

The need for rights-based reform of South Australia's child justice system

**Throughout this report (except when specifically referencing SA's Youth Justice services) the term 'child justice' is used to better reflect the need for reform that takes a child rights based approach.*

Commissioner's Position

The Commissioner is calling for reforms to be made to South Australia's child justice system to align it with a child rights-based approach. Such an approach would look beyond the current focus on policing, courts, and detention. Instead, it would commit to addressing the unmet needs and underlying drivers of South Australian children's involvement with the State's child justice system. These needs and drivers include inadequate systemic responses to poverty, housing insecurity and family violence, systemic racism, discrimination against children living with disability, and underinvestment in family and mental health supports.

What is required is a commitment to reforming existing legislation, policy, and practices currently operating within South Australia's child justice system. This reform encompasses everything from policing through to court processes and procedures, placing the emphasis on prevention and early intervention to divert children

away from the child justice system, rather than risking entrenching them within it.

It also requires us to build the capacity of all systems relating to the delivery of child-centred services and supports. This includes developing processes that enable children to tell us what they need to remain, healthy, safe and connected to their family and community, thereby reducing the risk of developing behaviours that could cause them to come in to contact with the justice system in the first place.

A rights-based approach will prioritise diversionary programs and reduce harmful effects that any involvement with the child justice system might have on a child, in line with contemporary understandings of child and adolescent development.

In practice, this means ensuring detention is used as a last resort and reducing custodial sentences for children while simultaneously increasing investment in evidence-based diversion and trauma-informed community-based models of support for children and their families that are known to work.

We know that when children come into contact with the justice system their inequality and trauma is exacerbated, their education and employment prospects are compromised, and the likelihood of them becoming entrenched in the system from childhood is markedly increased.

Decades of inquiries, reports and advocacy efforts have highlighted the need for urgent evidence-based reforms

to be made to Australia's federal and state child justice and related systems, so that they focus explicitly on upholding children's rights and protecting their wellbeing overall.

Recent examples of publications presenting this view include:

- The National Children Commissioner's 2024 report, *Help way earlier! How Australia can transform child justice to improve safety and wellbeing*.¹
- Justice Reform Initiative's 2024 discussion paper on *Children, youth justice and alternatives to incarceration in Australia*.²
- Save the Children and 54 Reasons' 2023 report, *Putting children first: A rights-respecting approach to youth justice in Australia*.³
- The South Australian Training Centre Visitor's 2024 *From those who know: minimum age of criminal responsibility* submission from children and young people detained at the Adelaide Youth Training Centre,⁴ submitted alongside the Guardian for Children and Young People's submission responding to the South Australian Government's proposed alternative diversion model for children under a raised minimum age of criminal responsibility.⁵

This Policy Position builds on these as well as on my own engagement with South Australian children and young people undertaken since 2017, including those with direct experience of child justice as reported in my 2019 *Making Change in Youth Justice* report.

Children's rights and the justice system

Australia's decisionmakers and lawmakers have obligations to ensure all children can realise their rights as set out in the United Nations Convention on the Rights of the Child (UNCRC). Despite these obligations, current laws, policies and services, fail to consistently achieve this.

My annual *Child Rights Progress Reports* highlight which actions need to be prioritised if South Australia is to become compliant with international obligations that realise children's rights across seven key areas: health, justice, education, child protection, disability, physical punishment and the environment.

It is now well established that children experiencing poverty, homelessness, inadequate healthcare, racism, trauma, violence and abuse are more likely to come into contact with the child justice system. This provides clear evidence that the systems we have put in place to support children are failing to deliver on their right to adequate health, education, standards of living, non-discrimination, participation, safety and culture earlier in their lives. While it is often a 'lack of basic rights' that can drive children's initial contact with the justice system, we also know children are likely to face additional and persistent breaches of their rights after they enter the child justice system.⁶

Children in contact, or at risk of coming into contact with the child justice system, have the same rights as all other children. This includes their right to be heard, their right to non-discrimination, and their right to have their best interests made the primary consideration in all actions and decisions concerning them.

The UNCRC instruments also provide for additional protections and principles in relation to the application of child justice:

- Every child accused or convicted of a crime has the right to legal help, and to be treated with dignity and respect for their rights (Article 40), including rights to healthcare, education, privacy, culture and safety from violence and discrimination.
- Where appropriate, governments should respond to children who commit an offence without resorting to judicial proceedings (Article 40(3)(b)).
- Courts, laws and procedures should be designed specifically to meet children's needs and account for their needs and developmental capacity (Article 40).

- Children have the right to be given the opportunity to be heard in any judicial and administrative proceedings affecting them (Article 12).
- Detention should only be used as a measure of last resort and for the shortest possible period of time (Article 37).
- Every child deprived of liberty should be separated from detained or imprisoned adults and treated with humanity and in a way that considers their needs, status and special requirements (Article 37(c)).
- No child shall be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 37(a)).

There are also additional instruments that recognise the known risks of human rights breaches for children and young people who are placed in detention. These include the UN Standard Minimum Rules for the Protection of Juvenile Justice (the Beijing Rules), the UN Guidelines for the Administration of Juvenile Delinquency (the Riyadh Guidelines) and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Given children differ from adults in their physical and psychological development, children must be treated differently to adults when they come in to contact with the law.

As the United Nations Committee on the Rights of the Child (the UN Committee) highlights:

- There should be greater focus on prevention and early intervention and protecting children's rights at all stages of the justice system.
- The minimum age of criminal responsibility should be 14 years with no exceptions, in line with the latest evidence in child development and neuroscience.⁷
- Laws, policies and decisions, including in relation to bail and sentencing, should recognise lesser culpability and emphasise diversion and rehabilitation over punishment. Weight should be given to the best interests of the child and the need to promote the child's reintegration into society.

What we know about South Australia's current child justice system

The stated mission of South Australia's Youth Justice service, administered by the Department of Human Services is to contribute to community safety and to reduce re-offending. In the policy and legislation that relates to the State's child justice system, there is also some recognition of the rights of South Australian children and young people, along with the need for those operating in the child justice system to make decisions that are in children's best interests.

The *Youth Justice Administration Act 2016* (SA) requires those administering the Act to give consideration 'at all times to promoting the wellbeing and best interests' of children. The Act also establishes a Charter of Rights for Youth Detained in Detention Centres. Yet there continues to be a disconnect between the stated goals in the Act and how the system works in reality.

Despite obligations at the international, national, and state levels, the way child justice operates in South Australia tends to undermine children's rights in the following ways:

- The child justice system disproportionately criminalises Aboriginal and Torres Strait Islander children, children living with disability, children in out-of-home care, children from low socio-economic backgrounds and other vulnerable groups of children. This over-representation signifies a failure of the state and highlights systemic discrimination.
- The low minimum age of criminal responsibility at 10 years is in breach of international human rights standards and is contrary to the evidence that the complex needs of younger children are better addressed outside of the justice system. The United Nations recommends a minimum age of at least 14 years with no exceptions.
- Children who enter child justice systems early tend to have more severe trauma and disadvantage compared to children who enter later. In other words, the younger

a child is upon entering the child justice system, the higher their likelihood is of re-offending.⁸

- While South Australia has specific legislation governing child justice (the *Young Offenders Act 1993* (SA) and the *Youth Justice Administration Act 2016*), the *Bail Act 1985* (SA) and the *Sentencing Act 2017* (SA) apply equally to children and adults. In other words, there is no requirement to distinguish between or recognise the developmental differences that exist between children and adults when bail and sentencing decisions are being made.
- Diversionary practices are underutilised, and police discretion and practices can undermine diversion. Access to diversionary programs is inconsistent and inequitable, particularly for Aboriginal children who are overrepresented in the child justice system.⁹
- Children experience the court system as overwhelming, intimidating, and confusing, impacting their ability to think clearly and regulate their emotions. Children are rarely provided with genuine opportunities to comment, respond, express their views, or answer questions relevant to their situation. They often lack information about their rights and court processes, including who the key people involved in the court proceedings will be, or who will be available on the day or in the lead up to support them.
- On an average day in 2022–23, 90% of young people being held in detention were on remand, meaning most were **not** found guilty of any crime.¹⁰ Some children face extended periods of remand due to a lack of safe alternative accommodation options.
- Restrictive bail laws and practices are undermining the principles of using detention as a last resort. Bail conditions set by South Australian police and courts too often set children up to fail. Children with lived experience of this are asking for bail conditions to be more appropriate for the age and development of child offenders and to take into account their situations. They also want court orders that facilitate their access to support services and provide them with with pro-social opportunities to participate in education, sport and employment.
- There continues to be reports of children being held in police cells alongside adults, in direct contravention of Article 37 of the UNCRC.
- Children in detention experience limited access to education and rehabilitation programs, as well as significant gaps in support services. Harmful practices in detention limit children's rights and exacerbate children's trauma and physical, psychological and emotional vulnerability. This includes the misuse and overuse of restraints, with some children facing extended periods of isolation and time in cells due to staff shortages or modified routines.
- There continues to be no funding and legislation to support South Australia's full compliance with the United Nations Optional Protocol to the Convention against Torture (OPCAT) in relation to children being deprived of their liberty.
- The detention system is costly as well as harmful, with an average cost to keep a child in detention per day in 2022–23 reported to be \$3,720.¹¹ Children in detention also bear the social costs of isolation from their friends, family, school, and community.
- The high proportion of young people who are released from sentenced supervision only to return to it within 12 months, indicates the failure of the system to promote rehabilitation and address the underlying reasons for children's reoffending.¹²

Since the conclusion of South Australia's Youth Justice State Plan 2020–2023 in June 2022, there has been no public reporting or evaluation of the Plan's implementation. Nor does there appear to be a new statewide plan in development to follow on from the previous plan. While there have been some welcome efforts to increase diversion in South Australia, including through the Youth Aboriginal Community Court, there is a lack of meaningful commitment to rights-based reform and justice reinvestment approaches, including a lack of effective alternatives to placing children in detention.

In February 2024, South Australia's Attorney-General released a discussion paper on a proposed alternative

diversion model for children under the raised age of criminal responsibility. The proposed model lacked detail and did not align with international human rights standards.

The case for a rights-based approach

We know Australia's current child justice systems are costly, discriminatory, and failing to achieve their stated objectives. The Standing Council of Attorneys-General has highlighted the need for whole-of-government action across all jurisdictions. Yet nationally, approaches to evidence-based reform of child justice are inconsistent and fragmented.

Despite evidence that marginalisation and disadvantage is a causal factor of offending, there continues to be a punitive and 'tough on crime' response being pursued. This is amplified by media reporting that reinforces the misconception that youth offending is increasing in frequency and severity and demonises groups of young people.

The National Children's Commissioner has identified the following systemic barriers to reform of child justice nationally:

- systemic racism
- fragmentation and siloing of government departments
- limited workforce capacity, particularly in relation to trauma-informed care and cultural safety
- use of punitive responses as a default
- lack of political commitment to make evidence-based reforms and lack of accountability to act
- pervasive 'tough on crime' rhetoric; and
- a failure to prioritise the rights and wellbeing of children in both policy and legislation.¹³

Expert advice and recommendations continue to be reviewed rather than acted upon. In 2024, several states

and territories regressed in terms of upholding children's rights while in detention by abandoning commitments to raise the minimum age of criminal responsibility and by reintroducing the use of spit hoods. Treating children in such an inhumane way appears to fly in the face of a society whose values include ending all child abuse and neglect. This not only reflects values about the treatment of children, it is symptomatic of Australia's 'immature' legislative framework for protecting human rights.¹⁴

While there has been some welcome progress made toward strengthening South Australia's and Australia's human rights framework throughout 2024, there is currently no Human Rights Act in South Australia or federally.

Despite often being framed as being in opposition to one another, rights-based approaches are consistent with promoting community safety. As noted by the UN Committee in *General Comment No. 24 on children's rights in the child justice system*, the prevalence of children's offending behaviour 'tends to decrease after the adoption of systems in line with [human rights] principles'.¹⁵

How to get there

There are significant opportunities for the South Australian Government to reform the child justice and related systems in line with international human rights standards. These opportunities involve making changes to legislation, policy, services, and workforce development and culture.

Existing opportunities for child justice reform include:

1. **Strengthening the legislative framework to promote children's rights and best interests.**
2. **Developing a state-wide public health approach that includes prioritising prevention and early intervention.**
3. **Promoting children's right to be heard at both the individual and systemic levels.**

The key objectives of investment in reform should be to address the factors underlying offending by children. The focus needs to be placed on reducing the number of South Australian children entering the justice system. Children's rights and wellbeing should be prioritised across all systems, including education and health. Interventions should be aimed at increasing protective factors, developing pro-social attitudes and behaviours that build a sense of belonging, identity, connection and purpose for every South Australian child, with a focus on those who are known to be disadvantaged and vulnerable.

1. Strengthening the legislative framework to promote children's rights and best interests

Legislation should align with contemporary understandings of child and adolescent development. It should provide a foundation for diversion and effective early intervention, applying rights-based decision making in child-safe environments and introducing child-friendly practices that are informed by children themselves.

To this end, the South Australian Government should:

- Introduce a Human Rights Act at the state level with explicit and comprehensive protections for children's rights. This will not only improve responses to human rights violations, but will also prevent breaches occurring across all systems, including but not limited to child justice.
- Raise the minimum age of criminal responsibility from 10 to 14 years with no exceptions.
- Ensure overarching child justice legislation is underpinned by the best interests of children and explicitly recognises developmental differences between children and adults. Reviewing and amending existing legislation and policies to ensure they align with a rights-based framework includes making different bail and sentencing decisions for children.
- Strengthen existing mechanisms and establish new child friendly and child safe environments and processes that allow children to meaningfully express their views on decisions that affect them, at all stages of their contact with the justice system (see 3).
- Work with other state and territory governments as well as with the Australian Government to develop enforceable minimum child justice standards that can be agreed upon and endorsed nationally as well as at the state government level, and not just by system administrators.
- Improve the accessibility and availability of mechanisms to divert children from contact with child justice at an earlier developmental stage by:
 - Increasing and incentivising the use of existing diversionary powers available to police and courts so that children are diverted toward therapeutic, community-based supports. This includes increasing investment in restorative justice conferencing.
 - Amending legislation to ensure access to diversion is not dependent on a child admitting any wrongdoing.
 - Improving oversight of early diversion practices to ensure consistency and equity in access to diversion, particularly for Aboriginal children.
- Align legislative responses with the fundamental child rights principle of using detention as a last resort and for the shortest amount of time possible by:
 - Making it easier for bail to be granted by increasing investment in bail accommodation and housing supports, particularly for children living in regional and remote areas, Aboriginal and Torres Strait Islander children, children living with disability, and/or children living in out-of-home care.
 - Ensuring bail conditions are reasonable, proportionate, and appropriate to a child's age, situation, and development. Bail conditions should facilitate connections to family and community, enable attendance at school, sport, and work, and prioritise access to support services.
 - Providing guidance to ensure sentencing decisions reflect contemporary understandings of child development and by reducing custodial sentences.

- Introducing a statutory obligation for decision-makers to record their reasons for imposing custodial sentences.
- Where community-based sentencing is not suitable and detention is used as a **last resort**, practices and models must be transformed so that they are therapeutic, rehabilitative and trauma-informed.

This means delivering on the following:

- Ensuring children are **never** detained with adults or in adult facilities.
- Ensuring children who are detained have access to quality education services and rehabilitation programs tailored to their individual needs and which support their emotional and vocational development.
- Ensuring access to quality health and mental health assessment and care across every stage of a child's contact with child justice.
- Supporting each detained child's connection with their family, friends and community, and providing them with adequate planning and support so they can successfully transition from custody back into the community. This includes ensuring they have access to culturally safe throughcare programs that include support with housing, employment and training, access to alcohol and other drug rehabilitation programs, as well as to health and mental health services and supports.
- Prohibiting isolation and solitary confinement of any detained child and addressing the misuse and overuse of restrictive practices on detained children.
- Increasing support for the workforce and operational environment to enable staff to provide trauma-informed and responsive care to detained children.
- Children whose unique circumstances warrant being placed in secure care should be supported in homelike environments with specialist therapeutic supports.
- Providing effective and transparent oversight of detention facilities, including resourcing for full

implementation and compliance with the United Nations Optional Protocol to the Convention against Torture (OPCAT).

2. Developing a state-wide public health approach and prioritising prevention and early intervention

Adopting a public health approach that is aligned with the principles of a child-rights approach will require focus on upstream efforts to prevent children from entering the justice system in the first place. Such an approach recognises that children often come in to contact with the justice system when the service systems that should have ensured their safety and wellbeing have failed them earlier in their lives. As the Standing Council of Attorneys-General has highlighted, 'almost all of the underlying causes of negative behaviour displayed by children lie beyond the reach of the youth justice system'.¹⁶

Rather than punishing some of the most disadvantaged and vulnerable children in our community, taking a public health approach would support children in the context of their family, school and community, to ensure they connect early with the right supports provided at the right time.

Taking a public health approach would:

- Provide for a continuum of integrated, community and place-based support for children and families, with a focus on health, housing and education as protective factors.
- Reduce risk factors to address the underlying determinants of offending, such as insecure or inadequate housing, poverty, family violence, involvement with the child protection system, limited access to health, mental health and disability support, and/or limited employment and recreational opportunities.
- Involve collaboration across service systems and departments beyond the justice system, with shared targets, actions and mechanisms for accountability and reporting.

- Provide long-term stable investment in early intervention and diversion to reduce the overrepresentation of vulnerable groups of children in the justice system.

This includes:

- Ensuring dedicated support for children aged 10–13 years that includes alternative police responses, therapeutic and solution-focused court proceedings and service models that include appropriate accommodation options for children.
- Developing new and expanding existing early intervention programs, particularly those led by and for Aboriginal and Torres Strait Islander people with decision makers across the justice system recognising the importance of supporting children's continuing connections to culture, family and community.
- Promoting participation by and improvement of safeguarding mechanisms for children living with disability who come in to contact with child justice.
- Preventing the criminalisation of children in out-of-home care, including by acting on the recommendations made by South Australia's Guardian for Children and Young People and Training Centre Visitor in her final report of the South Australian Dual Involved Project.¹⁷
- Setting out minimum standards of training for professionals working across key systems and services to understand child development and to develop skills in applying child-centred, trauma-informed, and culturally safe practices in South Australia's Youth Justice System.

Many of the reforms required to improve South Australia's Youth Justice System align with the South Australian Government's existing priorities and commitments.

These include reforms to the early childhood education and care sector, improvements in mental health supports for children and young people, and efforts to address domestic, family, and sexual violence.

3. Promoting children's right to be heard at the individual and systemic level

Currently, legislation and policy do little to provide children with real opportunities to understand, influence or participate in South Australia's Youth Justice System. Too often, whether children are heard or taken seriously, relies solely on the discretion of individual police or judicial officers.

Meaningful engagement with children and young people builds trust, improves policies and services, and leads to better outcomes at both the individual and system levels. System reform must prioritise children's rights to enable them to actively participate in their court hearings without intimidation, and to have opportunities to be heard and taken seriously at all stages of their contact with the child justice system.

Children and young people with lived experience of the South Australian justice system have identified opportunities for the physical environment of court rooms and changes to interactions with police, lawyers and other adults that could be made more child-friendly and child-safe. Their insights should drive systemic reform.

At the individual level this means:

- Providing children and families with information about their rights, key processes that affect them, and who is involved in decision making. This information should be provided in a range of formats children can understand – written, verbal and/or visual – and in a timely manner at every stage, including before and during contact with police, throughout court proceedings and processes as well as when children are being held in custody, and prior to and following their transition from detention back into the community.
- Resourcing the Communication Partner scheme to support children who are required to commence child justice proceedings, and providing enough time for children to understand and prepare for their court hearings.

- Supporting all professionals working within and associated with South Australia's child justice system to respect, value and respond to children's views and experiences in a trauma-informed, child-focused way.
- Creating environments and processes that support children to have genuine opportunities to comment, respond, express their views, and answer questions relevant to their situation without fear or shame. This includes providing ways for children to communicate directly with decisionmakers in ways they are comfortable with, including outside of the currently intimidating court room settings children are required to be in.

Importantly, reforming the child justice system in South Australia means promoting children and young people's right to be heard and providing them with meaningful opportunities to have input and feedback into the areas they wish to see reformed. This includes opportunities to provide advice and insight on the design, delivery and review of policies, programs and services being devised for and aimed directly at them.

Child-rights are there to ensure adults recognise children need to be treated differently because they are still children. This means for Australia and South Australia to become compliant with international standards, our systems need to reflect our commitment to undertake child-rights based reform now. Reform of the child justice system to align with a rights based approach is the only way we can hope to divert children away from the system and benefit from the positive outcomes this will deliver for children and the broader South Australian community.

Endnotes

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