



Child and Family Focus SA
Submission
on the
Minimum Age of Criminal Responsibility – Alternative Diversion Model
Discussion Paper

April 2024

Acknowledgement

We acknowledge the traditional lands of the Kurna people and acknowledge the Kurna people as the custodians of the Adelaide region and the Greater Adelaide Plains. We pay our respects to Kurna Elders past, present and emerging.

We acknowledge the traditional custodians of land beyond Adelaide and the Adelaide Plains, and pay our respects to all Aboriginal Elders past, present and emerging.

We acknowledge and pay our respects to the cultural authority of our Aboriginal and Torres Strait Islander colleagues and are grateful for the cultural expertise that they represent.

The role of Child and Family Focus – SA

CAFFSA is the South Australian peak body and industry association for child safety and child protection, representing the needs of South Australian children, young people, families, and the non-government, not-for-profit organizations who support them.

Background to this submission

CAFFSA is lodging this submission to register concerns with the proposals outlined within the Minimum Age of Criminal Responsibility – alternative diversion model Discussion Paper.

The context for this submission

Children and young people who come into contact with the juvenile justice system have often come from disadvantaged backgrounds where they were vulnerable to abuse, neglect and other adverse childhood experiences.¹ They are also more likely to have been removed from their families and living in residential care.^{2 3} Aboriginal children and young people are disproportionately represented in both the statutory and juvenile justice system⁴ and the number of girls in detention is rising rapidly.⁵ Advances in neuroscience increasingly emphasise the need to raise the age of criminal responsibility to the age of 14 or 16 years with no exceptions and this is supported by the United Nations. In this context, CAFFSA cannot support a proposal for the minimum age of consent in South Australia to be set at 12 years, with exceptions, and a model that will result in net-widening.

CAFFSA queries why the Discussion Paper notes that the United Nations supports a minimum age of criminal responsibility of 14 years of age, without exceptions, and recognises that South Australia is non-compliant with the international standard and then fails to make recommendations accordingly.

CAFFSA has long supported the Raise the Age campaign and we included raising the age of criminal responsibility to 14 years as one of our five Policy Positions and Election Commitment Requests for the South Australian State Election 2022. In 2023, 124 medical, legal, Aboriginal and Torres Strait Islander, and social services providers, as well as peak bodies including the RACGP urged Australia's

¹ AIHW. (2022). *Australia's Children*. Catalogue No CWS 69, 356.

² Baidawi, S. & Sheehan, R. (2019). *'Crossover kids': Offending by child protection-involved youth*. Trends & issues in crime and criminal justice services. No 582, Australian Institute of Criminology.

³ AIHW. (2022) *Young people under youth justice supervision and their interaction with the child protection system 2020–21*, catalogue number CSI 29, Australian Government.

⁴ AIHW. (2023). *Youth justice in Australia 2021–22*. Catalogue number JUV 140.

⁵ AIHW. (2023). *Youth detention population in Australia 2023: Trends in sentenced and unsentenced detention*.

state, territory and federal governments through the Raise the Age campaign to increase the minimum age of criminal responsibility (MACR) from 10 years to at least 14 years.⁶

The discussion paper points out that the United Nations Committee on the Rights of the Child cites the large volume of documented evidence in the fields of child development and neuroscience that supports the United Nations call for a MACR of 14 years, without exceptions.

Yet the discussion paper recommends a MACR of 12 years, **with exceptions**. There is no adequate rationale given for why the discussion paper ignores both the direction of the UN and the documented evidence in the Standing Council of Attorneys-General Age of Criminal Responsibility Working Group Report September 2023 indicating the desirability of a MACR of 14 years.⁷

Leaving aside what we now understand about children's brain development, the above report also points out that research identifies that children in the youth justice system are more likely to experience a range of risk factors, including:

- Disability including cognitive disability or neurodevelopmental impairment
- Complex trauma
- Mental health disorders, and drug and alcohol use disorders
- Involvement with child protection services
- Socioeconomic disadvantage, with children and young people from the lowest socioeconomic areas are about ten times as likely to be under youth justice supervision as those from the highest socioeconomic areas.⁸

The report goes on to assert that children engaging with the criminal justice system may also be more likely to have experienced parental substance use, parental incarceration, homelessness or unstable accommodation, poor physical health, diminished educational attainment and social participation, and interpersonal difficulties, and neuro divergency.⁹

All of these factors can also hamper the child or young person's ability to have reached a threshold of criminal responsibility. Multiple inquiries into youth justice have occurred since 2010, highlighting key findings for future changes.¹⁰ The inquiries identify:

- Young people presenting to youth justice, and especially those in detention, are vulnerable with complex needs. These vulnerabilities are exacerbated in custody.
- Detention should be an option of last resort, with the minimum age raised, diversionary opportunities used, and alternative models implemented.
- Centres should have appropriate staffing, training, education for all children and young people being detained, and systems in place to uphold operational integrity.

As such, CAFFSA recommends:

⁶ NewsGP. [Pressure builds on governments to 'raise the age'.](#) (Accessed 1 April 2024).

⁷ Standing Council of Attorneys-General. (2023). [Age of Criminal Responsibility Working Group Report 2023](#)

⁸ Ibid, p22

⁹ Ibid, p23

¹⁰ Clancey, G., Wang, S., & Lin, B. (2020). Youth justice in Australia: Themes from recent inquiries. *Trends and Issues in Crime and Criminal Justice* [Electronic Resource], (605), 1–19. <https://search.informit.org/doi/10.3316/informit.447563988248416>

- 1) **The MACR should be raised from 10 to 14 years, in keeping with contemporary understanding of child development and international obligations.**
- 2) **There should be no exceptions to the MACR. If the purpose of the MACR is to ensure no child incapable of apprehending their criminal responsibility cannot be held criminally responsible, it does not make sense to have exceptions to this. The child does not become more able to apprehend their responsibility with the changing nature of the crime and therefore exceptions should not be included.**
- 3) **Any proposed review of the MACR should have a clear rationale and terms of reference.**

CAAFSA notes that there are additional concerns about potentially disproportional outcomes from the proposed exceptions in the discussion paper. As the exceptions focus on violent offences, it should be noted they would apply disproportionately to girls and Aboriginal children and young people. A 2019 South Australian report demonstrated a higher proportion of Aboriginal and non-Aboriginal females in had at least one conviction for a violent offense (85.6% and 72.1%, respectively) compared to Aboriginal and non-Aboriginal males (62.9% and 59.7%, respectively).¹¹ The report highlighted the social expectations for females, identifying that girls may be more likely to receive harsh penalties for violent crimes. This would mean that exceptions to the MACR would be more likely used in instances of female violence, particularly for Aboriginal children.

This disproportionate application can be seen in current detention rates. On an average night in the March quarter 2023, comparatively more females (83%) than males (77%) were in unsentenced detention. This trend was observed in each quarter throughout the 4-year period from June quarter 2019 to March quarter 2023, with 71% to 83% of females in detention being unsentenced.¹²

Australian research has demonstrated connections between child sexual abuse and offending. When analysing 2,759 cases of child sexual abuse, it was found that individuals who experienced child sexual abuse were more likely than matched individuals from the general population to be charged with criminal behaviours, including violent, sexual and other offending.¹³ There were stronger associations among women for charges related to general and violent offending, and among men for sexual offending charges.

This is also an urgent issue for Aboriginal children and young people. Developing context-specific criminal justice system policy and practice is crucial to ensure that factors associated with criminal behaviours are addressed rather than enforcing policies that further pathologize the trauma responses of children. This is especially relevant in colonized countries such as Australia where historical policies of forced assimilation and removal of Aboriginal and/or Torres Strait Islander peoples has led to the erosion of culture and tradition, the consequences of which are widely recognized to affect young people and families today. These factors are directly related to their

¹¹ Malvaso, C.G., Delfabbro, P.H., and Day, A. (2019) Adverse childhood experiences in a South Australian sample of young people in detention. *Australian & New Zealand Journal of Criminology*, Vol. 52(3) 411–431

¹² AIHW. [Youth detention population in Australia 2023, Trends in sentenced and unsentenced detention - Australian Institute of Health and Welfare \(aihw.gov.au\)](https://www.aihw.gov.au/reports/young-people/youth-detention-population-in-australia-2023-trends-in-sentenced-and-unsentenced-detention)

¹³ Mathews, B., Papalia, N., Napier, S., Malacova, E., Lawrence, D., Higgins, D.J., Thomas, H., Erskine, H., Meinck, F., Haslam, D., Scott, J., Finkelhor D., & Pacella, R. *Child maltreatment and criminal justice system involvement in Australia: Findings from a national survey*. Trends & issues in crime and criminal justice, Australian Institute of Criminology, No. 681

overrepresentation in both the juvenile justice and child protection systems.¹⁴ Further, some Aboriginal children and young people are harmed by their contact with the youth justice system. For example, Northern Territory detention facilities have been found to be unfit for the accommodation of Aboriginal children and young people, placing their health and safety at risk, verbally abusing them, and violating their human rights – with the system described as ‘intent on breaking rather than rehabilitating the children’.¹⁵

In CAFFSA’s discussion with some of our Aboriginal members, we have been urged to make the point that rather than criminalising the vulnerable, the SA Government should focus on the Closing the Gaps Targets; (1) Formal partnerships & shared decision making, (2) Building the community - controlled sector, (11) Young People are not over-represented in the Criminal justice system and (17) People have access to information & services enabling participation in informed decision making regarding their own lives.

Children and young people with disability have additional vulnerabilities that require consideration. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability¹⁶ found that children and young people in youth detention have multiple complex needs and that they are exposed to an increased risk of violence, abuse, neglect and exploitation while in detention. These young people face higher likelihoods of ‘becoming enmeshed in the criminal justice system’ as adults. These findings further intersect for Aboriginal children and young people with disability in youth detention, who have been described as a ‘hidden national crisis’.¹⁷ Based on this evidence, the Royal Commission recommends that the minimum age of criminal responsibility be raised to 14 years.

Overall, there are long standing arguments that current Western models of youth justice are iatrogenic and costly, creating longer-term harm to both children and the community through their ineffectiveness.¹⁸ Instead of further punitive models, approaches need to focus on supporting children at risk by addressing their safety, socioeconomic status, and family needs.

The Alternative Diversion Model

Whilst CAFFSA recognises that spirit in which this model has been proposed, we have concerns that the model potentially broadens the scope for a criminal justice response for children and introduces what is essentially ‘administrative detention’ without the legislative oversight of the current system. There is little information about where the ‘places of safety’ will be, and the time limit the child can be kept there is described as 24 hours ‘at this stage.’

Although the discussion paper states the model should be restorative, culturally led, trauma-informed and include professionally led diversion programs, there appears to have been no mapping of services available that responding to the complex needs of children and young people from this group in order to identify the current gaps in service. The paper gives no detail as to how children and young people would be supported and assisted, particularly given their low socio-economic

¹⁴ Malvaso, C.G., Cale, J., Whitten, T., Singh, S., Day, A., Hackett, L., Delfabbro, P.H., Ross, S. (2021). Prevalence of Adverse Childhood Experiences Among Justice-Involved Young People: A Systematic Review. *Australian & New Zealand Journal of Criminology*, Vol. 52(3) 411–431

¹⁵ Australian Commonwealth. (2017). *Royal commission and board of inquiry into the protection and detention of children in the Northern Territory: Findings and recommendations*. <https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf> (p.8)

¹⁶ Australian Commonwealth. (2023). *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report*. <https://www.royalcommission.gov.au/publications/final-report>

¹⁷ Ibid.

¹⁸ Case, S., & Haines, K. (2021). Abolishing Youth Justice Systems: Children First, Offenders Nowhere. *Youth Justice*, 21(1), 3-17. <https://doi.org/10.1177/1473225419898754>

status and the non-existence or long waiting lists for public services. Further, the paper is silent on children with a disability, who are both over-represented and have very high needs.

In terms of the cultural aspects of the program, there is no evidence that ACCOs or ACHOs have been consulted, and no recognition of the importance of resourcing Elders to participate in such a program. It is also advisable that any further planning on this model be held over until the SA Voice to Parliament is operating, given the importance of their input in this regard.

The commitment to a trauma-informed model is commended. A South Australian study published in 2019 demonstrated that exposure to Adverse Childhood Experiences (which include child abuse and neglect, as well as other traumatic or stressful life events, such as parental separation or divorce, parental incarceration, mental illness, or substance misuse) among young people in detention is common and that these experiences are highly interrelated.¹⁹ Given the level of need these children and young people will commonly present with, a mediated action plan of 12 weeks, with an option for a further 12 weeks, with no associated pathways to services that are not currently available, should arguably be revisited if it is to be truly trauma informed. Alternative models have been proposed that integrate therapeutic facilities into the community, provide safe and culturally responsive environments to support young people at risk of future offending.²⁰ These models better meet the needs of children and young people, enhance community safety, and offer therapeutic interventions to reduce recidivism.

CAFFSA recommends:

- 4) In addition to raising the MACR to 14 years of age with no exceptions, that The Alternative Diversion Model be subject to a co-design process with the Aboriginal community and practitioners and researchers with expertise across the known risk factors in this area such as trauma and disability, along with a clear and costed model of referral pathways and support provision that consider community integrated facilities.**

Thank you for the opportunity to comment on this discussion paper. CAFFSA advises it is comfortable with our submission being public facing upon receipt.

SUBMISSION ENDS.

¹⁹ Malvaso, C.G., Delfabbro, P.H., & Day, A. (2019) Adverse childhood experiences in a South Australian sample of young people in detention, *Australian & New Zealand Journal of Criminology*, Vol. 52(3) 411–431

²⁰ Oostermeijer, S., Souverein, F., Popma, A., Ross, S., Johns, D., van Domburgh, L., & Mulder, E. (2024). The case for small-scale, community-integrated, therapeutic facilities: Utility and feasibility for policy transfer to the Victorian youth justice system. *Journal of Criminology*, 57(1), 100-120.
<https://doi.org/10.1177/26338076231193503>