



November 2021

## Raising the Age of Criminal Responsibility

### Background

Under the South Australian *Young Offenders Act 1993*, children as young as ten years of age can be detained in South Australia. Criminalising any child, and especially children who are under the age of 14, should have no place in our society. Detaining young children in the youth justice system places them at risk of becoming chronic, long-term offenders.

The criminal justice system disproportionately affects Aboriginal young people, and they are 21 times as likely to be under supervision as non-Aboriginal young people.<sup>1</sup> The inspection of the Kurlana Tapa Youth Justice Centre by the Guardian for Children and Young People, indicated that more than 60 per cent of young people in the Centre were Aboriginal.<sup>2</sup> The high number of 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.<sup>3</sup>

Of all the young people in Kurlana Tapa in 2019, 35 were 10 to 13-year-olds, with children in this age cohort each returning to the Centre four times on average in the same year.<sup>4</sup> This recurrence indicates that detention is not an effective deterrent or approach for rehabilitating or supporting young children.

The majority of the 10 to 13-year-old children detained during the 2019-20 financial year either had a disability, identified as Aboriginal and/or were being cared for under the guardianship of the Child Protection Department. About half the children under youth supervision have also been subject to child protection services, indicating a strong association between child protection experiences and youth offending.

The detention of children in closed facilities has long-term harmful and accumulative effects that can compound past trauma and detrimentally impact their lives well beyond the duration of any criminal sentence. The Australian Medical Association has confirmed that detaining children can have life-long impacts on a child's physical, mental and cognitive development, and increases the risk of future offending and premature death.<sup>5</sup> Medical experts have confirmed that prior to the age of 18,

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<sup>1</sup> AIHW 2019. Youth justice in South Australia 2017–18. Cat. no. JUV 129. Canberra: AIHW.

<sup>2</sup> The Training Centre Visitor, 2019 *Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide Youth Training Centre (now known as the Kurlana Tapa Youth Justice Centre)*

<sup>3</sup> Richards, S. 2020 'Call for SA to take national lead in lifting criminal age to 14' article, in *InDaily* <https://indaily.com.au/news/2020/07/23/call-for-sa-to-take-national-lead-in-lifting-criminal-age-to-14/>

<sup>4</sup> The Training Centre Visitor, 2019. Ibid.

<sup>5</sup> AMA and Law Council of Australia *Minimum age of criminal responsibility* <https://www.lawcouncil.asn.au/publicassets/20fb2a76-c61f-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>

children's brains are still developing, more especially in terms of regulating judgement, decision-making and impulse control.<sup>6</sup> Young children do not have the neurological maturity to foresee the consequences of their behaviours, assess risk and understand the potentially criminal nature of their behaviour.<sup>7</sup> Youth detention centres do not have the resources or capability to provide the appropriate conditions for children's fundamental and developmental needs, particularly for children who have experienced trauma or violence.<sup>8</sup>

Many countries have outlawed the detention of young children. In January 2021, Australia's human rights record was scrutinised by the UN Human Rights Council during the Universal Periodic Review, with 31 countries recommending that Australia raise the age, and condemning Australia for being out of step with international standards.

The ACT has already committed to enact legislation to raise the age and provides an example to other states who may wish to take action. The national Meeting of the Attorneys-General in early November indicated that they would 'support developing a proposal to increase the minimum age of criminal responsibility from 10 to 12 including with regard to any carve outs, timing and discussion of implementation supports (Communique).'

### **Policy Response**

The objective of SACOSS and a number of state-based and national campaign coalitions are calling for a minimum age of at least 14 years. Keeping children out of the justice system can be effected in a number of ways:

- Amend the *Young Offenders Act 1993* by changing the age from 10-14 years.
- Until such time that the minimum age is raised to 14 years, continue to apply available safeguards, such as the provisions of *Doli incapax*. (If a child aged between 10-14 is charged with an offence, the onus is on the prosecution to prove that the child had a sufficient understanding that their actions were criminally wrong and not just disobedient or naughty.)
- Listen to the experts and the evidence. Policy-making needs to be aligned with the scientific and social research on child development, community safety, criminogenic effects, and offending, as well as the relevant international conventions and SA legislation and policies on the rights and interests of children and young people.
- Ensure that alternatives to detention are made available in the form of child-centred, trauma-informed therapeutic services, a reduction of formal cautions by police and the availability of diversionary programs that invest in community-focused solutions, such as justice reinvestment. Noting that the number of children aged 10 to 13 in detention is relatively small, it will not be difficult, too onerous or costly to institute alternative responses.
- Counter the myth, often advocated by 'tough-on-crime' proponents, that the community expects young offenders to be detained. It is unlikely that people want millions of taxpayer dollars to be spent on administering a system that facilitates a troubled youth's transition to become a career criminal.

### **SACOSS Proposal**

1. That the Government commit to passing legislation to raise the age of criminal responsibility from 10 to at least 14 years of age, without exception. This could be done through an amendment of the age from 10 to 14 in the *SA Young Offenders Act 1993*.
2. That the Government concurrently ensures that alternative diversionary programs and child-centred therapeutic supports are in place.

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<sup>6</sup> Office of the Children's Commissioner, 2012. *Nobody Made the Connection: The Prevalence of Neuro-Disability in Young People Who Offend*; Fine, C & Kennett, J. 2004. 'Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment'. *International Journal of Law & Psychiatry* 27.

<sup>7</sup> AIHW 2019. Ibid.

<sup>8</sup> The Training Centre Visitor, 2019. Ibid.