

Submission to Attorney General's Department:

Minimum Age of Criminal Responsibility – alternative diversion model

March 2024

We thank the Attorney General for the opportunity to provide a submission on this topic and we are pleased that the process has recognised the importance of obtaining the views, knowledge, and expertise of interested stakeholders and individuals.

Dr Simone Deegan
Flinders University | Centre for Social Impact

Belinda Lorek
Centre for Excellence in Therapeutic Care

The focus of this submission

The Australian Childhood Foundation and Centre for Excellence in Therapeutic Care (CETC) are dedicated to upholding the rights of children and helping them to heal from trauma. This is joint submission with the Centre for Social Impact at Flinders University. We present this submission to underscore the significant challenges that children and young people in contact with the youth justice system face, particularly those who are also involved in the out-of-home care system and those under the age of 12.

In South Australia, the current criminal age of responsibility is 10 years of age. Ten is the age that the United Nations deems as ‘unacceptable’ and well below the UN’s absolute minimum (UN, CRC 2007, para 32).

This submission addresses the question of whether the minimum age of criminal responsibility (MACR) in South Australia should be increased from 10 years old to a minimum of 12 years. This submission also addresses the proposed alternative model to respond to the behaviours of 10- and 11-year-olds that are assessed as harmful, posing risk to the child’s safety, the safety of others, or the community. An overview of the key points raised within our submission are outlined within the summary of recommendations. Our responses to the questions, and other relevant material, are set out below.

About the Australian Childhood Foundation, Centre for Excellence in Therapeutic Care

The Australian Childhood Foundation, established in 1986, has been at the forefront of advocating for and supporting children and young people across Australia. It has committed itself to preventing child abuse and mitigating its impact through dedicated trauma counselling, education, and a broad spectrum of community awareness initiatives.

In 2018, Australian Childhood Foundation established the Centre for Excellence in Therapeutic Care (CETC) with the explicit vision of ensuring children and young people living in out-of-home care who are in contact with youth justice systems are provided with specialist support that is attuned, compassionate, and responsive to their often complex and challenging needs. These needs arise from the impacts of trauma and significant disruption in their lives. The focus of the CETC is to mobilise the “right information, at the right time, in the right format” to influence and shape practice, service delivery, and policy. The CETC is the only centre of its kind in Australia. It is an autonomous, respected, credible thought leader and system enabler in the out-of-home care sector.

About the Centre for Social Impact at Flinders University, SA

The Centre for Social Impact (CSI) at Flinders University sits within the national CSI network and shares a vision and capacity with CSI UWA, CSI UNSW, and CSI Swinburne within the University of Western Australia, the University of New South Wales, and Swinburne University respectively. CSI's common vision is for a better world where people have the opportunity to achieve their goals free of discrimination and social inequality, where complex social problems are addressed, communities are diverse and thriving, and where organisations across sectors work together to grow positive social impact.

CSI Flinders is part of the College of Business, Government, and Law (CBGL) at Flinders University. The activities of CSI are integral to achieving the College mission: to embrace innovative knowledge and practice to tackle the challenges of our time, with a strategic focus on technology, health, and social impact.

Recommendations

1. The minimum age of criminal responsibility must be raised to at least 14 years, with no exception.
2. Any diversionary model must commence at 14 years.
3. Diversionary models should not contain plans that lead to mandatory treatment or a later potential prosecution.
4. An evaluation of the existing reforms in South Australia should be undertaken, to inform future planning.
5. Any diversionary model should be developed from inception with input from mental health stakeholders, child protection, trauma specialists and Aboriginal Community Controlled Organisations. This will also allow integration into the systems that wholistically protect and support the child and family.
6. Based on the connection between residential care and the pathway into youth justice, protocols must be developed to reduce the criminalisation of young people in out-of-home care and their over-representation.
7. Diversionary models need to have the capacity to address the unique needs of young people in out-of-home care and explored and designed with experts in childhood trauma.
8. The secure and safe keeping proposal (see Level 3: Mandatory action plan) needs to be separated from the current submission process, and key stakeholders engaged in a considered and timely way.

Background

International comparisons

The MACR in South Australia at 10 years of age, is out of step with much of the developed world, with the global average MACR (according to Amnesty International) at 14 years old:

- 12 years: Belgium, Canada, Israel, Netherlands, Scotland, Turkey, Mexico
- 13 years: Greece
- 14 years: France, Austria, Germany, Italy, Spain, Serbia, China
- 15 years: Denmark, Finland, Norway, Iceland, Sweden, Poland
- 16 years: Portugal, Cuba
- 18 years: Belgium, Brazil, Luxembourg, Peru, Argentina

The only European countries with the age of 10 years are Switzerland, England, and Wales.

While raising the MACR in Scotland from 8 to 12 was a significant achievement in both political and practical terms, current longitudinal data from the Edinburgh Study of Youth Transitions and Crime¹ supports a further increase in the MACR to at least age 15. Making both an ethical and empirical case for raising the MACR further, McAra and McVie (2023) remind us that “most of those who come into contact with juvenile justice for the first time are older than 12, so the criminogenic effects of system contact which our research has demonstrated, disproportionately impact on those who will not be protected by the MACR” (McAra & McVie, 2023, p. 10).

Australian state comparisons

In Australia, there are state variations on the MACR, with many currently under review. The ACT and Victoria are both in the process of lifting the age to 12, with a view to 14 years in the coming years. Drawing on interviews with legal stakeholders and youth justice professionals in Victoria, a recent study found broad-based support for increasing the minimum age to 14 (O’Brien & Fitz-Gibbon, 2017).

¹ Funded by grants from the Nuffield Foundation, The Scottish Government and the Economic and Social Research Council, the *Edinburgh Study of Youth Transitions and Crime* is a programme of research that has been running for 21 years. The study aims to “examine the causes and consequences of young people’s involvement in crime and anti-social behaviour. The core of the programme is a major longitudinal study of a single cohort of around 4,300 young people who started secondary school in the City of Edinburgh in the autumn of 1998”. (<https://www.edinstudy.law.ed.ac.uk/about-the-study/>)

The Tasmanian government has committed to raising the age of criminal responsibility to 14 years without exception, and raising the age of detention to 16 years, in line with the Commission of Inquiry recommendations.

The Northern Territory raised the age to 12 during 2023. The NT has raised the age with no exceptions or options for prosecuting 10- and 11-year-olds. Instead, families will be offered assessment and referral to services and supports that can address the social needs related to youth offending.

Human rights compliance

Australia is a signatory to the Conventions on the Rights of the Child (CRC), and through this has committed to ensuring children enjoy the rights outlined in the CRC. However, the United Nations Conventions of the Rights of the Child (UNCRC) has maintained a longstanding criticism of the low age of criminal responsibility in Australia (UNCRC, 1997: [11, 29]; UNCRC, 2005: [73]; UNCRC, 2012: [82(a)]).

The UN's Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

While the Beijing Rules and the Riyadh Guidelines, both products of the United Nations (UN) deliberations, address the minimum standards for youth justice and the maturational and developmental issues relating to children's criminal capacity (United Nations, 1985; 1990) they stopped short of stipulating a MACR. However, almost two decades later, the UN Convention on the Rights of the Child (2007) went a step further, noting that a MACR below 12 years is not acceptable, and advised member states that a minimum age of 14 to 16 years is encouraged. The UNCRC also argued that a higher minimum age of criminal responsibility of 14 or 16 years contributes "to a juvenile justice system which deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected" (UNCRC, 2007, para. 33).

The Context for the MACR and proposed model

The children and young people at the centre of this submission

Children and young people who have experienced trauma can exhibit a range of challenging trauma-related behaviours. Trauma may have caused the child or young person to live in a persistently heightened state and they are quickly triggered into a fear response. This state of being can present with aggression and behaviours that challenge, which are often responded to as criminal behaviour. Often these behaviours, if exhibited in a family home, would not involve a criminal justice response. This places children and young people in out-of-home care, particularly those in residential care, at the centre of the MACR decision.

The State of Victoria, Sentencing Advisory Council (2019) confirmed that there was a significant over-representation of children and young people in the child protection system who are also involved with the youth justice system. Of relevance to the issue of raising the MACR, the Advisory Council highlighted that the younger children are at first contact with the justice system, the more likely they are to be known to child protection services, and to have therefore experienced trauma. Children involved in both the child protection and youth justice systems are sometimes referred to as “cross-over” or “dual-involved”.

Several studies have reflected on the increased likelihood of youth justice involvement for children living in out-of-home care. Research in 2006 found children and young people in out-of-home care were four times more likely to have contact with youth justice system than those who had not lived in out-of-home care (Alltucker et al., 2006). Further study in 2011 revealed they were 15 times more likely to have been in youth detention than children who had not been in out-of-home care (Cashmore, 2011). Nationally, AIHW data² confirmed that for the 2018-19 reporting year, more than half of all young people who had been in youth justice supervision had also received child protection services in the last 5 years.

The profile of young people in out-of-home care in South Australia:

- In Australia, as of 30 June 2011, there were approximately 46,200 children and young people living in out-of-home care³
- As of 31 June 2023, 4864 children were in out-of-home care in South Australia⁴.
- As of 31 June 2023, of those 4856, 701 of those children and young people were living in residential care (just over 14%)⁵.
- In 2022, 38.6% of children in SA in out-of-home care are Aboriginal or Torres Strait Islander⁶.

In South Australia, as of 30 June 2021, 15% of children and young people in care lived in residential care, compared to the national average of 7.3% (Guardian for Children and Young People [GCYP], 2022).

² [Australia's welfare 2019: data insights, Summary - Australian Institute of Health and Welfare \(aihw.gov.au\)](https://www.aihw.gov.au/reports/australias-welfare/2019/data-insights-summary)

³ [Child protection Australia 2020–21, How many children were in out-of-home care? - Australian Institute of Health and Welfare \(aihw.gov.au\)](https://www.aihw.gov.au/reports/child-protection/2020-21/how-many-children-were-in-out-of-home-care)

⁴ Department for Child Protection. (2023). <https://www.childprotection.sa.gov.au/departments/reporting-and-statistics>

⁵ *ibid.*

⁶ Productivity Commission, Closing the Gap: <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area12/out-of-home-care>

In South Australia, detention rates for children and young people in out-of-home care account for about **one per cent of the state's overall child population** yet comprise **almost a third of those in detention**⁷.

According to the 2022 GCYP Dual Involved Project, between 1 February and 31 December 2021, 71 individual dual-involved children and young people were detained at Kurlana Tapa Youth Justice Centre, on 240 separate occasions. Of these children and young people:

- 64 lived in non-family-based care (mostly residential care placements) (90.1 per cent)
- 25 were female (35.2 per cent), 46 were male (64.8 per cent)
- 30 were Aboriginal (42.3 per cent)
- 18 were under the age of 14 years (25.4 per cent)
- 26 had a diagnosed disability (36.6 per cent).

In recognition of the relationship between child protection involvement and youth justice, the MACR and proposed diversionary model must consider the needs of children in out-of-home care, to ensure this group of young people are not disadvantaged in the proposed approach. An approach that does not consider their unique needs will only exacerbate their existing over-representation in custody, or at the very least, fail to reduce their numbers.

There is also the high rate of incarceration of Aboriginal and Torres Strait Islander children and young people we must consider. Just over half of all Australian children imprisoned on any given night are First Nations children. The tendency to over-sentence Aboriginal and Torres Strait Islander children at an earlier age further entrenches cycles of indigenous disadvantage caused by poverty, intergenerational trauma, and systemic discrimination. Multiple convictions from a young age for minor offences impacts on education, family and community structures, employment, cultural connections, and the health and wellbeing of Aboriginal and Torres Strait Islander young people. An increased MACR supports Australia's efforts to Close the Gap in outcomes between Aboriginal young people and non-Aboriginal young people across a variety of domains not limited to youth justice.

Child development and neurobiology

In South Australia, the present MACR age of 10 years, and even the proposed age of 12 years, ignores robust evidence about children's neurological, cognitive, behavioural, emotional, and moral functioning. There is a growing body of longitudinal neuroimaging research which has demonstrated that adolescence is a period of continued brain growth and change, challenging longstanding assumptions that the brain was largely finished maturing by puberty (Arain et al., 2013). The proposed diversionary model also ignores this evidence, assuming that 10- and 11-year-olds will have the

⁷ <https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2022/07/OGCYP-Final-Report-of-the-South-Australian-Dual-Involved-Project.pdf>

capacity to not only take responsibility but also engage with and achieve successful behavioural ‘change’ through a short process of intervention.

Research on neurodevelopment and cognitive neuroscience demonstrates the adolescent brain is not a fully developed and functional organ, but rather a work in progress (Morris et al., 2018). A significant body of literature links the developmental aspects of the adolescent brain (particularly in executive functioning, management of competing cognitive demands, consequence analysis, increased attraction to novel ideas and exciting experiences, impulsivity, recklessness, etc.) to offending behaviour (Deegan, 2021). A well-established phenomenon in criminology is the age-crime curve which reflects observation that criminal behaviour increases in early adolescence, peaks in late adolescence, and decreases in adulthood (Sivertsson et al., 2024). This has major implications for criminal justice policy development. Longitudinal studies of offending cohorts indicate that the process of desisting from crime, even serious crime, is linked to the process of brain development that does not reach maturity until one’s mid-20s (Halsey & Deegan, 2015).

With a particular focus on the consequences of neurodevelopmental trauma on children in out-of-home care, the evidence is clear that these challenges will be compounded.

According to The Sentencing Advisory Council (2012), adolescents have not yet developed impulse control and are focused more on the immediate rewards than future consequences of behaviour. It is also a time for peer pressure that contributes to risk-taking and being influenced by changes in their neurological development and hormone fluctuations. Children in grades four, five, and six do not have the cognitive development to be held criminally responsible for their actions. This is why in Australia we attempt to protect children from participation in driving, smoking, drinking alcohol, sexual activity, and voting, until their brain develops more fully.

The Australian Early Development Census⁸ provides evidence that the types of systemic disadvantage faced by some Aboriginal children can have a profound impact on the development their brain, and they are more likely to be developmentally vulnerable than their peers. NATSILS⁹ (2020) contend that this can have implications for the ability of a child to manage stress, learn, manage their behaviour, and can lead to adverse mental and physical health impacts that may bring the child to the attention of police and law enforcement. This is clearly evidenced by the over-representation of Aboriginal children and young people in custody, and the significant number who are dually involved in South Australia (GCYP, 2022).

A study undertaken by Bower et al. (2018) found that of 99 children in detention in Western Australia, 89% had at least one severe neurodevelopmental impairment. These included Fetal Alcohol Spectrum Disorder, Intellectual Disability, ADHD, trauma, attachment depression, anxiety, learning difficulties, and speech and language disorders.

⁸ [Australian Early Development Census - Department of Education, Australian Government](#)

⁹ [NATSILS | National Aboriginal and Torres Strait Islander Legal Services](#)

The Disability Royal Commission recently concluded that “children with disability in youth detention have complex needs and are likely to have experienced multiple traumas. They are exposed to an increased risk of violence, abuse, neglect, and exploitation while in detention. Placing children with disability in detention, especially children with cognitive disability, increases the chances they will become enmeshed in the criminal justice system. The age of criminal responsibility should be raised to 14, in line with international accepted standards, to avoid this.” (Disability Royal Commission, 2023, p. 123).

Criminogenic effect of the MACR

Interactions with the criminal justice system are known to have criminogenic effects on children and young people. Contact with the criminal justice system has a hugely detrimental and destructive impact on children and young people (McAra & McVie, 2005). This involvement can stigmatise, label, and socially marginalise young people who often find it more difficult to re-enter life with their peers (Deakin et al., 2020). Contact with the criminal justice system at an early age can actually reduce the likelihood that a young person will desist, making future criminal transgressions more likely (McAra & McVie, 2005). The Victorian Sentencing Advisory Council (2019) found that the younger children are when they receive their first sentence, the more likely they are to reoffend overall, and the more likely they are to receive a sentence for violent offending before the age of 22.

Drawing on interviews with youth justice professionals, a recent study concluded that it is in children's best interest that the minimum age be increased to 14, despite the political pressures of the current punitive climate related to youth justice (O'Brien & Fitz-Gibbon, 2017, p. 138). By increasing the age to 14 years, those who are most vulnerable will be diverted from a system that is inadequate to address their needs and has consistently been found to both stigmatise and criminalise children (p. 139).

Therefore, the SA proposed diversionary model to hold a young person in a ‘place of safety’ that can include a ‘police facility’ raises serious questions about the model’s success in reducing the likelihood of further contact with police in the future. In fact, for some young people, this may in fact promote contact with a police facility that in the current arrangement, would not have occurred.

Correctional involvement is recognised as a life outcome that often has significant long-term detrimental consequences for individuals. Juvenile offending is often predictive of adult offending and therefore is a significant risk factor for poorer employment, financial, and educational outcomes (Malvaso & Delfabbro, 2015, p. 3562). How our systems respond can significantly change the course of their life.

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 has been extensive research in Australia, and around the world, into the impacts of incarcerating children on future offending. Both national and international evidence demonstrates that locking children up does not keep the community safe or reduce future offending by the child. Cunneen (2017) explains how:

“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” (p. 17).

These criminogenic factors are compounded for children and young people in out-of-home care. Children in care are criminalised for their behaviour in residential care, including altercations in placement and property damage. This criminalisation constitutes systems abuse and is “evident in institutional response to children who display behaviour which may have constituted a survival strategy in their previous placements, but which is deemed unacceptable or challenging in the care setting” (Pollack et al., 2012, as cited in McFarlane, 2015, p. 91).

Social need and the MACR

Children and young people involved with the justice system face multiple layers of complex social disadvantage and are in circumstances beyond their control. As already highlighted, many have had contact with child protection services, experiences of family violence, have mental health issues, or experience cognitive difficulties. There is a proven link between socioeconomic disadvantage and youth criminality. Goldson (2009) argues that “the corollaries between child poverty, social and economic inequality, youth crime and processes of criminalisation are undeniable” (p. 515).

The Australian Institute of Health and Welfare (2016) found that 10- to 17-year-olds with the lowest socioeconomic status were six times more likely to be under youth justice supervision than those with the highest socioeconomic status. Behaviour that is often recognised or responded to in a criminal context can be linked with social or environmental factors outside of their control, such as family violence, neglect, socioeconomic disadvantage, racism, or stigma.

One of the most significant reasons to raise the MACR is that children and young people who come into contact with the youth justice system are less likely to complete their school education, undertake further education or training, or gain employment (Kirk & Sampson, 2013). Education is a protective factor in the lives of young people. The dangers of youth detention are even more profound, with up to 43% failing to return to school after release (Holman & Ziedenberg, 2006). Any diversionary response must address the complex interaction of social support systems that have likely already failed the family and young person. Supports must be individualised and flexible, to build on what works, and to build trust with services to address their social and emotional wellbeing, connection with community, family and culture, and safety. This is paramount for children in out-of-home care who fare poorer in terms of educational outcomes. Investing in support for young people through

community and family-based early intervention will create better outcomes for children and young people at risk of contact with the justice system.

The concept of justice reinvestment “appears to be a straightforward approach to dealing with ... fundamentally problematic social issues” (Willis & Kapira, 2018, p. 4). In Australia, justice reinvestment focuses on the idea of data-informed, place-based strategies that aim to reduce imprisonment, and on directing funds towards those groups and communities that are most over-represented in the criminal justice system, specifically Aboriginal and Torres Strait Islander people (Willis & Kapira, 2018).

Submission on the MACR and proposed diversionary model

The MACR and commencement of any diversionary model

The MACR in South Australia must be raised to at least 14 years, without exception. Any formal diversionary model that includes a plan that is mandatory and has the potential to result in prosecution defeats the purpose of a diversionary model.

The proposed model will be confusing for families and young people. The lines between admitting behaviours for a voluntary first response, which can later translate into a process that is not voluntary and has risks of prosecution, seem incongruent with the intention of early intervention, engagement, and support.

Young people will inevitably have more than one process running at a time. Some processes will be voluntary, others mandatory, and others for prosecution. This diversion has the potential to overwhelm the young person and increase the risk of non-compliance and breaches. These outcomes will be similar to those of the current youth justice model that incorporates multiple remands, breaches of bail, and sentences running concurrently.

Encouraging a young person to comply with these agreements will place undue pressure on residential care workers, families, and carers to enforce behaviours and compliance. Many of these carers are already under extraordinary pressures in their caring role.

The diversionary model design and interaction with existing systems and programs

It is not yet clear how the proposed diversionary model interacts with, or supports, the current roll-out of the Youth Aboriginal Community Court Adelaide (YACCA), the Children’s Diversion Program, or the Youth Treatment Order Act. These new models are not yet evaluated.

Any diversionary model for young people aged above 14 years must be designed to complement existing programs that work, and must interact successfully with relevant systems, for example, The Department for Child Protection and Aboriginal Community Controlled Organisations. The model

design process must also invite development and ownership by Aboriginal Controlled Organisations and the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia.

Any diversionary model must take into account the children and young people for whom it is designed. The adoption of models and interventions that are not evidenced based risk wasting resources, unnecessary bureaucracy, and can foster untrust with the families and young people they are designed to help (Halsey & Deegan, 2015). The model must be resourced to address the complexity of child development, neurobiology, and the complex social issues of disadvantage and intergenerational trauma.

Implications of the proposed model for children in out-of-home care

The current model will unfairly impact on children in out-of-home care who present with serious trauma and related complex behavioural challenges, on account of their trauma-filled lives. They are often subject to complex and careful case management by extensive teams of professionals, who are often unable to consistently and reliably address behaviours of concern. Due to this complexity of needs, children's compliance with voluntary action plans is likely to prove difficult, increasing the likelihood of mandatory action plans, and ultimately, prosecution.

Young people in residential care are dependent on the staffing available to support them. Residential care houses have limited staffing and ongoing pressures with constant supervision and children's appointments. It is foreseeable that this proposed model will continue to disproportionately increase the number of children in out-of-home care being admitted to custody at an early age. This undermines the intention of the MACR, with evidence demonstrating that "minimal intervention during the early teenage years is likely to support the natural process of desistance from offending, whereas formal system contact acts to precipitate, rather than diminish, the development of criminal careers" (McAra & McVie, 2023, p. 10).

Implications of the proposed model for children living with disability

Any model for those over 14 years of age must consider the needs of children living with disability. Rather than adopting a fixed three-tier model, the individual needs and circumstances of children must be determined at the outset, to make sure what is put in place fits with their development, funding and plans, as well as strengths. As part of the Kurlana Tapa Youth Justice Screening Project, The Department of Human Services (2020) gives the following overview of some resident demographics in South Australia:

- 100% have impaired visual motor skills (over 50% in the "severe" range);
- 90% have below-average intellectual functioning;
- 90% are at risk for language disorder;
- 80% have deficits in attention and working memory;
- 80% have significant difficulties controlling impulses;
- 80% have deficits in executive functioning;
- 61% have a moderate to severe conduct disorder;
- 56% have significant alcohol and other drug problems;

- 41% have problems with anger and violence;
- 36% have Post Traumatic Stress Disorder;
- 33% have sensory processing challenges;
- 21% have Generalised Anxiety Disorder;
- 18% have previously attempted suicide; and
- 5% have an eating disorder.

The Disability Royal Commission found that the over-representation of First Nations people with cognitive disability in custody, particularly in youth detention, is a largely hidden national crisis (Disability Royal Commission, 2023, p. 123). The Commission also recognised that the MACR must be raised to 14 years, in recognition of the role of disability in offending.

Consideration of doli incapax

Doli incapax has been viewed as a safeguard to avoid a young person bearing full criminal responsibility. However, it has been found to be applied inconsistently and incompletely.

Concerns have been raised about incomplete and inconsistent application of the doli incapax safeguard by scholars and legal stakeholders, to the effect that it is not engaged for all children in a manner consistent with the intention (O'Brien & Fitz-Gibbon, 2017).

The Human Rights Commission (2020) noted the UN's caution against 'systems such as doli incapax that set a low MACR, but have a higher age below which sufficient maturity must be demonstrated' (p.15). It points out that: depriving a child or young person of their liberty is detrimental to adolescent development, dislocates young people from any protective factors they may have, and must only be an option of last resort.

The Australian Law Reform Commission (2010) also states that doli incapax is 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 of innocence, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, doli incapax may further criminalise children rather than protect them (p. 8).

On this basis, we again reiterate that the age must be 14 years, with no exception.

Problematic proposed 'places of safety'

The proposal to set up a network of 'places of safety' for children younger than the MACR raises significant questions about human rights. This submission rejects this proposal, as it would not serve the best interest of children.

The legislative powers that are proposed to hold a child are not clear. The proposed model similarly lacks clarity about the criteria for 'places of safety', with no examples of proposed services or locations. The inclusion of police facilities, even as a 'last resort', is at odds with attempts to divert young people away from criminalising and stigmatising environments. The upshot, for young people who live in out-

of-home care, is that they could be detained if a residential care house refuses to have them back following behaviours of concern.

If the child has not committed a crime or been charged, there also needs to be clarity about their right to legal advice. This proposal is essentially promoting a de-facto arrest of a ten-year-old child and has serious implications, not only for children in out-of-home care, but also Aboriginal young people in rural and remote communities. It has the potential to deprive vulnerable children of their liberty. Any justice initiative should aim to divert young people away from the criminal justice system, not towards it (Malvaso et al., 2022).

Proposed police powers to interview children

We reject proposed police powers to interview children younger than the MACR, as per our position on raising the age to 14 years with no exception. This proposal raises questions about children's human rights, including their right to legal advice.

Proposed three-tier action plans

We support early intervention approaches that include referral and support for young people over the age of criminal responsibility. This can be achieved through a comprehensive case management approach, with a plan developed together with the child, young person, family, and community that takes into account their individual needs and circumstances. There should be no consequence for not engaging, with a focus on building trust and relationships with trauma-informed service providers.

We note that the proposed 'mandatory' plans in the divisionary model are 'for children who have serious and complex needs'. Unfortunately, this nearly all the children and young people in the out-of-home care system, but also many who are at risk of contact with the justice system. This means most children who are currently in contact with the justice system would end up on multiple mandatory plans. Young people in care will be disadvantaged by this proposed age and diversion approach.

We advocate the avoidance of any legal or semi-legal environment, or formal setting that can foster distrust and fear, particularly for young people who have had experiences of trauma or removal by government organisations. Trauma work and interventions around childhood experiences can only occur when a young person feels safe to work through these issues (Malvaso et al., 2022).

The term 'mediated' may not reflect the intended proposed process. Mediation is a process that is undertaken by two parties of equal power to resolve a conflict (Gaffney, 2022). We would support a restorative process with a focus on relationships, connection, and repairing harm. It is important that restorative processes are led by professionals with skills in trauma-informed interventions, child development, family preservation, and disability. For Aboriginal young people, restorative processes may be led by a 'safe' organisation that is recognised in community.

Mandatory engagement or treatment is not a good predictor of length of engagement with treatment and positive treatment outcomes (Rittner & Dozier, 2000). Australian research concluded that mandated drug treatment is ineffective for most young people (Pritchard et al., 2007). South Australian

Network of Drug and Alcohol Services (2021) also concluded that mandatory treatment is expensive, stigmatising, and often counterproductive. We therefore question the capacity of brief and mandatory intervention plans to comprehensively and meaningfully address the serious social and complex trauma-related needs of young people.

Secure and safe keeping orders

The proposed diversionary model introduces the concept of 'safe keeping', which has been raised in this state previously. Our submission will not address this proposal and rejects the concept of safe keeping orders in South Australia. The safe keeping decision is lengthy, complex, and beyond the scope of this submission process. It requires a separate process that allows examination of any proposed legislation and careful consideration of human rights.

We reject the idea of safe keeping at the existing youth custodial facility in South Australia. Due to the centre's identity, history, location, model, staffing structures, and environment, this centre is viewed by young people as a place for criminal remand and sentence. This is wholly inappropriate and defies an early intervention approach.

Conclusion

Raising the age to 12 years ignores robust evidence about children's neurological, cognitive, behavioural, emotional, and moral functioning. The age must be raised to, at the very minimum, 14 years, to align with other developed countries and contemporary research.

Youth justice policy development is complex. Policy work must be informed by evidence-based practice about what works. Any proposed diversionary model based on the result of evidence-based practice and evaluated services drawn from a similar jurisdiction is the best approach to addressing this complex social issue.

A basic, reactive three-tiered diversionary model cannot begin to address the roots of young offending that is grown from trauma, adverse childhood experiences, family breakdown, poverty, early development, and intergenerational incarceration. Any diversionary model will need to be systemically adopted and implemented across government departments and include building the capacity of the not-for-profit and non-government field, to engage with families and young people where trust with services has diminished. This is particularly important for young people living with disability and Aboriginal young people.

Children and young people in residential care are our most vulnerable and at-risk cohort, who are overrepresented in youth justice. The SA policy response must adopt a unique and trauma-informed approach that prepares and responds both proactively and reactively to their trauma and safety needs. There is much emerging research about reducing the criminalisation of young people in residential out-of-home care that can provide this specific guidance.

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