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The Hon Brian Martin AO QC

Via email: [sentencingreductionsreview@sa.gov.au](mailto:sentencingreductionsreview@sa.gov.au)

To the Honourable Mr Martin,

### **Sentencing Discount Scheme Review**

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), including statutory authorities.

I am writing to you regarding the *Sentencing Discount Scheme Review*. The sentencing discount scheme currently applies to young offenders by virtue of the powers conferred to the Crown under the *Young Offenders Act 1993*. The scheme currently affords children and young people accused of a crime a discount for an early plea as well as the other discounts provided for under the *Sentencing Act 2017*. The exact operation of the sentencing discount scheme in practice for children is unclear. I am consequently concerned that whilst parts of the scheme give an important incentive for cooperation for adults, it is not appropriate for children and young people and breaches Article 40 of the UNCRC.

Therefore, I think this is an opportune time to reconsider sentencing laws in respect to children and young people and ensure that the courts use diversionary measures consistent to the UNCRC instead of "discount schemes" or anything similar. Any review of sentencing practices for children and young people should consider their unique developmental level. Children and young people face issues of competency, not only in their actions but also in the processes that they may become part of. They are a particularly vulnerable cohort and may be influenced by others, fear and a lack of understanding more so than other offenders. Therefore, they require a specific approach that should be unique to them facilitating their participation and rehabilitation, without soliciting their involvement in any confessional process that they may not be able to fully comprehend.

I have included some feedback on these areas which are particularly relevant to the protection of children's rights and those that have been reiterated by the inclusive empathetic understanding that children and young people have voiced and consistently requested of decision makers.

I hope that you will consider the following feedback in detail so we are able to ensure the best possible outcomes for our community and 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 Sentencing Discount Scheme Review*

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## **Children should be tried and sentenced as children**

Under the UNCRC children and young people are afforded specific rights, including children's interests being a primary consideration (Article 3)<sup>1</sup> and a right to have their voices recognised and heard at all stages, facilitating their engagement with the process in a way they are able to understand (Articles 12 and 13).

Further those deprived of liberty and those involved in the criminal law process, must be dealt with in a manner which takes into account their specific needs (Article 37) and not result in de-facto discrimination (Article 2).<sup>2</sup> Children accused of or having infringed the law must also be treated in a manner consistent with the promotion of their sense of dignity and worth (Article 40).<sup>3</sup>

In light of this, sentencing laws and any relevant discounts should be separate for children and young people, allowing them to be tried and sentenced as children. This is consistent with the recommendations made under the UNCRC Committee on the Rights of the Child, General Comment No. 10. Children have needs and rights that are distinct from those of adult offenders and as such it is inappropriate, in respect of the rights that are afforded to children, that current sentencing laws do not distinguish them. Their engagement in the whole judicial process should be different to that of accused adults, as such when the court is deliberating sentencing and any "discounts" that may be awarded this must be done in a manner that is consistent with their rights and previous engagement.

Discounts that the court may include should be consistent with children's rights and reflective of their capacity to understand and engage. There is a significant body of research that shows children and young people are at a different developmental stage to that of adult offenders. Just because a child has reached the legal age of criminal responsibility does not mean that they have the capacity to understand the process, or the ability to fully engage opportunities like an adult offender. Discounts should as such be different for children and young people who are unlikely to be able to think with the same foresight or experience as adults.

The need to distinguish children in sentencing laws is also supported by a flexible approach to sentencing that takes into as many as possible considerations to promote the wellbeing and best interest of the child and allow them to integrate back into society.<sup>4</sup>

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<sup>1</sup> UNCRC Committee on the Rights of the Child, General Comment No. 10 'Children's rights in juvenile justice', 2007, para 10.

<sup>2</sup> UNCRC Committee on the Rights of the Child, General Comment No. 10 'Children's rights in juvenile justice', 2007, paras. 6-9.

<sup>3</sup> UNCRC Committee on the Rights of the Child, General Comment No. 10 'Children's rights in juvenile justice', 2007, paras 13-14.

<sup>4</sup> UNCRC Committee on the Rights of the Child, General Comment No. 10 'Children's rights in juvenile justice', 2007, para. 71.

### **Children should not be compelled to confess guilt**

Article 40 of the UNCRC expressly states that children should “not be compelled to give testimony or to confess guilt”. The act of compelling is interpreted in a broad meaning and the age of the child developmentally, a lack of understanding, fear of unknown consequences or suggested possibility of imprisonment or a promise of rewards may be considered compelling actions.<sup>5</sup>

Sentencing discounts should operate separately for children and young people and at best should not be used. Instead, courts should be adopting diversionary practices.<sup>6</sup> There should be safeguards in place that prevent their potential use in compelling children and young people to confess guilt. In their current form, sentencing discounts may be used to encourage and compel a confession of guilt, when children and young people do not always understand the consequences of their actions if they plead guilty.

### **Juvenile justice should be rehabilitative not punitive**

Under article 40 of the UNCRC children must be treated in a manner that promotes their reintegration into society and assumption of a constructive role in it. The wellbeing and best interest of the child, as well as the promotion of their reintegration should be paramount<sup>7</sup> with proceedings conducive to this.<sup>8</sup>

The judicial system and sentencing laws, including discounts, for children and young people should not come from a punitive background and should give priority to rehabilitation and reintegration at every possible opportunity. If “sentencing discounts” must be used for children and young people they could for example be specifically constructed to expedite the reintegration of young offenders back into society and not be tied to early guilty pleas. In this way sentencing discounts could apply in a broader sense that allows for great flexibility that is reflective of the different capacity level of children and young people.

### **The age of criminal responsibility is too low**

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). Neurobiology research over the last decade has 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>9</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 a fuller contribution to society and would ensure that the application of sentencing laws remains relevant to reintegration.

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<sup>5</sup> UNCRC Committee on the Rights of the Child, General Comment No. 10 ‘Children’s rights in juvenile justice’, 2007, para. 57.

<sup>6</sup> UNCRC Committee on the Rights of the Child, General Comment No. 10 ‘Children’s rights in juvenile justice’, 2007, Part E.

<sup>7</sup> Ibid.

<sup>8</sup> United Nations General Assembly Resolution 40/33, ‘United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)', November 1985, r. 14.2.

<sup>9</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.”

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, its rebuttable nature on evidence to the contrary affords little protection. This is specifically relevant in regards to sentencing laws. Whilst a child may have been shown to have met the threshold for criminal responsibility they may not be capable of fully understanding the consequences of their decisions during the judicial process. This may place the child in a situation where they are unable to make use of opportunities to enhance their future prospects for reintegration and may contribute to a continued acceptance of punitive measures for young offenders.