

Raising the minimum age of criminal responsibility in the ACT: ARACY Response to the Discussion Paper

ARACY

August 2021

Contents

Summary of Key Points:	3
Section One: Threshold issues for raising the MACR	4
Section Two: An alternative model to the youth justice system	5
Appendix	9
References	11

Summary of Key Points:

- ARACY supports raising the MACR without exception on neurodevelopmental and human rights grounds, but emphasises the need for this legislative change to be coupled with evidence-based services and supports to children who fall below the MACR, and not inadvertently deprive children below the MACR of effective programs and supports.
- ARACY emphasises the importance of including the views of children, young people, and their families who are affected by the youth justice system throughout all stages of development, implementation, and evaluation through direct consultation. This is consistent with children's right to have a say in issues that affect them and is consistent with evidence indicating improved outcomes when consultation is utilised.
- ARACY supports the principles proposed in the discussion paper and recommends the addition of principles regarding a commitment to the use of evidence-based interventions, and a commitment to rigorous evaluation and monitoring with flexible implementation to facilitate ongoing improvements.
- ARACY points to the guiding principles published by the United Nations in the Guidance Note of the Secretary-General: UN Approach to Justice for Children for adoption or adaption in addition to the proposed principles.
- ARACY suggests consideration of consultation with the mental health workforce regarding the difficult ethical, legal, and logistical questions pertaining to the provision of mandatory supports given that mandatory treatment of mental health patients has some parallels with the provision of mandatory supports to children with harmful behaviours.
- ARACY recommends a dedicated systematic review of the literature be undertaken to identify all the effective universal and secondary services that could be introduced and/or expanded to support children and young people in contact or at risk of contact with the youth justice system. One example of a program that may be suitable for adaption to the ACT and presently being evaluated via a randomised controlled trial is the NSW Youth On Track program. Preliminary data is promising, and attention should be paid to the results of this randomised controlled trial due later this year.
- ARACY points to existing evidence-based resources that may help in assessing and responding to the needs of children and young people. From a policy and program perspective, ARACY's The Nest is a robust example an evidence-based wellbeing framework developed in broad consultation with children, young people and their families that could help in the development of holistic policies and programs.
- ARACY points to existing evidence-based resources that may help in assessing and responding to the needs of children and young people. From a service and delivery perspective, ARACY's Common Approach is a training program designed and evaluated to assist in the early identification of problems within all domains of a child's life to help facilitate early referral and prevention of crises. Widespread rollout of this program across industries who work with children and young people in contact with and at risk of contact with the youth justice system (such as education, child

protection, police, and health) has significant potential to impact the aversion of crises, and a pilot of this intervention should be considered.

- ARACY supports the deprivation of liberty of children in extreme circumstances provided:
 - The deprivation of liberty is consistent with the principles outlined in the Convention on the Rights of the Child
 - That the deprivation of liberty is coupled with evidence-based supports and interventions that facilitate the appropriate development and safe reintegration of the child into the community

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?

ARACY takes the position that there should be no exceptions to an increased MACR for children and young people on neurodevelopmental grounds. Irrespective of the seriousness of the offence, children’s brains are developmentally immature and multiple medical organisations argue for an increase in the MACR on this basis. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) has high-level expertise in both forensic psychiatry and child and adolescent psychiatry and represents the medical perspectives of over 6700 members. The RANZCP advocates for an increase in the MACR “to 14 years for all federal, state and territory criminal offences in Australia” arguing this is “in line with neurodevelopmental research and international human rights standards”ⁱ.

The wider medical community supports this view, as seen in a media release by the Royal Australian College of Physicians:

*“Children of this age have relatively immature brain development when it comes to decision-making, organisation, impulse control and planning for their future. We shouldn’t criminalise actions that may be developmentally normal for children of this age and they should not be incarcerated as a consequence...The Royal Commission has recommended raising the minimum age of criminal responsibility and this is a recommendation we fully support from a health perspective,”*ⁱⁱ

- Dr Mick Creati, International Child and Adolescent Health Specialist and Senior Fellow with the Royal Australasian College of Physicians

Raising the MACR has also been publicly supported by other medical institutions including the Australian Medical Association and the Australian Indigenous Doctor’s Associationⁱⁱⁱ.

Additionally, allowing exceptions to the MACR goes against the recommendations made by the Committee on the Rights of the Child. See the following excerpt from General Comment No. 10 paragraph 18^{iv}:

“The Committee wants to express its concern about the practice of allowing exceptions to a MACR which permit the use a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States Parties set a MACR that does not allow, by way of exception, the use of a lower age.”

- UN Committee on the Rights of the Child, General Comment No. 10 paragraph 18

The Committee's reasoning is that "The system of two minimum ages is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices." (p. 8 paragraph 16).

However, children who engage in very serious or repeated harmful behaviours should have these behaviours addressed for the benefit of themselves, their victims, and the wider community. ARACY advocates for interventions to address this behaviour that are neurodevelopmentally appropriate, demonstrably effective in reducing harm, and based on sound principles i.e., focusing on recovery and rehabilitation in a child-centred, strengths-based, holistic, and collaborative manner^v. (See our responses to Section 2 below). All means of addressing problematic behaviours in children and young people should be assessed under the same criteria as potential alternatives: are they appropriate, effective, and based on sound principles? Present evidence indicates that in general, the imprisonment of 10-14 year-olds does not reduce rates of reoffending and is associated with reduced likelihood of school completion, tertiary education, and employment^{vi}. The present response to criminal behaviours of children in the ACT should be evaluated for the effectiveness of improving child outcomes and should include the views of children and young people in contact with these systems. If elements of the present system are found to be useful, caution must be taken that raising the minimum age of criminal responsibility does not inadvertently deprive children below the MACR from accessing them.

In summary, ARACY supports raising the MACR without exception on neurodevelopmental and human rights grounds but emphasises the need for this legislative change to be coupled with evidence-based services and supports to children who fall below the MACR.

Section Two: An alternative model to the youth justice system

1. 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?

Principles proposed in the discussion paper:

- 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.
- 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.

Additional principles:

ARACY wholly supports the described principles to underpin the development of an alternative model to youth justice. There are several additional principles ARACY would like to recommend for consideration:

1. That all approaches to addressing youth justice be based on **evidence of what works** to minimise harm for all children and young people, both those who engage in harmful behaviour and victims.
2. That the alternative model of youth justice is submitted to **rigorous evaluation and ongoing monitoring with appropriate indicators** to determine impact and enable flexible and ongoing improvements to implementation and delivery. These indicators should include child-centred indicators developed in consultation with them i.e., what are the outcomes children, young people, and their families would like to see as a result of youth justice and does the youth justice model help achieve these?
3. That direct consultation with children and young people and their families is embedded in all stages of the development, implementation, and evaluation of an alternative youth justice model. **This consultation should include children and young people in contact with the justice system or at risk of being in contact with the system, children and young people who are victims, and their families.** As stated in our position statement^{vii}, the right for a child to have a say in issues that affect them is reflected in the UN Convention on the Rights of the Child, and evidence indicates that children are capable research participants, and that the incorporation of their views is beneficial to both project outcomes and children directly.

The United Nations has developed a document outlining the approach to justice for children which includes a set of guiding principles for all child justice interventions including policy development^{viii}. Many of the underlying concepts embedded in these guiding principles are implicit in the present s. However, incorporation of the principles especially those that are not already captured would be worth consideration. The guiding principles are included below, and an excerpt from the original document including a description of these can be found in Appendix 1:

1. Ensuring that the best interests of the child is given primary consideration.
2. Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination.
3. Advancing the right of the child to express his or her views freely and to be heard.
4. Protecting every child from abuse, exploitation, and violence.
5. Treating every child with dignity and compassion.
6. Respecting legal guarantees and safeguards in all processes.
7. Preventing conflict with the law as a crucial element of any juvenile justice policy.
8. Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time.
9. Mainstreaming children's issues in all rule of law efforts.

Additional considerations

The principle "Only mandate a child or young person to receive support if it is in their best interest, and only as a last resort" could be adjusted slightly to reflect the rights of victims and the intended outcome of supports. For example, "Only mandate a child or young person to receive supports if it is likely to benefit themselves and/or the victims of their behaviour, and there is no other less restrictive option appropriate and reasonably available". This wording reflects the wording of the involuntary temporary admission of a mentally unwell patient to a mental health facility for the protection of themselves or others^{ix}. Indeed, mandatory treatment of mental health patients has some parallels with the provision of mandatory supports to children with harmful behaviours, and the mental health workforce may be a source of information on how to address difficult ethical, legal, and logistical questions pertaining to the provision of mandatory supports.

Another final consideration relates to application of the principle regarding assessing and responding to the needs of children and young people. There are multiple evidence-based frameworks that can assist

in effectively assessing and responding to the needs of children and young people. ARACY developed the first national framework for children's wellbeing (The Nest) which was developed in broad consultation with over 4000 children and young people and their families of diverse background, professionals, and policy makers^x. The framework could prove useful in the practical application of the first principle, as it effectively captures the needs of children and young people in a holistic manner accompanied by a host of useful indicators for monitoring these needs at a population level.

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?

Identifying all the universal and secondary services appropriate for introduction or expansion in the ACT requires a dedicated review of the literature that is beyond the capacity of this submission. However, one example of an intervention that may be suitable is the NSW Department of Communities and Justice (DJC) secondary intervention called Youth on Track, offered to children and young people aged 10 – 17 years at significant risk of offending^{xi}. Referral pathways that can be initiated by a variety of relevant bodies including NSW Police, Education, Community Services, out of home care providers, and mental health services, combined with automated referrals based on police databases^{xii}. Referred children are screened for likelihood of offending/reoffending by a specially designed screening tool developed for the program and enter the program if they are above the threshold risk level^{xiii}. The program is based on sound principles including early intervention with an emphasis on risk and needs of participants, offering multidisciplinary evidence-informed interventions to address the underlying causes of offending^{xiv}.

The program is currently being evaluated via a randomised controlled trial conducted by the NSW Bureau of Crime Statistics and Research (BOSCAR) with results anticipated to be available by the end of this year. Preliminary results include^{xv}:

- Approximately 50% of eligible participants accept the voluntary referral with even higher (60%) participation for Aboriginal and Torres Strait Islanders
- Overall reduction in risk of reoffending with 50% reduction in rates of formal police contact following the program
- 25% of participants are aged 10 -13 years

This represents a promising intervention that could likely be adapted to suit the needs of the ACT. Particular attention should be paid to the results of the randomised controlled trial with consideration for a similar model to be implemented in the ACT if proven to be effective. If so, attention should also be given to improving voluntary uptake rates.

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

The Common Approach is an evidence-based training program developed by ARACY that equips both frontline and administrative level workers in assessing and thinking about the needs of children and young people in a holistic way (see Appendix 2). It was developed under the National Framework for Protection Australia's Children^{xvi} with the aim of early identification of problems within each domain of a child's life, to help facilitate early referral and prevention of crises^{xvii}. It has been independently evaluated by the Social Policy Research Centre^{xviii} which found that the Common Approach increased the number of practitioners identifying child and family needs earlier, and increased practitioners' ability to identify strengths and weaknesses, their confidence and willingness to engage with clients,

and their awareness of their role in prevention. Internal evaluation^{xixxx} has found improved relationships between families and services and increased referrals to informal services and supports in the community. Rollout of the Common Approach to frontline workers who regularly engage with at risk children and young people such as teachers, police officers, child protection workers etc. assists in the early identification of problems and needs in a child's life and help to facilitate an appropriate response to prevent crises. As always, implementation should be done with ongoing evaluation and include consultation with of children and young people and their families who are the target population of the intervention.

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?

As discussed above, the mandatory treatment of mental health patients has some parallels with the provision of mandatory supports to children with harmful behaviours. As such, and the mental health workforce may be a source of information on how to address difficult ethical, legal, and logistical questions pertaining to the provision of mandatory supports.

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?

The Convention on the Rights of the Child (CRC)^{xxi} Article 37 states that “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. The CRC further clarifies that children deprived of their liberty must:

- Be treated with humanity and respect, and in a manner, which takes into account the needs of a person of their age
- Shall be separated from adults unless it is not in their best interests
- Have the right to maintain contact with family through correspondence and visits
- Have the right to prompt legal access, to challenge the legality of the deprivation before a court with a prompt decision
- Not be subject to torture, cruel, inhumane, or degrading treatment
- Not be subject to capital punishment nor life imprisonment

ARACY supports the deprivation of liberty of children in extreme circumstances provided:

- The deprivation of liberty is consistent with the principles outlined in the Convention on the Rights of the Child
- That the deprivation of liberty is coupled with evidence-based supports and interventions that facilitate the appropriate development and safe reintegration of the child into the community

Appendix

Appendix 1: The Guiding principles to child justice as set out by the United Nations, adapted from their publication Guidance Note of the Secretary-General: UN Approach to Justice for Children (2008)

The following principles, based on international legal norms and standards, should guide all justice for children interventions, from policy development to direct work with children:

1. Ensuring that the best interests of the child is given primary consideration. In all actions concerning children, whether undertaken by courts of law, administrative or other authorities, including non-state, the best interests of the child must be a primary consideration.

2. Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination. The principle of non-discrimination underpins the development of justice for children programming and support programmes for all children's access to justice. A gender sensitive approach should be taken in all interventions.

3. Advancing the right of the child to express his or her views freely and to be heard. Children have a particular right to be heard in any judicial/administrative proceedings, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. It implies, for example, that the child receives adequate information about the process; the options and possible consequences of these options; and that the methodology used to question children and the context (e.g., where children are interviewed, by whom and how) be child-friendly and adapted to the particular child. In conflict and post conflict contexts, it is also important to involve children in transitional justice processes.

4. Protecting every child from abuse, exploitation and violence. Children in contact with the law should be protected from any form of hardship while going through state and non-state justice processes and thereafter. Procedures have to be adapted, and appropriate protective measures against abuse, exploitation and violence, including sexual and gender-based violence put in place, taking into account that the risks faced by boys and girls will differ. Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment) must be prohibited. Also, capital punishment and life imprisonment without possibility of release shall not be imposed for offences committed by children.

5. Treating every child with dignity and compassion. Every child has to be treated as a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected.

6. Respecting legal guarantees and safeguards in all processes. Basic procedural safeguards as set forth in relevant national and international norms and standards shall be guaranteed at all stages of proceedings in state and non-state systems, as well as in international justice. This includes, for example, the right to privacy, the right to legal aid and other types of assistance and the right to challenge decisions with a higher judicial authority.

7. Preventing conflict with the law as a crucial element of any juvenile justice policy. Within juvenile justice policies, emphasis should be placed on prevention strategies facilitating the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work. Prevention programmes should focus especially on support for particularly vulnerable children and families.

8. Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time. Provisions should be made for restorative justice, diversion mechanisms and alternatives to deprivation of liberty. For the same reason, programming on justice for children needs to build on informal and traditional justice systems as long as they respect basic human rights principles and standards, such as gender equality.

9. Mainstreaming children's issues in all rule of law efforts. Justice for children issues should be systematically integrated in national planning processes, such as national development plans, CCA/UNDAF, justice sector wide approaches (SWAPs), poverty assessments/Poverty Reduction Strategies, and policies or plans of action developed as a follow up to the UN Global Study on Violence against Children; in national budget and international aid allocation and fundraising; and in the UN's approach to justice and security initiatives in peace operations and country teams, in particular through joint and thorough assessments, development of a comprehensive rule of law strategy based on the results of the assessment, and establishment of a joint UN rule of law programme in country.

Appendix 2: The Common Approach Wellbeing Wheel



© ARACY 2022. The Common Approach* and The Common Approach Training* are registered trademarks of ARACY.

Common Approach* resources may only be used following official Common Approach Training*. Please visit www.aracy.org.au for training details.

References

- ⁱ<https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a39526d1c1f244809ff4f7/1621333287361/RANZCP.pdf>
- ⁱⁱ<https://www.racp.edu.au/news-and-events/media-releases/doctors-lawyers-experts-unite-in-call-to-raise-age-of-criminal-responsibility>
- ⁱⁱⁱ<https://www.ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>
- ^{iv} <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment10-02feb07.pdf>
- ^v [aracy.org.au/the-nest-in-action/the-common-approach](https://www.aracy.org.au/the-nest-in-action/the-common-approach)
- ^{vi} https://www.amnesty.org.au/wp-content/uploads/2018/11/AIA-to-QLD-Productivity-Commission_Imprisonment-and-Recidivism.pdf
- ^{vii} <https://www.aracy.org.au/news/childrens-voice-position-statement>
- ^{viii} https://www.un.org/ruleoflaw/files/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf
- ^{ix} <https://www.health.nsw.gov.au/mentalhealth/legislation/Documents/nh600900A.pdf>
- ^x <https://www.aracy.org.au/the-nest-in-action/the-common-approachthe%20nest>
- ^{xi} <http://www.youthontrack.justice.nsw.gov.au/>
- ^{xii} http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot-model.aspx
- ^{xiii} http://www.youthontrack.justice.nsw.gov.au/Pages/yot/youth_on_track_scheme/elements_model.aspx
- ^{xiv} http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot-model.aspx
- ^{xv} <http://www.youthontrack.justice.nsw.gov.au/Documents/youth-on-track-2020-snapshot-report.pdf>
- ^{xvi} <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>
- ^{xvii} <https://www.aracy.org.au/the-nest-in-action/the-common-approach>
- ^{xviii} <https://www.aracy.org.au/documents/item/128>
- ^{xix} https://www.aracy.org.au/publications-resources/command/download_file/id/79/filename/CAARS_Final_Report_-_Working_together_to_prevent_child_abuse_and_neglect_-_a_common_approach_for_identifying_and_responding_early_to_indicators_of_need.pdf
- ^{xx} ARACY. (2014). *Launceston to George Town Pilot of The Common Approach – Final Report*. Canberra, ACT: ARACY.
- ^{xxi} <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>