



17<sup>th</sup> October 2018

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cc: Hon Corey Wingard MP

Dear Mr Odenwalder

**Criminal Law Consolidation (Throwing Objects at Vehicles) Amendment Bill 2018**

As South Australia's Commissioner for Children and Young People my mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (the Act) is to advocate for the rights, interests and wellbeing of all South Australian children and young people. It is also my role to ensure that the State at all levels satisfies its international obligations under the United Nations Convention on the Rights of the Child (UNCRC). Under the Act each State authority must, in carrying out its functions or exercising its powers, protect, respect and seek to give effect to the rights set out in the UNCRC.

I am writing to you regarding the *Criminal Law Consolidation (Throwing Objects at Vehicles) Amendment Bill 2018* (the Bill) which you introduced to Parliament in June which seeks to double the maximum penalty. I have attached some detailed feedback regarding this Bill.

Whilst I acknowledge the seriousness of this crime; I am concerned that the proposed Bill will have a detrimental and disproportionate impact on the rights and wellbeing of children and young people in South Australia.

As you noted in Parliament on 20 June 2018, "six people, sadly mostly very young people, have either been arrested or reported so far this year."<sup>1</sup> In regards to recent events on the Southern Expressway a link between this crime and young people has also been reported by both the Police Commissioner and the Assistant Police Commissioner. In relation to this crime a number of media reports identified children as young as 9 years old as perpetrators. The amendment consequently has implications on a number of rights which are afforded to children and young people under the UNCRC.

It is possible under this Bill, for example, for a 10 year old child to be sentenced for as long as they have lived for a single offence. This is despite numerous studies and literature conducted in Australia and internationally consistently finding no evidence that increased penalties provide any deterrent effect for young offenders. Rather they have shown that they have a significant negative impact on the long term prospects of child offenders, including future opportunities for employment and an increased likelihood of recidivism.

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<sup>1</sup> South Australia, *Parliamentary Debates*, House of Assembly, 6 June 2018, 1154 (Mr Lee Odenwalder, Shadow Minister for Police)

Under the UNCRC, States must only use detention or imprisonment as a measure of last resort for the shortest appropriate period of time (Article 37) and in respect of criminal law promote the child's reintegration into society where they can play a constructive role (Article 40). The State also has a number of additional responsibilities with regards to the development of the child and their protection, education and integration.

The proposed amendment sends a clear message that the government believes that children and young people are incapable of rehabilitation and that this matter is beyond the community's capacity to address children's behaviour.

I hope that you will consider the following feedback in detail so we are able to ensure the best possible outcomes for our State's children and young people. If you have any questions or would like to discuss this in more detail please do not hesitate to contact me.

Yours sincerely,



**Helen Connolly**

Commissioner for Children and Young People



# Feedback on *Criminal Law Consolidation (Throwing Objects at Vehicles) Amendment Bill 2018*

From Commissioner Helen Connolly, Commissioner for Children and Young People South Australia

17<sup>th</sup> October 2018

I would also like to express my support of the submission made by the South Australian Guardian for Children and Young People on this Bill.

## **This amendment does not address the underlying causes of this problem**

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Under the UNCRC children have a right to live a full life and to develop healthily (Article 6); a right to a standard of living good enough to meet their needs (Article 27) and a right to be protected from activities that could harm their development (Article 36).

It has been widely reported in the media and discussed in parliament that those responsible for recent incidents of rock throwing are predominantly children.<sup>2</sup> The proposed amendment will consequently apply directly to this small group. The South Australian Police Commissioner noted earlier this year that there were children known to police who were out “at night, unsupervised”; questioning “what’s happening with these children?” Media reports have placed the ages of the suspected children as young as 9 and 12 years old.<sup>3</sup>

The Police Commissioner’s statement and recent media reports highlight that the behaviour that this amendment seeks to address is a symptom of a wider problem. This is reflected by the fact that these children and young people are out of the home environment in dangerous circumstances. When there are children and young people left to participate in an activity like this, it is clear we are failing to ensure they have a safe and caring environment to support their development. The cause rather than the behaviour should as such be a priority of the government.

## **The amendment is based on a presumption of deterrence and ignores the voices of Children and Young People**

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The UNCRC states that children and young people have a right to say what they think and to be heard on matters affecting them (Articles 12) with a right to share and receive information (Article 13).

This amendment is based on the presumption that an increased penalty will have a deterrent effect on the children and young people that are suspected of criminal activity. Despite this, there is a significant body of academic literature that underscores that increased penalties, such as those proposed, do not have any meaningful deterrent effect on children and young people.<sup>4</sup> This is backed up by Australian research on deterrence which has also shown that increases in severity of penalties do not correspond to an increase in any deterrent in the general population, let alone in

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<sup>2</sup> Lim, Josephine and Mott, Mitch. ‘Police launch operation targeting rock throwers on Southern Expressway after boys arrested at Seaton’, The Advertiser, June 7 2018.

<sup>3</sup> Higgins, Alice. ‘Nine-year-old among rock-throwers on major road’, Nine News, June 7 2018.

<sup>4</sup> For example: McGrath, Andrew; Vignaendra, Sumitra and Weaterburn, Don. ‘The specific deterrent effect of custodial penalties on juvenile re-offending’, NSW Bureau of Crime Statistics and Research, *Contemporary Issues in Crime and Justice*, No. 132 (2009), p.6.

children and young people.<sup>5</sup> Neurobiology research also supports this, showing that adolescent decision making is variable and influenced by a range of factors that can severely diminish regulatory control over risky behaviour.<sup>6</sup>

Rather than seeking to punish children and young people, we should be consulting with the cohort most at risk of engaging in this behaviour to understand what is causing it and what can be done to prevent it. In this case, the cohort is small so we have the opportunity to provide support mechanisms that would prevent them from participating in this behaviour in the first place. Failing to consult with them risks finding a cost effective long term solution, and may further marginalise this cohort in our community.

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**This amendment will impact on the development and wellbeing of Children and Young People especially the most vulnerable**

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Under the UNCRC children and young people have a right to receive and share information (Article 13) and a right to be protected from any activity that could harm their development (Article 36).

The proposed amendment will apply to children and young people in some of South Australia's most disadvantaged communities. Academic studies have held that offending behaviour is rooted in the culture and the environment of young offenders.<sup>7</sup> The Bill will consequently impact on a cohort that is already significantly vulnerable. Potential detention sentences are likely to further separate this group from our society rather than to facilitate their active engagement. Those that are already disadvantaged are likely to be more adversely affected, particularly in relation to the impact on their future prospects. Rather we should be communicating and engaging better with these young people to ensure they are adequately protected from circumstances likely to cause this behaviour.

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**The age of Criminal responsibility is too low**

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The UNCRC outlines that state parties must only use detention or imprisonment as a measure of last resort and for the shortest appropriate period of time (Article 37).

The proposed amendment seeks to increase the maximum imprisonment from 5 years to 10 years. This is in contradiction to the principle conveyed in Article 37 of the UNCRC and may further serve to increase the duration of sentences overall. For children and young people this will be especially impactful and may result in an increased rate of incarceration and a cohort that becomes institutionalised.

The age of criminal responsibility is currently too low at only 10 years of age. Whilst the principle of *doli incapax* allows a presumption that a child aged 10 to 14 years is not criminally responsible, this presumption can be rebutted on evidence that the child knew the act was seriously wrong. The principle consequently affords little protection to accused offenders below 14 years old and should not be used to justify such a low age.

The Royal Commission into the Protection and Detention of Children in the Northern Territory recommended the age of criminal responsibility be raised to 12 years, with no detention sentences

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<sup>5</sup> Ritchie, Donald. 'Does Imprisonment Deter? A Review of the Evidence'. Sentencing Advisory Council, *Sentencing Matters*, April 2011.

<sup>6</sup> Judge Andrew Becroft, Principal Youth Court Judge of New Zealand, 'From Little Things, Big Things Grow - Emerging Youth Justice Themes in the South Pacific', Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending, 2013, p 5.

<sup>7</sup> Casey, S., Day, A., Ward, T., & Vess, J. (2012). *Foundations of Offender Rehabilitation*. Oxford: Routledge Publishing.

for those under the age of 14 except in cases of utmost criminal seriousness.<sup>8</sup> Raising the age would also be reflective of international standards, with the median international age of criminal responsibility at 14 years old.<sup>9</sup>

Recent neurobiology research over the last decade has also highlighted the need to reconsider the age of criminal culpability and this has been echoed in relation to youth justice in other Australian jurisdictions.<sup>10</sup> Raising the age of criminal responsibility would ensure that we are not depriving children and young people of crucial years of their lives and opportunities for their life and a fuller contribution to society.

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<sup>8</sup> Royal Commission into the Protection and Detention of children in the Northern Territory report, p. 28.

<sup>9</sup> Australian Human Rights Commission, National Children's Commissioner, *'Children's Rights Report 2016'*, 187.

<sup>10</sup> Judge Peter Johnstone, President of the children's court of NSW, *'Early intervention, diversion and rehabilitation from the perspective of the children's court of NSW'*, 6<sup>th</sup> Annual Juvenile Justice Summit, 2017 at 67 summarises as follows: "In simple terms, according to neurobiology, a young person is unable to make any rational choice, let alone a rational choice to commit a criminal act."

