

Raising of the Age of Criminal Responsibility

Prepared by:

Preparation for: ATSILA Diploma Tranby National Indigenous Adult Education & Training

Trainer: Judith Curtain

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Acknowledgement of Country

XYZ Legal Service acknowledges and pays respect to the past, present and future Traditional Custodians and Elders of this nation and the continuation of cultural, spiritual and educational practices of the Aboriginal and Torres Strait Islander peoples.

Introduction

The minimum age of criminal responsibility (MACR) in the ACT, and most Australian States and Territories, currently sits at 10 years of age. In the fourth quarter of 2020-2021, 34 youth were detained at Bimberi Youth Justice Centre. Fourteen of the thirty-four were in the 10-14 year age group.¹ XYZ legal Services supports calls for the ACT to raise the MACR to 14 years, in line with recommendations received from members of the UN Children Rights Committee in 2019.²

Submissions to the Council of the Attorneys-General 2019 working group on Raising the Minimum Age of Criminal Responsibility, highlighted the importance of the matter & the need to act without delay. Of the 48 Submissions, all called for the MACR to be raised to a minimum of 14 years without exceptions.³ XYZ calls for the Australian Capital Territory to lead the way for all Australian States and Territories to make this change now.

¹ ACT Government, Community Services, Presentation to the ACT Legislative Assembly, *Bimberi Headline Indicators Report November 2021*, 3.

²<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child>

³ <https://www.raisetheage.org.au/cag-submissions>

1. Community Consultations

In preparation for this report many members of the Aboriginal and Torres Strait Islander community across Australia were consulted.

Each member was given the opportunity to provide their professional and personal opinions on the matter, as well as invited to share their suggestions on potential solutions moving forward. Members were advised that they may remain anonymous for the purpose of this report.

Jennifer Wood - Roper Gulf Regional Council & resident of Borroloola NT

Aunty Teresa Leslie - Indigenous Activist, Launceston TAS

Uncle Shane Carriage - Ulladulla Aboriginal Land Council, NSW

Uncle Brad Smith - Corrections Officer, Hobart TAS

Skyanne Fernando - ALO Queanbeyan, NSW

Jo Chivers - Aboriginal and Torres Strait Islander Elected Body (ATSIEB) ACT

2. Concerns With Current Laws

A. Current Legislation & Sections these issues relate to. (Questions A & C).

*Children and Young People Act 2008 (ACT)*⁴, Sections 91 through 95.
*Crimes (Sentencing) Act 2005 (ACT)*⁵, As a whole, particularly s133D(1.a, 1.b, 1.c), s133R(3) and s133B(b).
*Crimes (Sentencing Administration) Act 2005*⁶ (ACT), Chapter 14A.1 & 14A.2.
*Crimes (Restorative Justice) Act 2004*⁷, s12, s19 (1.b.i.B) & (1.b.ii), s20(2) & s27(5).
*Bail Act 1992 (ACT)*⁸, s23, s23 (1a), s26 (1a), s25(1).
*Human Rights Act 2004*⁹, s11(2), s20(2), s20(4).
*Criminal Code 2002*¹⁰, s25, s26, s26(1).
*Family Violence Act 2016 (ACT)*¹¹, s75.

B. Issues of Concern. (Questions B & D)

Each of the listed legislations defines a young offender as a person under 18 years but no younger than 10 years of age, or makes reference to another legislation that does so. Research has shown that children have not yet developed the necessary level of maturity to form the required intent to be held criminally responsible.¹² Many of the young people involved in the criminal justice system, whether by being incarcerated or under supervision, are more likely to have come from a disadvantaged background or have other complex needs that would be better dealt with outside of the criminal justice system.¹³ Some of these issues include disabilities, mental health problems, abuse, neglect, drug & alcohol abuse, homelessness & poverty.¹⁴ Human Rights Act 2004 (ACT)

⁴ *Children and Young People Act 2008 (ACT)*, s91-s95.

⁵ *Crimes (Sentencing) Act 2005 (ACT)*, s133D(1a,1b,1c), s133R(3), s133B(b).

⁶ *Crimes (Sentencing Administration) Act 2005 (ACT)*, Chapter 14A.1 & 14A.2.

⁷ *Crimes (Restorative Justice) Act 2004 (ACT)*, s12, s19 (1bIB), s19(1bii), s20(2), s27(5).

⁸ *Bail Act 1992 (ACT)*, s23, s23(1a), s26(1a), s25(1).

⁹ *Human Rights Act 2004 (ACT)*, s11(2), s20(2), s20(4).

¹⁰ *Criminal Code 2002 (ACT)*, s25,s26,s26(1).

¹¹ *Family Violence Act 2016 (ACT)*, s75.

¹² Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*.

¹³ Sally Parnell, Jesuit Social Services, *Too Much Too Young: Raise The Age of Criminal Responsibility, Letter to the Attorneys-General* (2015).

¹⁴ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology February 2011) 409 *Trends and issues in crime and criminal justice* 4.

s11(2) states: 'Every child has the right to the protection needed by the child because of being a child without distinction or discrimination of any kind'¹⁵

If this were put into practice, we would be first addressing the issues that children in trouble with the law are facing and secondly avoiding any further damage to their development by introducing them to the Criminal Justice System (CJS). Statistics have shown that the younger a child is when they first engage with the CJS, the more likely they are to reoffend.¹⁶ Due to their lack of maturity, younger offenders are also highly susceptible to being negatively influenced by their peers.

The overrepresentation of Aboriginal and Torres Strait Islander youth in the Australian Justice System is proof that it is time for change. On an average day between 2017-2018, 48% of all ATSI people under supervision were aged between 10 and 15 years, compared with 33% of non Indigenous.¹⁷ Socio economic factors, such as cultural displacement, intergenerational trauma, history of social disadvantage, cognitive disabilities, poor health and living conditions are all factors leading to this overrepresentation.¹⁸

The Criminal Code & Family Violence Act both include conditions relating to children between 10-14 being held responsible. The principle of doli incapax is often not applied or understood consistently across the board.¹⁹

It is our belief that current legislation in regards to youth in the justice system, is holding children to the same expectations and standards as adult offenders.

C. Evidence to support. (Question 2E)

Evidence in support is found within this document.



Judy

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Here you were meant to refer to the name of a report, or something equivalent.

¹⁵ Human Rights Act 2004(ACT), s11(2).

¹⁶ Australian Institute of Health and Welfare, *Young People aged 10-14 in the Youth Justice System 2011-2012(report 2013)*

¹⁷ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-2018 (Report, 2019)*10.

¹⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009) 45.

¹⁹Fitz-Gibbon, K. E., & O'Brien, W. (2019). A child's capacity to commit crime: Examining the operation of doli incapax in Victoria (Australia). *International Journal for Crime, Justice and Social Democracy*, 8(1), 18-33. <https://doi.org/10.5204/ijcjsd.v8i1.104>

3. Proposed laws and programs

A. Legislative Changes (Questions 3a & 3b)

We strongly recommend the MACR be changed to 14 years & that the legislation & sections mentioned above, as well as any other relevant legislation, be changed to reflect this. With the raising of the age, doli incapax would no longer be relevant. Similar to other jurisdictions across Australia, we call for a Youth Justice Act that clearly sets out laws regarding youth engagement with the justice system.

B. Programs & Cultural Considerations (Questions 3c &3d)

The implementation of early intervention training & programs across the community. These could include, but are not limited to, schools, youth centres, health clinics & parent/guardian sessions. Focussing on identifying potential issues & knowing the relevant services to contact.

Breakfast programs at schools as well as dedicated full time school psychologists to provide a safe place for at risk students to see help.

When implementing programs it is crucial to liaise with the ATSI community & have an Indigenous Liaison Officer present across each of the services to ensure that ATSI youth are receiving culturally appropriate interactions with services.

We note that the ACTs Justice Reinvestment Plan does mention some of the proposed changes listed in this report.²⁰ We urge the ACT government to reconsider the importance of addressing the issue of Youth in our Justice system as our youth are most at risk.

4. Other recommendations

Consultation with youth and adults who have been incarcerated or supervised by the justice system in the ACT. By better understanding the issues faced & the input from those with first hand experience in the justice system, programs can be tailored to be inclusive of all backgrounds in our community.

²⁰<https://justice.act.gov.au/justice-programs-and-initiatives/reducing-recidivism/building-communities-not-prisons>

Conclusion

The time to act is now, without delay. The ACT government has the opportunity to pave the way for Youth in our Justice System Australia wide. There has been much discussion about raising the age in the ACT & numerous submissions made in support of this.²¹ Raising the age is a crucial step to work towards reducing the rate of Youth in the Justice System & the amount of adults in the Criminal System that started off as young offenders.

²¹

<https://justice.act.gov.au/sites/default/files/2021-11/Report%20-%20MACR%20Discussion%20Paper%20-%20Submissions.PDF>

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Cases

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Crimes (Sentencing) Act 2005 (ACT)

Crimes (Sentencing Administration) Act 2005 (ACT)

Crimes (Restorative Justice) Act 2004 (ACT)

Family Violence Act 2016 (ACT)

Human Rights Act 2004