

Submission
to
the ACT Government Discussion Paper
on
Raising the Minimum Age of Criminal Responsibility

August 2021



AUSTRALIAN
CHILD RIGHTS
TASKFORCE

The Australian Child Rights Taskforce

CONVENOR

UNICEF Australia

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EXECUTIVE SUMMARY

This submission shares the insights of the Australian Child Rights Taskforce concerning this important development in justice and wellbeing for children and young people in Australia today.

Childhood and adolescence are 'critical times for building capabilities for life'¹. Learning experiences don't come in neat packages for all children and young people. Sometimes these experiences are guided by mistakes or misguided by the less than perfect circumstances around them. The criminal justice system offers a fundamentally flawed approach for supporting and learning for children. The surrounding service systems are not always child-centred and respectful of children's rights and health and wellbeing.

We believe that this inquiry offers an important opportunity to review the limitations of existing policy and practice in the service system for children and to consider possible future direction and developments that will improve justice, health and wellbeing and respect for rights for children and young people in Australia more generally.

In 1997 the Australian Law Reform Commission & Australian Human Rights Commission handed down a joint report called "Seen and Heard: priority for children in the legal process". Today, this landmark report remains the most comprehensive examination of children and the legal system in Australia. Disturbingly, many of the failures of legal processes for children identified in this report remain today:

- discrimination against children;
- a failure to consult with and listen to children in matters affecting them;
- a lack of co-ordination in the delivery of services to children;
- an overly punitive approach to children in criminal justice systems;
- the over-representation of Indigenous children in the justice and protection systems;
- court processes which are bewildering and intimidating for children; and
- school exclusion processes without fairness and natural justice.

The reform under consideration today in the ACT provides an opportunity to revisit and address some of the findings of that report.

Our recommendations

- The minimum age of criminal responsibility should be raised to 14 years with no exceptions.
- Child rights should guide the implementation of the reform.
- Gaps and weaknesses in the existing service system should be addressed.
- The focus should be to create and maintain safe, stable, and supportive environments.
- The views of children should be heard in design, implementation and decision making.
- The reforms should address coordination and integration of services and systems.
- The reforms should produce systems that address need and are voluntary and accountable.
- Services to victims of crime should not be affected.

¹ McLachlan, R., Gilfillan, G. and Gordon, J. 2013, *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra at page 14.

Background

The Issues

The ACT Government has proposed raising the minimum age of criminal responsibility in the ACT as a priority reform. It has identified that before any change is implemented, the ACT community needs to have the right systems in place to support children who will be affected by the legislative reform.

The Australian Child Rights Taskforce supports the reform and wishes to assist in the implementation of the reform.

A Discussion Paper has been released to guide the preparatory discussions. We also note that an independent review of the service system and implementation requirements has been commissioned. The review team will map existing service pathways and needs for children and young people using harmful behaviours, identify gaps and provide recommendations around options for mechanisms to replace the current youth justice system.

The Discussion Paper notes that:

"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."

The Australian Child Rights Taskforce and its work

The Australian Child Rights Taskforce² is a coalition of over 100 organisations, networks and individuals who are committed to the protection and development of the rights of children and young people in Australia. UNICEF Australia convenes the Taskforce, and its work is guided by a Steering Committee.

One of the key roles of the Taskforce is to hold Australian Governments to account on the implementation of the *United Nations Convention on the Rights of the Child* (the Convention). When Australia ratified the Convention in 1990, this represented a commitment that every child in Australia should enjoy the rights set out in the Convention.

The Child Rights Taskforce has published a series of reports (most recently 'The Children's Report')³, that have examined the implementation of the Convention in order to assist the United Nations Committee on the Rights of the Child⁴ in its review of Australia's performance. These reports acknowledge that while Australia is a wonderful place for most of its children, there remains significant structural and material disadvantage for many children.

These reports have informed the recommendations of the Committee⁵ which have covered a broad range of policy areas where improvements were considered necessary, including the raising of the age of criminal responsibility.

The Committee has also noted that despite Australia's ratification of the Convention in 1990, it has yet to effectively incorporate rights into policy and legislative frameworks to benefit children and there are unacceptable gaps in the legal protection of children's rights.

The Child Rights Framework

The Convention reflects a fundamental shift that occurred during the 20th Century in the way that children were viewed. Previously children were largely viewed as the property of adults. This shift to an understanding of children as autonomous rights holders has begun to be reflected in domestic legal systems as well as international law.

The Convention sets out this understanding in a range of ways including through its requirement that processes in law, government policy and judicial review will act to guarantee the effective implementation of the rights set out in the Convention for each Australian child (Article 2.1) and to require that all appropriate legislative, administrative and other measures are taken in order to implement the rights set out in the Convention: (Article 4).

² <http://www.childrights.org.au/welcome>

³ <https://apo.org.au/node/200771>

⁴ <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

⁵ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/5-6&Lang=En

The Australian Child Rights Taskforce's Contribution

Raising the minimum age of criminal responsibility to 14 years is a far-reaching reform and a powerful enabler for children's rights. If implemented well, it will have a systemic effect in interrupting intergenerational cycles of disadvantage, changing life trajectories for many children, and creating safer and fairer communities across the ACT.

The Australian Child Rights Taskforce commends the ACT Government for its decision to raise the age and its national leadership in undertaking this much needed reform. In doing so, the ACT is acting in accordance with the scientific and medical evidence about appropriate support for children's development.

It implicitly acknowledges the ineffectiveness of detention and other punitive responses in addressing the underlying issues in the challenging behaviours of children currently dealt with by the justice system in the relevant age group. It addresses the breach of international human rights standards which has seen Australia receive sustained criticism from the United Nations and a number of other nations globally. It seeks to address the stark reality that the current low minimum age (of 10 years) reinforces intergenerational disadvantage and disproportionately affects Aboriginal and Torres Strait Islander children.

The Australian Child Rights Taskforce supports the ACT Government's commitment to be guided by child rights principles as it implements a raised minimum age of criminal responsibility.

We acknowledge that the community expects that where appropriate, children are held responsible for their actions and given the opportunity to learn from their mistakes. We support coordinated and strategic action to support community safety and prevent and address harmful behaviours, including by children.

We note that the decision to raise the age of criminal responsibility puts a spotlight on the services and strategies available and required to build community safety and prevent harmful behaviours, both immediately and in the longer term. We acknowledge that this will identify gaps and weaknesses in the existing service system and structures including some that already existed without the challenge of implementing this reform.

We support the intention of the discussion paper to explore the challenges posed by this reform and the use of the identified threshold issues to assist the process of planning for the implementation of the reform. We offer our insights as we address the issues outlined in the paper.

We acknowledge and endorse the work of Save the Children and the ACT Raising the Age Coalition. Along with the insights of a range of other Taskforce members, this work (a submission and position paper respectively) has informed and guided our work on this submission.

SECTION ONE: THRESHOLD ISSUES

Building Appropriate Service System Responses

The Taskforce's view is that the minimum age of criminal responsibility should be raised to 14 years for all offences, with no exceptions.

There is no principled basis for distinguishing between different types of offence for this purpose. The criminal justice system is an inappropriate and ineffective way of dealing with children at this stage of development, physical, neurological, and moral. As the United Nations Committee on the Rights of the Child has said, exceptions to the minimum age 'are usually created to respond to public pressure and are not based on a rational understanding of children's development'.⁶

We are concerned that the creation of exceptions to the application of the minimum age may undermine the effectiveness and aims of the reform.

We acknowledge the importance of addressing the issue of appropriate service system responses to children engaging in serious harmful behaviours. The key intent of this reform should be that those responses are not based in the criminal justice system.

We also acknowledge that community expectations of justice and safety remain key considerations in building responses. However, there remain effective opportunities to address these concerns with strategies and responses that engage with and empower children, families, and communities.

Doli Incapax

The legal practice principle, *doli incapax* has offered a theoretical method for ensuring that a child aged under 14 cannot be held criminally responsible for an offence unless it can be proven that they knew what they were doing was seriously wrong. However, the practical problems with how *doli incapax* currently operates, and its failure to safeguard children's rights and best interests in practice, have been well documented.⁷

Further the principle is designed to operate within a criminal justice system and in the context of criminal justice response. Raising the age of criminal responsibility offers the opportunity to reframe both the system and the response within a broader and more comprehensive service system setting. In those circumstances the principle should no longer be required.

⁶ Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, United Nations, 18 September 2019, [25].

⁷ See, e.g., Aboriginal Legal Service (NSW/ACT), *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, 3 March 2020, available at <https://www.raisetheage.org.au/cag-submissions>.

The Middle Years

We agree with the proposition that raising the age will require significant reform and expansion to the services and interventions available to support children and young people aged 10 to 13 years. Whilst the current context focuses on those currently identified with therapeutic needs, we would argue that the universal and strategic service system responses for children between the ages of 8 and 12 (often described as “the middle years”)⁸ require better attention.

We note and endorse the intent to identify gaps in service system responses in implementing this reform and developing an alternative model. Addressing the broader needs of this age group more generally will be of significant value, will avoid the risk of stigmatising particular groups and build responses to the needs for this age group more comprehensively.

SECTION TWO: AN ALTERNATIVE MODEL

Making a Fresh Start

The Australian Child Rights Taskforce endorses the notion that this reform provides the opportunity to redesign the approach to understanding and responding to harmful behaviours; shifting the focus to creating and maintaining safe, stable, and supportive environments; and to address the underlying causes of harmful behaviour.

However, child rights principles would also support an approach that recognises that all children have a right to live in a safe, stable, and supportive environment. Shifting the focus away from the criminal justice system to the rights of all children to have their development needs met (rather than to solely the prevention of harmful behaviours) offers a more comprehensive and less potentially stigmatising approach.

As the Discussion Paper states:

“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.”

However, this should not permit shifting of responsibility from governments as the key coordinating agency for service systems that support the development of children (and responsibility for human rights entitlements more generally). Given the causes of serious and ongoing harmful behaviours in children are often found in broader social conditions, addressing expectations of accountability should not replace a focus on strong and coordinated service system responses and a principled child rights framework.

⁸ <https://pursuit.unimelb.edu.au/articles/the-importance-of-your-child-s-middle-years>

We endorse and support the recognition in the Discussion Paper that the rights of children will be central to this reform.

We endorse the commitments that:

- Policy and practice will be driven by what is in the best interests of the child,
- Strong and resilient families will provide safe, stable, and supportive environments
- Children should be involved in the design and implementation of any solutions.

Using a child rights framework will offer the opportunity to build in the necessary safeguards and mechanisms to address issues of personal and community safety and accountability.

Design Principles for an Alternative Model

The Australian Child Rights Taskforce endorses the child rights and human rights principles set out in the Discussion Paper for the design and development of the alternative model.

The Taskforce supports the inclusion of two additional principles consistent with our commentary in this submission on child rights and broad service system reform (as set out by Save the Children in its submission).

"First, any alternative model should prioritise hearing and taking seriously the views of children and young people in all decisions relevant to them, including in responding to harmful behaviour. Children have a right to be heard and taken seriously in such decisions, as reflected in Article 12 of the Convention on the Rights of the Child. Among other benefits, this assists in ensuring that children's best interests are being met. Moreover, when children are meaningfully involved in decisions about them, they are more likely to take support those decisions and the decisions themselves are more likely to achieve their desired purpose."

"Second, any alternative model should focus on identifying and addressing underlying causes and risk factors for harmful behaviour, including child and family poverty, child and family contact with the child protection system, and disengagement from education. This would include building strong links at all levels of policy making, budgetary investment and services across all relevant portfolios, programs and actors across levels of government and within communities."⁹

We offer these additional observations on the design and development of an alternative model

We endorse the comments of Save the Children in its submission that "the alternative that replaces the criminal justice system needs a more holistic approach in how it pursues its goals, including addressing the underlying causes – at a social and individual level – of harmful behaviours"; that the model should be based on child rights and child-centred; and addressing the social determinants of harmful behaviour (but not just for the sake of addressing harmful behaviours).

⁹ Save the Children Submission, August 2021

We note with approval Save the Children's observation that community safety is best served in preventing harmful behaviours by strategic and early interventions that support behaviour change. Early intervention models can be built on risk and need but must still be wary of the stigmatising impact of interventions that are not based on supporting family and involving willing participation by children, families, and communities.

There will be a challenge to ensure that the gate keepers to the model (whether police or other services) do not indirectly widen the net and stigmatising impact of referral into what otherwise would have been the criminal justice system.

There will still need to be a process of initial assessment before referral. Just as the existing system should operate with discretionary warnings and cautions before the referral into the more formal justice system, there will need to be assessments of whether any referral to further service beyond the risk and need.

The integration into existing (and where possible extension of) service models (including education, disability, and health services both universal and targeted) should be built on the provision of required support services that focus on risk and need.

Addressing Existing Service System Gaps

The position paper of the ACT Raising the Age Coalition makes the important observation that the existing service system has significant gaps in the delivery of services based on need. These include services for children that are homeless or at risk of homelessness; disability support needs and psycho-social services. It is hoped that this reform provides a strategic opportunity to fill those gaps.

Both the Discussion Paper and the ACT Raising the Age Coalition position paper propose the use of a multidisciplinary assessment and referral panel. We also support this suggestion. We would add that such Panels can offer improved accountability and transparency if supported and led by strong independent community expertise that is not beholden to any particular sectoral or government stakeholder. An independent statutory authority can offer support for ensuring consistency in performance and outcomes.

The use of community expertise can also improve processes for shared decision making and ensure the interests of children, families and communities can be heard during assessment, referral, and service delivery. This could provide opportunities for the involvement of key leaders and contributions from local Aboriginal and Torres Strait Islander families and communities.

Key Components of an Alternative Model

The Australian Child Rights Taskforce notes the important recognition of the need for accessible supports for children and families and the challenges that exist in the current service system to identify needs and provide appropriate supports.

Again, these challenges reflect gaps and limitations in existing service systems, including those that work alongside the current criminal justice system. By reframing the system on the basis of assessment of need, there are opportunities to achieve improvements in the coordination and delivery of each system.

Pathways of referral and eligibility should be reviewed. Community engagement and independent assessment offer new opportunities for overcoming existing barriers.

We defer to the knowledge of local communities and providers in identifying and meeting existing gaps. But in principle, we would expect that all universal and secondary services currently providing services to children and families (health; education; housing; welfare; family violence; disability; mental health and child-care and development) should be involved in the shift in focus and opportunity.

Coordinated and collaborative community-led and independent assessment and referral can lead and guide these mechanisms.

Voluntary and Accountable

Critically the Taskforce believes that, as a fundamental principle, referral to services should be voluntary and that efforts for involvement should be focused on addressing barriers rather than mandating compulsory involvement.

Any exceptions to this principle must be statutory and subject to accessible review.

The Discussion Paper has initially identified three areas likely to create referral opportunities: (when a crisis occurs; after a crisis; and when a crisis continues to occur). These suggest the involvement of responding agencies (police; mental health; intensive education supports; emergency services). Reporting and responding guidelines will be required and there may be the need for immediate family support or accommodation services.

Otherwise, initial assessment and if appropriate and required, referral to full assessment will be the next steps. There will also be the opportunity for assessment for accountability mechanisms where there has been an impact on other community members. Mechanisms could include restorative conferencing or fact-finding as suggested in the Discussion Paper.

We do not support any exceptions to the model for serious harmful behaviours. And so, the model must be able to respond and address a variety of behaviours that may have attracted attention.

However, there is also the opportunity to consider how the model (and service systems) may support referrals in other circumstances where need or concern has been identified.

SECTION THREE: VICTIM RIGHTS AND SUPPORTS

We support the notion that the alternative model should provide access to community members to supports that would be available to victims of crime: access to restorative justice mechanisms and assistance with recovery.

There will need to be mechanisms that protect against stigmatisation of the children involved. There may be mechanisms within victim offender mediation that can provide proxies for an offender. But these should not diminish recognition and respect for the rights of victims and those affected to safety, privacy, dignity, and participation.

SECTION FOUR: ADDITIONAL LEGAL AND TECHNICAL CONSIDERATIONS

We would anticipate that police will continue to play a key role in detecting and protecting community safety in dealing with children affected by the reforms.

Adjustments may be necessary to police powers and relevant offences. There may be additional statutory measures to ensure the involvement of other agencies and invested assessment bodies or persons.

In principle, we would support as far as possible the transition of children dealt with by the criminal law for offences committed between the ages of 10 and 13 to the alternative model and to have their criminal records adjusted to reflect the changed status of their offending.

Particular attention will be required to manage the personal information of children affected by the reforms. It may be that the review of services that will provide an opportunity to review the principles, policies, and practices in relation to information sharing and the improved coordination of services.

We note that these practices, particularly as they relate to child protection and child safety have already been the subject of recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse.