



**ACT**  
Government

# Discussion Paper

Raising the minimum age of criminal  
responsibility

**Justice and Community Safety Directorate**

**and**

**Community Services Directorate**

# Ministerial foreword

The ACT Government takes the safety and wellbeing of children and young people very seriously. We are committed to ensuring that the ACT community is a safe and inclusive place to live. Raising the minimum age of criminal responsibility in the ACT gives us the opportunity to improve the safety and wellbeing of children, young people and families, while also safeguarding all Canberrans.

Medical evidence tells us children and young people under the age of 14 who display harmful, risky, unsafe and sometimes violent behaviour often do so as a result of trauma, mental health issues, abuse or disability. This same evidence tells us that early involvement with the criminal justice system has a significant impact on the neurological and social development of children and young people, which often leads to further offending.<sup>1</sup>

We know that Aboriginal and Torres Strait Islander peoples – given the historical and ongoing traumas, dispossession, marginalisation and discrimination they have endured – have been disproportionately affected by the criminal justice system, and that First Nations children and young people are overrepresented in our justice and care and protection systems in the ACT. The ACT Government is committed to working in partnership with the Aboriginal and Torres Strait Islander community to develop holistic and equitable solutions in the spirit of the *ACT Aboriginal and Torres Strait Islander Agreement 2019—2028* and the *National Agreement on Closing the Gap*. Raising the minimum age of criminal responsibility will be an important step towards ensuring First Nations peoples in the ACT can thrive in safe environments and have access to quality services that support the positive development, health and wellbeing of children and young people.

We know that diverting young people from the criminal justice system and providing support to address their individual needs results in fewer young people continuing to engage in criminal behaviours throughout their lifetime and contributes to the broader safety of the community.<sup>2</sup> Improving the safety and wellbeing of children and young people through reforming the minimum age of criminal responsibility supports the ACT's ambitious goal to reduce recidivism by 25 per cent by 2025.

Raising the minimum age of criminal responsibility will not change the reality that some children and young people can and do behave in ways that impact the safety and wellbeing of themselves and others. However, the response must be evidence-based and targeted, rather than primarily punitive.

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<sup>1</sup> Farmer, E. (2011) 'The age of criminal responsibility: developmental science and human rights perspectives' *Journal of Children's Services* 6(2).

<sup>2</sup> Allard, T. et al. (2010) 'Police diversion of young offenders and Indigenous over-representation' *Trends & issues in crime and criminal justice*, no.390.

This reform will provide the tools to respond to these harms as an inclusive and compassionate community, while also more effectively improving the safety of our community. Raising the minimum age of criminal responsibility will enable us to more effectively use appropriate therapeutic and evidence-based approaches that are tailored to the individual needs of children and young people to achieve these outcomes.

The ACT Government is committed to ensuring that any reform gives appropriate attention to safeguarding the community. Careful planning is needed to ensure no child is left unsupported when the minimum age of criminal responsibility is raised. We are already working to identify what restorative and therapeutic services are available to provide this support and accountability, and what gaps need to be filled to ensure the needs of children who are at risk of harming themselves or others can be appropriately addressed.

We are also committed to ensuring that members of the Canberra community who are affected by the harmful behaviour of children and young people are adequately supported and that the community can clearly see how harmful behaviour is being responded to.

The reform to increase the minimum age of criminal responsibility will require the Canberra community to explore some difficult questions, many of which are set out in this Discussion Paper, so that we can together address how we can better care for our children and young people while continuing to support victims of harmful behaviour in our community.

Our hope is that by increasing the minimum age of criminal responsibility in the ACT, we will also provide other jurisdictions with a model for successful law reform and give all Australian kids the chance to be the best they can be.

We value your insights and views and look forward to hearing them.

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# Executive Summary

In August 2020, the 9th ACT Legislative Assembly passed a motion in support of raising the minimum age of criminal responsibility (MACR) in the ACT. This motion called on the ACT Government to consider how best to support the implementation of a higher MACR in the ACT. Following the 2020 ACT election, ACT Labor and the ACT Greens set out an ambitious legislative and administrative reform agenda as part of the Parliamentary and Governing Agreement for the 10th Legislative Assembly, which includes raising the MACR in the ACT as a priority reform, which will be progressed subject to legislative drafting capacity, Cabinet agreement to the Bill, and Budget funding approval as necessary.

The ACT Government is pursuing this reform as a high priority while ensuring we have the right legislative framework and environment to support the introduction of a higher MACR.

Before any change is implemented, the ACT needs to have the right systems in place to support children under the revised MACR whose behaviours significantly impact the safety and wellbeing of the child or young person, or that of another person (referred to in this Discussion Paper as ‘harmful behaviour’).

An independent review of the service system needs and implementation requirements for raising the MACR in the ACT (the review) commenced in February 2021 led by Emeritus Professor Morag McArthur in partnership with Aboriginal consultancy, Curijo, and Australian National University Research Fellow, Dr Aino Suomi (the review team). The review team will map existing service pathways and needs for children and young people using harmful behaviours aged 10—13, identify gaps in the ACT service system, and provide recommendations around options for non-criminalised statutory mechanisms to replace the current youth justice system.

This Discussion Paper will complement the review by seeking views on the policy parameters which will underpin the service model to support the introduction of a higher MACR.

A key component of this reform is the decriminalisation of harmful behaviour for a larger cohort of children and young people. To support this, a continuum of community and Government-based services will be needed. An alternative response must address the needs of children, young people, their families, and their communities. It must also improve access to early supports, provide options for therapeutic care and accommodation, embed restorative approaches, contain alternatives or other changes to court processes and consider how to support victims when traditional justice mechanisms are no longer available.

This discussion paper explores the key issues that need to be addressed before, during and after the MACR is raised.

Section one raises threshold issues including: the age to which the MACR should be raised, whether there should be exceptions to the MACR, and what role, if any, the *doli incapax* principle<sup>3</sup> could play in protecting children and young people who may continue to interact with the youth justice system.

Section two explores the importance of decriminalising behaviour of children and young people under the new MACR. It outlines that, instead of involving them in the criminal justice system, Government and community services must respond to harmful behaviour by addressing the needs of children, young people and their families. This section outlines principles for any alternative model to the current youth justice system and explores key components of any alternative model.

Section three considers the rights of community members who are affected by harmful behaviour once the MACR is raised. The ACT Government seeks to ensure community members continue to have the same access to support and are provided with the same opportunities for restorative justice as current victims of crime.

Section four deals with further technical and legal issues including transitional arrangements once the age is raised, what powers police should have and how best to record, handle and share information of young people under the new MACR.

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<sup>3</sup> *RP v The Queen*, discussed further in Section One of this paper, the *doli incapax* principle provides that children aged under 14 years cannot be held criminally responsible for an offence unless it is proven that they knew what they were doing was seriously wrong.

## Questions

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

### 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?
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?
5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?
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?
7. How should children and young people under the MACR be supported after crisis points?
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?
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?

### 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?
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?
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?

Section four: Additional legal and technical considerations

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?
14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?
15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?
16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?
17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?
18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally, or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?
19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act 2008* and the *Information Privacy Act 2014* sufficient?
20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?



## How to respond

The ACT Government welcomes your insights and views on the issues raised in this discussion paper and have provided the questions above to help guide your response. If you would like to make a submission on this Discussion Paper, please email [macr@act.gov.au](mailto:macr@act.gov.au).

Once consultation on the discussion paper has closed, the ACT Government will make submissions publicly available.

There are two circumstances in which your submission will be considered confidential:

- you request that your submission is made confidential by clearly marking your request on the first page of your submission.
- your submission identifies a child, young person or their family or makes allegations of criminal misconduct.

You may also request that your submission is published but your name or the name of your organisation is withheld. If you wish your name, or your organisation's name to be withheld, clearly mark your request for this on the first page of your submission.

In accepting submissions, the ACT Government must consider the right to privacy of all parties. If your submission identifies a child, young person or their family, or makes an allegation of criminal misconduct the Government may decide that your submission cannot be published. However, this does not mean that your submission will not be considered or not will contribute to the Government's consideration of key policy issues.

Submissions close on **5 August 2021**.

# Background information

1. The current minimum age of criminal responsibility (MACR) in the ACT is 10 years. This means children below the age of 10 are not currently considered to have the capacity to commit a criminal offence and therefore cannot be held criminally responsible for their actions. This also means that a child younger than 10 years of age cannot be charged with a criminal offence, be subject to the criminal justice system or be held in the Bimberi Youth Justice Centre.
2. Currently, children and young people aged 10 years or older can be charged with a criminal offence and subjected to the criminal justice system. However, children and young people aged between 10 and 14 years cannot be held criminally responsible for an offence, unless it is proven that they knew what they were doing was seriously wrong (the *doli incapax* principle).

## Why raise the MACR?

### Position of the United Nations Committee on the Rights of the Child

3. In 2019, the United Nations Committee on the Rights of the Child (the UN Committee) recommended that all State parties raise the MACR to *at least* 14 years of age.<sup>4</sup>
4. The UN Committee further noted that, while setting an appropriate MACR is important, an effective approach also depends on how each State party deals with children above and below that age. For children under the MACR, the UN Committee stated that they 'are to be provided with assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences.'<sup>5</sup>
5. The UN Committee also recommended that no child be deprived of liberty unless there are genuine public safety or public health concerns. The UN Committee encouraged State parties to set a minimum age for deprivation of liberty at 16 years.<sup>6</sup> However, this issue of prevention of detention for older children and young people is outside of the scope of the current MACR reform.
6. In its concluding observations on Australia, the UN Committee noted, with serious concern, the very low MACR in all States and Territories. The UN Committee recommended that Australia

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<sup>4</sup> Committee on the Rights of the Child - General comment No. 24 (2019) on children's rights in the child justice system, [22] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivHToQfjGxYjV05tUA1gpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>

<sup>5</sup> Ibid [23].

<sup>6</sup> Ibid [89].

raise the MACR to reflect internationally accepted standards to the upper age of 14 years, at which *doli incapax* should apply.<sup>7</sup>

### Summary of evidence around impact of the criminal justice system on children

7. The current MACR of 10 years in the ACT does not align with scientific evidence regarding brain development. Research suggests that children under the age of 14 have not developed the maturity necessary to form the intent for full criminal responsibility.<sup>8</sup> This developmental immaturity relates to multiple areas of cognitive functioning, including impulse control, reasoning and consequential thinking.

8. Research also indicates that the prefrontal cortex matures gradually over adolescence and is near complete maturity at 18 years, and that:

[Protracted] development is accompanied by greater reactivity of the socioemotional systems and a general increase in dopaminergic activity associated with heightened sensitivity to reward. This creates a window of potential vulnerability in the early- to mid-adolescent period during which the likelihood of impulsivity, sensation-seeking and risk-taking behaviours is raised.<sup>9</sup>

9. This can also mean that many children lack the capacity to properly engage in the criminal justice system, which can lead to children pleading guilty, giving false confessions or failing to keep track of court proceedings.<sup>10</sup>

10. Studies have also shown that the younger children are when they encounter the criminal justice system, the more likely they are to reoffend. Between 2011 and 2012, child offenders who were first subject to supervision orders under the youth justice system when aged 10-14 were more likely to experience supervision (of all types) in their later teens (33 per cent compared to eight per cent for those first supervised at older ages).<sup>11</sup>

## Who will the change affect?

11. According to the 2016 Australian census, 46,742 children and young people aged 10—19 were living in the ACT in June 2016. Of those, 22,235 were aged between 10—14.<sup>12</sup>

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<sup>7</sup> Committee on the Rights of the Child (2019) Concluding observations on the combined fifth and sixth periodic reports of Australia, [48], [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f5-6&Lang=en)

<sup>8</sup> Farmer, E. (2011) The age of criminal responsibility: developmental science and human rights perspectives' *Journal of Children's Services*, 6(2), 86-87

<sup>9</sup> Ibid [87]

<sup>10</sup> Farmer, E. (2011) The age of criminal responsibility: developmental science and human rights perspectives' *Journal of Children's Services*, 6(2).

<sup>11</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12* (2013)

<sup>12</sup> Australian Bureau of Statistics, *Census Quickstats* (2016) accessed via [https://quickstats.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/CED801](https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/CED801)

12. On an average day in 2019—20, 70 children and young people aged 10—17 in the ACT, were on a community-based order or in detention (referred to in this paper as a Youth Justice supervision order). Of those 70 children and young people, **three** were aged 10—13 years.<sup>13\*</sup>
13. Aboriginal and Torres Strait Islander children and young people are disproportionately represented in the ACT youth justice system. On an average day in 2019—20, 22 per cent of the youth population under supervision were Aboriginal or Torres Strait Islander, despite only representing three per cent of the general population of the same age.<sup>14</sup> Aboriginal and Torres Strait Islander youth were also nine times more likely to be under supervision than their non-Indigenous counterparts in the same period.<sup>15</sup>
14. Between 2015—2020, 9—12 per cent of Youth Justice supervision orders have concerned children and young people aged between 10—13 (Table 1).<sup>\*</sup> It is important to note that the numbers in Table 1 may not represent the actual number of children and young people under a Youth Justice supervision order, as individuals may experience multiple episodes of supervision in a 12-month period.
15. Notably, the data presented only accounts for the children and young people in the ACT whose behaviour has led to a Youth Justice supervision order that is supervised by the Community Services Directorate. It is important to note this does not include a larger cohort of children and young people who are supervised by their parents, are fined, or are sent to services in the community. Further, it does not include the children and young people aged 10 - 13 years who come into contact with ACT Police and who are diverted from the youth justice system by Police.

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<sup>13</sup> Australian Institute of Health and Welfare, *Youth justice in the Australian Capital Territory 2019–20* (2021)

<sup>\*</sup>Age is calculated based on the age a young person is each day that they are under supervision. If a young person changes age during a period of supervision, then the average daily number under supervision will reflect this.

<sup>14</sup> Australian Institute of Health and Welfare, *Youth justice in the Australian Capital Territory 2019–20* (2021).

<sup>15</sup> As above.

<sup>\*</sup> Youth Justice supervision orders can be placed on young people who have been charged or convicted of a criminal offence by the courts. Youth Justice supervision orders can be served in the community or in a corrections facility (Bimberi Youth Justice Centre). This data does not account for orders where a parent or guardian is authorised to supervise the Youth Justice order.

**Table 1 — Number of Youth Justice supervision orders for children and young people**

Age group	2015-16 <sup>16</sup>	2016-17 <sup>17</sup>	2017-18 <sup>18</sup>	2018-19 <sup>19</sup>	2019-20 <sup>20</sup>
14 to 17 years old	137	127	176	136	124
10 to 13 years old	11	14	15	12	13

16. Given the systemic reforms needed to raise the MACR, including improving access to early supports and options for therapeutic care and accommodation, it is likely that the revised system will apply to a broader cohort of children and young people who need support, even though they would not ordinarily be subject to a Youth Justice supervision order.

## Other work on raising the MACR in the ACT

17. The ACT Government has committed \$120,000 for an independent review of the service system needs and implementation requirements for raising the MACR in the ACT (the review). The review commenced in February 2021. A final report will be delivered in early August 2021.

18. This review is being led by Canberra-based Emeritus Professor Morag McArthur in partnership with Aboriginal consultancy, Curijo, and Australian National University Research Fellow, Dr Aino Suomi (the review team).

19. The review team will map existing service pathways and needs for children and young people using harmful behaviours aged 10—13, identify gaps in the ACT service system, and provide recommendations around options for non-criminalised statutory mechanisms to replace the current youth justice system. The review team has consulted justice and community organisations, Aboriginal and Torres Strait Islander representatives and ACT Government stakeholders. Dr Suomi's is undertaking consultation with children, young people and their families who have, or previously have had, involvement with the ACT youth justice and child protection systems.

<sup>16</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2015–16* (2017), Table S1b

<sup>17</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2016–17* (2018), Table S1b

<sup>18</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2017–18* (2019), Table S1b

<sup>19</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2018–19* (2020), Table S1b

<sup>20</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2019–20* (2021), Table S7b

20. Importantly, the review will also explore the needs of children and young people from diverse backgrounds.
21. The ACT Government is working closely with the review team and exploring issues set out in this discussion paper will ensure that policy considerations outlined will complement the work and findings of the review. The final report of the review will be considered alongside the broader community feedback that the Government receives in response to this discussion paper.

## SECTION ONE: Threshold issues for raising the Minimum Age of Criminal Responsibility

22. Several critical threshold issues need to be explored before details of any alternative service response can be discussed. These include what age the MACR should be raised to, whether there should be exceptions to the MACR and what role, if any, the *doli incapax* principle could play in protecting children and young people who may continue to interact with the youth justice system.

### Raising the MACR to 14 years

23. The current minimum age of criminal responsibility (MACR) in the ACT is 10 years. Raising the MACR in the ACT to 14 years will bring the ACT in line with UN Committee recommendations and current research on child development and neuroscience.

24. Preliminary evidence in the ACT suggests that the majority of children and young people who currently interact with the justice system have complex needs and require the most support when they are over the age of 13. Furthermore, offences conducted by children and young people often relate to administrative offences rather than harmful behaviours that impact on community safety.

25. Raising the MACR to 14 years will require significant reform and expansion to the services and interventions available to support children and young people aged 10—13 whose therapeutic needs mean that their safety and wellbeing, or the safety and wellbeing of someone in the community, is at risk. In Scotland, the Government chose to raise the MACR to 12 years of age.

### Scotland: Raising the MACR to 12 years of age

In 2019, the Scottish Parliament unanimously passed the Age of Criminal Responsibility (Scotland) Bill 2019, which included provisions to raise the MACR in Scotland from 8 to 12 years of age.<sup>21</sup> Twelve was already a significant age in Scottish law as it is the age at which a young person can legally instruct a lawyer and express views on their care arrangements. Further, it was determined that the Scottish service system was sufficiently equipped to manage the harmful behaviours of children under 12 years old.

At the time, the Scottish Government acknowledged that the MACR may need to be raised higher in the future. However, the Scottish Government considered that the scope and operation of the service system would need to be substantially reformed to manage the harmful behaviours of children aged 12 and older.

As of June 2021, the provisions that will raise the MACR in Scotland have not commenced.

## Exceptions to raising the MACR for serious offences

26. A key element of raising the MACR in the ACT is ensuring that there are appropriate systems and programs in place that protect the community when the needs of children and young people are not being met, and when there has been significant harm or violence. While significantly violent behaviour by a young person under the MACR is rare, the ACT Government must consider how to appropriately respond when a child or young person engages in these very serious, harmful behaviours. One option is to create exceptions to the MACR where a young person who is between 10 and 13 can be prosecuted for specific offences.

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<sup>21</sup> Scottish Government, Policy statement: *Youth Justice: Raising the age of criminal responsibility* [www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility/#:~:text=The%20Age%20of%20Criminal%20Responsibility%20\(Scotland\)%20Act%202019%20was%20passed,Scotland%20from%208%20to%2012.](http://www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility/#:~:text=The%20Age%20of%20Criminal%20Responsibility%20(Scotland)%20Act%202019%20was%20passed,Scotland%20from%208%20to%2012.)



### New Zealand: Creating exceptions

Like the ACT, the MACR in New Zealand is 10.<sup>22</sup> However, in New Zealand, there are limits on when a child under 14 can be prosecuted. This effectively creates a minimum age of criminal prosecution, meaning that a child or young person under 14 cannot be tried or sentenced in a court unless:

- the child or young person is aged between 10—13 and is accused of either murder or manslaughter.<sup>23</sup>
- the child or young person is aged between 12—13 and is accused of an offence for which the maximum penalty includes imprisonment for life or for at least 14 years.<sup>24</sup>
- the child or young person is aged between 12—13, is considered a ‘previous offender’, and is accused of an offence for which the maximum penalty includes imprisonment for at least 10 years but less than 14 years.<sup>25</sup>

27. The UN Committee does not support the use of exceptions, advising that “such practices are usually created to respond to public pressure and are not based on a rational understanding of children’s development”.<sup>26</sup> The UN Committee strongly recommends that countries set a single, standardised age below which children cannot be held criminally responsible for harmful behaviours, without exception.
28. An alternative to exceptions is ensuring that there are strong and robust evidence-based intervention programs with multidisciplinary approaches that respond both to the needs of the child and the expectations of the community. This includes ensuring that children are held accountable for their actions and in exceptional circumstances, are deprived of their liberty in a secure residential facility. This would likely only be used as a last resort and when there are no other options which meet both the needs of the child or young people and to ensure the safety of the victim and the community.
29. Creating exceptions to the MACR does not mean that children who may be held criminally accountable for their harmful behaviour would not also be able to access intervention programs that support their needs. However, an advantage of creating exceptions is that a court would have the power to mandate the young person’s involvement in the therapeutic interventions.

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<sup>22</sup>*Crimes Act 1961* (NZ) section 21.

<sup>23</sup> *Oranga Tamariki (Children’s and Young People’s Well-being) Act 1989* (NZ) section 272(1).

<sup>24</sup> *Ibid* section 272(1).

<sup>25</sup> *Ibid* section 272(1).

<sup>26</sup> Committee on the Rights of the Child - General comment No. 24 (2019) on children’s rights in the child justice system, [25]

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEnG3QGKUXFivHToQfjGxYjV05tUA1gpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>

30. In the ACT, any legislative change must be compatible with the *Human Rights Act 2004* and any exception would need to be justified as reasonable and necessary in accordance with section 28 of that Act.

### **Doli Incapax**

31. In all Australian jurisdictions, including the ACT, the MACR is 10 years of age. However, children aged under 14 years cannot be held criminally responsible for an offence unless it is proven that they knew what they were doing was seriously wrong (the *doli incapax* principle).
32. If there are exceptions for very serious, harmful behaviours, the *doli incapax* principle could be retained for children and young people charged with a criminal offence under the age of 14 years.
33. While *doli incapax* does provide some protection for young people, it does not always protect children and young people who need it.<sup>27</sup> Establishing *doli incapax* in individual cases can be quite complicated and often requires the child or young person to have substantial engagement with police, justice personnel and the Courts. Even where it is found that the child or young person did not know that their behaviours were seriously wrong, the child or young person will have already been subjected to the impacts of the criminal justice system.
34. The UN Committee notes that while there is some support for the idea of individualised assessments of criminal responsibility, the application of processes like *doli incapax* are highly discretionary decisions. The processes to reach that decision can result in practices that disadvantage children in the justice system.<sup>28</sup>

### **QUESTIONS FOR DISCUSSION**

1. Should there be exceptions to the MACR for children and young people that engage in very serious and/or repetitive harmful behaviour? If yes, what offences should be captured?
2. Should *doli incapax* have any role if the MACR is raised?

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<sup>27</sup> 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, 140–1; Krishna, Kershlin; Moulds, Sarah 'Old Enough to Know Better? Reform Options for South Australia's Age of Criminality Laws' (2020) 41(1) Adelaide Law Review 313, 315–316.

<sup>28</sup> Committee on the Rights of the Child - General comment No. 24 (2019) on children's rights in the child justice system, [26]

## SECTION TWO: AN ALTERNATIVE MODEL TO THE YOUTH JUSTICE SYSTEM

35. Raising the MACR provides the opportunity to redesign the approach we take to understanding and responding to the harmful behaviour of children and young people. Decriminalising responses to this behaviour will shift the focus of the response from the deeds of the child to what the child needs to have a safe, stable and supportive environment. This also presents an opportunity to provide better early support to address the underlying causes of harmful behaviour. This approach will keep the community safer by providing children and their families with the supports and services they need to prevent harmful behaviour.
36. Upholding the rights of children under the new MACR will be central to this reform. Policy and practice will be driven by what is in the best interests of the child, recognising that strong and resilient families provide a safe, stable and supportive environment for children. It will be critical that children and young people have a say in the design and implementation of any solutions.
37. Evidence demonstrates that early support, family-led decision making, and robust, consistent, and reliable service systems are critical for preventing children from entering a cycle of harmful behaviour. Service responses must develop strong relationships between children and young people, families and service providers, repair harm between families and communities, and establish accountability to prevent harmful behaviour.
38. Ignoring the risky, unsafe and harmful behaviour of children is not in their best interests. While a very small number of children and young people between 10 and 13 years come into conflict with the criminal laws in the ACT, a systemic response will be required to ensure they receive the services they need to keep them, and the community, safe. The ACT Government is seeking views on ways to improve access to early supports, options for therapeutic care and accommodation, restorative justice approaches, alternatives or other changes to existing court processes and consideration of how to support victims when traditional justice mechanisms are not available.
39. This includes consideration of the intensifying service responses that might be required across a spectrum of needs and behaviour, including on the exceptionally rare occasion that a child is involved in incidents of serious physical or sexual violence.

### Design principles for an alternative model

40. To replace the youth justice system for children under the revised MACR, an alternative model will need to be developed.

41. A set of principles are proposed to underpin the development of the alternative model. These principles will guide the development of legislation for the reform, as well as policy and practice for government and non-government services. These principles are based on the principles that have underpinned MACR reform internationally, and the initial views of ACT community and justice stakeholders. It is proposed that any alternative model should:
- assess and respond to the needs of children and young people, rather than focusing on offending and punishment.
  - ensure self-determination of Aboriginal and Torres Strait Islander communities in service design and delivery.
  - provide for the safety and wellbeing of children and young people to benefit the whole community.
  - ensure the safety and wellbeing of children and young people by supporting families, communities, schools and health services.
  - recognise the right to safety for all members of our community and victims of harmful behaviour by children and young people.
  - use restorative and culturally appropriate practices to respond to harmful behaviours by children and young people.
  - only mandate a child or young person to receive support if it is in their best interest, and only as a last resort.

#### **QUESTIONS FOR DISCUSSION**

3. Are these the appropriate design principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

### **Example of an alternative model – a multidisciplinary panel**

The ACT Government has undertaken initial, early consultations with key stakeholders on an alternative model to the youth justice system. Through these consultations, several stakeholders have identified that establishing a multidisciplinary panel (the Panel) would be a useful element of an alternative model.

A Panel could be made up of experts who can assess the needs of a young person, provide referrals to services to meet these needs, and work closely with young people and their families to ensure they attend these services.

These experts may have qualifications, experience, or expertise in one or more of the following fields, including (but not limited to):

- Psychology
- Paediatrics
- Child forensic medicine
- Education
- Social work
- Therapeutic care
- Investigations
- Mental health or disability
- Child protection

Where required, the Panel may also include an identified expert with experience working with Aboriginal and Torres Strait Islander children and young people. Any model developed must be culturally safe and appropriate and based on the principle of self-determination.

The Panel would also provide opportunities for shared decision making with the child or young person, their family and other important people identified by the child, young person and/or their family.

While a Panel may respond to harmful behaviour in the community, the benefits of a Panel are that it may be able to respond much earlier to the needs of young people, thereby preventing harmful behaviour.

By intervening early, a Panel could provide appropriate services and supports to children and young people that respond to the underlying causes of harmful behaviour including:

- support to stay engaged or reengage with school.
- opportunities for safe and stable accommodation.
- access to secondary service supports for physical and mental health or disability.
- therapeutic family supports like family group conferencing and functional family therapy.

By tackling the underlying causes of harmful behaviour, a child or young person receives better support, and the community is safer.

## Key components of an alternative model

42. Guided by the design principles, the alternative model will need to establish new mechanisms for children, young people and their families to access and engage with support services.

### Accessible support for children, young people, families, and the community before crisis

43. When children and young people access universal and secondary services that target the underlying causes of harmful behaviour, they are much less likely to engage in these behaviours. These services include physical and mental health services, disability services, education support, family functioning, counselling and stable accommodation. These services are critical to supporting children and young people to successfully develop physically and psychologically.
44. However, these services are often difficult to access, particularly for families who experience financial hardship, are Aboriginal and/or Torres Strait Islander or do not meet the threshold for statutory intervention in the care and protection system. For some families, statutory intervention is the first time their needs are identified, and they are provided with appropriate services.
45. When the MACR is raised, the youth justice system will not be able to identify and respond to children and young people at risk of, or already engaging in harmful behaviours under the new MACR. The ACT Government and service providers must find new ways to identify and respond to needs before crisis occurs. Without a new mechanism to identify and respond to needs, this cohort of children and young people may not receive adequate support until their needs and behaviours escalate later in life.

### QUESTIONS FOR DISCUSSION

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

## **Responding to harmful behaviours**

46. Any alternative model must consider how best to address the needs of children and young people and the safety of the community, including after a child or young person has engaged in harmful behaviour. This includes triggers for intervention, how referrals will operate, who should intervene and how services should be provided, including whether services should be mandated for the young person to engage in. The model will also need to include a function to monitor and review service provision to ensure the child or young person's needs are being met.
47. There are three main thresholds that can indicate key points for intervention when responding to harmful behaviour.

### **When crisis occurs**

48. At crisis point, a child or young person is harming themselves, property or another person in the community. This is the point at which a young person may, if they were above the MACR, be arrested, restrained, cautioned, charged or diverted by police (or other emergency responders).
49. Appropriate and proportionate responses may need to be available for service providers or police to respond to harmful behaviour in crisis moments, especially when a child or young person is attempting to harm themselves or others.
50. Currently, children and young people under the MACR can be arrested by police and taken to a safe place.

### **After crisis**

51. After a crisis, the child or young person may no longer be at immediate risk of harming themselves, property or another person in the community but involvement with services like mental health or intensive education supports may be required to respond to their needs.
52. This is the point at which a young person may, if they were above the MACR, be charged, remanded in custody or bailed, sent to the Children's Court, be fined or ordered to complete community services, or given a Youth Justice supervision order to be supervised by their parents or guardians. A smaller number of young people may be given Youth Justice supervision orders to be supervised by the Community Services Directorate in the community or in Bimberi Youth Justice Centre.
53. In an alternative model, it will be important to consider opportunities to establish accountability mechanisms where harmful behaviour impacts another person or another person's property. This may include restorative conferencing, fact-finding investigations or circle sentencing.

### **When crisis continues to occur**

54. If crisis points continue to occur, it evidences that the underlying causes of harmful behaviour are not being successfully addressed.

55. Currently, children and young people who are given a Youth Justice supervision order by the Children's Court are mandated to meet the conditions of their order. If they do not, they receive escalating responses through the criminal justice system.
56. Children who are currently under the MACR, cannot receive any mandatory Youth Justice supervision order if they engage in harmful behaviour. This means any engagement with services, counselling or support is undertaken voluntarily. If they do not engage with services and supports or continue to engage in harmful behaviour while under the MACR, there is no escalation via the criminal justice system.

## Serious harmful behaviours

57. Views vary in relation to the treatment of serious harmful behaviours by a child under the MACR.
58. Under a human rights approach that recognises the benefits of deterring children from the youth justice system, children who are accused of serious harmful behaviours would still have access to the alternative model.
59. Serious harmful behaviours are likely to have significant impacts on the child or young person, their family and the community.
60. However, the scientific evidence on brain development maintains that children under the MACR accused of or responsible for serious harmful behaviours have not developed the maturity to form the intent for criminal responsibility.
61. For those that do not support exceptions to the MACR for serious harmful behaviours, a model based on restorative approaches, voluntary engagement of the young person, and only resorting to compulsory measures, such as depriving liberty, as a last resort, is preferred.
62. If there are no exceptions to the MACR, it is important that any alternative model can appropriately respond to serious harmful behaviour.

### QUESTIONS FOR DISCUSSION

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



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?
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?

## SECTION THREE: VICTIM RIGHTS AND SUPPORTS

63. Any alternative model will also need to support the rights and interests of people impacted by harmful behaviour. Under a revised MACR, it is important that community members who have been impacted by the harmful behaviours of children and young people are able to access the same or similar supports that are currently available to victims of crime. This includes supports such as access to restorative justice mechanisms, assistance with recovery, and access to information regarding the steps taken in relation to the child or young person in response to their harmful behaviour.
64. Existing schemes and services may need to be updated to ensure that they are available, where appropriate, to community members who are impacted by the harmful behaviours of children and young people under a revised MACR. Views are sought on how best to ensure access to appropriate rights, supports, assistance and services for victims under a revised MACR.

### Restorative Justice

65. In the ACT, restorative practices are embedded throughout the justice system and underpin the supports offered to offenders and victims of crime as part of the ACT Government's commitment to developing Canberra as a restorative city. Restorative justice processes create space for victims' voices to be heard. They also facilitate a process through which offenders may take ownership of the harm their actions have caused. This empowers victims to make decisions about how to repair the harm done by the offences.
66. Restorative justice involves an exchange of information between the people most affected by an offence, particularly the victim and offender, by providing:
- victims an opportunity to talk about how an offence has affected them and those close to them and to address any unresolved questions, issues and emotions experienced by victims.
  - those close to a victim an opportunity to address any unresolved questions, issues and emotions experienced by them.
  - offenders an opportunity to accept responsibility for their actions and to repair the harm caused by the offence.
  - those close to the offender an opportunity to talk about how an offence has affected them.

- victims and offenders an opportunity to discuss the harm caused by offence in the presence of their supports in a carefully managed and safe environment.

67. At present, the *Crimes (Restorative Justice) Act 2004* enables children and young people who commit offences to participate in restorative justice provided they accept responsibility for the offence or for less serious offences, do not deny responsibility for the commission of the offence, and were at least 10 years old when the offence was committed or was allegedly committed. Participation in restorative justice occurs on a voluntary basis.<sup>29</sup> For restorative justice processes to remain applicable where there is a revised MACR, some elements of those processes may need to change, including that restorative justice conferences may need to be available where no offence has occurred. This may mean other changes to restorative justice processes may also be required.

## Charter of Rights for Victims of Crime and Support Services

68. In January 2021, the ACT Government launched the Charter of Rights for Victims of Crime (the Charter) that recognises the central role that victims of crime play in the criminal justice system and upholds their rights to safety, privacy, dignity and participation.

69. The Charter protects and promotes the rights of victims of crime to safety, privacy, dignity and participation when they engage with justice agencies in the criminal justice system, and prescribes the following specific rights for victims of crime:

- Respectful engagement and protections related to safety and privacy.
- Access to support services and other forms of assistance.
- Provision of information about general administration of justice processes.
- Provision of information and updates in regard to investigations, proceedings and decisions.
- Participation in proceedings.

70. The Charter defines a victim as a person who has suffered harm, such as physical or mental injury or emotional suffering, pregnancy, economic loss, or substantial impairment of a person's legal rights, because of an offence.<sup>30</sup> An offence means an offence against a law in force in the ACT. As long as these requirements are met, then a victim of crime is entitled to the above rights in their dealings with justice agencies when moving through the criminal justice system.

71. The ACT Government also provides a breadth of support for victims of crime, including access to financial assistance and support services, and provision of information around the justice processes relating to an offence, which will need consideration in terms of their continued application to children and young people following a revised MACR.

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<sup>29</sup> *Crimes (Restorative Justice) Act 2004* (ACT), section 19.

<sup>30</sup> *Victims of Crime Act 1994* (ACT), section 6.

## Youth Justice Victims Register

72. In addition to information sharing rights provided under the Charter, people can join the ACT Youth Justice Victims Register to seek access to information about a child or young person sentenced for an offence of which they were a victim. Currently, eligibility is contingent on the child or young person being sentenced for an offence, which would exclude individuals under the revised MACR.

## Victims Services Scheme

73. All victims of a crime (as defined by the *Victims of Crimes Act 1994*) are eligible for assistance under the Victims Services Scheme, with the exception of people who have suffered harm caused by, or arising out of the use of, a motor vehicle; or (directly or indirectly) as a result of committing an offence. The Victims Services Scheme provides supports to victims of crime to assist in their recovery and allow them to take part in the social, economic and cultural life of their community. While the Scheme covers people who have suffered harm because of an offence against a law in force in the ACT, the Victims of Crime Commissioner has some existing discretion available to deliver services to people impacted by harm who do not meet the eligibility criteria.

## Victims of Crime Financial Assistance Scheme

74. The *Victims of Crime (Financial Assistance) Act 2016* establishes the Financial Assistance Scheme to:

- assist victims of crime to recover from acts of violence.
- contribute to the safety of victims of crime and the prevention of future acts of violence.
- acknowledge the harmful effects of acts of violence.
- complement other services provided for victims of crime.

75. The scheme offers financial payments to cover both immediate needs and economic loss, and applies to victims who have been injured as a direct result of an act of violence, have witnessed a homicide, or are a family member or partner of a victim of a homicide.<sup>31</sup>

76. Eligibility for the scheme does not rely on an individual being charged, convicted or found guilty of a crime.<sup>32</sup>

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<sup>31</sup> Victim Support ACT, financial assistance scheme provides more information, accessible at <https://www.victimsupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016>.

<sup>32</sup> *Victims of Crime (Financial Assistance) Act 2016*, section 7.

## QUESTIONS FOR DISCUSSION

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 trigger the application?
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?
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?

## SECTION FOUR: ADDITIONAL LEGAL AND TECHNICAL CONSIDERATIONS

77. Raising the MACR will require close consideration of associated transitional measures, inter-jurisdictional issues, police powers, and arrangements for recording, handling and sharing information between agencies and jurisdictions about children and young people that need support under the new MACR. Views are sought on how best to manage these arrangements under a revised MACR.

### Police powers

78. Despite raising the MACR, it may still be important for police to have the power to investigate harmful behaviour. Further, it can sometimes be difficult to know a child's age during crisis situations and the police may need to exercise powers to prevent or stop harmful behaviour without knowing the age of the child or young person involved. The level of police investigation powers needed will depend on the model selected and whether or not there are exceptions to the revised MACR.

### Current police powers for children under 10 years of age

79. At present in the ACT, a warrant for the arrest of a child under 10 years may be issued if a judicial officer believes on reasonable grounds that the child has carried out conduct that:

- makes up the physical elements of an offence; and
- poses a risk to the safety of either the child or the community.<sup>33</sup>

80. Police may also arrest a child without a warrant in certain circumstances.<sup>34</sup>

81. A police officer must only do the minimum necessary to stop or prevent the child's conduct.<sup>35</sup> Once the child has been arrested, the police officer must either take the child to:

- a person with responsibility for the child; or
- another person or agency agreed in consultation with the Director-General of the Community Services Directorate.

82. Children under the age of 10 years cannot be subject to a strip search<sup>36</sup> or an identification parade.<sup>37</sup>

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<sup>33</sup> *Crimes Act 1900 (ACT)*, section 252A.

<sup>34</sup> *Ibid* section 252B.

<sup>35</sup> *Ibid* section 252C(1)(a).

<sup>36</sup> *Ibid* section 228.

<sup>37</sup> *Ibid* section 234.

## Powers that may no longer be available to the police

83. The *Crimes Act 1900* sets out additional police powers which apply both to adults and to children over the MACR. These powers relate to searches, police interviews and the taking of identification material.<sup>38</sup> Because many of these powers are based on the reasonable suspicion of an offence having been committed, these powers may no longer be available for use by the police when dealing with a child under the revised MACR. Depending on the model developed, it may be necessary to make provision for additional police powers to allow for investigations into specific incidents, particularly if the alternative model requires any fact-finding processes.

## Exploitation by adults

84. There are existing offences within the *Criminal Code 2002* that act to criminalise behaviour that recruits, induces or incites another person to engage in criminal activity. Particularly relevant to situations where adults seek to involve children and young people in criminal activity are the offences in sections 47 (Incitement) and 655 (Recruiting people to engage in criminal activity). Neither offence relies on the offence recruited for or incited being committed.

85. The maximum penalty for section 47 depends on the offence which was incited while section 655 attracts a higher maximum penalty of 10 years' imprisonment if the person being recruited is a child.<sup>39</sup>

86. Raising the MACR may incentivise adults to seek to involve children or young people under the MACR in crimes in order to avoid prosecution. Consideration may be needed as to how the criminal law treats those that seek to use children or young people to conduct criminal activities on their behalf.

### QUESTIONS FOR DISCUSSION

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If not, what should be different?
14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers that police should not have?
15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence

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<sup>38</sup> Ibid Part 10.

<sup>39</sup> If the person recruited is not a child, the maximum penalty is 7 years' imprisonment.

be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

## Transitional provisions

87. Children and young people who are currently above the MACR are subject to a criminal process that is similar to that used for adults:

- After being arrested and charged with an offence, a court or authorised police officer must determine whether the young person is to be granted bail or remanded in custody awaiting the hearing of the matter.<sup>40</sup> The criteria for granting bail is different for children and young people than for adults.<sup>41</sup> It includes consideration of the youth justice principles set out in the *Children and Young Peoples Act 2008* and, as a primary consideration, the best interests of the child.
- Once a child or young person has been convicted of an offence, the court sentences them in accordance with the *Crimes (Sentencing) Act 2005*. A court must give more weight to rehabilitation with a child or young person than any other sentencing consideration.<sup>42</sup> While a child or young person can be sentenced to detention; a sentence of detention must be imposed as a last resort and for the shortest possible term.<sup>43</sup>

88. When the MACR is raised, there will be children and young people under the new revised MACR who are subject to existing court orders (on bail, community-based orders or detention), as they committed an offence before the MACR was raised.

89. There are existing legislative provisions which may be relevant when looking at whether children currently on orders should be transitioned to the extent possible under existing laws, to the alternative model:

- *Human Rights Act 2004* –
  - Section 20(4) states that a convicted child must be treated in a way that is appropriate for a person of that child's age who has been convicted.
  - Section 25(2) states that if the penalty for an offence is reduced after anyone commits the offence, the offender benefits from the reduced penalty.
  - Section 30 states that legislation in the ACT must, as far as it is compatible with its purpose, be interpreted in a way that is compatible with human rights.
- *Legislation Act 2001* section 84A(3) states that if a law reduces the maximum or minimum penalty, or the penalty, for an offence, the reduction applies to an offence committed before or after the law commences, but does not affect any penalty imposed before the law commences.

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<sup>40</sup> *Bail Act 1992* Part 4.

<sup>41</sup> *Ibid* s 23.

<sup>42</sup> *Crimes (Sentencing) Act 2005* s 33C.

<sup>43</sup> *Ibid* s 133G.



90. Children and young people who have already been sentenced have already had their matter heard and determined by the courts. The management of those currently under sentence will consider the principle of judicial independence may require that these children and young people need to be treated differently to those that are yet to be sentenced.

### QUESTIONS FOR DISCUSSION

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?
17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

## Extradition between the ACT and other states and territories

91. The process that applies when a person (including a child or young person) is arrested by police in the ACT where another state or territory has issued an arrest warrant for alleged offending in that jurisdiction is set out in Commonwealth law.<sup>44</sup> This law applies to all states and territories.
92. If a valid interstate warrant is produced, ACT courts cannot interfere with the extradition process other than to decide whether the accused person should be transferred to the other jurisdiction in custody or on bail.
93. After the MACR is raised, children and young people that are younger than the revised MACR may travel to the ACT after participating in alleged criminal activity in another jurisdiction. While their age could preclude criminal prosecution in the ACT, they may still be subject to warrants issued by another state or territory.
94. The ACT is limited in its capacity to affect this issue as Commonwealth law governs extradition and those laws prevail over any inconsistent territory laws.<sup>45</sup> Currently, the extradition of children and young people between the ACT and other states and territories occurs very infrequently.

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<sup>44</sup> *Service and Execution of Process Act 1992* (Cth) s 82-83.

<sup>45</sup> *Commonwealth of Australia Constitution 1900* (Cth), section 109.

## Spent or extinguished convictions

95. If a conviction is 'spent,' the person convicted does not generally need to disclose that they were convicted of that offence.<sup>46</sup> This can be useful when applying for jobs, securing loans and for travel.
96. Under ACT law, convictions become 'spent' automatically following a prescribed crime-free period. For children and young people, convictions become 'spent' automatically after a five -year crime-free period.<sup>47</sup>
97. Convictions cannot be 'spent' for children and young people where:
- a sentence of imprisonment of longer than 6 months has been imposed.
  - it is for one of the specific offences prescribed by regulation.<sup>48</sup>
98. A conviction can also be spent earlier through a dismissal of charge following the completion of a good behaviour bond.<sup>49</sup> Convictions that are spent only have to be disclosed in specific circumstances (such as a court hearing).
99. At present, historical convictions which have been removed as offences due to law reforms resulting in conduct which was once considered criminal to no longer being considered criminal (such as homosexual offences) can be extinguished, rather than spent. When a conviction is extinguished, a person does not have to reveal the conviction to anyone and it does not appear in their criminal history.
100. Once the MACR is raised, historic prior convictions committed by children and young people when they were younger than the new MACR, would remain on their criminal record, in accordance with existing spent conviction laws.
101. If, and how, convictions are spent or extinguished under a revised MACR may depend on whether there are exceptions to the MACR for very serious harmful behaviour.
102. If there are any exceptions to the MACR which could result in convictions being recorded on a child's criminal record, it may be difficult to remove only some of the historical convictions committed at a time when a child was under the revised MACR, as they would need to be assessed on a case by case basis having regard to the alternative model.

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<sup>46</sup> The conviction doesn't disappear completely - it remains part of the criminal record kept by the police and may be presented to a court, but it is not included as a disclosable conviction for a police clearance.

<sup>47</sup> *Spent Convictions Act 2000* s 12(1).

<sup>48</sup> *Ibid* s 11(2). No offences are currently prescribed by regulation.

<sup>49</sup> *Ibid* s 12(3).

103. If there are no exceptions to the MACR all historical convictions for offences committed by children when they were younger than the new revised MACR could be 'spent' or 'extinguished'.

#### QUESTIONS FOR DISCUSSION

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent' or 'extinguished'? Should such convictions be spent/extinguished automatically and universally or should it be upon application? How should the approach differ if there are exceptions to the MACR?

### Supervision of orders made in other jurisdictions

104. Existing arrangements allow for ACT children that are subject to court orders in other jurisdictions to apply to have their orders transferred to the ACT for supervision. This includes orders for detention. When the order is transferred to the ACT it is managed by ACT Government services as an equivalent ACT Youth Justice supervision order. Discussions with other state and territories will be needed to consider how the orders for other jurisdictions will be met by the ACT justice system, including detention of children and young people under those court orders from another jurisdiction.
105. It is not anticipated that a revised MACR will apply to children and young people that commit a Commonwealth offence in the ACT, unless Commonwealth legislation is amended to revise the MACR.

### Managing personal information of affected children

106. The management of personal information is a complex area which is influenced by multiple pieces of legislation.

#### General management of information

107. Chapter 25 of the *Children and Young People Act 2008* deals with information security and sharing under that Act, both for information about children and young people being detained in the youth justice context and for information about children and young people in the protective services context. In general, it forbids the sharing of protected information unless it is otherwise allowed under the Act. This includes information about young detainees, which includes a child or young person who is in custody following an arrest, or who is being held in the custody of the director-general for the Community Services Directorate. The Act allows sharing of information in specific circumstances, such as when it is in the best interests of the child or if the information is materially relevant to an investigation being carried out by the police. Any alternative model brought in under the *Children and Young People Act 2008* would be subject to these provisions.
108. In addition to the protections under the *Children and Young People Act 2008*, there are general rules for the management of personal information in the *Information Privacy Act 2014* and the *Privacy Act 1988* (Cth). In general, a public sector agency must not use or disclose

information for a purpose secondary to the purpose for which the information was collected, unless the individual consents to the information being used. Information shared by ACT Policing falls under this legislation.

109. When the MACR is raised, one of the key issues around the management of personal information will be what happens to information gathered about children and young people who were previously criminally responsible for their behaviour.
110. To overcome these issues, Scotland's reforms created an Independent Reviewer. The Independent Reviewer determines whether or not relevant behaviour by children and young people under the MACR ought to be included in a criminal record certificate for things such as working with vulnerable people background checks.<sup>50</sup> This potentially includes information regarding Children's Hearings based on the offence ground of referral held before the MACR was raised, but will mainly deal with non-offence behaviour.

### Use of specific information

111. In addition to the general use of information, police collect information based on their interaction with the community. This raises the question of whether police should be able to use information gathered about a child under the revised MACR when investigating crimes committed after the child has reached the MACR.
112. Under the *Crimes (Forensic Procedures) Act 2000*, the police may take forensic material from adults, and children under specific circumstances. Forensic material can include things such as fingerprints, body samples, or photographs. The *Crimes (Forensic Procedures) Act 2000* would only apply to children under the revised MACR as volunteers (rather than suspects). In general, forensic material from volunteers is retained for an agreed period or as ordered by the court.<sup>51</sup>
113. In addition, the police have powers to take identification material from children or young people under the age of 18 under a court order where it is necessary to identify the person or identify the person as having committed an offence.<sup>52</sup> Material taken under this section must be destroyed after 12 months or after the relevant court proceedings.<sup>53</sup>
114. In Scotland, police may take identification material from a child under the MACR in certain circumstances.<sup>54</sup> That identification material can either then be passed to the Principal Reporter

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<sup>50</sup> *Age of Criminal Responsibility (Scotland) Act 2019* Part 2.

<sup>51</sup> *Crimes (Forensic Procedures) Act 2000* Part 2.8.

<sup>52</sup> *Crimes Act 1900* s 230A.

<sup>53</sup> *Ibid* 231.

<sup>54</sup> *Age of Criminal Responsibility (Scotland) Act 2019* Part 4, Chapter 4.

to facilitate a hearing into the child's behaviour or destroyed.<sup>55,56</sup> The material must also be destroyed after any hearing into the child's behaviour ordered by the Principal Reporter.

#### QUESTIONS FOR DISCUSSION

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act 2008* and the *Information Privacy Act 2014* sufficient?
20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

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<sup>55</sup> Ibid s 66 & 71.

<sup>56</sup> The Principal Reporter in Scotland considers referrals of children on a number of grounds, including that the child has committed an offence, and determines whether the child should be subject to the children's hearings system. The children's hearings system considers each matter referred to it and determines whether compulsory measures are necessary to support the child.