# Submission on the proposed alternative diversion model for children under the raised age of criminal responsibility

March 2024

Commissioner for Children & Young People

251 Morphett Street, Adelaide, SA 5000

08 8226 3355 | commissionercyp@sa.gov.au

**Introduction**

Thank you for the invitation to provide feedback on the discussion paper proposing an alternative diversion model for children under the raised age of criminal responsibility. Preventing and protecting children from entering the justice system through a diversionary model is a step in the right direction and it is commendable that the government is looking for alternatives.

As a systemic advocate that promotes and advocates for the rights, interests and wellbeing of all children and young people living in South Australia, I have a duty to support systemic change which will improve outcomes for all children and young people in this state.

As the discussion paper and subsequent questions to the Department have confirmed, there is a lack of detail as to how the proposed alternative system of diversion would be implemented on a day-to-day basis. It is therefore difficult to provide detailed responses to the questions posed by the Department.

At face value, I have concerns that the model appears to inadvertently diminish the rights South Australian children currently have in relation to the criminal justice system and opens up the possibility of a range of negative unintended consequences.

The discussion paper has failed to demonstrate how the alternative model:

- Diverts children and young people from the criminal justice system and reduces the criminalisation of children, particularly given the proposed expansion of police powers in the staged approach and the exceptions for serious offences.
- Creates more positive development outcomes for children, families, and the community.
- Is child focussed or how proactive therapeutic wrap-around supports for children and young people are at the core of the proposed diversional system.
- Complies with the United Nations Committee on the Rights of the Child and international best practice for a MACR of a minimum of 14 years.

Given these significant deficits, it seems most appropriate to recommend that the state take a more conservative approach and invest in more focussed stakeholder engagement and co-design processes. This should focus on identifying the range of system, program and service changes, as well as transition arrangements, that would need to be in place to support raising the age of criminal responsibility, first to 12 and then to 14 years, without exceptions.

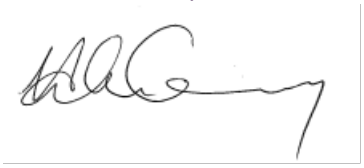
In respect to particulars, I raise the following:

1. **The alternative model should be grounded in a rights-based approach that prioritises early intervention and diversion and operationalises international best practice and UNCRC obligations with respect to raising the age of criminal responsibility to age 14.**

2. **The proposed amendments to the *Young Offenders Act 1993* do not appear to go far enough to improve outcomes for children.**
3. **The extension for police powers appears to be over-reach.**
4. **The proposed 'places of safety' cannot be supported without further information and consultation.**
5. **The proposed use of SACAT is inappropriate insofar as it will not be able to offer support and resources required to uphold children's rights.**

I am open to discussing any of these matters with you further, and I hope that this feedback, along with my previous submission, are considered in the improvement of the current model.

Yours sincerely,



**Helen Connolly**
Commissioner for Children and Young People
Adelaide, South Australia

**The alternative model should be grounded in a rights-based approach that prioritises early intervention and diversion and operationalises international best practice and UNCRC obligations with respect to raising the age of criminal responsibility to age 14.**

Other states, including Tasmania[1], ACT[2] and Northern Territory,[3] have committed to raising the age and have models that include rights-based principles, a public health approach and responses that are therapeutic in nature.

Whilst the discussion paper refers to early intervention pathways through community-based programs, it fails to acknowledge that early intervention programs and services for children and young people in this state are currently inadequate, especially in regional and remote areas. The paper makes no commitment to mapping where the gaps are or resourcing services to fill these gaps, including justice reinvestment programs.

Alternative diversional provisions in SA must include direct investment in local non-government therapeutic wrap around supports, including Aboriginal Community Controlled Organisations. These supports should be locally based and focussed on the child as their primary client and provide a range of individual non-legal advocacy and case management to ensure the child has a voice within the system.

Despite the discussion paper noting the complex needs and vulnerabilities of children who come into contact with the justice system and their families, this does not seem to be represented in the proposed model. The discussion paper is very focussed on children having to address their 'harmful behaviour' rather than an appreciation of the responsibility of adults and obligations of the State to respond to the reasons underlying the child's behaviour, including their socioeconomic circumstances, health, and relationships with family.

It is well known that a 'behaviour management' response is ineffective and simplistic and will not empower the child or provide support to address the impacts of trauma and disadvantage. Likewise, it is difficult to reconcile how first responses that rely on the sole presence of police officers in uniform and carrying weapons could be seen as **not** a criminal justice response. For a response to be diversional, it needs to be fundamentally different from the norm.

This different response must have its roots in prevention and early intervention to address the factors underlying children's behaviour and prevent children being exposed to the harmful effects of the justice system. The tertiary level response should also be diversionary in policy and practice. Providing a wider range of services for children and their families will also satisfy recommendations made in countless Royal Commissions and inquiries, including the Child Protection Systems Royal Commission.

**The proposed amendments to the *Young Offenders Act 1993* do not appear to go far enough to improve outcomes for children.**

It is of concern that the discussion paper focuses on amendments to the *Young Offenders Act 1993* that are largely technical in nature, including raising the age to 12 with exceptions. Amending legislation is rare, making this time a good opportunity for the

government to review the *Young Offenders Act 1993* (YOA), as well as the *Youth Justice Administration Act 2016* (YJAA) and *Youth Court Act 1993* (YCA), to reflect latest research and evidence. This means ensuring all three Acts comply with principles set out in the UN Convention on the Rights of the Child and its supporting instruments, including General Comment No. 24 on children's rights in the child justice system which 'guides States towards a holistic implementation of the child justice systems that promote and protect children's rights'. [4]

Provisions that should be reviewed include:

- The objects and statutory principles of 'care, correction and guidance' included in both the YJAA and YOA, which are outdated, not rights-based and inconsistent with current evidence. Legislative objects and principles should be amended to incorporate the CRC and the rights outlined in it other instruments, including ensuring a child's best interests is a primary consideration.
- Whether there is value to legislate for early interventions, diversionary measures to keep children away from the justice system and restorative justice for children above the minimum age of criminal responsibility.
- The extent to which current courts and youth justice facilities are child safe, therapeutic and child-focussed.
- Mapping provisions currently contained in general acts in relation to bail and remand that could be reintegrated into the abovementioned acts to ensure child rights approaches are used.

**The extension for police powers appears to be over-reach.**

It is well recognised that early interactions with the justice system is a strong predictor for future offending. Therefore, the proposal to extend police powers to interview children younger than MACR in an 'investigative capacity' as permitting the taking of 'forensic samples' is not an appropriate response.

I am unclear as to when and why these powers would be used. I also question whether these powers are in the best interest of children and am concerned that these powers may result in further harm. Although the discussion paper refers to similar powers in Scotland, it is inappropriate to 'cherry pick' this aspect of the Scottish system without a fuller understanding of the extensive independent rights protection, safeguarding mechanisms and joined-up legislative and operational service systems supporting Scottish children and young people.

Any extended powers of police should be limited to referring children to appropriate services and ensuring they have somewhere safe to go to if they are involved in any kind of behaviour that is putting themselves and/or others at risk. It is recommended that first responders are specialist officers (which could include police) who are trained to talk to children using a culturally safe, therapeutic, and restorative and trauma informed approach. Police operating alone should not be a sole 'first responder'. If they are to act as a first responder, it must be in concert with a support/youth worker who is there to support and advocate for the child in the situation.

**Places of safety cannot be supported without further information and consultation.**

Until further information is provided on how 'places of safety' will reduce the criminalisation of children and improve children's outcomes it cannot be supported. The status of these facilities, their regulation and the standards governing their operations are unclear. As such, it is difficult to endorse them on the information provided.

I am concerned that they appear to be secure care facilities, and that a range of system pressures will mean these 'places of safety' may be used as a bypass around the criminal justice rather than an alternative system, and that their use will be prioritised and used frequently. This is at odds with the introduction of a comprehensive therapeutic and preventative approach that keeps children safe at home, school, and the community without the involvement of police and child protection. Police facilities are not safe places for children and under no circumstances should they be deemed as such.

A considerable amount of work needs to be done for 'places of safety' to be included in an alternative model. For example, the following must be clearly documented:

- Who can take children to places of safety? Who makes the call that this is what is required?
- What efforts must be made to ensure they are truly last resort?
- How can parents, carers or family challenge the placement?
- What services are available to children within the place?
- Who has independent oversight of the facilities and their use and how they will not become a place of 'alternative detention'?

**The proposed use of SACAT is inappropriate insofar as it will not be able to offer support and resources required to uphold children's rights.**

The model is introducing another quasi-court to children that is neither child-focussed, child friendly or therapeutic. The proposed use of SACAT would not be able to offer support and resources required for children to have their rights upheld and needs met. I do not believe that SACAT is equipped to mediate action plans and to be considered an alternative to the justice system from the perspective of children and young people.

Although the tribunal has policies and practices in place to endeavour to make it more child friendly, from a child's perspective, the tribunal would look and feel like another court where children would not be empowered to participate in the process.

Given that the mediated action plans are voluntary, a more appropriate oversight body for the alternative diversion model would have advocacy functions and be child focussed, something more akin to the role of Family Relationship Centres in family dispute resolution and family court matters.

[1] Department for Education, Children and Young People Tasmania, *Youth Justice Blueprint 2024-2034: Keeping children and young people out of the youth justice system*, https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf.

[2] ACT Open Government. *Raising the Minimum Age of Criminal Responsibility*. Accessed at https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rattenbury/2022/raising-the-minimum-age-of-criminal-responsibility.
[3] NT Government Department of the Attorney-General and Justice. *Criminal Code Amendment (age of criminal responsibility) Bill 2022*.
[4] United Nations, Office of the High Commissioner. *General comment No. 24 (2019) children's rights in the child justice system, CRC/C/GC/24*. Accessed at https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child.