

5 August 2021

Emeritus Professor Morag McArthur
Raising the Minimum Age of Criminal Responsibility Review
Justice and Community Safety Directorate
ACT Government
GPO Box 158 Canberra ACT 2601
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Re. Raising the Minimum Age of Criminal Responsibility Review

Dear Professor McArthur,

Thank you for the opportunity to provide a written submission to the above Review.

The Foundation for Alcohol Research and Education (FARE) is a not-for-profit organisation working towards an Australia that is free from alcohol harm. We approach this through developing evidence-informed policy, enabling people-powered advocacy and delivering health promotion programs. Working with local communities, values-aligned organisations, health professionals and researchers across the country, we strive to improve the health and wellbeing of everyone in Australia.

FARE congratulates the ACT Government on being the first Australian jurisdiction to commit to raising the Minimum Age of Criminal Responsibility (MACR). This reform is based on the following research and human rights obligations:

1. **Medical and social research on child development.** Research evidence on developmental psychology and brain development shows that children are not sufficiently able to reflect before acting or to comprehend the consequences of a criminal action.¹
2. **Significantly improved life outcomes.** Neurobiological research on early childhood trauma shows that criminalising children under 14 years old leads to a lifetime of harmful consequences, including sustained contact with the justice system.²
3. **International human rights obligations.** Australia has human rights obligations under the United Nations Convention on the Rights of the Child. These obligations state that the MACR should be at least 14 years old.³

Summary of Recommendations

FARE recommends:

Recommendation 1: Raise the MACR to at least 14. All Australian State and Territory governments should raise the MACR in their jurisdictions to at least 14 years old.

Recommendation 2: No exceptions. The MACR must be raised to at least 14 years old. There should be no exceptions and no exemptions to this, regardless of the severity of behaviours.

Recommendation 3: Implement alternative means to achieve community safety. Protect community safety by referring children that would have come into contact with the justice system for clinical assessment to identify potential neurological disorders, and appropriate support.

Recommendation 4: End Doli incapax for 10 to 14-year-olds. Replace Doli incapax by raising the MACR to at least 14 years old.

Recommendation 5: Ensure that evidence of behaviour from before children were 14 years old cannot be used in future prosecutions. Ensure that police and courts are not able to use / rely on behaviour that occurred before a child was 14 years old in future prosecutions.

Recommendation 6: Educate relevant professionals about children with disabilities and cognitive impairment. This is essential for a better understanding by police, lawyers and the judiciary of how FASD and other impairments impacts on decision-making.

Recommendation 7: Include FASD in alternate pathway model design. Develop and fund appropriate alternative pathways for children suspected of having FASD or other neurological disorders that include adequate screening, diagnosis and ongoing support.

Recommendation 8: Develop FASD professional capacity. Invest in professional workforce development to establish capacity in the ACT for FASD screening, diagnosis and support. Allocate resources to educating professionals in recognising FASD.

Recommendation 9: Avoid net-widening. Ensure that any broader cohort accessing the new supports and services are not criminalised by any punitive compliance consequences.

Recommendation 10: Consider voluntary restorative justice processes or elements in designing the new model. Include appropriate voluntary restorative justice processes where appropriate in the new model.

Recommendation 11: Use trauma-informed care. Trauma-informed care should be used when engaging with children who are also victims of crime and survivors of trauma.

Recommendation 12: Automatically extinguish convictions. Automatically extinguish all previous convictions of children who were 10 to 14 years old at the time of the offence.

Recommendation 13: Allow restricted information sharing. Facilitate the sharing of information related to children 10 to 14 years old only for child protection, case management, and investigation of suspected adult exploitation of children.

Recommendation 14: Publish accurate crime data regularly. Collect, analyse and regularly publish accurate crime statistics, conviction, sentencing and recidivism data, and comprehensive costings for all aspects of the justice system.



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Fetal Alcohol Spectrum Disorder (FASD)

FARE has a particular interest in MACR being raised due to the high prevalence of people detained in the criminal justice system, (including children), with Fetal Alcohol Spectrum Disorder (FASD). Children with FASD can have cognitive, behavioural, health and learning difficulties, including problems with memory, attention, cause and effect reasoning, impulsivity, receptive language and adaptive functioning difficulties.⁴ Despite the lack of intent, this can place them at increased risk of early contact with the criminal justice system.⁵

Recent research at the Banksia Hill Youth Detention Centre in Western Australia identified that more than a third of the young people screened in detention were diagnosed with FASD. Researchers suggested this may be an under-estimate due to, for example, the lack of confirmation of prenatal alcohol exposure, suspecting that almost half of these young people may have FASD.⁶

Recommendation 1: Raise the MACR to at least 14. All Australian State and Territory governments should raise the MACR in their jurisdictions to at least 14 years old.

Section One: Threshold issues for raising the MACR (Questions 1 and 2). *Should there be any exemptions or exceptions to the new MACR for children and young people that engage in repeated or very serious harmful behaviours?*

There should not be any exemptions or exceptions to the new MACR. The evidence regarding brain development, and neurological disorders such as FASD, is the same regardless of the severity of behaviours. Effective supports and services implemented as alternatives to the justice system will address the causes and consequences of behaviours that would have brought children into contact with the justice system. Community safety remains important in raising the MACR, but must be maintained without criminalising children. To improve community safety, children with behaviour that would have brought them into contact with the justice system, should be referred for clinical assessment to identify causal factors such as trauma and potential neurological disorders, (including FASD). Assessment can help identify causal factors, triggers and appropriate behavioural strategies and approaches.

The current *Doli incapax* (deemed incapable of forming an intent to commit a crime), legal presumption is not an adequate alternative to raising MACR. *Doli incapax* does not take into account the scientific evidence on child and adolescent brain development. *Doli incapax*, which requires it to be proven that a child under 14 understands their criminal intent, is complex and legally opaque.

While raising the age of criminal responsibility to 14 years old is therefore a fairer, more consistent and more effective approach than the application of *Doli incapax*, the legal system also needs to recognise that children who are above 14 years of age also may not have the neurological capacity to form criminal intent. Thus, it must be understood that 14 is the absolute minimum age at which a child may be held criminally responsible – however for many children, especially children with FASD, they will not have reached a stage in their development where criminal intent can be formed. This is



why many countries have raised the minimum age above 14 – including Sweden where it is 15, Portugal where it is 16 and Luxembourg where it is 18.

Early interaction with the criminal justice system does significant harm to children, especially if children are imprisoned. For children with disabilities, particularly disabilities like FASD, this harm is profound. When these children are criminalised or imprisoned early in their lives, they are significantly more likely to experience long-term mental illness, death by suicide, homelessness, repeated imprisonment and other adverse effects throughout the rest of their lives. For children with disabilities, who lose access to universal healthcare systems such as Medicare and the National Disability Insurance Scheme if they are imprisoned, their interaction with the criminal justice system can be deeply disruptive to their ability to receive the supports that they need.⁷

Often this disruption takes many years to be remedied, even after release from prison. In this sense, the criminal justice system can be an intervention which removes children and young people with FASD and other disabilities from access to any of the supports which enable improvements in future behaviour and wellbeing.

In the case of young adults with FASD or other neurodevelopmental disabilities, the ACT Government should also consider dual track sentencing option for young people up to 21 years of age who are particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison. This system is in place in Victoria.⁸

There must be greater recognition and education of police, lawyers and judiciary regarding children with disabilities and cognitive impairment (including FASD) which can mean they do not have the cognitive capacity to form criminal intent and should not be dealt with by the criminal justice system at all. FASD is a frequently misunderstood and misdiagnosed disability. Given that approximately half the children who come into contact with the justice system have FASD, it is especially crucial that police, lawyers and the judiciary improve their understanding of how FASD impacts decision-making.

Recommendation 2: No exceptions. The MACR must be raised to at least 14 years old. There should be no exceptions and no exemptions to this, regardless of the severity of behaviours.

Recommendation 3: Implement alternative means to achieve community safety. Protect community safety by referring children that would have come into contact with the justice system for clinical assessment to identify potential neurological disorders, and appropriate support.

Recommendation 4: End Doli incapax for 10 to 14-year-olds. Replace Doli incapax by raising the MACR to at least 14 years old.

Recommendation 5: Ensure that evidence of behaviour from before children were 14 years old cannot be used in future prosecutions. Police and courts must not be able to use / rely on behaviour that occurred before a child was 14 years old in future prosecutions.

Recommendation 6: Educate relevant professionals about children with disabilities and cognitive impairment. This is essential for a better understanding by police, lawyers and the judiciary of how FASD and other impairments impacts on decision-making.



Section Two: An alternative model to the youth justice system (Questions 3 to 9). What services should be introduced, reoriented or expanded to support children and young people who demonstrate harmful behaviours? How should children and young people under the MACR be supported before, during and after crisis points?

Given the higher prevalence of FASD currently present within youth justice settings, appropriate screening, diagnosis and ongoing support is critical to improving the lives of these children and to establishing an alternate pathway when the MACR is raised.

Submissions to the Senate Inquiry on FASD⁹ support a multi-disciplinary and community-based approach responding to the needs, (including cultural needs), of people with FASD who come into contact with the justice system. International research and best practice indicate that this will address the inadequate accommodation of FASD-associated impairments within the criminal justice system and help maximise the therapeutic outcomes for people with FASD.

Additional funding and resourcing are needed for screening, diagnosis, assessment and support services. The ACT does not currently have FASD diagnostic services or support services for those living with FASD. Diagnosis is complex, time-consuming and expensive and so it becomes difficult to access and many people miss out on the treatment and support that a diagnosis facilitates.

There is an urgent and critical need to educate health practitioners as many are not aware of the signs of FASD.¹⁰ This can lead to children being misdiagnosed with Attention Deficit Hyperactivity Disorder (ADHD) or other disorders.¹¹ Children with FASD are likely to come in contact with General Practitioners, paediatricians, educators and social service providers. Each of these professions should be trained in recognising FASD to ensure that where suspected these children can be referred to appropriate diagnostic services and relevant support are identified as early as possible.

Another pathway for identifying and responding to children suspected of having FASD is in the school system. As the FASD Senate Inquiry recommended, Governments should ensure all schools can deploy and resource FASD-specific strategies and assistance to support educators and to support students with FASD and suspected FASD, irrespective of IQ level.¹²

Receiving a diagnosis is critical to children being supported appropriately and managing their disability to get the most from their lives. Referral for a FASD diagnostic assessment should occur when any of the following are identified:

- Prenatal alcohol exposure is at high risk levels
- Neurodevelopmental impairment and/or distinctive facial features and confirmed or suspected prenatal alcohol exposure
- The individual, their parent or caregiver is concerned that there was prenatal alcohol exposure and/or may be a FASD diagnosis

To ensure that this can occur, it is important that there are health professionals with the expertise required to undertake a FASD diagnosis in the ACT.



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Justice and legal professionals also need multidisciplinary, trauma-informed, culturally-appropriate training about FASD and its medical, social and legal implications¹³. This can help them identify and manage young people suspected of having FASD or other neurological disorders.

Any mandatory elements in the new system need to be carefully considered to avoid net-widening, especially in regards to any consequences of breaching mandatory compliance. The Discussion Paper suggests that there are likely to be more children and young people who can benefit from the additional support, but who would not have been subject to justice supervision orders.¹⁴ Access to these supports and services for this broader cohort is welcomed, but they should be able to access them without risking any punitive compliance consequences.

Recommendation 7: Include FASD in alternate pathway model design. Develop and fund appropriate alternative pathways for children suspected of having FASD or other neurological disorders that include adequate screening, diagnosis and ongoing support.

Recommendation 8: Develop FASD professional capacity. Invest in professional workforce development to establish capacity in the ACT for FASD screening, diagnosis and support. Allocate resources to educating professionals in recognising FASD.

Recommendation 9: Avoid net-widening. Ensure that any broader cohort accessing the new supports and services are not criminalised by any punitive compliance consequences.

Section Three: Victims' rights and supports (Questions 10 to 12). *How should this reform consider the rights of victims?*

Children who come into contact with the justice system are almost invariably themselves victims of significant abuse and traumatic experiences.¹⁵ In many cases, this abuse has occurred while children are in state care. It is important to acknowledge the broader systems failures which have often occurred in these children's lives, and to avoid binary understandings of who is and is not a 'victim'.¹⁶ This means that by better responding to children with these behaviours (in providing supports and services, instead of engaging with the justice system), the ACT Government will also be better addressing the rights of these victims of crime.

For community members who have been harmed by the actions of children aged under 14, there are many ways in which the ACT Government can recognise and redress that harm, outside of criminalising children. For example, there are victims of crime compensation mechanisms through which community members can access both financial compensation and other supports, without charges being laid nor convictions being sought. Other alternative approaches include no-fault schemes which are focused on meeting the needs of all people who have experienced harm.

The rights of victims can also be considered through restorative justice practices which are well established throughout the justice system in the ACT. The appropriateness of restorative justice would be dependent upon the cognitive capacity of the child. Restorative justice programs that involve victims in justice processes have been found to increase victim and community satisfaction with the criminal justice system¹⁷. They are also found to be a cost-effective way to reduce

imprisonment and reoffending. Some elements of restorative justice programs may be able to be incorporated into the design of new supports and services. This could include mediated restitution processes where appropriate.¹⁸ Currently, participation in restorative justice in the ACT occurs on a voluntary basis. As stated above, any mandatory compliance consequences risks both net-widening and undermining the principles that raising the MACR is based on, including the need to act in the best interests of the child.

Recommendation 10: Consider voluntary restorative justice processes or elements in designing the new model. Include voluntary restorative justice processes where appropriate in the new model.

Recommendation 11: Use trauma-informed care. Trauma-informed care should be used when engaging with children who are also victims of crime and survivors of trauma.

Section Four: Additional legal and technical considerations (Questions 13 to 20). Police Powers, Transition and Information Privacy

As discussed above, all justice professionals, including police, should be trained to recognise the features of potential neurological disorders such as FASD. This can facilitate the referral on to expert professionals trained to support children at crisis points.

Transitional provisions should include the automatic extinguishing of historical criminal convictions.

Policy collecting information about the child's harmful behaviour may be necessary for child protection services, and the investigation of exploitation by adults. There should also be information-sharing provision for the multi-disciplinary panel assessing the needs of the child.

Recommendation 12: Automatically extinguish convictions. Automatically extinguish all previous convictions of children who were 10 to 14 years old at the time of the offence.

Recommendation 13: Allow restricted information sharing. Facilitate the sharing of information related to children 10 to 14 years old only for child protection, case management, and investigation of suspected adult exploitation of children.

Challenging the harmful 'tough on crime' narrative

A key contributor to the lack of political appetite for the MACR reform by Australian governments has been the harmful '*tough on crime*' narrative, especially following incidents of significant harmful behaviour by children and during election campaigns. Evidence shows that imprisonment rates are increasing, (despite falling rates of crime), the costs are high and increasing, and that increased imprisonment can actually make the community less safe.¹⁹

Despite this 'tough on crime' approach requiring significantly increased spending on (often privatised) prisons and the criminal justice system, no significant return on investment has been achieved. This investment has not led to a reduction in offending rates, reduction in recidivism rates or improvements in community safety.²⁰



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The Australian Survey of Social Attitudes (ASSA) indicated that the Australian public sources their information about the criminal justice system primarily from broadcast and tabloid media. This has resulted in much of the public having inaccurate views about the occurrence of crime and the severity of sentencing. The ASSA indicates that the Australian public perceives crime to be increasing when it isn't, overestimates the proportion of crime that involves violence, and underestimates the proportion of charged persons who go on to be convicted and imprisoned.²¹

The 'tough on crime' rhetoric appeals to this misinformation both because of a fear of becoming a victim of crime and the belief that offenders deserve harsher punishments. As a result, the criminal justice system has been skewed unfairly towards harsher, more punitive responses including mandatory sentencing, minimum terms, and reduced parole. These approaches impinge excessively and unnecessarily on human rights, without evidence of positive outcomes of reducing crime or recidivism.²²

Harsher penalties including mandatory sentencing, minimum terms, and reduced parole, do not reduce crime, imprisonment or recidivism, but do cause harm, including criminalising and breaching human rights. One way for governments to help end the self-defeating 'tough on crime' rhetoric is for independent bodies to regularly collect, analyse and publish accurate justice information, including crime statistics, conviction, sentencing and recidivism data, and comprehensive costings for all aspects of the justice system.

The ACT Government committing to raising the MACR is a significant first step in implementing this long overdue reform throughout Australia. Designing and implementing an effective alternate model in the ACT will be another significant stage towards country-wide implementation. Collecting, analysing and regularly publishing accurate crime data will form another part of this important reform.

Recommendation 14: Publish accurate crime data regularly. Collect, analyse and regularly publish accurate crime statistics, conviction, sentencing and recidivism data, and comprehensive costings for all aspects of the justice system.

Thank you for the opportunity to provide a submission to this Inquiry.

Yours sincerely,

A handwritten signature in black ink, appearing to read "C. Giorgi".

CATERINA GIORGI
CHIEF EXECUTIVE OFFICER



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- ¹ Law Council of Australia (2019) *Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax* <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>
- ² ACTCOSS (2020) *Submission to the Council of Attorneys-General Review of Age of Criminal Responsibility* <https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a3902734ecdd22cc6932ed/1621332008645/ACTCOSS.pdf>
- ³ Cuneen, C (2017) *Arguments For Raising The Minimum Age Of Criminal Responsibility - Comparative Youth Penalty Project Research Report*, UNSW <https://www.cypp.unsw.edu.au/sites/ypp.unsw.edu.au/files/Cunneen%20%282017%29%20Arguments%20for%20raising%20the%20minimum%20age%20of%20criminal%20responsibility.pdf>
- ⁴ NOFASD (2019) *What Is FASD?* <https://www.nofasd.org.au/alcohol-and-pregnancy/what-is-fasd/>
- ⁵ NOFASD (2021) *The Senate Inquiry Series: FASD in The Justice System* <https://www.nofasd.org.au/blog/the-senate-inquiry-series-fasd-in-the-justice-system/>
- ⁶ Bower C, Watkins RE, Mutch RC, et al (2018) *Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia.* <https://bmjopen.bmj.com/content/bmjopen/8/2/e019605.full.pdf>
- ⁷ Law Council & AMA (2019) *Joint statement on the medical basis for raising the age to 14 years* <https://www.lawcouncil.asn.au/files/pdf/policy-statement/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>
- ⁸ Sentencing Advisory Council (2021) *Sentence Types for Children and Young People* <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentence-types-for-children-and-young-people>
- ⁹ Senate Community Affairs References Committee (2021) *Submissions to the Inquiry into Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/FetalAlcoholSpectrumDi/Submissions
- ¹⁰ Bower C, Elliott EJ (2016) *Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* Australian Government Department of Health https://www.fasdhub.org.au/siteassets/pdfs/australian-guide-to-diagnosis-of-fasd_all-appendices.pdf
- ¹¹ Weinberg J (2018) *Fetal Alcohol Syndrome Sometimes Misdiagnosed and Under-Reported due to Stigmas Around Drinking.* Vancouver Coastal Health Research Institute. <https://www.vchri.ca/stories/articles/2018/05/01/fetal-alcohol-syndrome-sometimes-misdiagnosed-and-under-reported-due>
- ¹² Senate Community Affairs References Committee (2021) *Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder Report*, March 2021 p.111 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024357/toc_pdf/Effectiveapproachestoprevention,diagnosisandsupportforFetalAlcoholSpectrumDisorder.pdf;fileType=application%2Fpdf
- ¹³ Passmore HM, Mutch RC, Watkins R, et al (2020) *Reframe the Behaviour: Evaluation of a training intervention to increase capacity in managing detained youth with fetal alcohol spectrum disorder and neurodevelopmental impairments*, <https://www.tandfonline.com/doi/abs/10.1080/13218719.2020.1780643>
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- ¹⁶ Lincoln, Brotto (2019) *Exploring the victim-offender overlap at the intra-individual level: Reimagining justice for crimes of interpersonal violence* <https://research.bond.edu.au/en/publications/exploring-the-victim-offender-overlap-at-the-intra-individual-leve>
- ¹⁷ Queensland Productivity Commission (2019) *Inquiry into Imprisonment and Recidivism – Final Report* <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>
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- ¹⁹ Queensland Productivity Commission (2019) *Inquiry into Imprisonment and Recidivism – Final Report* <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>
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