section two in the Paper through the lens of local human rights advocates.

An alternative model to the youth justice system

52. Australia ACT and Southern NSW Committee represents the greater Amnesty International organisation in the ACT and Southern NSW region. At the local level we represent 400 active members.

53. The local network of Amnesty volunteers has been working within the ACT community for over 5-years specifically around the area of raising the age of criminal responsibility. This included forums highlighting the experiences of Aboriginal People, hundreds of discussions with the community, and large creative campaigns. The community has expressed a strong support for raising the age of criminal responsibility, justice reinvestment, restorative justice, including a focus on addressing core systemic issues that has led to vulnerable persons coming into contact with the criminal justice system.

54. Over the last 2-years 76,786 people have signed the Amnesty petition to raise the age of criminal responsibility in Australia, of these 2,012 signatories are residents of the ACT.

55. Noting the overrepresentation of Aboriginal and Torres Strait Islander children in detention, the Amnesty ACT and Southern NSW Committee supports the recommendations found in the *Our Booris, Our Way Final Report.*[42] Investing in justice reinvestment and support services will lower the amount of children coming into contact with the ACT CJS, and therefore lower the risk of offending into adulthood.[43]

Recommendations

Aboriginal and Torres Strait Islander (ATSIL) Children's Commissioner in the ACT

56. The appointment of an ATSIL Children's Commissioner would bring the ACT in line with other Australian jurisdictions who have such Commissioners in place

Targeted programs

57. Accessible and appropriate early support programs for drug and alcohol rehabilitation, family violence, mental health and trauma

Adequate and fully funded access to legal representation and advocacy

58. As it stands, access to legal representation is limited, placing pressure on Legal Aid and Women's Legal Service, whilst both organisations are underfunded to handle this workload.

[42] Our Booris, '*Our Way Final Report'* 2019.
[43] K Richards, 2011, 'What makes juvenile offenders different from adult offenders? Trends and issues in crime and criminal justice', No.409, February 2011, Australian Institute of Criminology, 7.

Conclusion

59. Local Ngambri-Ngunnawal Elder, Dr Matilda House helped to establish the Aboriginal Legal Service in Queanbeyan in the 1980s and has served as a member of the Aboriginal Justice Advisory Committee, is a strong supporter of the initiative to raise the age of criminal responsibility. Dr House shared her perspective that is founded in acknowledging the past in order to move forward, “people seem to think the atrocities of the past are behind us but they are still with us everyday nothing has changed. We live in this world and I am afraid it is not going to get any better if we do not acknowledge what is continuing to happen. Children and parents need to be supported in justice”. Any and all approaches to justice prevention and reinvestment must be culturally sensitive and inclusive.