SACOSS
South Australian Council
of Social Service

Submission on the Attorney-General Department's Discussion Paper: *Minimum Age of Criminal Responsibility – Alternative Diversion Model*

March 2024

This submission was directed by email to: LLPSubmissions@sa.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.

SACOSS is a member of the national Raise the Age Campaign Alliance and a member of the national campaign steering committee. We have played a role in co-ordinating the work of the South Australian Raise the Age Coalition.

Acknowledgement

We acknowledge the traditional lands of the Kaurna people and acknowledge the Kaurna people as the custodians of the Adelaide region and the Greater Adelaide Plains We acknowledge the traditional custodians of lands beyond Adelaide and the Adelaide Plains, and pay our respects to Elders past and present. We acknowledge and pay our respects to the cultural authority of Aboriginal and Torres Strait Islander communities, organisations and colleagues and recognise the cultural expertise that they hold.

Title: *Submission on the Attorney-General Department's Minimum Age of Criminal Responsibility – Alternative Diversion Model Discussion Paper,* March 2024.

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Publication of submissions

In the interest of transparency and as part of an open public consultation and review, SACOSS consents to and requests that this submission is made public, along with all other submissions on this matter which have indicated consent to their submissions being made public. We intend to make our submission publicly available.

SACOSS wishes to indicate our support for the submissions provided to the Attorney-General's Department by the Human Rights Law Centre, Change the Record, the Public Health Association of Australia, and the Adelaide Hills Group of Amnesty International Australia, endorsed by Northern Territory and South Australia Activism Leadership Committee of Amnesty International Australia.

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Table of Contents

Summary 4

Our primary concerns about the proposals in the Discussion Paper 4

Summary of a proposed alternative framework 6

Summary of recommendations 7

Publication of submissions 8

1. Introduction 9

2. Our primary concerns about the proposed model 11

Lack of consideration and application of the evidence 11

Disregard for the principle and purpose of a stipulated minimum age 12

A punitive and coercive behaviour modification model 14

Tiered system of coercive, mandatory case management and administrative detention 18

Increased policing and discretionary powers 20

Lack of attention paid to the role of institutional racism and discrimination 20

Violation of human rights and the rights of the child 22

3. A proposed alternative framework 22

A comprehensive service system response for children and young people 22

Key principles to inform an alternative framework 23

Consideration of transitional arrangements and preparatory work 24

4. Recommendations 27

5. Conclusions 31

Summary

This submission responds to the Attorney-General Department's Discussion Paper – *Minimum Age of Criminal Responsibility: Alternative Diversion Model*[1] (the Discussion Paper).

Although long overdue, we are pleased that the South Australian Government is focusing its attention on the important issue of raising the minimum age of criminal responsibility after more than a decade of repeated calls to raise the minimum age from 10 to 14 years without exceptions. The South Australian Council of Social Service (SACOSS) remains steadfast in supporting this call.

While we welcome consideration being given to raising the minimum age of criminal responsibility in South Australia, we are very disappointed that the SA Government is only proposing to raise the age to 12, and is not drawing on the available robust evidence-base, wealth of cultural knowledge and practice, and professional expertise to inform its proposed model. Contrary to the available evidence, the Discussion Paper's proposals do not constitute a diversionary approach. They fly in the face of the state-based, national and international available expertise, and further serve to harm and criminalise children, and make South Australian communities less safe.

We are deeply discouraged by the apparent squandering of the good will and significant opportunity that this process provides to do the right thing by children and young people in this State. The content of the Discussion Paper does not appear to register the significance of this historical moment and the responsibility that comes with it to develop a genuinely diversionary approach and work towards enacting best practice approaches and laws to end the inter-generational harm caused to children through contact with the criminal legal system, and to address the over-incarceration of Aboriginal children.

In light of this, we urge the South Australian Government to reconsider the content of its Discussion Paper. The Government must consider and incorporate the wealth of evidence provided to it and genuinely engage with, and draw on, the expert knowledge available. It must give particular attention to the views and cultural knowledge and authority of the newly elected SA First Nations Voice to Parliament, the South Australian Aboriginal Community Controlled Organisation Network, the Aboriginal Legal Rights Movement, the Guardian for Children and Young People, and both Commissioners for Children and Young People.

Our primary concerns about the proposals in the Discussion Paper

In summary, the proposed alternative diversionary model will not result in raising the minimum age of criminal responsibility, but will instead provide further avenues to criminalise and brutalise children – including children below the minimum age of criminal responsibility – by means of expanding policing powers, introducing a form of administrative detention, and removing the legal protections afforded to children and young people.

[1] Attorney-General's Department (2024) *Minimum Age of Criminal Responsibility: Alternative Diversion Model - Discussion Paper*

In effect, the proposed model poses a significant risk of *decreasing* the minimum ages for both criminal responsibility and detention. By broadening the definition and scope of 'serious criminal offences', it further enables the criminal prosecution of children for these offences, compounded by the expansion of police powers to take forensic samples from, interview and detain children who are under the age of 12.

The proposed three-tier alternative diversion model does not serve to divert children away from the youth justice system towards appropriate service responses and support systems. Instead, it advocates an authoritarian system of 'scaled intensity' (p. 7) from increasingly coercive to mandatory case management and administrative detention. This model erodes the legal and human rights of children, and ultimately serves to make children and young people, and our communities less safe. There is no credible evidence that coercing, punishing or imprisoning children decreases levels of crime or improves community safety. However, there is a wealth of established evidence demonstrating that interactions with police and formal criminal justice institutions negatively impact children and are counterproductive. As the data demonstrates, the younger children are when they are sentenced results in them being more likely to re-offend, when compared with those who are first sentenced when they are older.[2]

In summary, most of the proposals in the Discussion Paper's model contravene human rights and the rights of the child. The following points highlight our key concerns with the proposals as set out in the Discussion Paper:

- **The lack of consideration and application of the evidence for raising the minimum age to 14 without exception.** By proposing to raise the minimum age of criminal responsibility to only 12 years of age with exceptions, and in the absence of an indication of a commitment to further raise the age within a specified timeframe, the Discussion Paper fails to accord with international benchmarks and South Australia's obligations under numerous rights-based instruments.
- **The application of a behaviour modification model, which is neither restorative nor rehabilitative.** The proposed model does not consider the material and situational conditions of the child's life, experiences, developmental capabilities, and home environment, and is not based on the best interests of the child.
- **A broadening of the definition and scope of 'serious criminal offences'**, which further enables the criminal prosecution of children for these offences.
- **The introduction of a tiered system of coercive through to mandatory case management and administrative detention**, which fails to include features that would be considered to be genuinely diversionary. This system removes important legal rights for children, and ultimately serves to provide ulterior pathways to criminalise children, including children who are under the minimum age of criminal responsibility, thereby circumventing the inherent purpose and principle of establishing a minimum age for both criminal responsibility and for detention.
- **The expansion of police and administrative powers**. These include:
  - enabling police to take forensic samples from, interview and detain children who are under the age of 12, in contravention of the UN Convention on the Rights of the Child[3];
  - affording SAPOL the power to criminally prosecute children under the proposed

[2] Gordon, F. (8 Nov 2022) ANU College of Law. 'Diverting children away from the criminal justice system gives them a chance to "grow" out of crime' *Politics, Law and Society* at https://reporter.anu.edu.au/all-stories/diverting-children-from-the-justice-system-gives-them-a-chance-to-grow-out-of-crime

[3] United Nations General Assembly, Convention on the Rights of the Child (November 1989) Article 37(b).

minimum age of 12 as an 'option of last resort' based on 'a reasonable suspicion (p. 8)', and by agreement with the Office of the Director of Public Prosecutions for an increased range of offences under certain conditions;
    - subjecting children to a 'Mandated Action Plan' for up to 12 weeks with an option to extend it for a further 12 weeks, without a limit to the number of Mandated Action Plans to which they can be subjected – in effect, there is no limit on the length of this detention. No consideration is given to ensuring that the detention of children under these plans is subject to adequate oversight. The proposal that the South Australian Civil and Administrative Tribunal (SACAT) would oversee determination under the Mandated Action Plans would thereby create a civil, administrative detention scheme that can subject children to detention without arrest or charge.
- **The creation of new places for the detention of children**, referred to as 'places of safety' and 'secure therapeutic facilities', with the latter potentially being co-located in the Kurlana Tapa Youth Justice Centre; and that police facilities will be 'places of safety' of last resort.
- **The delegation of the role of 'first responders'** (in situations involving children) to 'police, medical professionals, security guards, educators, social or youth workers, caregivers or cultural leaders' (p. 7), with no clarity about the eligibility or oversight of the legal powers these first responders will have, more especially in terms of detaining children for up to 24 hours.
- **The lack of clarity about the transitional arrangements**, more especially regarding the involvement and resourcing of community and social support services; and with reference to the status of children already in contact with the youth justice system, such as whether historic convictions of children below the MACR would be expunged.
- **The lack of attention to the role of institutional racism and discrimination** across the youth justice and policing system.

Summary of a proposed alternative framework – a response that supports prevention, early intervention and avoids harm

The following elements are proposed as an alternative framework:
A comprehensive service system response for all children and young people
A consideration of the minimum age of criminal responsibility needs to be situated within a comprehensive framing of what must be provided in order to ensure that children and young people's foundational needs are met and they have the best possible chances in life.

Recognition of key principles to inform an alternative framework
Towards the development of a comprehensive alternative framework, we emphasise the principles of non-punitive, trauma-informed, therapeutic, culturally-led, non-discriminatory responses to children and young people's experiences and needs. An alternative response framework should focus on prevention and early intervention, taking into account the rights of the child, their complex needs, and the social determinants of health and wellbeing that impact the circumstances in which the child has grown up (rather than focusing on narrow behaviour modification practices).

Consideration of transitional arrangements and preparatory work
Given that the Discussion Paper does not provide much information about transitional arrangements (p. 6), there is a need to consider these arrangements in more detail and to prepare for the introduction of any proposed legislation. This will necessarily involve the SA

Government reviewing the service response system required to support raising the minimum age of criminal responsibility. Clarity is needed about what will happen regarding any criminal justice proceedings already underway when the MACR is raised, the status of past convictions, and the status of children who are in custody at the time. Service response planning will need to be undertaken and should potentially include a focus on the following, which were highlighted in the ACT Government's comprehensive consultation process and instructive Position Paper[4] when it considered raising the age, including the need to:

- improve the experiences and outcomes for children under the MACR who are engaging in harmful behaviour that brings them to the attention of the justice system;
- leverage this as an opportunity to improve the service system for a broader cohort of children and young people who face risk and engagement with youth justice;
- increase community safety by intervening early and diverting children and young people onto a healthier pathway and away from later engagement in offending behaviour;
- work with community stakeholders to design and implement the service responses required to give effect to alternative pathways for children and young people;
- integrate any proposed changes accompanying raising the minimum age with the current services and programs that aim to support families and keep children and young people safe and well. This will require undertaking a mapping exercise.

Summary of recommendations

The following recommendations are made in this submission, with additional detail provided for each recommendation in the body of the submission:

1. The minimum age of criminal responsibility must be raised to at least 14 years of age, with no exceptions.
2. Any proposed diversionary model must adhere to the principle and purpose of having a stipulated minimum age of criminal responsibility and a minimum age of detention.
3. *Doli incapax* should not be necessary or retained if the MACR is raised and adhered to.
4. Decarceration, not incarceration – this means the Government should prioritise other constructive and comprehensive approaches to diversion, such as:
    - addressing the social determinants of offending, including poverty, housing insecurity, and family violence, amongst others;
    - redirecting resources from punitive and carceral systems to fund culturally-safe and trauma-responsive services that support children and families in crisis or at risk of crisis;
    - giving decision-making powers back to communities, and allowing them to self-determine their own futures. To this end, the SA Government should realise its Implementation Plan to reduce the incarceration of Aboriginal children and young people, consistent with Priority Reform 3 and Target 11 of the National Closing the Gap Agreement; and
    - addressing the lack of bail accommodation and current bail laws.
5. A genuinely diversionary model should be designed based on key principles – these include:
    - avoiding contact between children and the criminal legal system at any level;
    - non-punitive, trauma-informed, therapeutic, culturally-led, non-discriminatory responses to children and young people's experiences and needs;

[4] ACT Government (2022) *Raising the age of criminal responsibility - Position Paper*

- a focus on prevention and early intervention, taking into consideration the rights of the child, their complex needs, the material and situational conditions in which the child has grown up (rather than focusing on behaviour modification practices);
- self-determination for Aboriginal and Torres Strait Islander children, families, communities and Aboriginal Controlled Community Organisations; and
- children with developmental delays or neurodevelopmental disorders or disabilities should not be in the child justice system at all, no matter their age and even if they have reached the minimum age of criminal responsibility.[5]

6. In developing an alternative framework, the SA Government should commission an independent mapping exercise and analysis of the gaps and needs in the existing health, social, and community services landscape in South Australia, with a view to the provision of appropriately resourced services for all children and young people.

Publication of submissions

In the interest of transparency and as part of an open public consultation and review, SACOSS consents to and requests that this submission is made public, along with all other submissions which have indicated consent to their submissions being made public. We intend to make our submission publicly available.

[5] United Nations, Committee on the Rights of the Child CRC/C/GC/24 Convention on the Rights of the Child (18 September 2019) General comment No. 24 (2019) on children's rights in the child justice system.

1. Introduction

This submission is in response to the Attorney-General Department's Discussion Paper – *Minimum Age of Criminal Responsibility: Alternative Diversion Model*[6] (the Discussion Paper).

The South Australian Council of Social Service welcomes consideration being given to raising the minimum age of criminal responsibility in South Australia, and we believe that it provides South Australia with a significant opportunity to genuinely explore the best possible options, to put an end to the persistent intergenerational harm caused by subjecting children to the criminal legal system, to get the settings right, and to really make a difference in the lives of children and young people. Our submission reflects a commitment to a child-centred and non-punitive approach in the best interests of children and young people, which will ultimately make our society safer and more humane.

Although long overdue, we are pleased that the South Australian Government is now focusing its attention on this important issue after more than ten years of repeated calls to raise the minimum age of criminal responsibility from 10 to 14 years without exceptions. These calls have been made by SACOSS[7], Change the Record, the Human Rights Law Centre, the Justice Reform Initiative, more than 40 members of the SA Raise the Age Coalition, Aboriginal and Torres Strait Islander leaders and communities, independent parliamentary inquiries, medical and legal experts, United Nations bodies[8], over 100 support organisations at a state and national level, and the 2022 hand-over of a petition to the SA Attorney-General which included the signatures of nearly 12,000 South Australians[9].

Recommendations for the minimum age to be raised from 10 to 14 years without exception have also been made in a number of Government reports and commitments, including reports of the SA Attorney-General's own appointed Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia (2023)[10], and the national Council of Attorneys-General *Age of Criminal Responsibility Working Group's Draft Final Report* (2020)[11], amongst others.

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[6] Attorney-General Department (2024) *Minimum Age of Criminal Responsibility: Alternative Diversion Model - Discussion Paper*

[7] SACOSS has issued a number of media statements, open letters and policy briefings focused on raising the minimum age of criminal responsibility. These have included:

- Joint media release: SA government must raise the age to at least 14
- National call to raise the age of criminal responsibility
- Raising the Age of Criminal Responsibility (2021)
- Plan to reduce Aboriginal incarceration (2021)
- SA is out of step on raising the age of criminal responsibility
- Report calls for age of criminal responsibility to be raised to 14
- Urgent message to Attorneys-General: Don't fail children
- Overall youth detention down but proportion of Aboriginal youth is up
- Human rights concerns - children in detention

[8] By way of example, in 2019 the UN Committee on the Rights of the Child recommended all countries increase the minimum age of criminal responsibility to at least 14 years of age, and specifically urged the Australian Government to raise the minimum age, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice*.

[9] SACOSS (2022) *Petition delivered to SA Government issues powerful call to stop jailing children* (18 August 2022)

[10] Advisory Commission, (2023). Report into the Incarceration Rates of Aboriginal Peoples in South Australia

[11] Council of Attorneys-General (CAG), (2020). Age of Criminal Responsibility Working Group, Draft Final Report

In addition, and noting the over-representation of Aboriginal children and young people in the youth justice system, the Discussion Paper does not appear to support South Australia's own Implementation Plan[12] to realise its commitments in the National Partnership Agreement, or its commitment to realise Outcome 11 and Target 11 in the National Partnership Agreement on Closing the Gap[13], namely that Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system; and that by 2031, the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention will be reduced by at least 30%. Proponents of raising the MACR to at least 14 years of age believe that this would contribute significantly to achieving Target 11.

Furthermore, the Discussion Paper does not reference the significance of the SA Government's establishment of a South Australian First Nations' Voice to Parliament, and its potential role in shaping the parameters and principles underpinning an initiative to raise the minimum age of criminal responsibility or the development of an accompanying diversionary model.

Noting that previous strong recommendations of other Aboriginal Advisory bodies to raise the age have already been made,[14] we are, however, encouraged by the SA Attorney's public commentary[15] regarding the importance of the newly elected SA First Nations Voice to Parliament and its role in shaping policies and programs which affect the lives of Aboriginal South Australians, and trust that the SA Voice will be engaged in the process of determining the minimum age of criminal responsibility and designing an alternative diversionary model:

> *When people affected by decisions of government are more involved in the processes that lead-up to those decisions, you get better results. Aboriginal people having more of a say in the decisions that affect their lives through an advisory body like this* [the First Nations Voice]*, I'm sure will lead to better outcomes and I'm sure that all of those who are designing programs and designing services for Aboriginal people in South Australia will welcome the direct input that this will provide* - SA Attorney-General, the Hon Kyam Maher MLC.

This submission sets out our response to the Discussion Paper, highlighting our concerns regarding the flaws, omissions and inherent dangers of the proposed 'alternative diversion model'. This is followed by a proposed alternative framework for a systemic response that supports prevention, early intervention and avoids harming and criminalising children and young people by diverting them away from the statutory youth justice system. The subsequent sections of the submission focus on recommendations and final conclusions.

[12] Attorney-General's Department South Australia's Implementation Plan for the new National Agreement on Closing the Gap.
[13] National Partnership Agreement on Closing the Gap

[14] For example, SA Government's Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia
[15] ABC Radio National, interview with the SA Attorney-General, the Hon Kyam Maher MLC, on the SA First Nations Voice to Parliament (1 April 2024) at https://www.abc.net.au/listen/programs/radionational-breakfast/-good-base-to-build-on-low-voter-turnout-for-sa-voice/103653356

2. Our primary concerns about the proposed model

Lack of consideration and application of the evidence

The proposal to consider raising the minimum age of criminal responsibility to only 12 years of age with a number of exceptions – and in the absence of any commitment to further raise the age – flies in the face of significant international, national and state-based expert advice and evidence.

Much of the commentary advocating for the age to be raised to at least 14 years of age points to the clear evidence-base for this to occur. This evidence is clearly set out in the Discussion Paper itself (p. 4), indicating that the Attorney-General's Department is aware of the 'significant evidence-based research findings that support raising the age (page 4)'. It is unclear why, in the face of this evidence-base and the Discussion Paper's stated intention that the proposed alternative diversion model will be based on principles that are 'restorative, culturally led, trauma-informed, and include professionally developed and led diversionary programs … engaging universal services and direct service responses (p. 7)', the proposed alternative diversion model does not heed and manifest this evidence or its own stated intention but, in many ways, actively contradicts these.

The SA Government's own Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia[16] stated that it is essential that the age of criminal responsibility be raised, highlighting that children under the age of 14 do not belong in the criminal justice system, and that children aged between 10 and 14 years do not have the necessary knowledge to have criminal intent. The Commission's 2023 report indicates that, despite this, the evidence shows that children between 10 and 14 years of age are still receiving custodial orders.

In the words of a senior Aboriginal Elder and member of the Advisory Commission, the harmful treatment of children by their removal and detention needs to change:

> *These children... You are taking them away from their comfort zone, taking them away from their home, their families and their relatives and putting them there in detention. That needs to change* - Major Sumner AM.

In 2023, the Advisory Commission's Recommendation 17 – that the SA Government legislate to raise the minimum age of criminal responsibility to 14 years – does not mean that children under 14 years should be left without any intervention or support. Instead, intensive, holistic, family-based early interventions and services are required to provide support to address the causes of their behaviour. Such interventions and services should not just be targeted at children who display offending behaviours, but also at children whose needs are not being met. Providing support to children only when they begin to display what would otherwise be considered criminal behaviour is too late.

[16] Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia, (2023). Report into the Incarceration Rates of Aboriginal Peoples in South Australia

To support raising the age, the Commission recommended (Recommendation 18) that alternative intervention options should take a health-based approach and be devised, implemented, and run by Aboriginal Community-Controlled Organisations. These ACCOs should be appropriately funded to develop and implement health and behavioural intervention programs and support services for young people under 14 years of age and their family members.

Reiterating the Advisory Commission's recommendations, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), the peak body for Aboriginal and Torres Strait Islander legal services in Australia, states:

> *We are of the view that raising the [minimum age of criminal responsibility] is a crucial and transformative step towards ending the overrepresentation of Aboriginal and Torres Strait Islander people in the legal system … When children enter the legal system at very young ages, evidence shows that they are more likely to stay in the system, including as adults. Australia's low age of legal responsibility 17 exacerbates intergenerational cycles of imprisonment by criminalising the most disadvantaged children and young people in the country, and not helping them adequately.*[17]

Despite the bank of robust evidence provided to the Attorney-General's Department, and without providing reasons as to why the detailed evidence-base for raising the age is not going to be applied, the Discussion Paper's proposal is to only raise the minimum age to 12 accompanied by a suite of exceptions and a so-called diversionary model that advances a case for a punitive and coercive approach, with a heightened role for policing and the arrest and detention of children, including those below the minimum age of criminal responsibility.

The medical evidence is clear that *any* engagement with the criminal justice system causes harm to a child – from police contact right through to the deprivation of liberty. While it may be impossible to safeguard against any engagement with police, consideration should be given to ways in which police engagement could be made more supportive, de-escalated and minimised. For example, there are a number of programs in operation around the country and internationally which rely on highly skilled trauma-informed youth workers engaging with young people as first responders either instead of police, or in collaboration with police. These options should be further explored in South Australia.

Disregard for the principle and purpose of a stipulated minimum age

The Discussion Paper's proposed diversionary model disregards the principle and purpose of having a stipulated minimum age of criminal responsibility.

Allied to the consideration and application of the available evidence, is the importance of adhering to the principle and purpose of stipulating a minimum age of criminal responsibility. The fundamental principle and purpose of having a MACR in place is that *no* child under that

[17] National Aboriginal and Torres Strait Islander Legal Service (NATSILS) (2020) Submission to Council Attorneys-General Age of Criminal Responsibility Working Group Review.

defined minimum age can or should be criminalised for *any* reason. The medical evidence is clear: children under the age of 14 years of age do not have the capacity to form criminal intent or comprehend the consequences of their action – this applies just as much to serious acts as it does to less serious behaviour. There should therefore be no exceptions to the MACR. Either we have a minimum age of criminal responsibility or we do not. We cannot legislate a minimum age and then seek ways to circumvent it, as proposed in the Paper's diversionary model.

In this regard, the UN Committee on the Rights of the Child states:

> *The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence.* ***Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development.*** *The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.*[18]

The introduction of any diversionary model must avoid 'respond(ing) to public pressure' such as the repeated and ill-conceived calls to be 'tough on crime', and in ways that 'are not based on a rational understanding of children's development'. In addition, such models must exclude the construction of an ulterior pathway or staged approach of coercive and mandatory steps aimed at enabling the criminal prosecution of a child. An appropriate diversionary framework must be put in place and aimed at diverting children and young people away from the youth justice system and towards appropriate therapeutic, psycho-social and socio-economic supports for them and their families.

With regard to assumptions about apparent public pressure for governments to be 'tough on crime', and the general public's understanding of the age at which children are held criminally responsible, polling research undertaken by the Australia Institute and Change the Record[19] showed that three in four Australians already think that the age of incarceration is higher than 10 years of age, including 51% who think it is 14 years or over. Only 7% of Australians correctly identified 10 as the age of criminal responsibility.

As indicated in Figure 1 below, just over half of Australians (51%) support or strongly support raising the age of criminal responsibility to 14 years of age, while only 26% oppose doing so. That is, twice as many people support raising the age of criminal responsibility as those who oppose raising the age.

[18] United Nations, Committee on the Rights of the Child CRC/C/GC/24 Convention on the Rights of the Child (18 September 2019) General comment No. 24 (2019) on children's rights in the child justice system.

[19] Browne, B. and Trevitt, S. Australian Institute and Change the Record (2020). *Raising the age of criminal responsibility – Discussion Paper.*

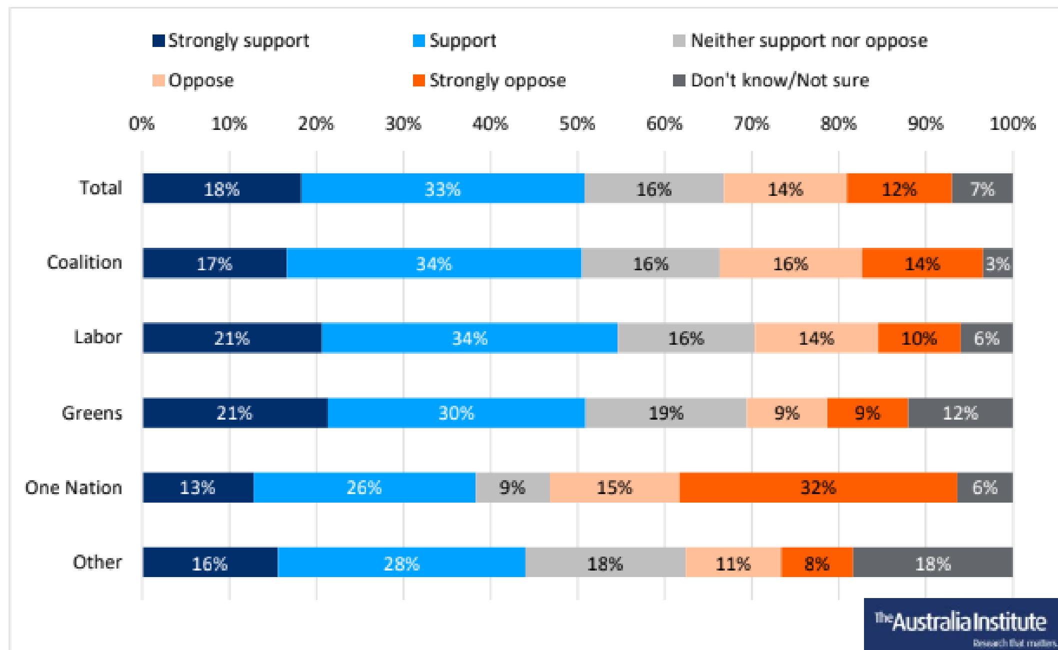

Figure 1: Support for raising the age to 14, by voting intention

The polling also found that most Coalition (51%) and Labor (55%) voters support raising the minimum age to 14 years, and that most Australians (72%) agree that politicians should be guided by the medical experts when deciding how to respond to children's behaviour, with 65% of respondents agreeing that public money spent on incarcerating children would be better spent on social services, and 52% agreeing that the overall impact on the community of locking up children is negative, with 45% of Australians agreeing that sending children aged 13 and under to detention centres makes our communities less safe in the long term, compared to 37% who disagree.

A punitive and coercive behaviour modification model

The overall emphasis across the Discussion Paper's proposed model is one founded on a misdirected assumption that coercive behaviour modification will lead to improved outcomes for children and young people, and reduce offending.

The proposal fails to recognise that all behaviour, whether 'good' or 'bad', is symptomatic of what is going on in a child or young person's life and family. The starting place should be one of situating the child within their context and finding out how they and their environment could be supported to enable them to be the best they can be.

The constant framing in the Discussion Paper is through the labelling and modifying of 'harmful behaviour'. This behaviour modification approach does not consider the material and situational conditions of the child's life, experiences, developmental capabilities, and home environment, and is not based on the needs and best interests of the child. It simply measures the wellbeing of the child in terms of whether their so-called 'harmful behaviour' is modified according to an externally determined set of seemingly arbitrary criteria that are open to interpretation by a range of responders, including police. If their behaviour is not modified, children are then subjected to further harmful and mandatory treatment.

If we accept that – as much of the evidence has already made clear – children under the age of 14 have been shown not to have the neurological and mental development to distinguish right from wrong, and that this is amplified for children who have experienced childhood trauma or live with disability, then why is it assumed that a model premised on increasingly coercive and punitive behaviour modification is an appropriate response?

Rather than punishing, criminalising and imprisoning children who come into conflict with the law, the evidence suggests that diverting them away from the criminal justice system and providing appropriate supports gives children the best chance to 'grow out' of the behaviours that are being criminalised.[20] Criminalising a child and channelling them into the youth justice system can aggravate existing traumas and health conditions and result in new ones, such as depression, suicidal thoughts, and post-traumatic stress disorder. As research has shown, many children and young people change their behaviour patterns or stop offending and in effect 'grow out' or 'age out' of it as they get older, more especially if they are provided with appropriate supports. This perspective is echoed by Victoria's Commissioner for Aboriginal Children and Young People:

> *Evidence shows unequivocally that the way to reduce youth crime is to place the wellbeing and rights of children at the heart of our justice policies. When children and young people are healthy and given opportunities to flourish, be inspired and learn, they are far less likely to offend* - Meena Singh, Victoria Commissioner for Aboriginal Children and Young People.[21]

Lessons from other countries are instructive. While Australia has a very low minimum age of criminal responsibility, a number of other countries have a much higher age of criminal responsibility.[22] In contrast to Australia's heavy reliance on the police, courts and prisons, and punitive diversionary programs, other countries prioritise diversion for children who come into conflict with the law and promote alternative, community-based and social care-focused responses, which have much better outcomes for children and for communities.[23]

One example (which is cited but not comprehensively followed in the Discussion Paper – see p. 8) is the public health model approach adopted in Scotland, which has been adopted in Scotland.[24] The Discussion Paper cites the Scottish approach in order to substantiate its

[20] Gordon, F. (8 Nov 2022) ANU College of Law. 'Diverting children away from the criminal justice system gives them a chance to "grow" out of crime' *Politics, Law and Society*.

[21] Victoria Commission for Children and Young People (July 2023) *Should we be tougher on youth crime?*

[22] For example, in Luxembourg and South America, it is 18 years, Poland is 17, Portugal is 16, and Norway and Denmark is 15.

[23] Gordon, F. (8 Nov 2022) ANU College of Law. 'Diverting children away from the criminal justice system gives them a chance to "grow" out of crime' *Politics, Law and Society*

[24] Gordon, F. (2022) references data which indicates that Scotland's homicide rate halved between 2008 and 2018 after the approach was implemented, and the number of hospital admissions, due to assault with a sharp object, fell by 62 per cent in Glasgow (knife crime had been a significant issue). However, research by McAra, L., & McVie, S. (2007). 'Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending.' *European Journal of Criminology*, 4(3), 315-345, assesses the effectiveness of the Scottish model of youth justice in the context of a growing body of international research that is challenging the `evidence base' of policy in many western jurisdictions. Drawing on findings from the Edinburgh Study of Youth Transitions and Crime, it shows how labelling processes within agency working cultures serve to recycle certain categories of children into the youth justice system. The deeper a child

proposal to expand the powers of police to interview children and conduct forensic searches. However, the Discussion Paper does not elucidate the Scottish approach which also involves panels of specialist interviewers (not the police) and the establishment of inter-disciplinary panels such as health, social services, education, justice and police working together to solve problems that contribute to violence and offending including homelessness, poverty, addiction and family violence.[25] The Discussion Paper does not highlight the usefulness of these panels, as applied in Scotland. It will be important to further interrogate the aspects of the Scottish model which the Discussion Paper alludes to considering and to ensure an avoidance of cherry-picking specific aspects of the Scottish model which serve to justify particular ends. While some research commentators have raised concerns about the Scottish approach, an evaluation of this model points to an important conclusion that the key to reducing offending lies in *minimal intervention and maximum diversion*.[20 & 26]

In South Australia, the potential introduction of multi-disciplinary panels and inter-sectoral work must necessarily include working with First Nations communities, Aboriginal Community-Controlled Organisations (ACCOs) and the mainstream South Australian community services, health and education sectors to develop an appropriate and holistic response. This should have regard to the Priority Reforms committed to in the National Closing the Gap Agreement and SA Implementation Plan, and include properly resourcing ACCOs to participate in these processes to ensure internal resources are not diverted from frontline service delivery and advocacy.

In other countries that have a much higher age of criminal responsibility, such as Norway with a MACR of 15 years, children under 15 have no interaction with the courts, are not punished but instead are supported by effective child protection services, and their identities are not released in the media. For those over 15 years of age, suspended sentences and probation, as well as support from child protection services, are prioritised. Norway's approach appears to be effective with an overall rate of recidivism (the number of people who return to prison after release) of 20%. This is in stark contrast to Australia's recidivism rate, where of young people aged 10–17 who were under sentenced youth justice supervision at some time between 2000–01 and 2021–22, 41% returned to sentenced supervision before turning 18. Of young people aged 10–16 in 2020–21 and released from sentenced community-based supervision, 40% returned to sentenced supervision within 6 months, and 57% within 12 months. Of those released from sentenced detention, 66% returned within 6 months, and 85% within 12 months.[27] Besides causing significant harm to the lives of the affected young people, this data provides a clear indication that incarceration and youth justice supervision is not working, is not a deterrent, and is effectively increasing the likelihood of young people returning to

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penetrates the formal system, the less likely he or she is to desist from offending. The article concludes that the key to reducing offending lies in minimal intervention and maximum diversion. Although the Scottish system should be better placed than most other western systems at delivering such an agenda (owing to its founding commitment to decriminalization and destigmatization), as currently implemented, it appears to be failing many young people. Furthermore, the Children and Young People's Commissioner in Scotland has raised concerns about the new powers of investigation bringing more children into contact with the police, the additional use of powers to hold children in so-called 'places of safety', all of which are causing life-long harm (Children and Young People's Commissioner Scotland, Minimum Age of Criminal Responsibility https://www.cypcs.org.uk/positions/age-of-criminal-responsibility/) .

[25] Gordon, F. (2022)

[26] McAra, L., & McVie, S. (2007). 'Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending.' *European Journal of Criminology*, 4(3), 315-345. https://doi.org/10.1177/1477370807077186 Australian Institute of Health and Welfare (August 2023) *Young People Returning to Sentenced Youth Justice Supervision 2021-22*.

prison. Juvenile detention is 'criminogenic', it increases their odds of reoffending, and can have serious negative consequences for a child's health, education and employment outcomes, including leading to an early death.[28]

As the data demonstrates, the younger children are when they are first sentenced means that they are more likely to re-offend than those first sentenced when they are older. Raising the age will prevent the criminalisation of younger children.[29] This factor is of particular relevance given that the data indicates that in 2022-23, First Nations young people were younger when they entered supervision than their non-Indigenous counterparts. More than a third (34%, or 1,572) of First Nations young people under supervision were first supervised when aged 10 - 13 compared with about 1 in 7 (15%, or 634) non-Aboriginal young people.[30]

Both national and international evidence demonstrates that locking children up does not keep the community safe, or reduce future offending by the child, as criminologist Professor Cunneen explains:[31]

> *[A] small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age. For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending.*

The Australian Institute of Criminology indicates that removing children from their communities and detaining them in youth prisons increases their risk of criminal offending and negative peer influence:[32]

> *It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are 'universities of crime' that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks.*

There is substantial evidence that, rather than making our communities safer through the promotion of the positive development and rehabilitation of children, incarceration leads to an increased likelihood of reoffending.

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[28] Australian Medical Association (2019) *AMA calls for age of criminal responsibility to be raised to 14 years of age*

[29] Gordon, F. (8 Nov 2022) ANU College of Law. 'Diverting children away from the criminal justice system gives them a chance to "grow" out of crime' *Politics, Law and Society*

[30] Australian Institute of Health and Welfare. *Youth justice in Australia 2022–23*

[31] Cunneen (2017) *Arguments for raising the minimum age of criminal responsibility*, p. 12.

[32] Richards, K (2011) Australian Institute of Criminology. *What makes juvenile offenders different from adult offenders?* pp. 6–7.

Tiered system of coercive, mandatory case management and administrative detention is not genuinely diversionary and contradicts the principle of a minimum age

The Discussion Paper proposes a three-level scaled secondary response that would include a Community Action Plan, a Mediated Action Plan and a Mandatory Action Plan, with each tier of the model becoming increasingly coercive. The evidence is clear that the application of coercive and mandatory so-called 'therapeutic' interventions (as set out on pages 11 and 12) is contrary to providing effective and appropriate responses and outcomes for children who are traumatised and in a state of fear and crisis.

The level 3 stage of the 'secondary response' action plan is described in the Discussion Paper as the 'Mandatory action plan' and is 'the most serious level of response' (p. 12). In effect, it introduces a new form of administrative detention of children. The Paper indicates that 'a mandatory action plan could be in place for a maximum of 12 weeks, however the option exists to extend it for a further 12 weeks, and there is no limit to the number of mandatory action plans to which a child can be subject' (p. 12).

This worrying proposal means that the government can detain children under 12 in secure facilities without criminal charges or conviction, in the absence of legal or human rights safeguards or the application of minimum standards for juvenile detention. The proposal does not indicate what, if any, independent oversight or accountability mechanisms will be brought to bear at 'places of safety' and new 'therapeutic' secure facilities. There is the suggestion that such a secure facility 'for children under the MACR' could be co-located with the existing youth detention centre Kurlana Tapa (p. 12) – this is a site that many children associate with trauma, fear and detention and which would be impossible for them to consider or trust as being safe and therapeutic.

The Discussion Paper indicates that at the Level 2 and Level 3 stages of the action plans, 'the preferred option for a body 'to oversee mediated and mandatory action plans is the South Australian Civil and Administrative Tribunal (SACAT).' Children would be referred to this administrative tribunal which would oversee these levels of the proposed action plans, and be enabled to order the detention of children without the oversight of a court. SACAT could make formal orders which may involve mandatory orders to compel children to engage in specified treatments and/or programs and to be detained in a secure facility to receive treatment – this, without a formal arrest or charge.

The Discussion Paper provides no assurance that the detention of children subject to a Mandated Action Plan will be subject to adequate oversight, or any indication as to whether this option would be OPCAT-compliant or have other human rights oversight. While seemingly intended to indicate a focus away from the criminal legal system, this proposed provision instead creates a civil, administrative detention scheme that can subject children to periods of detention without arrest or charge. It is noted that administrative detention is a carceral response ordinarily deployed in military and immigration detention settings, not in the normal course of the care and support of children.

While the Discussion Paper ostensibly proposes the raising of the MACR from 10 to 12 years of age, the practical application of the proposal would in effect result in a decreasing of both the minimum ages of criminal responsibility and of detention. Due to the inclusion of a broader suite of excepted offences as well as the introduction of administrative detention, the effect of

the proposed changes would be to lower or nullify the minimum age of criminal responsibility, and the minimum age of detention.

The Discussion Paper proposes a very broad schedule of 'serious offences' that children under 12 could still be prosecuted for. Four offences are listed on page 5 of the Discussion Paper as exceptional offences for which children under the MACR could be charged and prosecuted – murder, manslaughter, rape and cause serious harm (the latter being an overly broadly defined offence under section 23 of the *Criminal Law Consolidation Act* 1935 (SA), and one which could grant police significant and discretionary powers to criminally prosecute children under the age of 12 in relation to an undefined range of alleged behaviours).

Having initially listed four 'serious offences, the Paper then proceeds (on page 14) to expand the scope of the 'serious criminal offence' category to include:

- Cause death by use of a motor vehicle;
- A serious firearm offence;
- Robbery;
- Serious criminal trespass in a place of residence;
- Property damage to a building or motor vehicle by fire or explosives;
- Causing a bushfire;
- Indecent assault;
- Acts of gross indecency;
- Causing serious harm;
- Shooting at police officers; or
- Possession of an object with intent to kill or cause harm.

The proposed model does not indicate whether or how children under the age of 10 will be protected from these provisions in the diversionary model, including those involving the criminal prosecution, coercive case management and administrative detention of children under the age of 12.

If the SA Government is assuming that these proposed provisions will not apply to children under the age of 10 (or if it is relying on the retention of *doli incapax* as a proxy for this assumption), the obvious conclusion is that it is not, in practice, raising the MACR from 10 to 12 years of age. The framing of the proposal leads one to conclude that by failing to clarify that the new provisions and systems will not apply to children under the age of 10, the Government will effectively be advocating to decrease and/or abolish the MACR through the application of the broadened schedule of excepted offences, and to abolish the minimum age of detention.

Leading one to draw this worrying conclusion is further reinforced on page 13 of the Discussion Paper: 'It is also proposed to introduce an option of last resort *to deal with* (sic) children younger than the MACR who repeatedly engage in extreme or repeated harmful or violent behaviour and where a mandatory action plan has not been effective. This will allow for the criminal prosecution of the child.' It is clear that, according to Discussion Paper, the minimum age of criminal responsibility does not have to be respected and adhered to, and its application is largely open to interpretation by the police, enabled by the Office of the Director of Public Prosecutions (ODPP).

We submit that there should be no exceptions to the MACR. The fundamental principle and purpose of having a MACR in place is that *no* child under that stipulated age can or should be

criminalised for *any* reason, given that they cannot understand that their behaviour was wrong in a criminal sense and therefore cannot be held criminally responsible.

Increased policing and discretionary powers

The Paper indicates that ‘in order for a child younger than the MACR to be criminally prosecuted for an offence that is not one of the serious offence exceptions’, a specified process will apply, which can include SAPOL having the powers to proceed to charge the child with a serious criminal offence ‘if SAPOL is of the view that’, amongst other factors, ‘there is a reasonable prospect of a successful (sic) prosecution’, and that the Office of the Director of Public Prosecutions ‘agrees with SAPOL’s assessment of the matter (p. 13)’.

The proposed model increases policing powers and grants police the discretionary (and potentially, arbitrary) power to determine whether and under what circumstances a child can be deemed to be criminally responsible – police are afforded an ‘option of last resort’ based on ‘a reasonable suspicion (sic) (p. 8)’, allowing them to criminally prosecute children under the proposed minimum age of 12 by agreement with the Office of the Director of Public Prosecutions for an increased range of offences under certain conditions. This option grants police the powers to interview children in an investigative capacity and take forensic samples from them, which would invariably subject children to potentially invasive searches, interrogation by police, and increased surveillance, with no right of refusal. This would constitute a violation and contravention of the UN Convention on the Rights of the Child.[33] This expansion of police powers will place children at greater risk of harmful contact with police.

Lack of attention paid to the role of institutional racism and discrimination

The Discussion Paper pays inadequate attention to the role of racism and discrimination and the ways in which these play out in the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system.

Evidence strongly indicates that not all children are equal before the law and that at every stage of contact with the criminal justice system Aboriginal children are overrepresented. Aboriginal children are significantly more likely than their non-Aboriginal peers to be referred to court rather than receive a caution and be arrested rather than issued with a caution or diversion.[34] The high number of South Australian Aboriginal children in detention may partially be explained by Aboriginal children being more likely than non-Aboriginal children to receive a formal rather than informal caution when coming into contact with police. SA Police data shows that from November 2018 to June 2019, more than 25% of all formal cautions issued to children were handed to Aboriginal children, despite them representing less than 5% of SA’s child population.[35]

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[33] United Nations General Assembly, Convention on the Rights of the Child (November 1989) Article 37(b).

[34] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (n.d.) *Doing Time - Time for Doing - Indigenous youth in the criminal justice system*, pp. 200–205.

[35] Richards, S. 2020 ‘Call for SA to take national lead in lifting criminal age to 14’ article, *InDaily* https://indaily.com.au/news/2020/07/23/call-for-sa-to-take-national-lead-in-lifting-criminal-age-to-14/

In South Australia, the most recent figures from the Australian Institute of Health and Welfare[36] reveal the extent of the disproportionate representation of young Aboriginal and Torres Strait Islander young people (ages 10–17) in supervision and detention. On an average day in 2022–23, in South Australia:

- First Nations young people made up 4.7% of those aged 10–17 in the general South Australian population, but 48% (or 101) of those of the same age under supervision;
- a similar proportion of First Nations young people aged 10–17 were under community-based supervision (46% or 87) and a higher proportion in detention (61% or 15);
- First Nations young people aged 10–17 were 19 times as likely as non-Indigenous young people to be under supervision (124 per 10,000 compared with 6.5 per 10,000);
- First Nations over-representation was similar in community-based supervision (18 times the non-Indigenous rate) and higher in detention (31 times the non-Indigenous rate).

The following graph (Figure 2) throws this data into stark relief, and offers a comparison across all states and territories.[37]

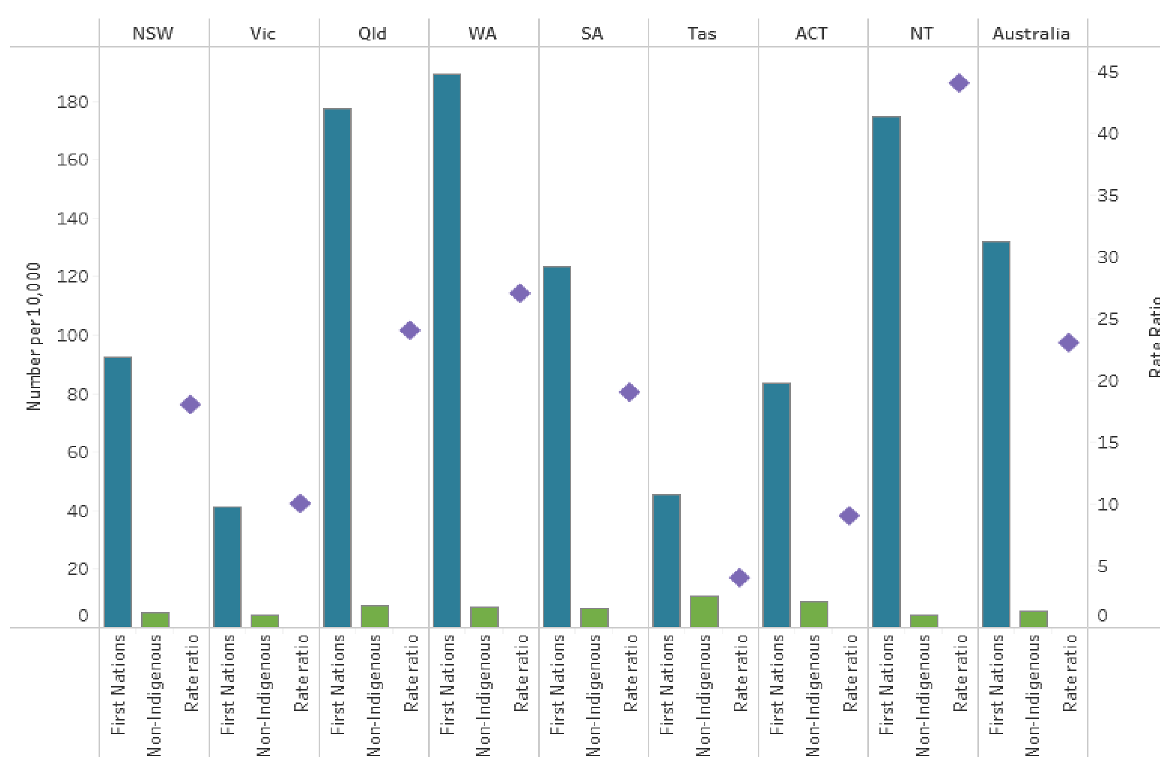

Figure 2: Young people aged 10–17 under supervision on an average day, by Indigenous status and state and territory 2022–23

Given this targeting and over-representation of Aboriginal children in the youth justice system, it is worrying that the Discussion Paper gives little, if any, explanation as to how the SA Government's proposal relates to its commitments to the Priority Reforms contained in the National Agreement on Closing the Gap, with particular reference to Target 11. There is no reference in the Discussion Paper to *South Australia's First Implementation Plan for the new*

[36] Australian Institute of Health and Welfare, *Youth justice in Australia 2022–23*

[37] Australian Institute of Health and Welfare. https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-annual-report-2022-23/contents/characteristics-of-young-people-under-supervision

National Agreement on Closing the Gap,[38] or to working with the Justice Policy Partnership (JPP), which brings together representatives from the Coalition of Peaks (including the SA Aboriginal Community-Controlled Orgsanisation Network (SAACCON)), Aboriginal and Torres Strait Islander experts, and Australian, state and territory governments to take a joined-up approach to Aboriginal and Torres Strait Islander justice policy. It was established in recognition of the urgency for concerted national action and leadership in response to increasing over-representation of Aboriginal people in prison and the persistent crisis of Aboriginal deaths in custody.[39] The focus and primary function of the JPP will be to make recommendations for actions to address adult and youth incarceration, with a focus on actions and activities that progress Targets 10 and 11, as well as the Priority Reforms and other drivers of incarceration.

The process for the development of the Discussion Paper's proposal and the proposal itself are out of step with the Priority Reforms in the National Agreement on Closing the Gap, and it is argued that the proposed model would actively work against meeting the Agreement's socio-economic targets.

Violation of human rights and the rights of the child

The Discussion Paper's proposed 'alternative diversion model' contradicts a number of the basic standards of justice and children's rights, and disregards common law norms such as the right to personal liberty, natural justice and access to the courts.

If the proposed model were to be implemented, it would be in breach of the basic principles contained in the United Nations Convention on the Rights of the Child, the Declaration on the Rights of Peoples with Disabilities, and the Declaration on the Rights of Indigenous Peoples, to which Australia is a signatory. In light of the current Inquiry into the potential for a Human Rights Act for South Australia, it is noted that the proposal's provisions would be in breach of any meaningful Human Rights Act for South Australia.

The proposed model would further breach minimum international standards for juvenile detention, and minimum standards for the oversight of places of detention under the Optional Protocol to the Convention Against Torture (OPCAT).

3. A proposed alternative framework – a response that supports prevention, early intervention and avoids harm

A comprehensive service system response for children and young people

Rather than starting by focusing on and adjusting the shortfalls of the existing youth justice system, a consideration of the minimum age of criminal responsibility needs to be situated within a more comprehensive framing of what we need to provide in order to ensure that children and young people have the best possible chances in life. South Australia currently has an historic opportunity to create a constructive approach and framework to respond to the

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[38] Attorney General's Department. *South Australia's First Implementation Plan for the new National Agreement on Closing the Gap*

[39] Australian Government, Attorney-General's Department. Justice Policy Partnership at https://www.ag.gov.au/legal-system/closing-the-gap/justice-policy-partnership

needs of all children and young people across the State, including those who experience particular vulnerabilities and who may be affected by contact with the criminal justice system.

South Australia can draw useful lessons from the approach adopted by the ACT in raising the minimum age, which highlighted that raising the MACR was an important priority for the Government, and that it needed to be 'embedded in a broader focus on building a better system for all children, young people, families and the community, including (but not limited to) children aged 10-13' (i.e. those under its proposed minimum age of 14 years). The importance of this aim is clearly stated in the Review conducted by McArthur et al. for the ACT Government:

> *Based on the findings of the current Review, we argue for taking the legislative change as* ***an opportunity for comprehensive systems reform****. Unless broad-ranging service reform is undertaken, neither the legislative change nor the proposed therapeutic response will result in better outcomes for children … In the absence of systems reform, the legislative change is likely to result in failure to meet children's needs, but also to drive an increase in reporting to child protection services and – ultimately – to more children entering the justice system at 14.*[40]

Every child and young person in South Australia should be free to go to school, have a safe home to live in, have enough healthy food to eat, and be supported to live a healthy life and learn from their mistakes. With these fundamentals in place, children and young people will have a more stable foundation on which to develop and grow into adulthood and come to understand their interests, capabilities, responsibilities and the consequences of their actions. This calls on us to collectively develop an alternative framework to support and respond to children and young people in their best interests, and free from fear, criminalisation and harm. Our collective response to addressing the minimum age of criminal responsibility needs to be understood and developed with a view to developing a more comprehensive response for how our society could better respond to the needs and experiences of young people.

In the immediate term, the South Australian government must develop a trauma-informed and culturally safe approach for responding to children in need which, instead of fixating on harmful behaviours and criminalising children, focuses on addressing the unmet needs that are causing contact with the criminal legal system in the first place.

Key principles to inform an alternative framework

Towards the development of an alternative framework, we emphasise the principles of non-punitive, trauma-informed, therapeutic, culturally-led, non-discriminatory responses to children and young people's experiences and needs. An alternative response framework should focus on prevention and early intervention, taking into consideration the rights of the child, their complex needs, the social determinants of health and wellbeing that impact the circumstances in which the child has grown up (rather than focusing on simplistic behaviour modification practices).

[40] Ibid. p. 3.

The principle of self-determination for Aboriginal and Torres Strait Islander children, families, communities and Aboriginal Controlled Community Organisations must be integral to the development of an alternative framework and a responsive service system. Given the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system, we strongly advocate for the Attorney General's Department to engage the First Nations Voice to Parliament, to support the design of an alternative response model. This would also support the Closing the Gap Target 11 to reduce, by 2031, the rate of Aboriginal and Torres Strait Islander young people in detention by at least 30 per cent.

Children with developmental delays or neurodevelopmental disorders or disabilities (e.g. autism spectrum disorders, foetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, no matter their age even if they have reached the minimum age of criminal responsibility.[41] Given the number of children with disabilities who come into contact with the criminal justice system, we must ensure that an alternative model is underpinned by principles of universal design and universal access.

These key principles should guide the SA Government in its development of an alternative system to the criminalising of children and young people. Adherence to these principles will create a strong foundation to support children, divert them from the criminal justice system, and focus instead on responding to their needs within their family and community contexts.

Consideration of transitional arrangements and preparatory work

Given that the Discussion Paper provides little information about transitional arrangements (p. 6), there is a need to consider these arrangements in more detail and to prepare for the introduction of any proposed legislation – this will necessarily involve the SA Government reviewing the service response system required to support raising the minimum age of criminal responsibility. Besides providing clarity about what will happen regarding any criminal justice proceedings already underway when the MACR is raised, the status of past convictions, and the status of children who are in custody at the time, it will be necessary for planning to be undertaken and to include a focus on the following, as highlighted in the ACT's comprehensive consultation process and instructive Position Paper[42] when it considered raising the age, including the need to:

- improve the experiences and outcomes for children under the MACR who are engaging in harmful behaviour that brings them to the attention of the justice system;
- leverage this as an opportunity to improve the service system for a broader cohort of children and young people who face risk and engagement with youth justice;
- increase community safety by intervening early and diverting children and young people onto a healthier pathway and away from later engagement in offending behaviour;
- work with community stakeholders to design and implement the service responses required to give effect to alternative pathways for children and young people.

In preparing for raising the MACR, it will be essential that the South Australian Government considers the potential pathways of engagement for children and their families who might be facing risks. This could include a recognition of the child's exposure to intergenerational

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[41] United Nations, Committee on the Rights of the Child CRC/C/GC/24 Convention on the Rights of the Child (18 September 2019) General comment No. 24 (2019) on children's rights in the child justice system.

[42] ACT Government (2022) *Raising the age of criminal responsibility - Position Paper*

trauma, early childhood trauma, developmental delay and/or learning challenges. It would give attention to early signs of concern, such as poor engagement/ achievement in school, age-inappropriate behaviour, disconnection from school and/or family, domestic or family violence, risk of homelessness, starting to experiment with alcohol or drugs, mental health challenges. Further, attention could be focused on children who come to the attention of Child Protection Services or of the Police, or who engage with youth services, homelessness, mental health and/or alcohol and other drug services, or an escalation of harmful behaviour.

In order to be responsive to this range of experience and need, it will be important for the Government to explore and establish a number of service responses – in conjunction with all the relevant community-based and service support services – and associated legislative reforms. Again, drawing on the ACT's experience of raising the MACR, these could potentially include:

- increasing access to family-led decision-making mechanisms, such as Family Group Conferencing, and to intensive family-based supports;
- engaging with Aboriginal Community Controlled Organisations and community-led initiatives;
- enabling earlier intervention, more intensive case management and wrap-around support for children and young people who come to the attention of the Child Protection system, Police and other services;
- establishing a therapeutic panel (potentially drawing on the Scottish example or other multi-disciplinary therapeutic panels) to respond to complex matters involving children, young people and their families. The establishment of a multi-disciplinary panel where children can be referred if they come into contact with police, or if their behaviour raises concerns within the home, community or school, is an essential part of both diverting a child away from the criminal justice system and ensuring that the appropriate assessments, identification of needs and referrals to relevant services occurs. For this multi-disciplinary panel to work effectively, it is crucial that its primary role is to assist and strengthen families, and identify the needs of and supports for children.

There is a relatively small number of children who have contact with the criminal justice system – according to information provided by the SA Department of Human Services to the Office of the Guardian for Children and Young People, a total of 39 young people under the age of 14 were admitted to youth detention in South Australia 2022-23, with five being under the age of 12. Given the small size of these cohorts, the development of alternative service responses would not be particularly onerous. Rather than further fragmenting existing services or adding cumbersome layers and new structures, as far as possible, the attempt should be to better align services to children and young people's diverse needs, and for these services to be appropriately resourced.

It will be important that any proposed changes accompanying raising the minimum age are integrated with, and create necessary improvements in, the current services and programs that aim to support families and keep children and young people safe and well. This will require undertaking a mapping exercise. Such an exercise would map the services currently funded to support children at risk in South Australia, evaluate their effectiveness and work to identify and remedy any gaps in service purpose and delivery.

The proposed mapping exercise should include:

- mapping the availability and accessibility of Aboriginal Community-Controlled and mainstream services and support, including psycho-social services for children, especially those with disability; respite care; child care; educational support; family counselling and family group conferencing; home visiting programs; poverty relief; alcohol and other drug services; mental health services; disability support services; specialist homelessness services and public housing, amongst others;
- a consideration of the geographic spread of need across the state;
- drawing lessons from other international, national and jurisdictional approaches to raising the age and establishing appropriate frameworks to support children and young people and associated support services.

Having conducted a gap and needs analysis, the SA Government should enable the development of a co-designed plan to redirect resources away from policing and youth detention in order to address identified service needs. This should include a strategy for the development of a workforce of appropriately-trained, trauma-informed and qualified first responders who are not police, are not connected to a criminal legal response, and are subject to clear accountability frameworks.

In recognising that SAPOL has indicated that it currently has limited options to respond to children and young people who come to police attention and that they cannot always be safely returned home, the SA Government, in conjunction with relevant service providers, could explore possible options, including the use of on-call trauma-informed and qualified youth workers, and the creation of safe spaces (that do not include police stations or watch-houses) and emergency accommodation to which police can take young people who cannot safely return home.

Lessons for the development of an alternative framework for children and young people in South Australia could also be drawn from the *Tasmania's Youth Justice Blueprint for 2024 – 2034*[43], which outlines that Government's 10-year plan to reform the youth justice system. It focuses on the rights of the child, rehabilitation and breaking the cycle of offending to improve outcomes for children, young people and their families, and keeping the community safe.

The Blueprint was developed in collaboration with key agencies, young people and relevant stakeholders to ensure that it is fit for purpose. It recognises that children and young people who are at risk of, or are already engaged in offending, are often vulnerable and have a range of needs that require responses across multiple service systems. This requires working collaboratively across the whole of government and community to establish better connections for these children and young people, their families, and services. It commits to actively partnering with Aboriginal organisations and families to support Aboriginal children and young people in a culturally appropriate way to reduce their over-representation in the youth justice system. It is envisaged that over time, these actions will result in a system that supports early intervention and diverts children and young people away from the statutory youth justice system.

[43] Tasmanian Government, Department for Education, Children and Young People. *Tasmania's Youth Justice Blueprint for 2024 – 2034*

4. Recommendations

1. **The minimum age of criminal responsibility must be raised to at least 14 years of age, with no exceptions.**

   The medical evidence calls for the age to be raised to at least 14 years of age. While nothing specific or dramatic changes in a child's development at the age of 14, and many countries have raised the age to *above* 14 years of age, what the evidence does make clear is that 14 years is *the bare minimum* that you could expect a child to have sufficient neurological development to be held criminally responsible.

   The medical evidence is also clear that children under 14 years old are particularly vulnerable to developmental harm when they come into contact with the criminal legal system which can result in a higher prevalence of mental illness, unemployment, homelessness later in life, and premature death.

   It is extremely rare that children under the age of 14 years of age are arrested and charged with serious or violent offending. When they are, it is because something has gone seriously wrong in that child's life. A child who engages in serious physical or sexual behaviour, for example, will almost invariably be a child who has been exposed to trauma, violence and/or has critical mental health and behavioural needs. It is in the best interests of the child, and in the best interests of the whole community and promoting community safety, for the needs of the child to be met in a therapeutic and rehabilitative manner, rather than the child being exposed to further harm through the criminal justice system.

2. **Adhere to the principle and purpose of having a minimum age**

   The fundamental principle and purpose of having a MACR in place is that *no* child under that defined minimum age can or should be criminalised for *any* reason. The medical evidence is clear: children under the age of 14 years of age do not have the capacity to form criminal intent or comprehend the consequences of their action – this applies just as much to serious acts as it does to less serious behaviour. There should therefore be no exceptions to the MACR, and no child below the stipulated minimum age should be subjected to incarceration or administrative detention. Either we have a minimum age of criminal responsibility or we do not. We cannot legislate a stipulated minimum age and then seek ways to circumvent it.

3. ***Doli incapax* should not be retained if the MACR is raised and adhered to**

   The Discussion Paper proposes that the old, common law presumption of *doli incapax* – which provides that a child aged 10-13 lacks the capacity to be criminally responsible for their actions – is retained for children under the age of 12 as well as codified in legislation ('based on the common law standard' p. 5).

   > If a child is between the ages of 10 and 14, they are presumed to be *doli incapax* (from the Latin 'incapable of evil' or 'incapable of wrongdoing') and cannot be convicted of a crime, unless the prosecution can prove the child had the mental capacity to understand what they did was criminally wrong, and not just 'naughty'.[44]

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[44] Office of the Guardian for Children and Young People and the Training Centre Visitor (2021) *Law intern finds doli incapax is not protecting children from entering youth justice system*

If the MACR was raised to at least 14 years of age with no exemptions there would be no need for *doli incapax*. The presumption should not be retained as it does not reflect contemporary medical knowledge of childhood neurological and brain development, social science, the long-term health effects or human rights law.[45] Both the United Nations Committee on the Rights of the Child and the Australian Law Reform Commission have criticised *doli incapax* for its failure to protect children,[46] with the latter noting that:

> *Doli incapax can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.*[47]

The UN Committee on the Rights of the Child has also expressed concern as to the inconsistency in the operation and discrimination in the application of such a system and have stated that:

> *Initially devised as a protective system, it has not proved so in practice. Although there is some support for the idea of individualized assessment of criminal responsibility, the Committee has observed that this leaves much to the discretion of the court and results in discriminatory practices.*[48]

As stated by the Office of the Guardian for Children and Young People and Training Centre Visitor[49] as well as the Human Rights Law Centre, *doli incapax* is not working as it is intended and children can often be exposed to the harms of the criminal legal system through the very process of trying to prove *doli incapax*. Instead of the prosecution meeting its requirement to prove the child *did have* the necessary mental capacity, *doli incapax* is commonly viewed as a 'defence'. This means that defence lawyers are having to prove the child *did not have* the mental capacity to tell the difference between serious wrongdoing and naughtiness. Although the common law presumes that children under the age of 14 do not have capacity to commit a crime, this reversal of the onus means that, in

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[45] Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [44]; Committee on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia, UN Doc CERD/C/AUS/CO/18-20 (29 December 2017) [25]-[26].

[46] United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, CRC/C/AUS/CO/5-6 (30 September 2019) 13.

[47] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997) [18.19].

[48] United Nations Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, UN Doc CRC/C/GC/24 (18 September 2019) [26].

[49] Office of the Guardian for Children and Young People and the Training Centre Visitor (2021) *Law intern finds doli incapax is not protecting children from entering youth justice system*

practical terms, those under 14 are assumed to have capacity and defence lawyers are required to disprove it.[50]

A trial or summary hearing must be held for the court to determine conclusively whether a child was *doli incapax* at the time of the offence. This can take months or longer depending on court lists, case management processes and the availability of experts. In the meantime, the child awaiting trial will have already experienced certain aspects of the legal process, and will have been frightened or traumatised by the experience. For example, a child suspected of committing an offence may be arrested and taken into custody by police, handcuffed, strip searched, subjected to forensic examinations, interrogated, remanded in custody or subject to conditional bail and multiple court appearances, and identified or labelled as a 'criminal' through media or social media reporting. This process serves to criminalise children. Overwhelming evidence shows that, even if only for a short period of time, the negative exposure during a critical period of brain development adversely impacts the health, wellbeing and long-term outcomes for children. It is particularly harmful to children with developmental delay, disabilities and those who have experienced complex developmental trauma.

4. Decarceration, not incarceration by prioritising constructive approaches to diversion

For each day that passes with the age of criminal responsibility remaining unchanged, young children can be arrested, driven in police vehicles, taken through police stations, courts and locked up in youth detention centres. This causes ongoing harm to children and fails to keep them or their communities safe. In particular, it harms First Nations children and children with disabilities, who are disproportionately targeted and impacted by the criminal legal system.[51]

We call for a change in approach and perspective about children who come into conflict with the law. There needs to be a complete overhaul of our systems, leading to decarceration,[52] not incarceration. In South Australia this would mean prioritising other constructive and holistic methods of diversion, such as addressing the social determinants of offending, including poverty, housing insecurity, and family violence, amongst others.

Resources should be redirected from punitive and carceral systems to fund culturally-safe and trauma-responsive services that support children and families in crisis or at risk of crisis. Rather than plans to build new youth justice facilities and financial resources being allocated to criminalising children, we call for youth justice facilities to be closed. Alternative responses should include Justice reinvestment[53] to redirect resources from traditional criminal justice and related systems to communities, to instead invest those resources into programs that prioritise early intervention and prevention, and to give communities back decision-making powers, allowing them to self-determine their own futures. Community-designed and community-based diversion programs are much more

[50] Ibid.

[51] Ibid.

[52] Decarceration is a process of reducing the number of people in prison by diverting people away from the criminal justice system and reducing the focus on prison as a solution to crime.

[53] Justice Reinvestment Network Australia at https://justicereinvestment.net.au/

effective than formal criminal justice system responses and evaluations show positive outcomes and reductions in reoffending.[54]

To this end, the SA Government is to actively implement its Implementation Plan to reduce the incarceration of Aboriginal children and young people, consistent with Priority Reform 3 and Target 11 of the National Closing the Gap Agreement.

As a transitional arrangement as we move towards increased decarceration, there should be a focus on addressing the lack of bail accommodation and current bail laws, as they are resulting in large numbers of children spending time in prison on remand. We know that the majority of children in South Australia who have contact with the youth justice system are not formally sentenced. This means that many children are being detained in a detention centre prior to having their case heard, and often only because they have nowhere else to go. The SA Commissioner for Children and Young People proposes that, in the first instance, we should:

- ensure unsentenced children and their families have access to suitable support services and resources that divert them away from youth detention while awaiting sentencing;
- provide options for children who have no safe accommodation available to them while they await sentencing. This includes those children with complex health needs and those who have been made homeless due to difficult circumstances at home;
- in addition to enabling the appropriate use of formal and informal cautions, SAPOL and the courts should revisit bail practices and look to setting bail conditions which support children to succeed; not inadvertently set them up to fail. This can include reducing the number and complexity of bail conditions set, so that children can understand and follow them more easily.[55]

5. A genuinely diversionary model should be designed based on key principles

Aligned with the call for decarceration and the development of an alternative framework to meet the needs of all children and young people, we advocate for a genuinely diversionary approach that recognises the following key principles, as previously set out above:

- Any contact with the criminal legal system at any level, including police, causes harm to children and young people, and must be avoided;
- Non-punitive, trauma-informed, therapeutic, culturally-led, non-discriminatory responses to children and young people's experiences and needs;
- A focus on prevention and early intervention, taking into consideration the rights of the child, their complex needs, the social determinants of health and wellbeing that impact the circumstances in which the child has grown up (rather than focusing on simplistic behaviour modification practices);
- The principle of self-determination for Aboriginal children, families, communities and Aboriginal Controlled Community Organisations, including the SA First Nations Voice to Parliament, must be integral to the development of an alternative framework and service system. When First Nations children are involved, First Nations Peoples are the primary decision-makers about the care, discipline, support and protection of their children. In First Nations communities, the planning, design, implementation and evaluation of services and supports should be self-determined and community-led; and

[54] Gordon, F. (8 Nov 2022)
[55] Office of the South Australia Commissioner for Children and Young People (November 2022) Position Brief. *Bail Conditions for Children*

- Children with developmental delays or neurodevelopmental disorders or disabilities (e.g. autism spectrum disorders, foetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, no matter their age even if they have reached the minimum age of criminal responsibility.[56] Given the number of children with disabilities who come into contact with the criminal justice system, we must ensure that an alternative model is underpinned by principles of universal design and universal access.

6. **The SA Government is to commission an independent analysis of the gaps and needs in the existing health and community services landscape in South Australia**
   Any proposed changes accompanying raising the minimum age must be integrated with, and create necessary improvements to, the current services and programs that aim to support families and keep children and young people safe and well. This will require undertaking a mapping exercise to locate and map the services currently funded to support children at risk in South Australia, evaluate their effectiveness and work to identify and remedy any gaps in service purpose and delivery, and allocate the requisite resourcing to enable efficacy.

5. Conclusion

There is no credible evidence that punishing or imprisoning children decreases levels of crime or improves community safety. On the contrary, there is a wealth of established evidence demonstrating that interactions with formal criminal justice institutions negatively impact children and are counterproductive.

The current consideration of the minimum age of criminal responsibility in South Australia poses a significant opportunity to actively explore the best possible options, to get the settings right in order to protect young children from being exposed to the criminal justice system and being deprived of their rights in places that are unsafe and harmful to them, to align South Australia's position with international compliance standards, and to really make a difference in the lives of children and young people. We therefore urge the adoption of an approach that is not focused on a coercive or mandatory model of behaviour modification but one that reflects a commitment to a child-centred and non-punitive approach in the best interests of children and young people, and which will ultimately make our society safer and more humane.

In the words of the South Australian Guardian for Children and Young People and Training Centre Visitor:

> *The way we treat children today, right now, will directly impact their interaction with society when they become adults. So, I urge us all to think about what we want for our future generations – because the decisions we make today will dictate that.*[57]

[56] United Nations, Committee on the Rights of the Child CRC/C/GC/24 Convention on the Rights of the Child (18 September 2019) General comment No. 24 (2019) on children's rights in the child justice system.
[57] Guardian for Children and Young People and Training Centre Visitor, Media Release, 24 January 2024. *South Australian Government proposes to raise the age of criminal responsibility to 12-years-old*