

Justice (Age of Criminal Responsibility)

Legislation Amendment Bill 2023

Greens Amendments

Explanatory Statement including Human Rights Compatibility

Introduction and Summary

This amendment is to insert a Sunset on provisions concerning offences for which children 12 years old and older but under 14 years old are criminally responsible after 1 July 2025, also described here as *the exceptions*. This is consistent with the recommendation made in the additional comments of Andrew Braddock to the Justice and Community Safety Committee’s inquiry into the bill.¹

The amendments are made in the context that section 93 of the bill requires that “the Minister must review the operation and effectiveness of the amendments to all Acts made by the Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023 as soon as practicable after the end of 5 years after this section commences; and present a report of the review to the Legislative Assembly before the end of 6 years after this section commences.” The explanatory statement to the bill identifies that this “will allow the ongoing need for exceptions to be further considered and tested once the alternative therapeutic system is fully operational and risks can be more accurately assessed.” For clarity, the review will be expected to commence shortly after the October 2028 Territory election and report to the 12th Assembly within a year.

The suggestion contained in these amendments is that, at the conclusion of this review, it should be assumed that the exceptions will be removed rather than prompting the Assembly to consider whether this should occur. It would be within the power of the Assembly to legislate changes that retain the exceptions if required, and in full knowledge of the consequences for human rights when the time comes. By creating a situation where human rights are advanced by default, it means a failure to take any action will not result in a continuing constraint on human rights.

Human Rights Background

The recommendations of the Human Rights Commission with regards to this bill are best described in their submission to the committee inquiry.² To summarize their position, they make the observation that maintaining an age of criminal responsibility of less than 14 years for any offence is incompatible with human rights. The measures in the bill advance human rights overall, but do not achieve compatibility because the exceptions are established.

This position is based on a significant and broad base of evidence that a child’s ability to form criminal intent is not dependent upon the nature of the offence. This understanding was

¹ https://www.parliament.act.gov.au/data/assets/pdf_file/0009/2253789/FINAL-JACS-Report-18-with-additional-comments.pdf pages 52-54

² https://www.parliament.act.gov.au/data/assets/pdf_file/0008/2243906/Submission-018-ACT-Human-Rights-Commission.pdf

demonstrated by a majority of submissions to the government during its community consultation on the bill, as articulated in its listening report.³

The principle argument in favour of having the exceptions appears to be that they are a necessary constraint on human rights made to advance other human rights, notably the right to security of person, as the therapeutic supports being introduced in this bill might be an inadequate response to the offences in the exceptions. To quote the Minister for Families and Community Services during the committee hearings:

“I think ACTCOSS pointed out in their evidence today that in fact no young person aged between 10 and 13 have committed any of these four offences in the ACT. Their conclusion from that was that, if it did happen, we could deal with it. My conclusion from a practical sense is that, if it did happen, I am not convinced that we could deal with it in a non-criminal way. ... What we would do in such a case in the ACT, I do not know, and I do not believe that we have a service system that could respond. We do not have a psychiatric facility that would be appropriate for confining and detaining a 13-year-old. We could not establish a bespoke response in a short period of time and, if we did establish a bespoke response in a short period of time, it would effectively mean segregating, detaining and confining a young person.”⁴

This hesitancy is acknowledged as real in these amendments. It is why the amendments propose to sunset the exceptions rather than remove them immediately. This will give the Community and the Government that represents it time to adapt to the earlier changes, witness the system in action, and prepare for the full implementation of the reforms in July 2030. If reforms are needed to the schemes prior to the sunset of the exceptions, these can be prompted by the review and enacted by the government during the 12th Assembly.

This approach is one of those recommended by the Human Rights Commission:

“We would therefore recommend that, to ensure consistency with human rights, the ACT Government moves Government amendments to remove the prescribed exceptions from the Bill **or otherwise ensure that they are scheduled to sunset within six months of the proposed statutory review.**”⁵

Conclusion

The amendments do not seek to limit human rights, but rather to allow them to advance to a point where ACT law will become fully compatible with human rights in respect of the minimum age of criminal responsibility. In doing this, and in acknowledgement of community concerns regarding the right to Security of the Person, the exceptions for serious offences will be scheduled to sunset after the scheduled statutory review of the legislation in order to provide for an opportunity to amend any legislation to accommodate the reform in a manner consistent with human rights.

³ [https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2916/3589/7082/Report - MACR Discussion Paper - Listening Report.pdf](https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2916/3589/7082/Report_-_MACR_Discussion_Paper_-_Listening_Report.pdf)

⁴ Ms Rachel Stephen-Smith MLA, Minister for Families and Community Services, Proof Committee Hansard, 15 June 2023, pp 63–64.

⁵ https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/2243906/Submission-018-ACT-Human-Rights-Commission.pdf

Notes on individual amendments

1. This amends the commencement provisions, which currently preclude the clauses identified in subsection (2) from commencing 7 days after the bills notification day. It adds an exclusion of subsection (3) which is created by these amendments and is intended to start in July 2030.
2. As per the previous line, subsection (3) is established to provide that new sections 56A and 58A will commence on 1 July 2030. This is timed to be the day after the provisions contained in clause 58 concerning transitional provisions for the expungement of youth offences is due to expire. It is expected to occur more than six months after the review of the Act under clause 93 of the bill is due to report to the Assembly.
3. Section 442A of the Act, as will be created by clause 55 of the Bill and updated on 1 July 2025 by clause 56 of the Bill, concerns requirements that youth offence particulars not be disclosed in court proceedings. The amendment adds an additional stage to the updates, so as to remove the references to the schedule offences on 1 July 2030, thereby removing the exceptions at that time, but to retain the required reference to a youth offence.
4. Sections 57 and 58 of the Bill inserts and subsequently updates a new Part 35 concerning transitional arrangements of the expungement of prior offences. The amendment adds a further iteration of these transitional arrangements for the expungement of the schedule offences starting from 1 July 2030 – the day after the expungement provisions for raising the age to 14 other than for the schedule offences expires. These additional expungement provisions in turn expire 5 years later.
5. This sunsets the exceptions on 30 June 2030.