THE JUSTICE REFORM INITIATIVE

The Justice Reform Initiative (JRI) is a national justice advocacy organisation that considers that jailing is failing. We are working to reduce over-incarceration in Australia and promote a community, in which disadvantage is no longer met with a default criminal justice system response (see JRI 2021). We currently have a network of over 100 eminent Australians as our patrons, including two former Governors-General, a number of former High Court judges, current and former public prosecutors, and multiple former parliamentarians from all sides of politics.

The JRI recognises the need for multiple legislative and policy, social, health, and human service reforms to be enacted, so that historically over-incarcerated and disadvantaged populations have opportunities to thrive in the community. Raising the minimum age of criminal responsibility (MACR) to 14 is one of the key priority reform areas for the JRI, and we welcome the opportunity to make a submission on the ACT Government's discussion paper on this matter.

Childhood is a time of learning to be responsible, of being encouraged to take active responsibility for repairing harm. This is quite a different conception of responsibility from that of criminal law jurisprudence, which is more about holding people responsible for things they have done in the past. Formal criminal law is about a more backward-looking version of responsibility in that sense. Responsibility for children is more about a restorative version of responsibility of children learning how to take active responsibility for putting things right for justice as a better future.

SECTION ONE: THRESHOLD ISSUES FOR RAISING THE MACR

The JRI is of the view that there should **not** be any exceptions on the MACR, on the basis of the 'type' or severity of the offence or behaviours.

The evidence is clear that 14 is the **minimum** age, developmentally and neurologically, that children could or should be held criminally responsible (see Farmer, 2011; Cunneen, 2017; Australian Medical Association, 2019). There are in fact compelling developmental arguments to suggest this age should be higher. The United Nations Committee on the Rights of the Child has pointed to developments and neuroscientific evidence that shows adolescent brains continue to mature beyond teenage years and has therefore 'commend[ed] States Parties to have an even higher minimum age, for instance 15 or 16 years' (2019: [22]).

The frame around which decision-making should be made, with regard to the minimum age should be medical and developmental – not political. If a child is not able to be held criminally responsible for offences that might be considered 'less serious' (for instance, shoplifting), then there is no reason

why they could be held criminally responsible for more serious offences. This is especially the case for offences that require specific intent, for example, the requirement for murder that the person intended to cause the person's death or cause serious harm to the person (see *Crimes Act 1900* (ACT) s 12(1)(a), (c)).

If our starting point is the developmental frame and we are clear that children between 10 and 13 cannot be held criminally responsible, then there is no role for *doli incapax* for this age group.

SECTION TWO: AN ALTERNATIVE MODEL TO THE YOUTH JUSTICE SYSTEM

SERVICE DELIVERY AND ALTERNATIVE MODELS

The principles noted in the discussion paper are a solid starting point for the development of an alternative youth justice model, although we suggest that consideration be given to the proposed multidisciplinary panel also including a member with relevant legal expertise, to ensure that young people's legal rights are respected. Furthermore, if someone aged 10-13 has allegedly engaged in behaviour that would previously have constituted an offence, guilt should not simply be assumed. Removal of the case from the criminal justice system should not deprive the child of an entitlement to a hearing on the merits, accompanied by due procedural fairness.

There are additional considerations that should be given to the principles underpinning the 'mode' of service delivery, which will have a significant impact on the extent to which young people can engage with such services. These relate to both the relationships developed between workers and young people, and the adequate resourcing of services, so that they can provide support that is both flexible (including services that have skilled workers working outside of business hours) and meaningful. Service models should also recognise and respond to the family and social determinants of crime.

Service delivery for young people should also be person-centred, strengths-based, flexible, trauma-informed, culturally safe, holistic, and relational in approach (see Sotiri, 2008; Semczuk et al 2012; Cunneen et al, 2021). The quality of the relationship between workers and young people is critical, in terms of building trust, engagement and hope. Long-term support, where relationships can be developed over time, should always be an option. First Nations children should also always have the option of receiving culturally safe support. Highly vulnerable young people, with multiple and complex support needs, are accustomed to their needs being 'too much' for service and support providers in the community and too often end up 'managed' in justice system settings, rather than supported in the community. In order to build an alternative system, support services must be equipped to be able to work intensively and long-term with highly vulnerable young people. Workers and services must have the capacity to 'hold' multiple and complex issues, and wherever possible (although specialist support is essential), there should be one point of contact and connection for the young person, who also serves as an advocate, when it comes to navigating service systems. Children need to feel and know that there is someone in their corner, who can help them through a difficult time. Consistency and the option of long-term support is critical here.

Services should have the capacity and resourcing to work with young people both in and out of crisis and service systems should assume that consistent and sustained support over time will be required to shift the kinds of behaviours that often result in young people coming into conflict with the law.

Key resourcing issues in service delivery include, but are not limited to, access to:

- immediate, safe, supported and appropriate housing (including in times of crisis);
- meaningful disability support;
- mental health support;
- educational support; and
- holistic family support.

For children who have loved ones in custody – including children who are in the care and protection system, as a consequence of parental incarceration – specific support around this, including facilitating visitation and contact, is also required.

MANDATED ENGAGEMENT AND/OR DEPRIVATION OF LIBERTY

Any form of coercive response should be a last resort. The fact that, 68% of young people in detention across Australia in 2019-20 were on remand (Australian Institute of Health and Welfare, 2021) demonstrates the need to ensure this principle is upheld in practice. In the rare circumstances where a child presents an **immediate and serious threat of harm to themselves and/or others** and this behaviour is unable to be de-escalated, a mechanism to mandate engagement in services should be available and should be formally embedded in the systems of any first responders. This mechanism should immediately connect the young person with services and supports **outside** of the justice system. Decisions about mandated placements or engagement should be made by skilled practitioners.

Repeated behaviour that **does not** present an immediate or serious threat requires a different frame for response. If a young person is repeatedly engaging in behaviours that are bringing them to the attention of police and/or the community, but are **not** presenting a serious threat, there should not be a mechanism for a mandated response. If a child is refusing to engage in a program, then the reasons for this disengagement should be unpacked, but the child should not be punished for their lack of engagement. Person-centred responses very clearly place the onus on the services, to ensure that they are meeting the needs of the child, including operating in ways that will facilitate engagement. Given the clear evidence about the failure of punitive measures to work as a deterrent in the justice system, we should not replicate this logic in the community sector. That is, the potential threat of mandated 'treatment' or 'secure accommodation' will not shift repeated behaviours because it will not address them.

Deprivation of liberty is a punitive response and should not be used **unless** the child presents an **immediate** and serious threat (either to themselves or others). It should not be used in response to a child committing a serious offence, **unless, in the period after the offence, the child continues to pose an immediate and serious threat**. Where deprivation of liberty occurs, this should not occur in

any form of custodial setting and it should be limited until the immediacy of the threat has subsided. That is, it should be a short-term response to immediate threat and should take place in a therapeutic, rather than a custodial, setting.

Approaches should also be consistent with the ACT Government's *Disability Justice Strategy 2019-2029*, which recognises that

> the range of disadvantages experienced by people with disability are best addressed early in the life of a person with disability, as well as early intervention in the development stages of legal needs will lead to better outcomes. if the human services system works effectively to identify needs and provide supports at an early stage this can work to reduce the level of future contact with the justice system (2019: 5).

SECTION THREE: VICTIMS' RIGHTS AND SUPPORTS

The JRI acknowledges the importance of the rights of victims in the development of any alternative framework for responding to harmful behaviours. However, the starting point for this should be that that the rights of victims and the rights of young people engaging in problematic behaviours are not in opposition. Many children currently in contact with the justice system are themselves victims of crime. Ensuring that victims of crime (including children who have harmed others) have a voice and are heard is critical in terms of developing a response to harm that seeks to be restorative, rather than punitive. Restorative and transformative approaches offer potentially important avenues, with regard to facilitating responses which promote accountability, transparency, and elevate the experience of any victims. The ACT has a long and proud history of restorative justice practices and the effectiveness of this, both in terms of participant satisfaction and reductions in reoffending, has been borne out by the research (see Broadhurst et al, 2018).

The absence of criminal responsibility should not alter these processes (in fact restorative justice exists in many settings outside of the justice system, including in schools). It should, however, be voluntary, and the developmental capacity of the young person to participate in a way that is useful for them must be carefully assessed. Similarly, the rights of victims to have their experience acknowledged (through, for instance, financial assistance) should not be reliant on the age of criminal responsibility.

SECTION FOUR: ADDITIONAL LEGAL AND TECHNICAL CONSIDERATIONS

Where police interactions with children occur, these should be focused on connecting children with other supports and services outside of the justice system. Consideration should be given to the use of different frameworks in terms of first responders (for instance, co-responder models using skilled youth workers, comparable to the PACER model, which appears to currently be working well in the ACT, in response to people with mental health conditions: see Power, 2021).

The existing offence provisions when applied to adults who recruit, induce or incite a child to engage in criminal activities will remain sufficient under the new MACR

All children between the ages of 10-13 who are currently in the youth justice system (whether incarcerated or in the community) should be transitioned out of this system and into an alternative system as soon as practicable. An expert panel could be set up specifically to facilitate appropriate referrals and pathways.

Historical convictions for offences committed by children when they were younger than the revised MACR should be automatically and universally spent, given that the new framework is to be built on the evidence around our medical understanding of the childhood and adolescent development.

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