

Raising the minimum age of criminal Responsibility in the ACT



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Barnardos Australia (Barnardos) thanks the Australian Capital Territory (ACT) Government's Justice and Community Safety Directorate for the opportunity to provide a submission on its Discussion Paper exploring the key issues that need to be addressed before, during and after raising the minimum age of criminal responsibility (MACR) in the ACT.

Background: Barnardos knowledge of this area

Barnardos is a not for profit children's social care organisation, providing family support and out-of-home care (OOHC) to approximately 15,000 children and their families in the Australian Capital Territory (ACT) and New South Wales (NSW) each year. In our family support work, we aim to reach vulnerable children at risk of separation from their families, and homelessness is a strong feature of this work. For close to 100 years, we have been working together with children, young people and families to break the cycle of disadvantage, creating safe, nurturing and stable homes, connected to family and community. Barnardos has provided services in Canberra and ACT suburbs since 1965 and our Canberra Children's Family Centre which is currently located at Atherton Street Downer has a high profile within the local domestic and family violence and homelessness sector.

Threshold issues for raising the MACR (Section One)

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?*

- Yes. We agree that the only exceptions to MACR should be reserved for very serious violent behaviour where they are strictly indictable matters including murder and serious sexual assault and/or children who pose considerable risk to community safety. In addition, the exceptions need to be clearly identified and the courts should have the power to mandate these young people's involvement in therapeutic interventions.
- However, these children should have faced a significantly different criminal justice process than adult offenders focusing on their rehabilitation and thorough assessment of their individual developmental needs and discretionary decision making.
- We note, for example, Ireland, where a court can send children charged with serious crimes to a therapeutic centre, not a youth detention centre, coupled with strategies to intervene early with children identified as being at risk of becoming involved in very serious crime. However, the former approach would require significant investment to establish a high level of therapeutic care distinct from either residential out-of-home care or youth detention facilities such as Bimberi Youth Justice Centre with resourcing for appropriate wrap around services.
- We would also emphasise that in our experience, children displaying very serious and/or repeated harmful behaviours are rare, and their behaviours are highly atypical for their age cohort. For example, most children aged 10-13 years old do not seriously offend.

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

- No. Barnardos shares the concerns of the United Nations Committee on the Rights of the Child (the UN Committee) that the application of processes such as *doli incapax* is

challenging to do consistently and may well result in practices that disadvantage some children in the criminal justice system.

- Nevertheless, if *doli incapax* is to have any role, it needs the underpinning resources to make it work effectively requiring careful mapping of the proposed assessment process and a tiered approach.

An alternative model to the youth justice system (Section Two)

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?

- Barnardos strongly supports the centrality of upholding the rights of children under the new MACR reform and that children and young people have a say in the design and implementation of any solutions (*Section 2; paragraph 36*).
- We agree that raising the MACR provides the opportunity to redesign the ACT's approach to understanding and responding to the harmful behaviour of children and young people.
- We agree with the proposed set of principles for any alternative model (*Section 2; paragraph 41*).
- Barnardos strongly endorse the principle of ensuring self-determination of Aboriginal and Torres Strait Islander communities in service delivery and design.
- We support an additional principle that any alternative model needs to keep the child connected to the family, so the intervention does not disrupt their connection to family.
- Of particular importance is the strengthening of relationships with the Aboriginal community to ensure decisions for children and young people are culturally appropriate, help the child and young people to stay engaged or reengage with their community and make the community safer.
- The onus should be clear on the wider service system that surrounds specific interventions to be responsive to the individual needs of the child and provide them with the supports and services they need to prevent harmful behaviour. This could be articulated by including system-wide principles and a mandate for all essential service providers.
- Barnardos would welcome the opportunity to work collaboratively with the ACT Government on options for access to early supports and therapeutic care and accommodation. We are keen to share our expertise in any further consultation processes to develop robust and reliable service system responses for children with risky, unsafe and harmful behaviours.

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?

- We note there are significant existing service gaps to better support this cohort which include:

- Mental health inpatient services for youth. There is currently one service (STEPS) and what required is services across the continuum, including inpatient services for young people with acute mental health problems.
- Continuity of support for young people exiting detention – after leaving Bimberi services are typically no longer available in the community.
- Multifaceted services that can support children and young people with comorbidity (e.g AOD; mental health difficulties).
- Resources for schools to identify children who are at risk of offending early and more full-time counsellors and psychologists positions located in schools to intervene earlier.
- Sufficient family support intervention services for conflict resolution (there are long waiting lists).
- Affordable mental health services– there are long waiting lists currently for free services.
- Our client families perceive that they are often treated like adjuncts when planning discharge from detention facilities. Services need to be underpinned by principles including family being central to planning and decision-making.
- When a Young Person enters OOHC there is a significant risk of losing the opportunity to work in a reparative way (getting the child home) because of the loss of the ‘family environment’ making them ineligible for many services.
- Services need to carefully consider their accessibility criteria to minimise the opportunity for ‘at risk’ children falling through the gaps.
- Universal Support Services need to be appropriately resourced and accessible with significant geographical coverage so young people can get access to them at an earlier age.
- Overall there is a need to strengthen available services ensuring they are accessible to communities and free to access so they can focus on the needs of children and young people at risk of offending and harmful behaviour before they exhibit harmful behaviours.
- Placing resources in community based services and schools (e.g. co-locating family support and referral services in educational settings) increases the opportunities to identify children at risk at an earlier age and to engage with the family as a whole before Child and Youth Protection Services (CYPS) become involved (with the consequent risk of children entering care which may in turn lead to an escalation of behaviour and further disconnection from their family).

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

- Child Care and educational settings need to be viewed as a community. They are a critical arena for early identification of at-risk children and provide optimum opportunity for engagement and intervention.
- In our experience, our client families find the service system confusing, hard to understand and difficult to navigate. Investment in a strong community hub approach (one stop shop) would reduce the navigation complexity and assist families get the supports they need when they need them.

- There is scope for assertive outreach models with the flexibility to adapt (recognising a one size fits all approach will not meet individual needs) and respond to reach socially isolated families and communities.
- A focus is required on strengthening engagement and relationships with Aboriginal Community Controlled Organisations to ensure responses to Aboriginal children, young people and their families are culturally informed and safe.
- Enabling flexibility for service provision will ensure supports are available for as long as they are needed thereby providing maximum opportunity for the reduction in the risk of harmful behaviour to be sustained.

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?

- In our view, crisis services and supports need to give priority to strengthening the family.
- Once child protection services become involved, and where younger children are present, we have seen evidence that parents perceive they are under pressure for the older offending child to leave home or risk having their younger children removed from their care.
- Provision of flexible accommodation options where the offending child could still live with a family member would keep the connection with family and kin whilst children received treatment.
- In school settings, counsellors and student engagement workers would benefit from training in detecting early signs of disruption at home, what services are available to reduce family conflict and how to link the young person to services.
- Wrap around service for supporting parents to reengage the family to work together and strengthen family functioning have an important role.
- Family Functional Therapy (FFT) and Safe and Connected are two such services working to strengthen families.
- An evidence review of current best practices that strengthen families and improve family involvement for children and youth with emotional, behavioural and other disorders who are at risk of offending should be undertaken to guide and shape service planning under the MACR.

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

- Barnardos believes that services should not be withdrawn at the point where it is thought the crisis has subsided. The underlying causes of behaviour need to be identified and addressed. Supports should be determined by the work undertaken during the crisis including the assessment of what is needed to ensure ongoing stability.
- To achieve better outcomes 'end to end' planning for the young person, including defined check in points.
- Flexible criteria are required to ensure at risk children are not 'missed'.
- Diversionary accommodation services/youth after hours bail services are required for children who cannot stay at home and do not meet the criteria for existing residential

rehabilitation services (e.g. Ted Noff Foundation Program for Adolescent Life; STEPS) to provide a safe place for them to go (rather than the streets or entry to residential OOHHC).

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?

- We note that mandating a teenager's behaviour is challenging irrespective of the circumstances.
- The current processes that are in place around trying to mandate behaviour (i.e. bail conditions), often do not work. Whilst the young person may understand that there are consequences of breaking the conditions, they continue to do so, get charged and then bailed again and it is a vicious cycle. If mandates are to be considered as part of the model, there would need to be evidence that mandating engagement works.

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?

- Yes. Barnardos believes there is a role for secure placement which should be considered for the safety of the community. We note that the young person still has a right to whatever support they need to help them make changes in their harmful behaviours including therapeutic rehabilitation.

Victims' rights and supports (Section Three)

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?

- Government has a pivotal role in communicating to community the process and long-term gain of the reform for the community as a whole. As part of this messaging support for community members who have been impacted by harmful behaviours should be explained as well as highlighting the benefits of the restorative justice practices that are embedded throughout the ACT justice system.
- Community members who have been impacted by the harmful behaviour of a child under the revised MACR should have access to the same breadth of support for victims of crime including access to financial assistance and support services.

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?

- The most meaningful option for participation in our experience is the youth justice conference model which can have benefits for both the child and the people affected by the harmful behaviours.

- We note that currently some young people are deemed not eligible to participate due to an assessment of 'lack of empathy', however, participating in such processes (with appropriate support) could help empathy development.
- Successful examples of boosting young offender's capacity for empathy include the work in Bimberi in engaging young people in custody in healing conversations around the victim's perspective as well as the innovative use of Aboriginal art apology programs.

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?

- We note the effectiveness of Victim Liaison Officers with ACT Police in providing a linking role to broader community supports.
- Community members who are impacted by harmful behaviour will need access to counselling services.

Additional legal and technical considerations (Section Four)

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?

- Yes (noting the need for certain exceptions to MACR concerning serious harmful behaviour, refer Q1). Police need to have the power to investigate harmful behaviour as a matter of community safety.

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?

- Barnardos supports provision for additional police powers to allow for investigations into specific incidents, where the alternative model requires any fact-finding processes.

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?

- Barnardos strongly supports the principle of disincentivising adults to seek to involve children or young people under the MACR in crimes in order to avoid prosecution.

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?

- In our view, ideally, the courts should have the option to apply principles of the new model in decisions about sentencing.

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?

- Whilst consideration of existing legislative provisions is needed, the overall approach should be that once the principles and elements of the new approach are decided they need to be adopted as much as possible for all children already in the system.

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?

- Barnardos does not have a view on if and how, convictions are spent or extinguished under a revised 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?

- Yes, where this required to maintain information sharing arrangements that will enable service providers to comprehensively assess and respond to a young person's needs and understand their history of their harmful behaviours, noting this a complex area. We note also that a mechanism may be needed to determine whether or not relevant information should be included in a criminal record certificate for working with vulnerable people background checks (*Section 4, paragraph 110*).

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

- Barnardos does not have view on the use of specific information.

We would welcome the opportunity to discuss any aspect of our submission. Please feel free to contact Dr Robert Urquhart, Head of Knowledge, Outcomes and Research on (02) 9218 2392 or rurquhart@barnardos.org.au.