



**Submission to the Australian Human Rights Commission –
Youth Justice and Child Wellbeing Reform across Australia**

June 2023

This submission is directed to:

Ms Anne Hollands
National Children's Commissioner
Australian Human Rights Commission
Youthjusticereform@humanrights.gov.au

About SACOSS

The South Australian Council of Social Service (SACOSS) is the peak body for non-government health and community services in South Australia, and has a vision of justice, opportunity and shared wealth for all South Australians.

Our mission is to be a voice that leads and supports our community to take actions that achieve our vision, and to hold to account governments, businesses, and communities for actions that disadvantage South Australians.

SACOSS aims to influence public policy in a way that promotes fair and just access to the goods and services required to live a decent life. We undertake research to help inform community service practice, advocacy and campaigning. We have 75 years' experience of social and economic policy and advocacy work that addresses issues impacting people experiencing poverty and disadvantage.

Acknowledgement

We acknowledge the traditional lands of the Kaurna people, and pay our respects and acknowledge the Kaurna people as the custodians of the Adelaide region and the Greater Adelaide Plains. We acknowledge and pay our respects to the cultural authority of Aboriginal and Torres Strait Islander communities and organisations, and appreciate the cultural knowledge that is held and shared. We underscore the importance of Aboriginal-led responses to address the needs and rights of Aboriginal children and young people.

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1. Introduction

The South Australian Council of Social Service (SACOSS) welcomes this opportunity to engage with the Australian Human Rights Commission and the National Children's Commissioner about opportunities for reforming youth justice and related systems, based on evidence and the protection of human rights. In sharing our insights about ways to reduce children and young people's involvement in the youth justice system, we primarily focus on the need to address the social determinants of their wellbeing and the important role of prevention and early intervention.

Over recent years, most states and territories have undertaken extensive reviews of their youth justice systems. It is not our intention to duplicate the findings of these reviews here. However, key themes emerging from these reviews are instructive and have included the need for youth justice detention to be a measure of last resort; that detention – more especially for young people who have survived abuse and neglect or who have mental health challenges or live with disabilities – is damaging, traumatising, is not rehabilitative, and does not act as a deterrent or reduce recidivism.¹

While we do not support holding young people in detention, if detention is used, the following recommendations from previous reviews should apply: raise the minimum age of criminal responsibility; that diversion should be used; and alternatives to being remanded in custody should be employed. Children and young people who are detained are entitled to have their rights met and not be subjected to a range of violations as repeatedly found by the South Australian Training Centre Visitor and Guardian for Children and Young People.²

There was considerable agreement across the previous reviews that young people entering youth justice systems invariably have a number of complex needs, and that a significant proportion of the young people in the youth justice system experience challenging home circumstances, unstable accommodation or homelessness, and socio-economic disadvantage or poverty.³

Against the backdrop of the key emerging themes from previous reviews and inquiries, this submission responds to the four questions outlined by the Commissioner. The following overview provides a summary of the issues addressed in this submission:

1. What factors contribute to children and young people's involvement in youth justice systems in Australia?

- Socio-economic disadvantage, poverty, and homelessness
- The intersection of poverty, discrimination, racism, and criminalisation
- Criminogenic responses to children and young people with disability
- The nature and role of the child protection system, and the cross-over with children caught up in the youth justice system ('dual-involved' children and young people)
- Adult incarceration and the criminalisation of children, including those as young as ten.

2. What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

¹ Clancey G, Wang S & Lin B (2020). Youth justice in Australia: Themes from recent inquiries. *Trends & issues in crime and criminal justice* no. 605. Canberra: Australian Institute of Criminology. <https://doi.org/10.52922/ti04725>

² Richards, S (2023) *Child detainees suffering in isolation in Kurlana Tapa Youth Justice Centre cells, watchdog says*. ABC News, accessed at <https://www.abc.net.au/news/2023-06-21/staff-shortages-at-adelaide-youth-justice-centre/102498964> and Martin, P (Dec 2022) SA children locked up in adult cells thousands of times breaching their human rights, report finds. ABC News accessed at [Patrick Martin](https://www.abc.net.au/news/2022-12-01/sa-children-locked-up-in-adult-cells-thousands-of-times-breaching-their-human-rights-report-finds/102498964)

³ Armytage, P. and Ogloff, J. (2017) *Youth justice review and strategy: meeting needs and reducing offending*. Department of Justice and Community Safety (Vic), accessed at: <https://apo.org.au/node/101051>

- Listen to the voices of children and young people and create mechanisms for this to occur. Community-led responses that include the participation of young people are central to achieving this.
 - Focus on early intervention, prevention and support rather than over-emphasising 'safety' and removal, or detention. The essential focus needs to be on strengthening families and addressing the factors that lead to children and young people being caught up in the child protection system, and potentially in the youth justice system.
 - Increasing expenditure does not necessarily result in better outcomes – redirect funding to the preventative 'front-end' of the child protection and youth justice systems
 - Adhere to international conventions and human rights instruments, and raise the minimum age of criminal responsibility from ten to at least 14 years of age. Importantly, implement the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and establish a National Preventative Mechanism (NPM) in all jurisdictions, including South Australia.
- 3. Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?**
- Raising the rate of social security payments and the positive impact on the involvement of young people in the justice system
 - The positive contribution of Justice Reinvestment initiatives
 - Lessons from international examples and approaches, such as that adopted in Norway and the Netherlands.
- 4. From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?**
- A national approach enables consistency and opportunities for the development of a strategic focus based on shared principles
 - It would enable Australia to move beyond data collection and analysis towards a more strategic approach to the harmonisation of youth justice across jurisdictions, enable a genuine recognition of the rights of children and young people, and advance adherence to international instruments and conventions – including the Convention on the Rights of the Child and the OPCAT.

2. Commentary in response to the questions

2.1 What factors contribute to children and young people's involvement in youth justice systems in Australia?

The factors and social determinants that contribute to young people becoming involved in the youth justice system include socio-economic disadvantage, poverty and homelessness; the intersection of poverty, discrimination, racism and criminalisation; criminogenic responses to children and young people with disability; the nature and role of the child protection system, and the entanglement of 'dual-involved' children; and the incarceration of adults and the criminalisation of children and young people.

- **Socio-economic disadvantage, poverty, and homelessness**

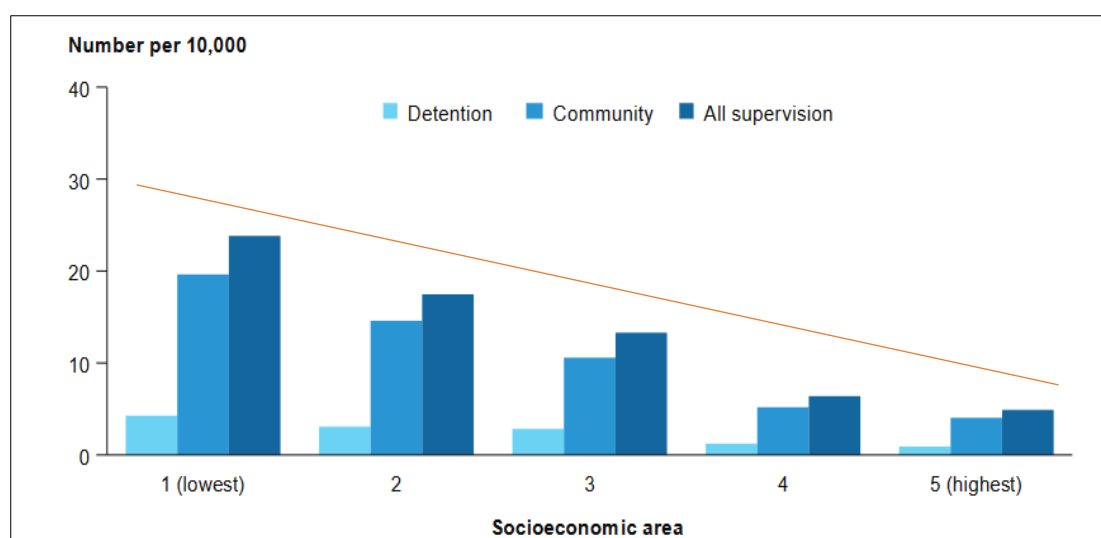
There are 3.3 million people (13.4%) across Australia living below the poverty line of 50% of median income, including 761,000 children or one in six children (16.6%).⁴ In South Australia, one

⁴ Davidson, P; Bradbury, B; and Wong, M (2022) *Poverty in Australia 2022: A snapshot*. Australian Council of Social Service (ACOSS) and UNSW Sydney.

in four children is growing up in a family that is overwhelmed by increasing challenges, including poverty, substance use and addiction, homelessness, domestic and family violence, intergenerational trauma and mental health challenges.⁵

Of the 122,494 people experiencing homelessness across Australia in 2021, this included 4,502 children below the age of three, 17,646 (14.4%) aged under 12 years, with 2,339 South Australian children in this latter cohort.⁶ This level of homelessness and housing insecurity experienced by young children is a significant contributory factor for children and young people becoming involved in the youth justice and child protection systems. As starkly shown in Figure 1 below,⁷ there is a direct link between young people from low-income areas – where experiences of poverty and homelessness are heightened – and involvement in the youth justice system.

Figure 1. Young people aged 10 – 17 under supervision on an average day, by socio-economic area (low-income to highest-income) of usual residence and supervision type, Australia (2020-21)



In 2020–21, more than 1 in 3 young people (35%) under supervision on an average day were from the lowest socio-economic area, compared with only 6.4% from the highest socioeconomic areas – this equates to them being almost five times as likely to be under supervision as those from the highest socio-economic areas.⁸

Young Aboriginal and Torres Strait Islander Australians (40%) were more likely than their non-Aboriginal counterparts (31%) to have lived in the lowest socioeconomic areas before entering youth justice supervision.⁹

Against this socio-economic backdrop and the links with the youth justice system, the structural rate of child poverty,¹⁰ entrenched material poverty, and housing insecurity, it is critical that every effort is made to support children and their families and to ensure that preventative and early intervention measures are put in place to keep children out of both the youth justice and child

⁵ Alexander, K. (2022) *Trust in Culture – a review of child protection in South Australia*.

<https://www.childprotection.sa.gov.au/documents/report/trust-in-culture-a-review-of-child-protection-in-sa-nov-2022.pdf>

⁶ Australian Bureau of Statistics, Estimating Homelessness: Census 2021 at

<https://www.abs.gov.au/statistics/people/housing/estimating-homelessness-census/2021#age>

⁷ Australian Institute of Health and Welfare (2022) *Youth Justice in Australia 2020–21*, catalogue number JUV 138, AIHW, Australian Government. <https://www.aihw.gov.au/getmedia/10da194d-5756-4933-be0a-29d41743d79b/aihw-juv-138.pdf.aspx?inline=true>

⁸ Ibid.

⁹ Ibid.

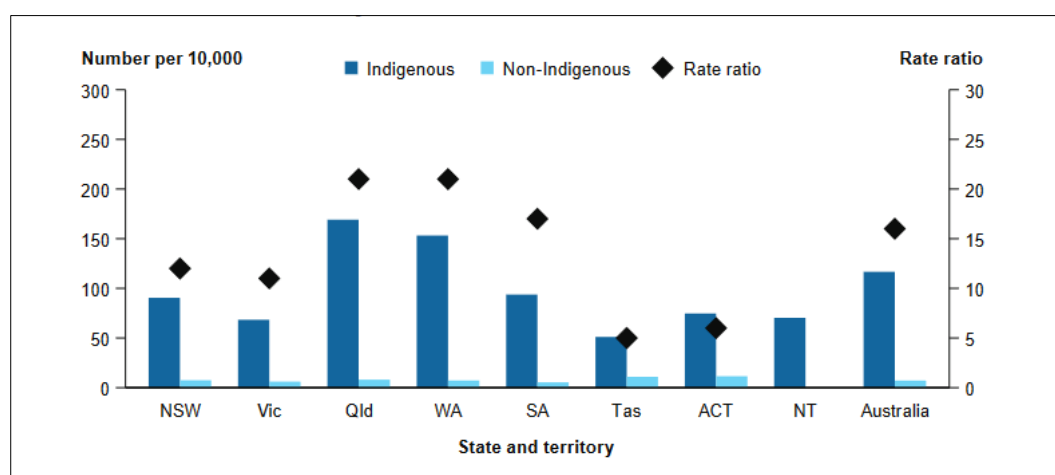
¹⁰ Freiler, C. Rothman, L. and Barata, P (2004) *Pathways to Progress: Structural Solutions to Address Child Poverty*. Campaign 2000 Policy Perspectives. Toronto, Canada

protection systems. This calls for a comprehensive response that reaches well beyond a focus primarily on removing children or placing them in out-of-home care or under supervision or in detention.

- ***The intersection of poverty, discrimination, racism and criminalisation***

In 2020-21, even though only about 5.8% of young people aged 10 – 17 in Australia identified as being of Aboriginal or Torres Strait Islander descent, almost half (49%) of the young people in this age group who were under supervision on an average day were Aboriginal or Torres Strait Islander Australians – indicating that they were about 16 times as likely as their non-Aboriginal counterparts to be under supervision. About half (48%) of those aged 10–17 under community-based supervision were Aboriginal Australians, while just over half (53%) of those in detention were Aboriginal.¹¹ Figure 2 below, shows the stark contrast between the rate of the criminalisation of Aboriginal and non-Aboriginal young people aged 10 – 17.¹²

Figure 2. Young people aged 10–17 under supervision on an average day, by Indigenous status and state and territory, 2020-21



An array of research studies conducted after the Royal Commission into Aboriginal Deaths in Custody (established in 1987) asserted that ‘systemic bias contributed significantly to the incarceration of First Nations peoples’.¹³ As in cited examples from Canada and New Zealand, negative relationships between police and minority groups are also a significant contributing factor to the higher incarceration rates of First Nations young people in Australia.¹⁴

Police have significant powers and discretion as to who receives a caution, who is diverted away from the courts and whether a young person is detained in custody with or without sentencing. With variations across jurisdictions, Aboriginal young people are more likely to receive a formal rather than an informal caution from police, when compared to their non-Aboriginal counterparts, with SA Police data for November 2018 and June 2019 indicating that over a quarter of all formal

¹¹ Australian Institute of Health and Welfare (2022) Youth Justice in Australia 2020–21, catalogue number JUV 138, AIHW, Australian Government. <https://www.aihw.gov.au/getmedia/10da194d-5756-4933-be0a-29d41743d79b/aihw-juv-138.pdf.aspx?inline=true>

¹² Ibid. p. 12

¹³ Behrendt et al. (2009), cited in O’Brien (2021) ‘Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia’ *Soc. Sci.* 2021, 10(2), 68, accessed at <https://www.mdpi.com/2076-0760/10/2/68>

¹⁴ Tauri, Juan Marcellus. (2009) ‘An Indigenous perspective on the standardisation of restorative justice in New Zealand and Canada.’ *Indigenous Policy Journal* 20: 1–25.

cautions issued to children were handed to Aboriginal young people, despite Aboriginal children representing less than 5% of South Australia's child population.¹⁵

In many countries, as is the case in Australia, criminal justice responses disproportionately affect people who are experiencing poverty or homelessness. This often intersects with groupings in society who are already marginalised or from racial and ethnic minorities, and effectively creates a two-tiered justice system with apparently insignificant offences being used to arrest and imprison marginalised populations. Laws, policies, and practices frequently criminalise people for *who they are*, rather than for *what they have done*.¹⁶ International trends and examples of the ways in which socio-economic disadvantage and poverty are criminalised echo the trend in Australia. Instructive international responses to this trend include the *Campaign to Decriminalise Poverty and Status*,¹⁷ and the *Cape Declaration on Decriminalising Poverty and Status*,¹⁸ which calls attention to, and requests urgent action to challenge the increasing use of laws that unfairly target the poor and marginalised groups in society based on their status (social, economic or political) and/or their activism; and the state's overreliance on criminal justice and punishment to respond to problems often caused by social inequalities, including limited access to social security services, education, housing, and drug treatments.

If we are to address and reduce the number of young people engaged in the youth justice and child protection systems, our attention and focus needs to be on the drivers and responses that are leading to the criminalisation of young people from low-income areas, locations of socio-economic deprivation and poverty, and profiled population groups.

- **Responses to children and young people with disability**

Children and young people with a disability frequently experience that some of the behaviours manifesting from their disability are treated as 'anti-social' and, in some instances, are criminalised. Their behaviours are viewed through a criminogenic lens, rather than a disability lens, and their behaviours are incorrectly treated as offences. In the absence of a supportive response, children and young people can be subjected to the youth justice system. The 2021 report on *Police Responses to People with Disability*,¹⁹ by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, highlights that current responses to people with disability in the justice system are 'inadequate' and impact on their rights to justice. It reiterates that coming into contact with police and the criminal justice system is 'far more likely to occur for particular groups of people with disability, such as alleged offenders with cognitive disability ... and other disabilities such as hearing impairment – all of whom also commonly experience multiple and interlocking support needs and social and cultural disadvantage' (p. 3).

- **The nature and role of the child protection system, and dual-involved children**

The number of children in out-of-home-care (OOHC) has reached crisis proportions, with one in three children born in South Australia reported to the Department of Child Protection (DCP) by

¹⁵ Richards, S. (2020) *Call for SA to take national lead in lifting criminal age to 14*. InDaily. Accessed at <https://indaily.com.au/news/2020/07/23/call-for-sa-to-take-national-lead-in-lifting-criminal-age-to-14/>

¹⁶ Penal Reform International (website) *Campaign to Decriminalise Poverty and Status*, accessed at: <https://www.penalreform.org/issues/excluded-populations/decriminalise-poverty-and-status/>

¹⁷ Ibid.

¹⁸ Cape Declaration on Decriminalising Poverty and Status (2022), South Africa, accessed at <https://www.penalreform.org/resource/the-cape-declaration-on-decriminalising-poverty-and-status/>

¹⁹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2021), *Research Report – Police responses to people with disability* (UNSW), accessed at <https://disability.royalcommission.gov.au/system/files/2023-05/Research%20Report%20-%20Police%20responses%20to%20people%20with%20disability.pdf>

the time they are ten years old.²⁰ Coupled with this worrying trend is the evidence of a clear link between children being caught up in the child protection system and the youth justice system.

More than half (53%) of young people, aged 10 and over, who had been in youth justice supervision during 2020–21 had also had an interaction with the child protection system in the last 5 years. Young people in detention (60%) during this same time period were more likely than those under community-based supervision (54%) to have had an interaction with the child protection system in the last 5 years.²¹

Data for the 2016 and 2017 calendar years in Victoria is instructive, that children who were first sentenced between the ages of 10 and 13 were likely to have been known to child protection services, with 54% of this age cohort being subject to a child protection report, 38% to a child protection order, 33% had been in out-of-home care, and 26% had experienced residential care.²² If we are to reduce the number of young children becoming engaged in the youth justice system, it is critical that we focus on minimising the contact of this young age cohort with the child protection system and offer children and families alternative therapeutic and financial supports.

Given the evidence of the strong association and the ‘dual involvement’ of children with child protection experiences being caught up in the youth justice system, it is essential that consideration is given to the role and nature of the child protection system as a contributory factor in the involvement of children and young people in the youth justice system.

The *South Australian Dual Involved Project* highlights the ways in which the residential care system has played a part in the criminalisation of children, directly or indirectly. The Project’s report reflects on the experiences of 71 ‘dual involved’ children and young people who were in state care and experienced youth detention in 2021. It found that harmful practices at multiple service levels exposed children and young people living in state care to a disproportionate and unacceptable risk of becoming involved in the youth justice system. These practices, which included ‘unsafe social dynamics and fraught, unpredictable living environments within the child protection system – at times brought about by problematic placement matching, inadequate therapeutic support and the over-policing of children in state care’ – were identified as key issues that led to the children’s incarceration in the Kurlana Tapa Youth Justice Centre.²³

For children who do find themselves caught up in the child protection system, it is essential to ensure that residential care units are made safer and provide children with appropriate environments; that improvements are made to enable the early assessment of the needs of each individual dual-involved child and young person; that there is increased cultural support for Aboriginal children and young people; that the over-involvement of police in residential care settings is reduced; and that specialist expertise is developed within DCP to work with ‘dual

²⁰ Government of South Australia (nd) *Roadmap for reforming the Child and Family Support System - Safe and well Supporting families, protecting children 2021-23*, accessed at https://dhs.sa.gov.au/_data/assets/pdf_file/0004/107437/DHS-1503-Roadmap-Abridged-NoFore_FA.pdf

²¹ Australian Institute of Health and Welfare (2022) *Young people under youth justice supervision and their interaction with the child protection system 2020–21*, catalogue number CSI 29, AIHW, Australian Government <https://www.aihw.gov.au/reports/youth-justice/young-people-under-youth-justice-supervision/summary>

²² State of Victoria, Sentencing Advisory Council (2019) ‘Crossover Kids’: *Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children’s Court*, accessed at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf

²³ Guardian for Children and Young People (2022) *Final Report of the South Australian Dual Involved Project Children and young people in South Australia’s child protection and youth justice systems*, <https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2022/07/OGCYP-Final-Report-of-the-South-Australian-Dual-Involved-Project.pdf>

involved' children and young people.²⁴ In addition, it is essential that young people leaving care or youth detention have access to housing, income and mental health support.

AIHW (2022) research shows that children and young people who have been abused or neglected are at greater risk of being caught up in the youth justice system. Better understanding the characteristics and pathways of children and young people under youth justice supervision who have had an interaction with the child protection system can help to develop more preventative and protective strategies in order to support children, young people and their families.²⁵

- **Adult incarceration and the criminalisation of children**

The incarceration of children, young people, and adults all have detrimental effects on the individuals themselves and on their families and communities, and in turn contribute in the longer-term to the involvement of children and young people in youth justice systems.

A recent report by the Committee for Economic Development of Australia (CEDA 2022)²⁶ indicates that a significant proportion of imprisoned women have children and are more likely than men to be a primary carer. There is also clear evidence that children with incarcerated parents are more likely to enter the out-of-home care and criminal justice systems themselves.²⁷

Evidence has also established that children whose parents had contact with the criminal justice system are 'at risk of poor development across all developmental domains'.²⁸ Children can also be exposed to increased violence, sexual abuse and neglect in the custody of a violent partner and/or other adults who come into their household while their mother is in prison.²⁹ Children in these situations are therefore at heightened risk in their own families and are more at risk of being placed in out-of-home-care, and of potentially encountering the youth justice system.

CEDA suggests that important steps that can be taken include: reducing the number of women on remand; providing better support to women released on bail; and diverting women to community-based sentences and programs as an alternative to imprisonment.³⁰

Not only are children at heightened risk when their parent/s are incarcerated, young children can themselves also be incarcerated. Across most jurisdictions, and under the *South Australian Young Offenders Act 1993*, children as young as ten years of age can be detained. Criminalising and detaining any child, and especially such young children, causes lifelong trauma and damage, and places them at risk of becoming chronic, long-term offenders.³¹

²⁴ Ibid.

²⁵ Australian Institute of Health and Welfare (2022) *Young people under youth justice supervision and their interaction with the child protection system 2020–21*, catalogue number CSI 29, AIHW, Australian Government.
<https://www.aihw.gov.au/getmedia/e4f440c3-abb0-4547-a12b-081a5a77908b/aihw-csi-29-Young-people-under-youth-justice-supervision2020-21.pdf.aspx?inline=true>

²⁶ Committee for Economic Development of Australia (2022) *Double jeopardy: The economic and social costs of keeping women behind bars*. CEDA, accessed at
<https://cedakenticomedia.blob.core.windows.net/cedamediacontainer/kentico/media/attachments/double-jeopardy-the-economic-and-social-costs-of-keeping-women-behind-bars.pdf>

²⁷ Deery, S (2021), "Victoria has more Indigenous kids in child protection than any other state or territory", Herald-Sun.

²⁸ Bell et al. (2018) 'Using Linked Data to Investigate Developmental Vulnerabilities in Children of Convicted Parents' *Journal of Developmental Psychology* 54(7), 1219-1231. p. 3

²⁹ Mental Health Legal Centre, Inside Access and Centre for Innovative Justice, (2015) Submission to the Victorian Royal Commission into Family Violence.

³⁰ Committee for Economic Development of Australia (2022) *Double jeopardy: The economic and social costs of keeping women behind bars*. CEDA, p. 3, accessed at
<https://cedakenticomedia.blob.core.windows.net/cedamediacontainer/kentico/media/attachments/double-jeopardy-the-economic-and-social-costs-of-keeping-women-behind-bars.pdf>

³¹ Training Centre Visitor (2019) *Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide*

SACOSS opposes the detention and criminalisation of children and young people, and in the event that children continue to be detained, calls for the minimum age of criminal responsibility to be raised from 10 to at least 14 years of age. In addition, the incarceration of adults is to be viewed only as an option of absolute last resort (in general, and in accordance with the recommendation of the Royal Commission into Aboriginal Deaths in Custody); that the recommendations put forward by CEDA outlined above are implemented; and that the rates of incarceration of Aboriginal and Torres Strait Islander young people and adults are reduced by at least 30 and 15 per cent, respectively, by 2031, in accordance with the National Agreement on Closing the Gap.

2.2 What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

- ***Pay attention and listen to children and young people***

A recent post on the website of the SA Office of Guardian for Children and Young People, written by a young person with first-hand experience of the Kurlana Tapa Youth Training Centre, powerfully calls for the voices of children and young people in detention to be amplified and listened to, and that their rights are upheld to prevent further trauma and marginalisation for this already vulnerable group. She writes:³²

As someone who experienced the criminal legal system as a young person, I know how damaging it can be ... In environments where young people's rights are inherently violated, it becomes crucial to amplify and act upon their voices to safeguard their rights. But in reality, too often, young people's voices are silenced. The very nature of these facilities prioritises control and discipline over listening to young people's opinions and perspectives, with institutional culture and policies impeding the opportunities for young people to voice their thoughts and opinions. Young people's complaints or reports of mistreatment or abuse are often not taken seriously or adequately investigated, staff members may dismiss or downplay young people's concerns – reinforcing a culture of silence and power imbalances. Additionally, the constant surveillance and monitoring creates an atmosphere of intimidation, which discourages open expression and fear of punishment for speaking up.

It is imperative that we break free from this cycle and actively listen to the voices of children and young people. Their needs and concerns must be translated into tangible and meaningful action. We must advocate for a profound shift in focus – one that prioritises the safety and wellbeing of children and young people over outdated responses that not only fail to meet the needs of children and young people, but also exacerbates trauma, marginalisation and exclusion.

If these young people were being treated this way in our communities, would we stand idly by? We cannot continue to let these violations of young people's basic human rights go unchecked.

Youth Training Centre (now known as the Kurlana Tapa Youth Justice Centre)

³² Robinson, L. (June 2023) *Prioritising young people's voices: a call for change*, Guardian for Children and Young People, accessed at <https://gcyp.sa.gov.au/2023/06/22/prioritising-young-peoples-voices-a-call-for-change/>

- **Focus on early intervention, prevention and support rather than safety and removal**

Recognising the link between youth justice and child protection systems, and given that the 2021-22 AIHW data on children receiving child protection services indicates that a total of 177,556 children across Australia received these services, including 9,610 children from South Australia, it is evident that the nature and focus of the child protection system needs to change – away from crisis-management and a tertiary responses founded on the removal of children and placement of children in out-of-home-care (OOHC), and towards a preventative model and early intervention that is framed on doing whatever is necessary to support children and families so that children can remain at home, with family and community. The essential focus needs to be on strengthening families and addressing the factors that lead to children and young people being caught up in the child protection system, and potentially in the youth justice system.

When listening to the words of children and young people, it is clear that early support for them and their families would make a big difference to their lives and play a preventative and protective role. Informed by conversations with children and young people, the South Australian Commissioner for Children and Young People's report, *Best Interests: Listening to children and young people's experiences within the child protection system*³³ highlights that the majority of children who engaged in these conversations said that:

Their families would have benefited from more services, resources, and practical assistance to support their parents to provide more stable homes for them and their siblings. They needed someone to check in regularly to see that things are okay, help them get to school, pay for internet at home and keep the electricity connected. They felt that with this kind of help things would have been better (p. 5).

There is an association between the increasing level of hyper-vigilance in relation to child protection, with a focus on the potential for removal – rather than an emphasis on providing family and material support – and a significant increase in the number of child protection notifications being made and, by extension, resulting in increasing numbers of children encountering the youth justice system.

If children and young people are to be kept out of the youth justice system, every preventative effort also needs to be made to keep children at home with their family and out of the child protection system. Socio-economic disadvantage and experiences of poverty, the focus on removing children, compounded by prejudice and discrimination, have a direct impact on interaction with the youth justice and child protection systems and whether Aboriginal families access support. This is highlighted in the Statement³⁴ from the Australian First Nations Children's Commissioners, Guardians and Advocates at their inaugural meeting in January 2023, outlining the ways in which experiences of poverty and prejudice can cause families to avoid seeking help, and calling for greater investment in support services. The Statement's Advocacy Priority 10 states: 'Promote the difference between poverty and wilful neglect ... Aboriginal and Torres Strait Islander families experiencing poverty are reluctant to seek help when the consequence is often removal of their children'. Priority 11 states, 'Advocate for greater investment in support services

³³ Connolly, H. Commissioner for Children and Young People, South Australia (2023) *Best Interests: Listening to children and young people's experiences within the child protection system*. <https://www.ccyp.com.au/wp-content/uploads/2023/05/Best-Interests-Report.pdf>

³⁴ Statement from the Australian First Nations Children's Commissioners, Guardians and Advocates – 10 and 11 January 2023 at <https://cacyp.com.au/wp-content/uploads/2023/02/First-Nations-ANZCCG-statement.pdf>

for vulnerable and impoverished families, highlighting that structural disadvantage, prejudice, systemic discrimination and diminished support services exacerbate the marginalisation of impoverished families leading to the greatest levels of removal’.

A more balanced and effective system would focus on primary intervention as the largest component of the service system, with secondary and tertiary services as progressively smaller components. Investment in primary prevention programs has the greatest likelihood of preventing progression along the service continuum and sparing children and families from the harmful consequences of abuse and neglect, as well as the damaging effects of being placed in out-of-home-care or under youth justice supervision.

- **Increasing expenditure does not necessarily result in better outcomes**

Kate Alexander’s report, *Trust in Culture – A review of child protection in South Australia*, states that, in South Australia, ‘The spending on early intervention and intensive family support is the lowest of all Australian states and territories. This imbalance is set against clear evidence that investing in quality early intervention and family preservation work stems the flow of children into the care system (p. 9)’,³⁵ and, by extension, we suggest that it also stems the flow of children and young people into the youth justice system.

Data from the latest *Productivity Commission Report on Government Services – Youth Justice*, indicates that the annual operating cost of incarcerating a child was \$2,068 per day and \$761,507 each year.³⁶ This Commission’s concurrent report on Child Protection Services indicates that the annual cost per child in care as at 30 June 2022 ranged from \$61, 731 to \$150, 783 (depending on jurisdiction), with annual costs for residential care being considerably higher than for non-residential care.³⁷ These amounts suggest that there is significant capacity to redirect some of this funding towards preventative and early intervention measures as well as justice reinvestment programs. The SA Guardian for Children and Young People’s May 2023 report on Child Protection Expenditure³⁸ highlights that ‘There is extensive reform work ahead, to find the most effective ways to leverage available funding to promote the best interests of children and young people ... The success of the reform measures proposed across recent inquiries and reviews will depend largely upon whether the government is willing to take a different approach to child protection expenditure, and substantially increase investment in the places where it is needed to meet and advance the human rights of children and young people (p. 60)’.

Early intervention can improve the lives of children and young people and strengthen families and communities, while at the same time reducing pressure on government budgets, and enable more efficient and effective spending. Research conducted by the Early Intervention Foundation³⁹ calculated annual expenditure on the acute, statutory and essential benefits and services provided by government that become necessary once children or young people are experiencing serious issues. Its study found that Australia spends \$15.2bn every year because children and young

³⁵ Alexander, K. (2022) *Trust in Culture – a review of child protection in South Australia*.

<https://www.childprotection.sa.gov.au/documents/report/trust-in-culture-a-review-of-child-protection-in-sa-nov-2022.pdf>

³⁶ Productivity Commission (2023) *Report on Government Services 2023: 17 Youth Justice Services*. Melbourne: Australian Government.

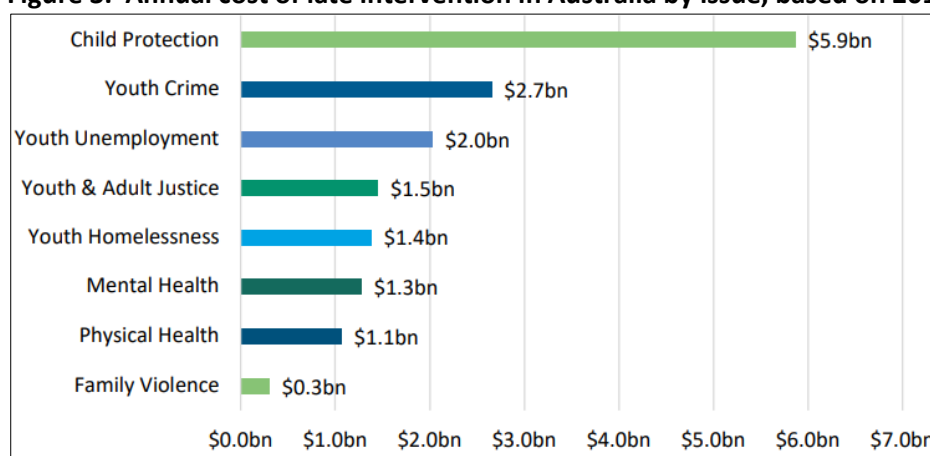
³⁷ Productivity Commission (2023) *Report on Government Services 2023: 16 Child Protection Services*. Melbourne: Australian Government

³⁸ Guardian for Children and Young People (2023) *Child Protection in South Australia, from the Productivity Commission’s Report on Government Services 2023*. Office of the Guardian for Children and Young People, Adelaide 2023, accessed at <https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2023/06/OGCYP-Child-Protection-from-the-Report-on-Government-Services-2023.pdf>

³⁹ Teager, W. Fox, S. and Neil Stafford, N. (2019) *How Australia can invest early and return more: A new look at the \$15b cost and opportunity*. Early Intervention Foundation, The Front Project and CoLab at the Telethon Kids Institute, Australia.

people experience preventable serious issues that require crisis services and that could be prevented or minimised by early intervention initiatives. The graph below indicates the annual cost of late intervention in Australia by issue, and shows that child protection expenditure is by far the single largest area of late intervention expenditure.

Figure 3. Annual cost of late intervention in Australia by issue, based on 2018-19 prices



Source: Teager et al. (2019 p. 5).

This study illustrates that alternative and early intervention approaches could be adopted, possibly aligned to that of the Justice Reinvestment model, whereby much of the annual cost of late intervention in child protection (approximately \$5.9bn per annum), Youth Crime (\$2.7bn) and Youth and Adult Justice (\$1.5bn) could be more effectively re-directed to early intervention initiatives.

- **Adhere to international conventions and human rights instruments**

Key lessons can be learned from countries that have developed or revised their youth justice policies and practices over the past three decades. A major influencing factor has been the introduction of international agreements and guidelines by the United Nations. For example, under the United Nations' 1989 Convention on the Rights of the Child, member states regularly report to the United Nations Committee on the Rights of the Child. This has influenced youth justice systems in many countries, including the principles underpinning each system, and the decision-making processes.

In order to protect the fundamental human rights of children and young people who are held in watch houses, police vehicles, police or court cells, or youth justice detention, amongst other facilities, it is critical that there are scrutiny and accountability mechanisms in place.⁴⁰ This emphasises the critical importance of implementing the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by establishing a National Preventative Mechanism (NPM). OPCAT represents a commitment to upholding preventive human rights obligations for people in various forms of detention.

Even though the Federal Government had ratified the OPCAT in December 2017, the status and legislative scope to operationalise and resource an NPM in South Australia is yet to be resolved. The designated proposed NPM includes the Training Centre Visitor (a concurrent role held by the Guardian for Children and Young People). While OPCAT legislation has previously been introduced into Parliament, such as the *Correctional Services (Accountability and Other Measures) Amendment Act 2021 (SA)* and the *OPCAT Implementation Bill 2021 (SA)*, the former received

⁴⁰ Guardian for Children and Young People. (2022) *Call to governments to give OPCAT powers to oversight bodies* <https://gcyp.sa.gov.au/2022/12/01/call-to-governments-to-give-opcat-powers-to-oversight-bodies/>

criticism for not being entirely OPCAT compliant, and the latter did not pass before the state election in March 2022, with significant concerns raised about the framing of the legislation. To date this Bill has not been re-introduced to Parliament. It is essential that clarity is provided regarding the implementation of OPCAT in South Australia, accompanied by the associated legislative framework, operational mechanism and requisite resourcing. In the absence of this, children and young people will not be afforded the protections that the Federal Government has signed up to and for which Australia is currently non-compliant.

As a party to OPCAT, Australia is required to agree to and comply with international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture. Early in 2023, this Subcommittee took the significant decision to terminate its visit to Australia, having been refused entry to certain places of detention, thereby effectively preventing it from carrying out its mandate. This lack of compliance and flouting of its stated commitment to fulfil its obligation to protect the rights of people in detention and to address the violations of human rights within these facilities is cause for international shame and embarrassment and does not serve the best interests of children and young people.

2.3 Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?

- **Raising the rate of social security payments positively impact involvement in justice system**

A consideration of the engagement of young people in the justice system during the early stages of the COVID-19 pandemic and the provision of associated financial supplements, offers interesting insights. Findings from a study that examined the impacts of the COVID-19 pandemic on youth offending in 2020 in Queensland suggest significant declines in most forms of youth offending, including property offending, offences against the person and public order offences.⁴¹

During the initial stages of the COVID-19 pandemic, when the Government introduced financial supports such as the Coronavirus Supplement and a wage subsidy in the form of 'JobKeeper', it is estimated that these two measures reduced poverty and housing stress to below pre-COVID levels, leading to the largest reductions in household poverty in the lowest-income households.⁴² Early research suggests that this temporary lessening of financial deprivation in the lowest-income families, may have reduced motivations for offending during this time amongst disadvantaged young people in these families.⁴³

These findings point to the importance of addressing household poverty and disadvantage if we are to redirect the trajectory of young people being caught up in the youth justice system. Central to this is the imperative for an increase in the rate of payments of all social security payments that keep people below the poverty line, more especially those of the Youth Allowance and JobSeeker payments.

- **Justice reinvestment**

Justice Reinvestment aims to reduce the amount of funding spent on incarceration, and to redirect public expenditure into community-based programs and strategies. This is done by

⁴¹ McCarthy, M., Homel, J., Ogilvie, J., & Allard, T. (2021). 'Initial impacts of COVID-19 on youth offending: An exploration of differences across communities.' *Journal of Criminology*, 54(3), 323–343. <https://doi.org/10.1177/00048658211005816>

⁴² Leishman C., Ong R., Lester L., Liang W. (2020). *Supporting Australia's housing system: Modelling pandemic policy responses* [AHURI Final Report No. 346]. AHURI. <https://doi.org/10.18408/ahuri3125701>, and

Phillips B., Gray M., Biddle N. (2020). *COVID-19 JobKeeper and JobSeeker impacts on poverty and housing stress under current and alternative economic and policy scenarios*. ANU Centre for Social and Research Methods.

⁴³ McCarthy et al. (2021).

utilising data to analyse and implement evidence-based initiatives that focus on the origin of the behaviour and motives behind offending in communities. This approach shifts the focus of interventions from an individual to the community, and from reactive punishment to proactive prevention and early intervention, including a focus on factors within an environment that may be causing and maintaining offending.⁴⁴ The focus includes youth-specific programs and services that are relative to each targeted community and designed with significant community input and partnership.

The Maranguka Justice Reinvestment Project in Bourke illustrates that alternative approaches are possible and effective. Bourke is a small remote town in far western New South Wales with a fairly young population, high levels of unemployment and disengagement from education, and high imprisonment rates.

Five years after the Bourke project started, the outcomes have been significant, with a notable reduction in expenditure in the justice system; reduction in levels of domestic violence and juvenile offending (a 38% decrease in five main juvenile offence categories); and improvements in early childhood development.⁴⁵

- **Lessons from international examples and approaches**

There are international examples that provide useful and instructive approaches to reducing the involvement of young people in the justice system. A comparison of Australia's youth justice system with that of Norway, illustrates alternative approaches which could serve to better protect the rights and interests of children and young people and, ultimately, make communities safer.⁴⁶ While Norway has adopted a restorative justice approach, Australia (albeit that it has ratified the Convention on the Rights of the Child) leans towards a punitive, retributive and 'tough on crime' approach. In general, the primary difference in approach is reflected in the extent to which the Convention on the Rights of the Child has been applied in policy and legislation as well as implemented at a practical and operational level.⁴⁷

Australia's punitive and retributive approach is fundamentally inconsistent with the Convention. By comparison, Norway's restorative justice approach enables consistency with the Convention, and 'aims to repair the harm caused by the crime rather than punish [the young person]'.⁴⁸

Norway rarely sentences young people to any prison time at all. In the event that young people do receive custodial sentences, these are limited to the most serious offences. In total, two institutions across the entire country retain eight custodial places for young people. During the last few years, there has been an average of only four to six young people per year serving prison

⁴⁴ Allard, T. Ogilvie, J. & Stewart, A. (2007) *The Efficacy of Strategies to Reduce Juvenile Offending*, Produced for the Department of Communities by Justice Modelling @ Griffith, JMAG.

⁴⁵ Milliken, R. (2018) *Breakthrough at Bourke - An outback town's gamble on cutting Indigenous crime is paying remarkable dividends*. Inside Story. <https://insidestory.org.au/breakthrough-at-bourke/>

⁴⁶ This section draws on a study by Bauer, E. (2022). 'Rehabilitative Promise: Why Norway Uses Restorative Justice in Juvenile Law' *Michigan State University International Law Review* https://www.msuilr.org/msuilr-legalforum-blogs/2019/1/24/rehabilitative-promise-why-norway-uses-restorative-justice-in-juvenile-law#_ftn23

⁴⁷ The Convention on the Rights of the Child attempts to create consistency in juvenile justice by requiring member states to establish a minimum age of criminal responsibility, and it also gives guidance about how children and young people are to be treated, whether in the youth justice system or not – the primary consideration being the 'best interest of the child', and a focus on rehabilitation rather than punishment. According to the Convention (Article 37), '(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used **only as a measure of last resort and for the shortest appropriate period of time**; and (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.'

⁴⁸ Johns, B. (Sept. 10, 2018) *Juvenile Justice: The American Justice System v. Other Countries* <https://medium.com/@bjohns81/juvenile-justice-the-american-justice-system-vs-other-countries-3dc6860c77ad>

sentences in Norway. Instead of prison, alternative strategies are put in place, which include restorative meetings/processes with the victims or others affected by the offence; person-specific youth action plans for the period of the sentence; and the signing off and fulfilling of this plan, supervised by a multi-disciplinary team. During this time, the young person will continue to live with their families. If a penal case is successfully mediated and a signed agreement is fulfilled, the case is closed and, after two years, if the person did not commit another offense, the case is expunged from their criminal record.⁴⁹

In addition to the rehabilitative nature of Norway's youth justice system, it also has a relatively high minimum age of criminal responsibility – 15 years of age. Australia's more punitive approach and very young age of criminal responsibility (currently set at 10 years in most jurisdictions), means that young children are detained or placed under supervision with very little, if any, capacity to comprehend the consequences of their behaviour, without the opportunity to rehabilitate, and invariably with limited access to education, healing therapies or comfort.

The different outcomes and sentencing options available for young offenders vary across countries. For example, young people in custody in the Netherlands can be released to take part in training courses or treatment during their sentences. Other outcomes include intermittent custody (such as night or weekend detention) and training in various forms, such as in Austria where trainees receive a wage throughout their vocational training.⁵⁰

Rates of young people in detention in various countries generally reflect the principles and operation of their respective youth justice systems. High rates are commonly evident in countries that operate under what is often termed a 'justice model', emphasising accountability and punishment. Lower rates are evident in countries that operate under a 'welfare model', emphasising rehabilitation and meeting the needs of the young person.⁵¹ Countries with lower rates of young people in detention tend to adopt the principle of custody as a last resort.⁵²

There is significant value in examining and learning from approaches adopted in other countries. While Australia might remain challenged to prevent young people from offending, we can change how they are treated and whether they emerge from encounters with the youth justice system with a stronger sense of themselves and a sense of purpose and direction, or become brutalised and set on a negative trajectory. There is a lot that we can learn from countries such as Norway and the Netherlands in order to better support children and young people, and enable them to feel that they are worthy and entitled to opportunities to learn from mistakes and be active participants in their community.

2.4 From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

- ***A national approach enables consistency and opportunities for the development of a strategic focus based on shared principles***

Youth justice in Australia is viewed as a state responsibility and, as a result, there are different approaches, systems, funding allocations, and legislation in each jurisdiction – the adoption of

⁴⁹ Fighting Knife Crime (January 2023) *Punishment or Rehabilitation? Comparing Two Countries – Is Norway Succeeding where the UK is Failing?* <https://www.fightingknifecrime.london/news-posts/punishment-or-rehabilitation-comparing-two-countries-is-norway-succeeding-where-the-uk-is-failing>

⁵⁰ Hazel, N. (2008). *Cross-national comparison of youth justice*. University of Salford. https://dera.ioe.ac.uk/id/eprint/7996/1/Cross_national_final.pdf

⁵¹ Provided to Noetic Solutions in April 2010 and cited in *A Strategic Review of The New South Wales Juvenile Justice System*, <https://noeticgroup.com/wp-content/uploads/2018/09/Juvenile-Justice-Review-Report.pdf>.

⁵² Hazel, N. (2008). *Cross-national comparison of youth justice*. University of Salford. https://dera.ioe.ac.uk/id/eprint/7996/1/Cross_national_final.pdf

different minimum ages of criminal responsibility being a case in point. There are times when the lack of consistency across states/territories causes confusion and can appear contradictory – more so for a young person from one state who offends in another, unaware that different processes, cautions, bail options and principles apply. However, there are key principles which could guide more appropriate, equitable, and uniform approaches. The NSW Young Offenders Advisory Council provided a useful summary of these types of principles that could guide work across the youth justice system (see footnote).⁵³ The application of consistent principles and approaches requires national co-ordination, strategy development, and information sharing.

- ***Moving beyond data collection and analysis towards the harmonisation of youth justice approaches, the rights of children and young people, and adherence to international instruments and conventions***

Some of the functions mentioned above are currently undertaken by the Australian Youth Justice Administrators (AYJA), comprised of one senior executive officer from the relevant department responsible for youth justice services in each state and territory and in New Zealand. However, much of its role appears to be focused on the collection and analysis of data, and research. While this function is critically important, and its collaborative work with the Australian Institute of Health and Welfare (AIHW), the Productivity Commission and other research bodies is invaluable, it would be useful for this body to have a broader strategic remit in order to support a more expansive consideration of approaches to youth justice, the application of the Convention on the Rights of the Child, the best interests of the child, the ways in which the experiences of young people might be improved, and the creation of coherent mechanisms for the voices of children and young people to be heard.

The national body of Attorneys-General, previously referred to as the Council of Attorneys-General, and now the Standing Council of Attorneys-General (SCAG), comprises Attorneys-General from the Australian Government, states and territories, and the New Zealand Minister for Justice, and has responsibility to maintain and promote best practice in law reform. However, this body does not necessarily include expertise in specialist areas that affect young people and, based on its response to the persistent calls to raise the age of criminal responsibility in accordance with international conventions and human rights instruments, does not appear to be the best vehicle to drive reform in the area of youth rights and justice.

Ultimately, the harmonisation of youth justice approaches, the realisation of the rights of children and young people, and the application and adherence to international instruments and

⁵³ Provided to Noetic Solutions in April 2010 and cited in *A Strategic Review of The New South Wales Juvenile Justice System*, p. 7. <https://noeticgroup.com/wp-content/uploads/2018/09/Juvenile-Justice-Review-Report.pdf>.

NSW Young Offenders Advisory Council's list of principles:

1. It is recognised that offending by young persons has a wide spectrum of causal factors, beginning with the origins and background of the young person. Therefore, interagency partnerships may result in better outcomes for young offenders.
2. The design of any project will need to be founded upon a sound understanding of the principles of child and adolescent brain development.
3. Given the demonstrated effectiveness of diversionary projects in reducing recidivism, diversionary options and alternatives to custody will be the primary focus of the project.
4. Intervention options will build on those strategies that are evidence based and have been extensively evaluated for their effectiveness in assisting to reduce juvenile recidivism and producing cost savings to government.
5. Consideration must be given to the United Nations rules and conventions.
6. More intensive programs should be reserved for young offenders who are more at risk of reoffending.
7. At each point in their contact with the criminal justice system juvenile offenders should be screened to identify those most at risk of re-offending.
8. While the need to keep a number of young people in custody will continue, research indicates that this option is not useful in reducing recidivism. However, there may be programs that can assist in achieving a reduction in recidivism following release from custody.

conventions would be significantly aided by the adoption of a Human Rights Act at a national and state level.

3. Conclusion and key recommendations

In conclusion, it is clear that the current youth justice and child protection systems require considerable reform in the best interests of children and young people and their wellbeing.

A primary focus on ensuring that children and young people do not experience levels of poverty and homelessness, currently rampant across Australia, would enable a significant number of children and young people to avoid coming into contact with either the child protection or youth justice systems, and to live better and healthier lives. This will necessitate coherent reforms across the social security system and increases to the rates of payments, such as JobSeeker and the Youth Allowance. It will also require that more housing is built and made affordable to low-income households.

Listening to the voices of children and young people, adopting an early intervention, preventative and supportive approach, considering alternative and effective approaches such as Justice Reinvestment, and drawing instructive lessons from other countries' approaches to youth justice, would make a significant contribution to reforming our youth justice system.

Adherence to the *United Nations Convention on the Rights of the Child* and rigorous scrutiny of its application and focus on rehabilitation rather than punishment – coupled with the implementation of the OPCAT and a National Preventative Mechanism – are central to effecting positive change in the lives of children and young people. This would include raising the minimum age of criminal responsibility to at least 14 years of age, and detention being a measure of absolute last resort, if not ruled out completely.