Formal Submission

in response to the Minimum Age of Criminal Responsibility and Alternative Diversion Model Discussion Paper, as developed and distributed by the South Australian Government

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Contents

Acknowledgement of Country

I respectfully acknowledge and celebrate the Traditional Owners of the lands throughout South Australia and pay my respect to their Elders, children and young people of past, present and future generations.

Preliminary Notes

I make this submission in my capacities as Guardian for Children and Young People, Training Centre Visitor (TCV), Child and Young Person's Visitor (CYPV) and Youth Treatment Order Visitor (YTOV). In these positions, my role is to advocate for the rights and best interests of children and young people in care and youth detention.[1]

I fulfil these functions through providing advocacy on individual and systemic matters, as well as monitoring the safety and wellbeing of individual children and young people.

Complimentary Submission

In March 2024, I sought the views of children and young people who were detained at the Adelaide Youth Training Centre (the Centre), to hear what they thought about raising the minimum age of criminal responsibility. These young people have first-hand, direct experience with the South Australian criminal justice system, and it is important that we listen to their views on what's needed to improve the criminal justice system, and break cycles of offending.

Over a two-week period, 27 children and young people contributed their views. Some of these young people were detained and deprived of their liberty at the age of 10. They are the ones who know what is at stake in this policy consultation, and I am honoured and humbled to have the opportunity to present those views to the South Australian government.

I have prepared a complimentary submission, which collates and presents the statements those children and young people made. It is confronting and direct. It is not meant to cause offence; it is merely the truth as seen, felt and experienced by children and young people in the Centre. The scenarios and experiences that are very much a part of these children and young people's lives are confronting, and we cannot meaningfully talk about the age of criminal responsibility without engaging with those experiences.

Quotes from that complimentary submission appear throughout this document as well. As I was trusted with these words, I present them as unaltered as possible. There is swearing and I acknowledge some people may take offence, but I consider it is important to use those words as they were spoken. This is necessary to convey the intensity of feeling behind the statements.

I thank my staff for their tireless efforts in gaining children and young people's voices. I thank the Department for Human Services and the operational team at the Centre for supporting my access and contact with children and young people. Most of all, I thank the children and young people for their willingness to talk about their experiences in the Centre and the broader criminal justice sector.

[1] Information about each of my roles and statutory functions is available on the Office of the Guardian for Children and Young People's website at https://gcyp.sa.gov.au/what-we-do/.

Introduction

In February 2024, the South Australian Government released a discussion paper prepared by the Attorney General's Department, which outlined a proposal to raise the minimum age of criminal responsibility (MACR).[2] In summary, the discussion paper proposes:

- raising the MACR from 10 to 12 years.
- subject to broad exceptions.
- alongside a proposed alternative diversion model for children and young people below the MACR.

There has been much anticipation amongst the South Australian community and social services/youth justice sector, regarding what action the South Australian Government will take regarding the MACR. Nationally, there has been significant commentary and movement across multiple jurisdictions about this area of law and social policy. We have seen varying levels of legislative, regulatory and policy changes to ages and service models for children and young people interacting with the criminal justice system.

Here in South Australia, I can confidently say there has been a sincere hope this important area of social reform would present an opportunity to re-evaluate how we engage children and young people in our society. This includes how we can 'treat' our children and young people – and future generations – with more compassion, respect and dignity.

As a public figure whose responsibility is to remind and reassert the importance of human rights doctrines and commitments, I saw this as an opportunity to actively demonstrate our human and child rights maturity here in South Australia. To put forward a social and cultural change to our value systems and attitude towards children and young people.

I saw this as an opportunity to ask hard questions about gaps in our capacity to support children and young people who are at risk of youth justice involvement, and work together to fill those gaps. To make our communities safer through using evidence-based approaches to prevent and respond to unmet needs of children and young people – particularly those who need us the most.

I am sad to say, the proposal in this discussion paper does not hold those opportunities. The content of the discussion paper is entirely distracting from the core matter which should be under consideration: *how to support children who are (or are at risk) of causing harm to themselves or others but should not be involved in the criminal justice system due to their young age*.

What the proposal represents, instead, is a failed attempt at compromise.

It announces a plan that purports to remove children under 12 years from the criminal justice system, without giving up current government power to use coercive methods and physical force to control children who need help. Concerningly, maintaining this power appears to require designing, navigating and implementing a complex and expensive feat of mental, legislative and systems gymnastics. In doing so, it introduces the risk of a host of unintended consequences that invariably will be at the cost to the most vulnerable in our society – our children.

Doing so is not in anyone's interests – legally, ethically, morally or economically.

[2] Government of South Australia, Attorney-General's Department, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (2024) ('MACR Discussion Paper').

The model put forward in the discussion paper has placed me – and other child rights focused agencies, individuals and advocates – in the unfortunate position of navigating the following conundrum:

- raising the age of criminal responsibility is an urgent human rights priority, and an essential ingredient to effective youth justice reform.
- I cannot support the model put forward in the discussion paper.

In writing this submission, I urge government to clearly separate these two points. Community and stakeholder opposition to the model as developed should not delay the government meeting its commitment to raise the minimum age of criminal responsibility above the reprehensible age of 10 years old.

But government needs to go back to the drawing board on how they intend to do it.

Guardian's response to the discussion paper

This submission explains the reasons why I hold such serious concerns about proposed model. In doing so, my primary aim is to challenge the notion that it is necessary to legislate exceptions to the MACR, or establish a different court, tribunal and detention process exclusively for 10 and 11-year-olds.

Moving away from a criminogenic response will, of course, require a different way of thinking, changed investment approaches and restructuring aspects of our community-based support networks and infrastructure. **But it should not be seen as an overly complex legal matter.**

The primary legislative change required is amending section 5 of the *Young Offenders Act* – which sets the MACR at the age at 10 years old – to a higher age. Ancillary legislative amendments to give force to the new MACR require further scoping and consultation, which should include matters such as expunging records and discharging relevant children and young people from court orders. Legislation (draft and enacted) from those other jurisdictions which are already ahead of South Australia will be of assistance in this process.

In my opinion, it is **entirely unnecessary** to legislate an alternative diversion model. The point of raising the MACR is to remove children and young people from criminogenic-based responses, which cause harm and are unsupported by evidence. Legislating an alternative diversion model which maintains the key features of these harmful responses will not work. It will maintain old problems and introduce new ones – all at an expensive price tag.

I reiterate: the legislative change required to raise the MACR is relatively simple and does not require the complex alternative diversion model put forward by the government.

This is not to say that I believe South Australia is immediately ready for this change. For a justice reinvestment approach to work, we need to scope and understand where the service and support gaps are for children and young people here in South Australia. It is entirely appropriate (and indeed necessary) to engage in consultation, beyond this time limited submission round. Implementation will require planning and staged approaches to rolling out matters such as changed funding arrangements, program establishment and expanding service capacity. Practical implementation measures should be the focus of the government's next round of consultation.

In addressing these matters, it is important to resist a binary approach in areas of social policy reform such as MACR. This reform is about more than youth justice and policing. It is fundamentally about supporting our children from all walks of life to grow up well, so they can participate fully in our society.

In the context of this discussion, I assert that targeting our focus on formal diversionary programs once harmful behaviours are displayed leaves a trail of wasted prevention opportunities – so we are simply left flat footed on the starting line. Unfortunately, this is the approach reflected in the government's discussion paper.

The social success of raising the MACR must be viewed, instead, in the full context of reforming child and family health and wellbeing systems. The 'alternative diversion model' does not need to be legislated to maintain police and court powers to 'deal with' children and young people. Police and the courts already have this power across a range of mechanisms.

Instead, it needs a holistic approach to addressing the reasons children and young people in their adolescence end up with youth justice involvement and detention, including:

- the high incidence of family violence, and poor systemic responses.
- chronic underfunding for family support services.
- inadequate mental health supports available for children.
- systemic racism and racial inequality for First Nations children and young people, as well as those who are culturally and linguistically diverse.
- systemic discrimination against children and young people with disability, including through school exclusion and disproportionate reliance on institutionalisation.
- factors underlying the care criminalisation phenomenon.

Viewed through this lens, we should acknowledge that preparations are already somewhat underway for a raised MACR, through significant government expenditure and planning towards areas of reform such as:

- implementing recommendations from the Royal Commission into Early Childhood Education and Care, including expanding access to three-year old preschool.
- developing South Australia's first Autism Strategy, for 2024-2029.
- rolling out the School Mental Health Service.
- Support and Inclusion Reforms underway at the Department for Education.
- investment towards reducing Aboriginal incarceration rates.
- expanding access to family group conferencing.
- the upcoming Royal Commission into Domestic, Family and Sexual Violence.
- establishing bodies to provide expert advice to Parliament, including the SA Peak Body for Aboriginal and Torres Strait Islander children and young people, and the First Nations Voice to Parliament.

There is more to be done, but these are the types of reform that are required to support raising the MACR. Far from furthering this work, the proposed alternative diversion model undermines such efforts towards supporting and building the capacity of South Australia's most vulnerable. I would encourage the drafters of this proposed model to review current social policy and legislative reform through the lens of these initiatives and assess the complimentary nature of the proposed model (if any).

Guardian's position on the age of criminal responsibility

Before discussing details about my concerns, I believe it is important to clearly articulate my position on the key principles regarding the MACR. I do so below.

10 is too young

Every day that the age of criminal responsibility remains unchanged, is another day that children as young as 10 – who are in 'Year 5' at primary school – are subjected to police stations, courts and locked up in youth detention centres. This causes ongoing harm to children and fails to improve safety in our communities.

A MACR of 10 years is in breach of international human rights standards. This number is not arbitrary; there are strong, evidence-based reasons for deeming that a MACR of this age is a human rights violation. Just some of the reasons are listed below.

A MACR of 10 years old....

1.	Damages children's future	There is a direct correlation between increased likelihood of reoffending and the younger a child encounters the criminal justice system.[3]
2.	Punishes victims of childhood abuse	Children entering the criminal justice system at earlier years tend to have more severe trauma compared to children who enter in their later teenage years.[4] Criminalising vulnerable young people early results in a perpetual cycle whereby children transition from being a victim of offending to a perpetrator.[5]
3.	Is unfair	Children charged with early offending often do not understand the seriousness of their behaviour and are highly impressionable, particularly when their actions are a result of seeking connection and belonging.[6] These characteristics are often emphasised by the vulnerability of criminalised young people, resulting from lack of access to appropriate adult guidance, exposure to adverse childhood experiences and the presence of undiagnosed or unsupported disability.[7]
4.	Is discriminatory	It is well established that the youth justice system disproportionately criminalises First Nations children, children in care, children with disabilities and other groups of vulnerable children. The earlier this occurs, the more difficult it is for children to escape the harm and impacts for their future.

What do young people in detention have to say?

> *"10 is like... you're still a little mummy's boy, still a little baby. And you should still be at home you know?"*
>
> *"Like think about it. What year are you in school when you're 10? ... Bro when I was [year] 5 at school I was just learning my times tables, just like NAPLAN."*

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[3] Australian Human Rights Commission, 'The Minimum Age of Criminal Responsibility' (2021) Submission to the Universal Periodic Review, p. 2.

[4] Susan Baidawi, Ribini Ball, Rosemary Sheehan and Nina Papalia, Australian Institute of Criminology, *Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes* (2024), p. 48.

[5] Ibid, p. 53.

[6] Ibid, p. 52.

[7] Ibid, p. 51.

"If you're old enough to do the crime, you're old enough to be incarcerated."

"When you're 10 you still play with toys."

"Yeah, they shouldn't get put in here at that age."

"They shouldn't be in here… they should be like, with who they live with. They should be out with their friends."

"…the age of 10 and 11, they don't know what they're doing. They just think it's fun. Cause they see everyone else do it, then they decide to do it."

"We always talk amongst ourselves when we see a little kid come in like 'what the heck, why is this kid here?"

"How often do you see a 10 or 11 year old here?… so like the police and courts obviously see a problem with it."

The MACR should be, at least, 14 years

My firm view has consistently been – and remains – that the MACR should be set at 14 years, without exception. This must be accompanied by significant investment in evidenced-based, therapeutic supports for children and their families.

This is consistent with guidance from the United Nations Committee on the Rights of the Child. The view of that Committee, based on evidence and expert advice, is that anything lower than 14 years is unacceptable.[8]

As acknowledged in the AGD's discussion paper:

> *The United Nations supports a MACR of at least 14 years of age with no exceptions or conditions. The United Nations Committee on the Rights of the Child cites the large volume of documented evidence in the fields of child development and neuroscience that supports its reasoning. A MACR of 10 years of age is non-compliant with international standards and among the lowest of all Organization for Economic Co-operation and Development (OECD) nations.*
>
> *There have been significant evidence-based research findings that support raising the MACR. The evidence was extensively discussed in the 2020 report from the National Working Group under the auspices of the Council of Attorneys-General.*[9]

The relevant evidence, as articulated in the discussion paper,[10] includes:

- in practice, the presumption of doli incapax does not operative effectively to safeguard vulnerable children.
- a justice reinvestment approach is likely to deliver significant long-term savings.
- the complex needs of younger children exhibiting anti-social and criminal behaviours are better addressed outside the criminal justice system.
- evidence-based research shows that typically, children who encounter the criminal justice system have complex needs and vulnerabilities.
- there is a direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment, and having one or more parents with a criminal record.

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[8] Committee on the Rights of the Child, *General comments No 24: Children's Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [22].

[9] Government of South Australia, AGD, *MACR Discussion Paper* (n 2), p. 4.

[10] Ibid.

Noting that evidence, the recommendation from the National Working Group was to raise the MACR to 14 years, without exception.[11] This is consistent with the recent recommendation of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*.[12]

It is also consistent with the recommendation from the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia[13] – which the South Australian government procured to provide expert guidance on strategies to meet relevant Closing the Gap commitments, specific to our State.

These recommendations represent expert consensus. I accept that consensus and agree on principled and evidence-based grounds.

There should be no exceptions to the MACR

Serious crime exceptions and other carve outs undermine the basis and effect of setting a MACR. There is no evidence-based reason to include exceptions. Doing so is an emotional, and a political response.

To unpack this issue, it is important to analyse the reasons why we already have a MACR, which is currently set at 10 years old. Children who fall beneath that age cannot be prosecuted, regardless of the severity of their conduct or whether the individual child understands that their behaviour was wrong. Establishing a MACR is an example of a fundamental principle of our criminal justice system: that committing a crime is not just about harmful conduct, it also requires an element of personal fault. For children under 10 years, they cannot be prosecuted because our legal system deems that they are incapable of forming the mental state which our society considers 'criminal'.

There are numerous other examples of this principle in our criminal justice system. A person who has impaired cognitive capacity may not be prosecuted for conduct that would otherwise be a crime; a person who intentionally causes harm or kills another human being may not be criminally liable if they committed the conduct in self-defence; a 9-year-old who hits their classmate cannot be prosecuted for assault.

The rationale for these exceptions to criminal liability vary, but tend to gravitate around reduced moral culpability, inability to control the conduct or the circumstances, and identifying situations where the criminal justice system is not the best vehicle to address the risk of repeat conduct. For children below the MACR, it is a combination of all these things.

There is no *doli incapax*[14] presumption for children below the MACR, in recognition that the concept of whether a child understands right or wrong at that age is not a relevant basis for criminal prosecution. The 9-year-old who hits their classmate may well be expected to know that it is wrong to hurt other people and they may get in trouble if they do it. Yet, whether or not they have this understanding, our social values deem that they should not be criminally prosecuted. We recognise that undertaking a criminal prosecution would be a blunt instrument to address the reasons why the child engaged in the behaviour, and we have a sense that they are not morally culpable for their actions to the same extent as an adult. That reduced moral culpability centres around our understanding that the conduct is quite common child behaviour. It is common

[11] *Draft Final Report 2020: Council of Attorneys-General Age of Criminal Responsibility Working Group* (2020), recommendation 1, p. 79.
[12] *Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (2023), vol 8, recommendation 8.22, p. 313.
[13] Report of the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia (2023), recommendation 17, p. 28.
[14] The *doli incapax* presumption presumes that children aged between 10 to 14 years are incapable of forming the requisite mental intent to commit a crime. However, this presumption can be rebutted by evidence proving that the child understood what they did was seriously wrong. This is currenting not codified in SA and is a part of common law, per *RP v The Queen* (2016) HCA 53.

because, even if the child knows that the action is wrong, their comprehension of the full consequences of the action is not the same as an adult. Nor is their ability to control their emotions and their bodies.

In past decades, we have advanced upon our knowledge and understanding of why this occurs for children. Previous emphases on teaching the right behaviour and concepts of morality to children has been supplemented with our understanding that children act differently to adults due to brain function and development. It is appropriate, and right, to rely on the science to analyse whether the relatively arbitrary age of 10 years should be changed.

Expert evidence tells us that 14 is the youngest age where the child's stage of development ordinarily allows a sufficient understanding of consequences (and ability to regulate their actions and emotions), so as to meet contemporary standards of criminal fault.

For some, this is challenging to accept, within the context of our harsh penal system that leans towards punishment over rehabilitation. But, nevertheless, it is what the evidence says. Maintaining serious crime exceptions and carve outs is based on outdated understandings of children and young people's capacity to understand consequences and emotionally regulate. Simply put: it is logically inconsistent with raising the MACR.

How children and young people in detention explain this concept…

"That's too early for them. They don't even understand what their body is and that… still, their mind and everything. You know? They can't process what's going on."

"I think that kids as young as 10 might not know what they're doing, but they could be influenced by other people that might pervert the way that they see everything."

"Most 10 year olds are influenced. Like, do you reckon a 10-year-old by just the ripe age will be like 'oh yup I'm just gonna go do this because I can'?"

"I didn't understand, didn't think it was wrong cause I was doing it with other people. Like, just didn't think anything of it until I went to court."

"Like you obviously know what you're doing when you're young, like 12, but you don't really know what you're doing, you know what I mean? You don't really have that much common sense. And it depends what life you grow up in. Like, if you grow up in a broken home or around criminals, like people who use drugs and that, then it's just normal to you, you know? It's just normal."

"[By 15 or 16] that's when you've kind of developed enough like feelings and emotions and you understand yourself just that little bit more than you did when you were like 10."

"Me personally? I learned [about right and wrong] when I was like younger. Cause that's how I was brought up, that's how I was taught, you know? But it was too much responsibilities on me, and now that's why I'm in this position I'm in now, yeah."

What's it like for children in detention?

The position I have articulated above is consistent with academic research, the evidence surrounding child and adolescent development and the social benefits of justice reinvestment. But my passion for this topic comes from talking to children and young people who are in detention, and seeing what it is like for them.

> ***How many children under 14 years are in detention?***
>
> In 2022-23
>
> - 39 young people under the age of 14 years were detained at the Youth Justice Centre.
> - The average daily population for this age bracket was less than one young person.
> - For the first time since 2019-20, there were 10-year-olds detained.
>
> While these 10-year-olds were deemed old enough to be sent to detention, they were not yet old enough to:
>
> ~ catch a flight alone (without registration as an unaccompanied minor) until they are 12.
> ~ go to Adelaide Zoo without an adult until they are 14.
> ~ get a piercing without guardian permission until they are 16.
> ~ vote in a local council or other election until they are 18.[15]

In the past year, I have been vocal about the highly concerning conditions of detention in the Centre. My 2022-23 Annual Report identified widespread use of practices which can severely undermine rehabilitation and trauma recovery – and a critical lack of transparency and accountability regarding the use of those practices.

I was particularly vocal last year about limitations on the time young people can spend out of their rooms. Despite the care displayed to me by many staff at the Centre, I observed that staffing and other operational challenges restricted that time, as well as access to services, education, rehabilitative programs, human interaction and even medical attention. When considering that these experiences occur for children and young people with significant histories of trauma, I was alarmed to note the high incidence of children and young people self-harming in the Centre.

Concerning figures from that report for the 2022-23 financial year include:

- nearly three in four ambulance attendance over the financial year were responding to young people self-harming.[16]
- two in five individuals involved in incidents throughout the year self-harmed or expressed self-harm ideation during their admission.[17]
- Aboriginal young people, young people with a disability, and young people in care were all seriously overrepresented in the detention population. All these young people experienced a greater likelihood of having force used against them, and higher rates of self-harm. [18]

As consistently expressed to me by children and young people in the Centre and those who have youth detention experience:

> *Trauma recovery, healing and rehabilitation simply cannot happen in a place that exerts trauma.*

[15] Training Centre Visitor, *Training Centre Visitor 2022-23 Annual Report* (2023), pp 103-4.
[16] Ibid, p. 91.
[17] Ibid, p. 90.
[18] Ibid.

This is a concern for any child or young person detained at the Centre; but it is especially worrying for younger children. As an institutional environment, there is a very heavy focus on security and control in the Centre. This is not too dissimilar to observations across other jurisdictions, nationally. However, it is an approach that is consistently challenged for its lack of focus on rehabilitation, care and treatment for children.

The inherent nature of an institutionalised, control-based environment can be highly challenging for many children, especially those who have a disability or trauma triggers that exacerbate their youth justice involvement. But it is especially difficult for younger children – particular those with neurodevelopmental disability – who are still learning to regulate their emotions, exploring different behaviours, and learning about consequences.

In this environment of control, detention is a physically dangerous place for younger children. For example, in 2022-23, 100% of recorded incidents for children under the age of 14 years involved physical restraint or force being used against the child.[19] Not only is this potentially traumatic for the child, but the use of force is risky in these circumstances, as the restraints used are not suitable for pre-pubescent bodies. This is recognised in the training manual for the MAYBO method of restraints – as used by Centre staff – which includes the following statement:

> *Pre-pubescent children have additional vulnerabilities in terms of an increased risk of falls, increased risk of head injury and increased risk of damage to bony growth plates.*[20]

The MAYBO restraint techniques are not only more dangerous for smaller bodies but may also be ineffective. In reviewing incident records and footage, I have noted a concerning trend of staff resorting to non-MAYBO techniques when trying to guide or restrain young teens. MAYBO restraint techniques are intended to maintain the young person's dignity to the greatest extent possible and reduce the risk of injury, lethality and pain. As such, the resort to unregulated non-MAYBO restraint techniques is highly worrying – particularly when noting that 100% of incidents involving children in this age range resulted in use of force.

If children under the age of 14 years are too small for the restraint methods used in youth detention, then it begs the question: how can we justify detaining them in that environment?

What do children & young people in detention say about the Centre?

> *"It'll be hard for young fullas cause, you know, they have to go straight into this routine and shit, and get told what to do and shit. And they wouldn't be used to it, you know? Their first time. It would be a bit thing, yeah."*
>
> *"They harm themselves in here, and that. .... Get sad... crying everyday. Feel shit."*
>
> *"I don't even see why there should be a 'young boys unit'. Like, if they literally have to have a unit for younger boys, then they shouldn't be here at all. You know what I mean? Like, they're obviously too young to mix with the older boys so why are they even in here? Because the older boys know what they're doing. But the young boys obviously don't and that's why there's another unit, so they don't get bashed."*
>
> *"Recently there's been hella tiny ones coming in, you know, and I'm like 'well how old is this kid?' You know?"*
>
> *"It's not safe because other kids, other residents, might bash you, you know, and that's not safe."*

[19] Ibid, p 104.

[20] Maybo Positive and Safer Outcomes, Physical Skills Risk Assessments (v 3.3, 2022), p. 6.

"I don't reckon it's a safe place because staff can be a little bit, like thing some time, you know... and I reckon they don't like handle young fullas, you know and they'll be like, yeah agitated with them too, you know? And that's when young fullas go off their heads and stuff."

"It's a waste of life in here."

"Why don't you give your kid a try in here, man? You never been in our shoes."

"They should spend the night [here] if I'm honest. Spend the night here, see how it is for them."

"When I was younger and I was coming in and out I thought it was cool, you know? But now I look back at it, not really. But I don't know these days, these younger ones probably feel the same, you know."

The proposal to raise the minimum age of criminal responsibility

I wish to clearly express my disappointment that the discussion paper does not propose to raise the MACR to 14 years, and includes broad exceptions.

The proposal is as follows:

- raise the MACR to 12 years.
- subject to exceptions for certain serious offences,
- an alternative diversion model, which includes options to impose mandatory treatment conditions and detention (through a secure care facility)
- prosecution as a last resort in certain circumstances
- where prosecution occurs, maintaining (and codifying) the *doli incapax* presumption.

This model put forward by the South Australian government represents the most restrictive approach to raising the MACR in Australia to date. Of the five Australian jurisdictions to have commenced consultation, drafting or implementation to raise the MACR, South Australia is the only jurisdiction to not commit to 14 years – whether that be initially, or in the future.[21] South Australia is also the only jurisdiction to contemplate exceptions for children and young people aged 10 and 11-years-old.

The effect of the proposed model is to change very little in term of children's contact with harmful features of youth justice processes, including with police, courts and youth detention. While it improves very little, **it does introduce the risks of a new and untested legislated diversion system for children**.

To be blunt: the model proposed in the discussion paper is complex, expensive and has very little to recommend it. At best, little would change in terms of policing and court responses to children exhibiting behaviour that requires additional support. At worst, the proposed model would further criminalise, institutionalise and harm children and young people aged 10 and 11-years-old.

In the following sections, I address the reasons why I believe the model, as drafted:

- maintains unreasonably broad circumstances where children under the age of 12 years can be prosecuted.
- essentially mirrors existing diversion pathways and sentencing options.

[21] The ACT, Tasmania, Victoria and the Northern Territory being the other four jurisdictions.

Prosecuting children under 12 years

The discussion paper outlines 'limited exceptions', which allow children younger than the MACR to be prosecuted for certain serious crimes, if the presumption of *doli incapax* is rebutted.

The proposed list of crimes are:

- Murder (section 12 *Criminal Law Consolidation Act 1935* (CLCA))
- Manslaughter (section 13 CLCA)
- Rape (section 48 CLCA)
- Causing serious harm (s 23 CLCA).

The ambiguity in the discussion paper surrounding whether the exceptions are intended to capture children under the age of 10 years has caused significant concern, for myself and other stakeholders. In a recent meeting with the Attorney-General, I was assured that the exceptions and alternative diversion model are only intended to apply to 10 and 11-year-olds – and I provide my feedback on this basis, in good faith. However, I would like to clearly record my view that it would be wholly unacceptable to expand serious crime exceptions to capture children and young people under 10 years.

As highlight above, I do also object to serious crime exceptions for 10 and 11-year-olds on principle and evidence. The premise of setting a MACR is that children and young people below that age should not be considered to have the mental capacity and/or moral culpability to be held criminally responsible for their conduct. This is a matter of human rights, but also relying on evidence about the ineffectiveness of the criminal justice system to prevent recidivism in that age bracket. The severity of the behaviour or harm caused is not a current consideration for children below the MACR. If we accept the science for why the MACR should be raised above 10 years, then **the existence of exceptions is illogical** and undermines the effectiveness of the reform.

With respect to the particular offences selected as exceptions, I note that the number of children and young people aged 10 and 11-years-old who commit violent offences is relatively low, and so these exceptions – particularly the homicide offences and rape – may not apply to many individuals.

However, the exception with the greatest potential impact and scope to capture unintended circumstances is 'causing serious harm'. This scope arises from the fact that the severity of the crime is based on the extent of the harm caused, rather than the nature of the conduct. We know that tragic circumstances can result from reckless and foolish behaviour that is without ill-intent. The below example demonstrates how the offence of causing serious harm has the potential to apply in such circumstances.

> For example, a 10-year-old who pulls a chair out from under their classmate may leave them with a scratch. But they could also leave their classmate with a fractured spine that causes permanent impairment. Under the proposed exception, the 10-year-old could not be prosecuted for assault in the former instance but could potentially be prosecuted for causing serious harm in the latter.

I suggest that it is beyond the intention of the exception to capture such a scenario, where the conduct is relatively benign but causes serious consequences. If we are to meet the intent of raising the MACR, the point is to keep that 10-year-old out of the criminal justice system because it will neither be helpful to redress future behaviour, nor do we believe that they are at a stage of cognitive development to be held morally culpable for that crime. The fact that bad luck intervened and caused a more serious result is not a logically relevant consideration for this purpose.

Effects on the investigative process

The inclusion of exceptions for 'result' (rather than conduct) offences would also likely create significant complexities regarding the criminal investigation process. This may include a lack of clarity regarding when ordinary police investigation processes should apply. That complexity raises the risk that police would use powers to conduct ordinary investigation processes – including interviewing and taking forensic samples – where a matter is in doubt, to improve chances of successful prosecution. If this were to occur, it would significantly undermine the intention to keep children and young people away from contact with criminogenic responses to harmful behaviours.

For example, in the above scenario involving the 10-year-old who causes their classmate a fractured spine, it will not be immediately clear whether 'serious harm' has occurred or not. Prosecutions for causing serious harm are often lengthy in duration, due to requiring time to determine the existence and extent of any ongoing impairment (which may be required to meet the threshold of 'serious harm' in some circumstances). However, a successful prosecution would likely depend on identifying witnesses, seeking witness statements, and interviewing the young people involved shortly after the event. So, while it may take six months or longer to determine whether the classmate's injury meets that threshold, it is unlikely police would wait for that period before conducting investigations.

As proposed, the model would appear to allow police to undertake a normal investigation, charge the 10-year-old with the offence of causing serious harm, and they may then be bailed or remanded. The possibility of criminal prosecution may hang over their head for six months or more, involve contact with police, court and lawyers, require compliance with bail conditions or even periods of detention. After that time, it may be determined that there is insufficient evidence that the injury meets the threshold for serious harm, and the charges may be withdrawn.

The evidence is clear that it is not only criminal records or sentences that cause harm to children and young people with early youth justice involvement. Harm arises with all stages of contact with the youth justice system. As such, the example scenario above demonstrates how even the possibility of prosecution under the causing serious harm exception can undermine the effectiveness of raising the MACR in achieving positive youth justice reform.

Such matters would, of course, be subject to police and prosecutorial discretion and it could be hoped that individuals applied common-sense approaches. However, experience raises the very real concern that vulnerable population groups would experience discriminatory applications of such discretion – including Aboriginal children, those with disability and/or displaying trauma-related behaviours and children in care.

Prosecution as a last resort

A surprising feature of the model put forward by government is the existence of an option to prosecute children and young people under the age of 12 years through a 'last resort' mechanism.

The model permits prosecution if a child or young person:

- has been on at least two 'mandatory action plans'[22] in a 12-month period.
- within three months of the second one ending, engages in conduct that meets the definition of a 'serious criminal offence' on at least three separate occasions.
- SAPOL forms the view that certain criteria are met to justify charging the child with the offence. This includes that the behaviour of the child poses a risk of harm to the community and there is no other satisfactory option to address the behaviour through the alternative model

The process would require a procedural safeguard of consultation and agreement from the Office of the Director of Public Prosecutions, and an application to the Youth Court to proceed with the prosecution. If this occurs, then ordinary youth justice processes apply.

To add a layer of complexity, the definition of a serious criminal offence is not the same as the initial serious crime exceptions (i.e., murder, manslaughter, rape and causing serious harm). Instead, the following list is proposed to apply:

- cause death by use of a motor vehicle (section 19A (1) CLCA).
- a serious firearm offence.
- robbery (s 137 CLCA).
- serious criminal trespass in a place of residence (s 170 CLCA).
- property damage to a building or motor vehicle by fire or explosives (s 85(1) CLCA).
- causing a bushfire (s 85B CLCA).
- indecent assault (s 56 CLCA).
- acts of gross indecency (s 23(2) *Summary Offences Act 1953*).
- causing serious harm (s 23 CLCA).
- shooting at police officers (s 29A CLCA); or
- possession of object with intent to kill or cause harm (s 31 CLCA).

Similar to the above discussion, the scope of these offences can be broad.

> For example, a 10-year-old child who is exhibiting trauma-related sexualised behaviours through inappropriately touching adults may fit within the 'indecent assault' provisions.
>
> Or the 10-year-old child who is present with a group of older children who break into multiple houses in a single night may meet the criteria for three separate occasions of committing 'serious criminal trespass in a place of residence'.

The inclusion of this option of last resort should be expected to significantly expand the scope of children and young people aged 10 and 11 years old who could still be prosecuted. As such, I believe that it would result in very little change in how police interact with children viewed as 'trouble-makers', repeat property offenders or a drain on police resources.

Effects on the investigative process

Prior to charging a young person under this last resort option, SAPOL are required to make an application to the Youth Court for permission to proceed. To satisfy the Court that relevant criteria have been fulfilled, SAPOL must demonstrate that there is a reasonable prospect of a successful

[22] Discussed later in this submission.

prosecution. It is unclear from the discussion paper whether SAPOL can apply to charge the child for all three instances of the behaviour that would constitute a serious criminal offence. If SAPOL only applies to charge the child for one instance, it is unclear whether they must also prove to the Youth Court that their behaviour would constitute a serious criminal offence on the other two occasions – and, if so, to what standard that would need to be proved.

Presuming that there must be some level of proof of all three instances, this process encourages a policing approach which 'keeps track' of children who are perceived to be likely to engage in repeat behaviour and collect sufficient evidence on each occasion – including through interviews, searches and taking forensic samples – to demonstrate that there is reasonable prospect of a successful prosecution.

As a result, for children and young people who are perceived as being on the path to the last resort prosecution, it seems likely that police investigations would mirror existing processes. This comes with a risk of increased profiling and targeted policing.

A further issue is that the articulated standard of proof is very low. SAPOL are not required to satisfy the court that the behaviour is more likely to have occurred than not – or even that it has occurred beyond reasonable doubt. It is an evidentiary standard, that there is a reasonable prospect of a successful prosecution – similar to standards applicable at bail hearings to justify a period of remand. Applying such a low standard, there is also a reasonable prospect that the prosecution will be unsuccessful. Where this occurs, the child is subjected to the criminal justice system – and all the harms involved – for no reason.

The level of complexity involved in this last resort option would likely create a rough transition period, with increased costs to government associated with:

- policy development and implementation
- training for police, lawyers, magistrates and judges
- higher numbers of appeals, and
- greater resourcing for the Legal Services Commission and Aboriginal Legal Rights Movement, to navigate the increased complexity of these matters.

It would also be inconsistent with efforts towards simplifying youth justice processes, to increase children's understanding and exercise of their legal rights and the consequences of their actions.

No other jurisdiction in Australia has suggested such a process, and for good reason. I recommend that this aspect of the model be removed from consideration.

Recommendation 1
Consistent with other Australian jurisdictions, raise the MACR to 14 years. At a minimum, there should be a commitment to do so after an initial period at 12 years.

Recommendation 2
Remove the serious crime exceptions to the MACR from the proposed model.

Recommendation 3
Remove the option to prosecute children under the MACR as a 'last resort' from the proposed model.

The proposed 'alternative diversion model'

The proposed alternative diversion model sets out a system that should be *'put in place to replace the criminal justice response to behaviour from children that would otherwise have constituted a criminal offence had that child been older than the MACR*'.[23]

As I understand it, the proposed model is as follows:

1. A first response, involving:
    a. Community-based early intervention processes, and/or
    b. Police first responder powers to:
        i. forcibly remove children and young people from a location.
        ii. transport children to 'places of safety', which may include detaining them in police cells or the Centre.
        iii. conduct criminal investigation processes (including conducting interviews and taking forensic samples).
2. A secondary response that can be scaled in intensity, from:
    a. **Community action plan:** A voluntary agreement made between children and other relevant parties, including parents/guardians, police, schools, medical professionals, youth workers, DCP and community members and leaders etc.
    b. **Mediated action plan:** Analogous to the existing family conferencing process within the youth justice system, which could impose similar requirements or undertakings to family conferencing outcomes.
    c. **Mandatory action plan:** formal orders made by SACAT or another body – potentially the Youth Court. Orders may include compelling children to undertake specific treatments, engage with specific programs or deprive the child of their liberty in a secure therapeutic facility, which may be the Centre.

The discussion paper notes that SAPOL has emphasised the need for officers to be able to respond appropriately when children are engaging in behaviour that presents a risk to the safety of the community. In answer to that emphasis, **it appears the Attorney-General's Department have determined the alternative diversion model should largely replicate existing processes,** subject to terminology and some procedural changes.

The remarkable similarities between existing youth justice processes and the proposed alternative diversion model can be seen in the table below.

[23] Government of South Australia, AGD, *MACR Discussion Paper* (n 2), p. 7.

Comparison: Existing youth justice processes v the proposed alternative diversion model

	Current	Proposed	Comments
No police contact	Community-based early intervention processes and programs	✓	No change, same as current provisions
Police attendance	Powers to involuntarily transport children to their home or another location (under child protection powers)	✓	No change, same as current provisions. It is explicity mentioned in the proposed model under 'places of safety' approach
	Detain children at police station for a certain period	✓	No change, same as current provisions. It is explicity mentioned in the proposed model under 'places of safety' of last resort
	Transport to the Centre	?	Unclear whether would be deemed as a 'place of safety'. Police do transport children to the Centre currently if bail is not granted
	Power to conduct criminal investigation processes	✓	Currently occurs, however, the alternative model identifies a possibly more limited process – unless there is reasonable suspicion that the child has committed a serious offence
	Police diversion (including informal caution)	?	These processes would likely be replicated, but it is unclear
Police charges	Power to lay charges for a criminal offence	✗	A referral through to the secondary response (i.e., a community-based, mediated or mandatory action plan) replaces this step. In many circumstances, it may have a similar effect.
Community response	Voluntary case planning and meetings involving: • child, family, community • various agencies and professionals, incl DCP, schools, SAPOL, health, psychologists etc.	✓	No change, same as current provisions
Court-based response	Youth justice family group conferencing	✓	No change. The discussion paper notes the 'mediated action plan' is based on current approach
	Discharge without penalty	✓	Replicated in the alternative model through termination of a plan and/or the 'step-down' approach which refers the child back to a voluntary plan
	Found not guilty at hearing	✗	The alternative diversion model does not address the standard of proof for imposing a mediated action plan or mandatory action plan. It is unclear what process would exist for children who dispute allegations about their behaviour.
	Financial penalties, including fine and/or victim restitution	?	The discussion paper does not address whether this may form part of a community action or mediated action plan.
	Sentenced to community-based order Sentenced to detention-based order	✓ ✓	No change, same as current provisions. A mandatory action plan which does not require detention in a secure care facility appears to mirror current sentencing options for community-based orders (including conditions to engage in rehabilitative programs and treatment). Like non-compliance with community-based orders, there is an option to escalate to deprivation of liberty to coerce that engagement (via the proposed secure care facility). Alternatively, a secure care order may be made in the first instance.

Observing that existing processes are so closely mirrored, I am unsure what the alternative diversion model is hoping to achieve regarding improved outcomes and wellbeing for children, and community safety.

Accordingly, I am forced to ask the question: what's in it for the kids?

I do acknowledge that there are children who could benefit from raising the MACR to 12 years, particularly those who are likely to be effectively diverted from further police contact or harmful behaviours at an early stage under existing processes. But I am concerned that this benefit may be outweighed by the risk of harm to others, including unintended consequences of the transition.

It is concerning that a discussion paper which proposes to raise the MACR should call into question whether it would improve anything for children. Instead, I am worried that the model as proposed is aimed at satisfying uninformed community opinions of child and youth offending patterns and trauma recovery.

In this context, I consider the distinct lack of community and sector consultation prior to the release of the proposed model is notable. As the independent oversight body for youth detention, I am surprised that my input was not sought in development of the draft model. When I questioned the Attorney-General's department on this, it was merely stated that this discussion paper amounted to the consultation process. I assert that this is an underdeveloped and supercilious approach to developing such important social policy reform. I am disappointed that South Australians' expertise in this field have not been respectfully engaged in any form of co-design of a proposed model – such a process may have led to indeed a more fulsome, productive and informative feedback process.

I also understand from my engagement with relevant stakeholders that other child-rights and child-focused bodies and organisations were not contacted during the development of the proposal. Had consultation occurred, I and other stakeholders could have raised the type of issues set out in this submission at an earlier opportunity, to work towards a more child-focussed response to concerns raised by SAPOL.

Specific concerns regarding the alternative diversion model

Places of safety: Increasing police contact?

The discussion paper proposes to establish a network of 'places of safety', which can be used as an alternative to existing arrest procedures for children younger than the MACR.

The discussion paper describes the places of safety concept in the following terms:

> *It is proposed to set up a network of 'places of safety' where a child younger than the MACR can be taken by first responders (including police) if they are engaging in behaviour that is harmful or there is a risk to the child's safety, the safety of others or the community, and it is not possible or safe to return the child to their parent or guardian.*
>
> *A time limit on how long a child may remain at a place of safety is proposed to be set (at this stage, 24 hours). The intention is to prevent immediate harm and allow time for longer-term arrangements to be made for the child. This may mean the child protection system being activated, including early intervention services, if those legislative thresholds are met.*

The proposal recommends that police facilities will be places of safety of last resort when no alternative options are available.

The 'places of safety' model is intended as an alternative to children and young people being brought to police cells and stations, or otherwise held in detention when there are immediate safety concerns for a child younger than the MACR. I recognise that the intent in avoiding police facilities is to improve safety, as well as preventing the premature criminalisation of children and young people. If the intent is achieved, then the potential to limit the scope and extent of contact with the criminal justice system is promising.

However, on analysing the model in the broader context of other features of the discussion paper, I am seriously concerned that the places of safety network may not prevent arrest of children, but instead **act as authority for a form of pseudo-arrest**. If this occurs, it is unlikely to reduce children's admissions to police facilities, or the time spent in police cells.

As noted in the discussion paper, the places of safety approach is based on the model used in Scotland as an emergency response to an immediate concern about a risk of harm from a child's behaviour.[24] The mechanism is applied when it is considered necessary to protect a person – including the child in question – from an immediate risk of significant harm, or suffering further such harm.[25] When a child is taken to a place of safety there is an immediate and co-ordinated response between police and social workers to ensure that the child can be removed from the situation and taken to more appropriate facilities, where they can be supported and cared for.[26]

In analysing the potential of this model to work in Australia, it is important to note that there is already legislation in place which requires arrest and detention to be used as a matter of last resort. Further, police already have relevant child protection powers to remove children and young people from unsafe situations and transport them to a place of safety (albeit not using this terminology) – such as their home or placement or, in certain circumstances, a child protection office. Yet, even with these principles and powers in place, my observation is that arrest and detention in police cells **is not in fact used as a last resort**.

The issue is contextualised by the most recent data SAPOL has provided to my office: in 2021-22, children under the age of 14 years were admitted to police custody in South Australia 684 times. This amounted to nearly one in four of all admissions to police custody. In this context, I am concerned that introducing legislation to implement police powers to transport children and young people to places of safety will result in the same problems and incidence of admission to police custody, just under another name. Potentially, it may increase this number.

Whilst I agree there is a need to explore 'places of safety', I am hesitant to support it in the context of this submission. The draft proposal and intent of this current model does not adequately meet human and child rights measures. As such, I fear any support for a model in this context could not truly be developed in accordance with the intention needed or required to meet the very real safety needs of children and young people.

South Australia is a long way from having the kind of 'wellbeing-driven' approach to child safety that exists within the Scotland child wellbeing and youth justice systems. While the Scotland model relies on relatively basic safeguards regarding using a police station as a place of last resort,[27] the practical circumstances in Scotland are very different to South Australia. This can be seen in the following statistics in Scotland, for a 12-month period between December 2021 and December 2022:

- there were only four occasions where a child was taken to a 'place of safety'.
- all four uses of this power were initiated due to violent or significant harmful behaviour.

[24] Social Work Scotland, Age of Criminal Responsibility operational Guidance for Social Work and Police (2021), p. 13.

[25] *Age of Criminal Responsibility (Scotland) Act 2019,* s 28(1)(2).

[26] Social Work Scotland (n 24).

[27] *Age of Criminal Responsibility (Scotland) Act 2019,* s 28(5).

- there were no occasions where a police cell was used as a place of safety.
- in two instances, the child was taken to a suitable room at a police station (not a cell) while an alternative place of safety was arranged.
- one of these two instances, saw the child in a suitable room at a police station for 1 hour 5 minutes before being moved to a Local Authority established place of safety for 6 hours 15 minutes.
- in the second instance, the child was in a suitable room at a police station for 41 minutes while arrangements were made to take the child to their home address. [28]

In contrast to Scotland, it is also relevant to note the different challenges that arise due to South Australia's vast regional and remote areas. The extent of this challenge can be seen in the context of remarks made by the Attorney-General in Parliament late last year, which emphasised the importance of allowing children and young people to be detained in police facilities in regional and remote areas to avoid the significant travel required to transport children and young people to Adelaide.[29]

The environment in South Australia, including these types of comments, cause me concern about how government proposes to avoid relying on police cells in regional and remote areas, and instead ensure access to child-appropriate facilities as 'places of safety'.

Inherent in my concerns is an objection to the characterisation that police cells are a 'place of safety' for children and young people. For years, myself (and my predecessor) have raised concerns with the South Australian government about the conditions for children and young people held in police cells. My office has heard direct accounts from young people of rough treatment and verbal abuse, being subjected to strip searches, having frightening interactions with adult prisoners and detention conditions that they found humiliating, degrading and traumatising.

Young people have described being held for multiple days in regional police facilities over weekends. This can be a particular issue over long weekends, such as Easter or Christmas public holidays. Concerningly, these issues arise not only in regional and remote areas, but also in the Adelaide City Watchhouse and other metropolitan police stations.

Despite legislative requirements that they be detained at the Centre if bail is not granted, children and young people have frequently described being held overnight in metropolitan facilities. This appears to be consistent with relevant SAPOL and Department for Human Services policies, and operational records such as shift logs for the Centre. Relevant records have also revealed circumstances where children self-harmed during these periods of detention in metropolitan police cells, prior to admission to the Centre.

The gravity of these safety concerns must also be understood in the context of the lack of independent, child-focussed oversight of police facilities in South Australia.

At the date of this submission, there remains no funding or legislation in South Australia to support activities required under the United Nations Optional Protocol to the Convention against Torture (OPCAT) regarding respect to places where children and young people may be deprived of their liberty.[30] This includes youth detention facilities, police facilities, police transport vehicles, health

[28] Letter from Convenor of Equalities, Human Rights and Civil Justice Committee and Convener of Education, Children and Young People Committee to Scottish Government, Minister for Children, Young People & The Promise, dated 5 May 2023

[29] Parliament of South Australia, Legislative Council, 15 November 2023, p. 4313 (Hon Kyam Maher MLC, Attorney-General).

[30] I have been administratively assigned a role in Australia's NPM by the state government with respect to young people detained at the Youth Justice Centre, that presumptively commenced in January 2023. In a nominal role, I participate actively in National NPM network meetings convened by the Commonwealth Ombudsman. However, I am neither funded nor legislated to undertake the separate responsibilities required for an NPM under OPCAT. Performance of NPM functions is vastly different to that of the TCV (with the TCV being a responsive mechanism and the NPM being a preventative mechanism). Without appropriate legislation and resources, it is not possible

facilities (including hospital emergency departments and wards), health transport vehicles, residential care houses and other places where out-of-home care is provided.

OPCAT compliance is the key standard of international best practice regarding methods to prevent mistreatment of people in detention settings. Meeting OPCAT requirements includes undertaking inspections of places of detention and closed environments, a range of preventive oversight strategies and broad civil society engagement (including, but not limited to providing community education). Yet, at the time of this submission, the OPCAT process in Australia continues to be problematic, particularly in the context of the United Nations Subcommittee for the Prevention of Torture's (SPT) aborted Australian inspection in late 2022.[31] Commonwealth and state governments have been seriously criticised (nationally and internationally) for failure to comply with basic OPCAT commitments.

On multiple occasions, I have raised the significant risk involved with children and young people's lack of access to independent, child-focussed oversight when they are detained in police facilities.

In correspondence last year, the Minister for Police, Emergency Services and Correctional Services responded to this concern through highlighting that there are 'Official Visitors' who have the power to inspect SAPOL facilities. These visitors are assigned responsibility for adult correctional facilities, as part of South Australia's current (and problematic) OPCAT National Preventive Mechanism arrangements.

With great respect to the work of the Official Visitors, I maintain that specific child focus and expertise is required to oversight the suitability of detention facilities for children and young people – both on an individual and systemic level.[32] The importance of this focus is apparent in the annual reports of the Official Visitors for the 2022-23 year. While 15 police facilities were inspected throughout the year, those reports do not mention any circumstances specific to the detention of children and young people.

With all this information in mind, I will say that I am open to further information about the proposal to establish a network of places of safety. However, I am fundamentally opposed to including police facilities as a relevant place where children may be taken for safety.

What do children and young people say about police cells and cars?

> *"They're fucking dirty, they don't give you pillows, literally. So I'm sitting on like rock hard bed, with a fucking shit, probably dirty, heavy and dirty-ass blanket."*
>
> *"The police and like the cell sergeants and that can be pretty hard on young fullas."*
>
> *"I was like banging my head for entertainment. Cause, like, it's so quiet. And you can't see outside."*
>
> *"When you like crack up, they'll like chuck you in a padded cell, you know and treat you like an adult and stuff. It's not good for kids."*
>
> *"Last time I spent 18 hours in there, and all I had to do was read a book to the point where I was going insane. I was swiping on that book, thinking it was my phone."*

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to undertake the NPM function as intended. Considerable problems about enabling appropriate scope and capacity to conduct an NPM role remain to be resolved, including with respect to a capacity to engage with Civil Society and the SPT itself.

[31] United Nations, Office of the High Commissioner for Human Rights, UN torture prevention body terminates visit to Australia, confirms missions to South Africa, Kazakhstan, Madagascar, Croatia, Georgia, Guatemala, Palestine, and the Philippines (20 February 2023).

[32] The case for specialised child-focused oversight expertise is well established in international best practice guidance and advocacy. As highlighted in a **report by the Association for Prevention of Torture**, monitoring places where children are deprived of their liberty requires a high degree of sensitivity and professional knowledge across a number of fields including social work, child rights, child psychology and psychiatry.

"They can see you when you use the toilet! The cameras, they can see!... Here you know, there's a curtain at least. "

"You're also stuck in there with a bunch of adults that just yell and scream, cause they're on drugs and shit."

"I don't think kids should be in there."

"You can't protect yourself [in the dogbox][33], like... I thought there'd be a seatbelt in there at least."

"...and it's cold as, too. In the dogbox."

The relationship between policing and child protection

For the reasons outlined above, I hold concerns that South Australia is currently over-reliant on policing responses to children under the age of 14 years. Similarly, I hold concerns that South Australia is over-reliant on interventionist child protection responses to identified safety concerns.[34] The success of youth justice reform – including raising the MACR – is dependent on challenging and changing this reliance, on both fronts.

There is a complex and nuanced relationship between child protection and policing practices. In an ideal scenario, both departments are a matter of last resort in situations of genuine necessity, where there are safety and wellbeing issues that cannot otherwise be resolved by a strong network of family, community and government supports for children and young people. However, where this network is not robust, both child protection and policing agencies can become first or primary responders in a wide range of unsuitable circumstances. This can create an unhealthy environment that brings child protection and police officers into conflict – whether that be to avoid responsibility or take inappropriate control for circumstances that are unsuited to their agency responsibilities.

My observation is that South Australia finds itself in a circumstance where our funding and legislative arrangements are not supporting a strong, healthy community-based response to children and young people's support needs. And, as a result, the relationship between policing and child protection practices in South Australia is problematic and, at times, fraught.

This is a difficult issue to solve and cannot be done overnight. But the issue needs to be named and acknowledged, so that we can factor it into our planning for important reforms such as raising the MACR. The consequences of this issue include:

- In the absence of alternative referral pathways, our child protection department is overwhelmed with reports of child wellbeing concerns.
- This issue creates unpredictable results for individual children and young people. In some circumstances, it means that children are inappropriately left in circumstances where there are serious safety issues. In others, it results in a rush to removal and long-term guardianship over exploring family support and reunification pathways.
- Police and child protection officers can become caught in a loop of referring matters to the other agency, to the detriment of a timely, holistic and coordinated response to the child or young person's needs
- Contact with one system often results in contact with the other, which can develop into a perpetual cycle.

[33] During the consultation, it became clear that children and young people colloquially refer to police vehicles as 'the dogbox'. My staff were advised this is based on terminology police use to children.

[34] For detailed discussion of this matter, see OGCYP, *Child Protection in South Australia from the Productivity Commission's Report on Government Services 2023* (2023), Part 2.

An example of the adverse consequences of this relationship can be seen in the social phenomenon commonly referred to as 'care criminalisation' – whereby children in care account for only 1% of the child population, but more than one in three young people held in youth justice detention on an average day are in care. The majority – up to 90% – are children and young people living in the institutionalised environment of residential care. [35]

There are many complex social conditions and factors underlying this phenomenon. But one relevant factor is the way in which contact with one system often leads to contact with the other. For young people in care, their contact with police may begin at early ages, without being connected with their own offending or alleged offending behaviours. For example, young people may have encountered police in the following contexts:

- **Being picked up on a 'Missing Person Report':** although it is not a crime to run away from a property (unless there are bail arrangements in place) police may be the ones to collect a young person on MPR. My staff hear young people refer to the photo which may be attached to their MPR as a "mug shot".
- **Forensic interviews:** depending on the circumstances, some young people have been interviewed due to the reasons for their removal from their parents' care.
- **Being interviewed as the victim of a crime:** sadly, this may have been due to being a victim of sexual exploitation.
- **Police attending the house in response to another young person's behaviour:** this could be complicated for young people, who may have felt scared of the other young person but may also find the presence of police in their house confronting. Young people speak to my staff about police being used as a behaviour management tool, often as a first response – rather than carers supporting them to navigate complex emotions and outbursts.

My firm belief is that homes should be places where young people can learn how to experience and process emotions safely. This ensures they can engage constructively and appropriately in society as they grow. However, young people in residential care can experience heavy policing responses as a direct result of that early contact with police, or simply because of where they live. Too often, the moment children and young people in residential care escalate in their 'home' environment – because they are scared, have a trauma response, become dysregulated – they risk contact with the youth justice system, through other young people or carers calling for SAPOL attendance.

In a context where one in three children in detention are also in care, any response to raising the MACR must factor in the underlying causes and results of care criminalisation. That means considering and addressing the reasons why touchpoints with one system so often leads to a touchpoint with the other. It also means approaching conversations between SAPOL and DCP, to promote collaboration on how they will resolve the challenges associated with removing a (systemically convenient) youth justice response to complex and challenging child behaviours. That collaboration is imperative to ensure that raising the MACR does not result in either increased police attendance and transport, or interventionist child removal as a response to child protection reports and referrals.

[35] Training Centre Visitor, *Training Centre Visitor 2022-23 Annual Report* (2023), pp 36-7.

The evidentiary threshold for court/tribunal orders?

> The model proposed in the discussion paper introduces alternative court and tribunal-based processes for children and young people who have engaged in harmful behaviours. However, it does not address how it should be established that the behaviour has occurred.

Under existing youth justice processes, children have access to an important procedural protection; namely, that the onus is on the State to prove that they have committed a criminal offence, beyond reasonable doubt. In contrast, it is unclear whether the alternative diversion model requires some finding of guilt or fault – or even that the conduct has occurred – for children to be subject to mediated action or mandatory action plans.

There are two options for how this issue may be addressed:

1. The beyond reasonable doubt threshold is maintained, for proving that the behaviour occurred.
2. A lower evidentiary threshold is legislated to apply.

If it is the former, it may be expected that police would follow similar investigative approaches to existing practice, from the time that the harmful behaviour is identified or alleged. This would likely be necessary to ensure that the matter can be proved to the court or tribunal beyond reasonable doubt. However, following those processes would obviate the benefits of reducing contact with key aspects of the criminal justice system, and likely maintain a criminogenic lens for children's behaviour.

If it is the latter, then there is a risk of greater numbers of children being captured by court and tribunal processes under the mediated and mandatory action plans. Far from reducing contact with the criminal justice system, this could increase the risk of exposure and the number of children who may be subject to detention via secure therapeutic care orders.

Neither option is good, or helpful, for children.

Secure therapeutic care

It is important to be clear that the proposal to enable secure therapeutic care orders is an alternative mechanism to deprive children and young people of their liberty.

I am concerned that the proposal to raise the MACR has been connected to this concept, which has been controversial in South Australia for some time and is subject to significant community and stakeholder objections. As noted in the discussion paper, there is **no therapeutic environment currently available in South Australia that could be used for secure therapeutic care**. Developing such a facility would take considerable time to establish and be highly expensive to run. The outcomes are questionable, and the potential ramifications for increased institutionalisation of children and rights abuses in closed environments are severe.

Mandatory treatment orders are not an evidence-based approach, and the benefits have not been established through formal evaluations. The effect of mandatory treatment on rehabilitation and long-term outcomes for children remains largely within the theoretical realm.[36]

Treatment is more successful and reduces reoffending when it is accessed **voluntarily**. Children and young people who are addressed through voluntary and non-criminalised approaches

[36] F Erika Fortunato, Nina Papalia and James RP Ogloff, 'Expanding treatment pathways for sexually abuse behaviour in young people: an examination of Therapeutic Treatment Orders' (2024) *Psychiatry, Psychology and Law* 1.

demonstrate a greater inclination to participate in processes designed to assist and support them.[37] In contrast, there are reasons to be concerned that the forceful nature of mandatory treatment exposes children and young people to a real risk of serious human rights violations.

I do acknowledge that there may be extreme circumstances where children are kept alive or safe through mandatory orders, **such as those that can be imposed under the *Mental Health Act 2009***. But the circumstances should be highly restricted, and the places where treatment may be provided must be therapeutic. These circumstances require a health response, not a criminogenic or youth detention response – and there is existing legislation in place that allows those responses.

Noting this, I am highly concerned that the government would consider a matter such as building a wing at the Centre for a secure care facility, particularly in light of my recent 2022-23 Annual Report as Youth Treatment Order Visitor. In that report I made the following observations about the conditions of detention for children subjected to a YTO, which includes:

- extended periods in isolation.
- insufficient access to education and rehabilitation.
- compromised medical care, including monitoring of ongoing conditions by non-medically qualified staff.
- inadequate mental health supports, including lack of therapeutic responses.

This is not a therapeutic environment. Attempting to deprive children younger than the MACR at the Centre could not be said to be secure *therapeutic* care.

In addition to my principled objections, I note that there are a number of practical considerations which impact the viability of establishing a secure care facility to meet this purpose. This includes:

- ongoing challenges regarding recruitment and retention of youth workers to staff residential care facilities and the Centre (which could be expected to extend to a separate secure care facility).
- the costly nature of secure care facilities.

There is a strong risk that the price tag and worker drain associated with introducing secure care would constrict human and financial resourcing available to properly enact a justice reinvestment approach.

Recommendation 4
That the South Australian government remove the proposal to introduce secure therapeutic care as part of MACR reform.

Indefinite detention

The discussion paper proposes that:

a mandatory action plan could be in place for a maximum of 12 weeks, with an option to extend it for a further 12 weeks. **There is no limit to the number of mandatory action plans to which a child can be subject.** They will be reviewed regularly and can be adjusted as needed.[38] (emphasis added)

As highlighted above, the model proposes that a child may be compelled to reside – i.e., detained – in a secure therapeutic facility, in order to receive treatment under a mandatory action plan.

[37] Barry Goldson, 'COUNTERBLAST: 'Difficult to Understand or Defend': A Reasoned Case for Raising the Age of Criminal Responsibility' (2009) 48(5*) The Howard Journal of Criminal Justice* 514, 518.

[38] Government of South Australia, AGD, MACR Discussion Paper (n 2), p. 12.

On the face of the discussion paper, there appears to be potential authority for children and young people to be held in secure care on successive and unlimited mandatory action plans, in conditions amounting to indefinite detention.

Indefinite detention is a serious human rights violation, which may amount to a breach of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[39]

It is beyond understanding for this to even be contemplated. I sincerely hope that this is an issue of ambiguity in the discussion paper – otherwise, I could only assume that the author of this proposed model did not think through the risk of unintended consequences or is misinformed on current systemic tendencies to extend timeframes and protract legal or detainment matters.

Recommendation 5

Redesign alternative diversion principles to reflect a justice reinvestment model, relying on community-based child and family wellbeing supports.

The model should not include court-based orders, expanded police powers and/or the introduction of secure care facilities.

Conclusion

Since the release of the discussion paper, I have felt unsure about the best way to approach this submission.

On the one hand, I am strongly committed to supporting efforts to raise the MACR above the age of 10 years. In my role as an advocate for children and young people in care and detention, I see the harms the youth justice system – and indeed detention facilities – cause on a daily basis. While I am clear in my position that the MACR should be raised to 14 years, I would still be supportive of raising the MACR to 12 years as an **interim measure** to support transition arrangements to 14, if that was the only way to progress this reform.

But I am afraid I cannot support the model put forward in the discussion paper. I do not believe that model is effective to achieve the intention of raising the MACR. The scope of the serious crime exceptions and prosecution as a last resort would maintain a criminogenic response for those children who most need the care and attention of a truly trauma-informed, therapeutic model of support within their home and community. The remarkable similarities between **existing youth justice processes** and the alternative diversion model appear to represent more of the same. Except, children would be forced to navigate a tricky transition period and the unintended consequences of excessive compromise, to placate those in our community who do not support raising the MACR.

At the core of my submission, I call for government to go back to the drawing board and come up with a plan for real change. This must be done in a way that listens to children and young people's voices, about what they need to grow up well and avoid contact with the youth justice system, and how we should invest in them and their families.

At the next stage of consultation, I hope to see a less complex proposal which focuses on what we are trying to achieve, over politics. To see a commitment to justice reinvestment over new pathways to police contact and institutionalisation.

[39] See, e.g., Alfred De Zayas, 'Human rights and indefinite detention' (2005) *International Review of the Red* Cross, vol 87, number 857, p 19.

I sincerely hope to see engagement with the views and solutions bravely put forward by children and young people in detention, and as set out in my complimentary submission. They engaged in that process with genuine desire to make things better for their siblings, family and friends, in the event they happen to 'get caught up' in trouble in their lives.

They just want to make it better. Let's meet them there. With the same sense of honesty and genuine engagement.