Submission

Alternative Diversion Model in SA 2024

ANTAR

Submission: Minimum Age of Criminal Responsibility – Alternative Diversion Model

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Nations Peoples. We do this primarily through campaigns, advocacy, and lobbying.

ANTAR is campaigning for the implementation of the Uluru Statement from the Heart, now focused on the establishment of a Makarrata Commission to oversee national agreement making and truth-telling as well as processes that promote the agency of First Nations Peoples. We actively support State and Territory-based voice, treaty and truth-telling processes.

We also engage in national advocacy across various policy and social justice issues affecting First Nations communities, including cultural heritage protection; justice reinvestment, over-incarceration and raising the age of criminal responsibility; child protection and statutory out-of-home-care; anti-racism campaigns, native title and land rights, and closing the life equality gap.

ANTAR is a foundational member of both the Close the Gap Campaign and Change the Record Campaign Steering Committee, and an organisational and executive committee member of Just Reinvest NSW. ANTAR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, independently funded and community-based organisation.

Introduction

Thank you for the opportunity to provide commentary and recommendations in response to the proposed alternative diversion model for children under the minimum age of criminal responsibility in South Australia as set out in the Minimum Age of Criminal Responsibility – alternative diversion model Discussion Paper.

ANTAR strongly supports raising the minimum age of criminal responsibility (MACR) in South Australia, as well as developing an alternative diversion model for children who would otherwise be exposed to criminal justice processes. In particular, ANTAR supports the design of this diversionary model being needs-based, restorative, therapeutically-focused, culturally-led and trauma-informed.

As a non-partisan advocacy organisation working for justice, rights and respect for First Nations Peoples, ANTAR is particularly concerned about the overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system (CJS) in South Australia as well as the gaps in their access to culturally safe diversionary programs. First Nations children are disproportionately impacted by the low age of criminal responsibility as they are more likely than non-Indigenous children to have contact with the youth justice system at an early age, less likely than non-Indigenous children to receive a caution from police, and more likely to be charged with a criminal offence.[1] First Nations children are also less likely to receive the benefit of diversionary measures than their non-Indigenous peers.[2]

[1] Policy Brief: Raising the Age of Criminal Responsibility, *Victorian Aboriginal Legal Service* (2022): 3.
[2] Papalia, N., Shepherd, S. M., Spivak, B., Luebbers, S., Shea, D. E., & Fullam, R, Disparities in Criminal Justice System Responses to First-Time Juvenile Offenders According to Indigenous Status *Criminal Justice and Behavior*, 46(8), (2019): 1067-1087.

Summary of Recommendations

1. Raise the MACR to 14 with no exceptions in line with the United Nations Committee on the Rights of the Child recommendations;
2. Remove 'causing serious harm' from the proposed list of serious offences that would allow children between 10-11 years to be criminally prosecuted, if exceptions are to be maintained;
3. As a matter of urgency, ensure that all first and secondary responses do not isolate or separate any Aboriginal and Torres Strait Islander child from their family or community connections, including peers;
4. Partner with established First Nations community-led organisations in order to design and deliver holistic, rehabilitative and trauma-informed early intervention programs for children under the MACR that are based on long-term relationship building, consistent with best practice;
5. Utilise community-based first responders instead of police as part of a trauma-informed, culturally safe, community-based and holistic social service response for First Nations children and young people;
6. Implement adequate and appropriate limitations and safeguards on police powers in relation to children under a raised MACR, with particular emphasis on minimising police contact and interaction with First Nations children. Further to this, remove specific powers for police to take forensic samples from and/or interview children younger than the MACR in an investigative capacity;
7. For First Nations children, ensure that all action plans in Levels 1, 2 and 3 of the secondary response are developed and led by individuals and/or Elders in the community who are trusted and known by the child in question. Minimise the role that police play, if any, in the development, implementation and evaluation of secondary response action plans;
8. For First Nations children, transfer decision-making power and supervising responsibilities for mediated action plans from the South Australian Civil and Administrative Tribunal (SACAT) to relevant ACCOs or local First

Nations communities via an Aboriginal Community Supervision Agreement or similar;

9. Where decisions about the placement and care of First Nations children are concerned, ensure the five core elements of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) are understood and applied, consistent with their human rights as laid out in the United Nations Convention on the Rights of the Child (UNCRC) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
10. Ensure the alternative diversion model for children under the MACR adopts a highly localised, holistic and whole-of-community approach to working with First Nations young people, Elders, community and partner organisations;
11. Ensure that the focus of secondary responses to children under a raised MACR are not grounded in any criminal justice considerations (e.g. reducing incidence of harmful behaviour for community benefit), rather each response is focused entirely on addressing the needs of the child in order to improve their life circumstance, irrespective of the nature of the 'harmful behaviour' they may exhibit;
12. Commit to the expansion of First Nations-led youth justice reinvestment programs across South Australia, including adequate long-term funding and resourcing;
13. Ensure that all action plans for First Nations children under the alternative diversion model operate from a strengths-based and culturally relevant approach and within a framework which respects First Nations sovereignty and self-determination, including the transfer of decision-making power to ACCOs and other relevant community members and Elders. As part of this, ensure that ACCOs, Elders and community organisations are well resourced by the SA Government to carry out this work.

Policy Context

States and territories in Australia continue to uphold laws, policies and practices that impact negatively on the rights and well-being of children and young people and fail to serve the wider public interest.[3] As noted in the Community Guide on Raising the Age of Criminal Responsibility, children who come into contact with the CJS often have complex needs.[4] When these children are criminalised at an early age, there's a high risk that these problems will intensify.[5] Studies have also shown that the earlier a child is exposed to the CJS, the more likely they are to reoffend.[6]

This is particularly true for First Nations children, many of whom face unique challenges of intergenerational trauma, institutional and systemic racism and social disadvantage in addition to the larger range of issues affecting children engaged with the CJS. These intersectional patterns of social and economic disadvantage are compounded by contact with the CJS in early life, often trapping children in a cycle of poverty, instability and incarceration.[7]

In South Australia, much like the rest of Australia, authorities disproportionately imprison Aboriginal and Torres Strait Islander children and adults. In the children's prison in South Australia, 51% of imprisoned children are First Nations, despite First Nations people making up only 2.4% of South Australia's total population.[8] The imprisonment rate of First Nations children aged 10 to 17 years old is 18.1 per 10,000, compared to 0.9 per 10,000 for non-Indigenous children.[9] Even where they are diverted from the CJS through police cautioning, First Nations children are disproportionately targeted. Data indicates that from

[3] Australian Human Rights Commission, Call for Submissions
[4] Raising the age of criminal responsibility – Community Guide, Government of South Australia (January 2024): 2.
[5] ibid
[6] 'Review of the age of criminal responsibility', Australian Human Rights Commission (26 February 2020): 11.
[7] Donald, B. B. 'Effectively addressing collateral consequences of criminal convictions on individuals and communities' *Criminal Justice*, vol. 30, no. 4 (2016): 33.
[8] Productivity Commission, Report on government services 2023, table 17A.5.
[9] ibid

November 2018 to June 2019, over a quarter of all formal cautions issued to children in South Australia were handed to First Nations young people, despite this group representing less than 5% of South Australia's child population.[10]

In responding to the Discussion Paper below, we will address major elements of the paper in the order in which they appear, followed by key themes that are relevant to the wellbeing of First Nations children who will be most affected by the alternative diversion model proposed in the paper.

Minimum age of criminal responsibility

The most common minimum age of criminal responsibility (MACR) worldwide is 14 years of age.[11] In 2019, the United Nations Committee on the Rights of the Child (CRC) urged Australia to bring its child justice system fully into line with the Convention on the Rights of the Child by raising the MACR to 14.[12] The CRC supports a MACR of at least 14 years of age with no exceptions or conditions, a decision that is supported by a large volume of documented evidence in the fields of child development, psychology and neuroscience which show that the areas of the brain responsible for higher function – including planning, reasoning, judgement and impulse control – are not fully developed until a person is in their early 20s.[13] Children under the age of 14 have not yet developed the social, emotional and intellectual maturity to properly understand the ramifications of their actions and thus cannot be considered criminally responsible.[14]

The high rates of cognitive and intellectual disabilities amongst young people involved with the justice system means that many young people aged 14 to 17 years may also lack the emotional, mental and intellectual maturity to fully

[10] SACOSS Submission to the Australian Human Rights Commission – Youth Justice and Child Wellbeing Reform across Australia (June 2023): 6.
[11] Riley Morgan, How young is too young? The age of criminal responsibility around the world, SBS News, 22 November 2017.
[12] Concluding observations on the combined fifth and sixth periodic reports of Australia, UN Committee on the Rights of the Child, 1 November 2019: 14.
[13] Gluckman & Hayne Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence, Office of the Prime Minister's Science Advisory Committee (2011): 24–25
[14] Sophie Trevitt and Bill Browne, Raising the Age of criminal responsibility discussion paper, The Australia Institute (July 2020): 11.

understand the impact of their actions.[15] This is particularly relevant for First Nations children who are incarcerated, a larger proportion of whom have mental health disorders, complex trauma and neurodisabilities than non-Indigenous children in detention.[16] The 2020 Youth Justice Assessment and Intervention Project in South Australia found that 9 out of 10 children in the Adelaide Youth Justice Centre, Kurlana Tapa, had some form of disability.[17]

Aboriginal and Torres Strait Islander Peoples who are diagnosed with mental health disorders and/or cognitive disabilities are significantly more likely to have earlier contact with police, more likely to have been youth justice clients, and will have more police and prison involvement throughout their lives than people with single or no diagnosis.[18]

A trauma-informed approach to raising the MACR must acknowledge that while most Aboriginal and Torres Strait Islander children and young people grow up in supportive environments, due to the ongoing and brutal effects of colonisation and its structural violence – dispossession of land, systematic attempts to destroy culture and language, racism, discrimination, and the trauma of forced family separation and removals – some Aboriginal and Torres Strait Islander children experience compounding levels of disadvantage which can disrupt a child's brain architecture in a way generally not experienced by their non-Indigenous peers.[19] This disruption leads to a lower threshold of activation for a child's stress management system manifesting in learning difficulties, behavioural problems and adverse mental and physical health outcomes.[20]

It is ANTAR's view that any proposed alternative diversion model which claims to be trauma-informed must necessarily acknowledge and mitigate the role of ongoing harmful effects of colonisation and systemic racism in contributing to a

[15] Age of Criminal Responsibility Working Group Report (2023): 75
[16] Age of Criminal Responsibility Working Group Report (2023): 27
[17] Identification of Population Needs at the Adelaide Youth Training Centre, Disability Screening Assessment Project Report, Department of Human Services, South Australian Government (2020)
[18] Eileen Baldry et al, 'A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system', University of New South Wales (October 2015) 45.
[19] National Aboriginal and Torres Strait Islander Legal Services (NATSILS) Submission to the Standing Council of Attorneys-General (SCAG) Age of Criminal Responsibility Working Group Review (2020): 11.
[20] Amnesty International, The Sky is the Limit: Keeping Young Children Out of Prison By Raising The Age Of Criminal Responsibility (2018): 6.

child's 'harmful behaviour', as well as the potentially traumatic effects of police intervention and engagement with child protection services, both of which are currently included as options in the model's first response. The current proposed model does not address these concerns.

As such, while we are pleased to see movement toward increasing the MACR in South Australia, the proposal to raise the MACR to 12 with exceptions is not supported by the evidence or best practice for supporting children at risk of interaction with the CJS – particularly Aboriginal and Torres Strait Islander children, who will be most affected by MACR reform in South Australia.[21] As the Discussion Paper itself states, a MACR of 12 remains non-compliant with international standards and among the lowest of all Organization for Economic Co-operation and Development (OECD) nations. Furthermore, the existence of exceptions to the MACR of 12 undermines the therapeutic approach proposed and is inconsistent with the overwhelming peer-reviewed evidence on children's development.

The Discussion Paper's background acknowledges that raising the MACR may be seen by some as allowing children to engage in harmful behaviour with no consequences. It is ANTAR's view that failing to commit to an increase of the MACR to 14 – despite overwhelming evidence to support this decision – due to pressure from sections of the South Australian public to be 'tough on crime' is a short-term and misguided policy decision with immediately grave consequences for children and disastrous longer-term implications for society.

No exceptions

We note that the proposal set out in the Discussion Paper includes exceptions to the raised MACR for serious offences, which include murder, manslaughter, serious harm and rape. These exceptions would apply to children younger than the MACR, allowing them to be prosecuted for those offences if the prosecution can provide sufficient evidence that the child knew that their conduct was

[21] Age of Criminal Responsibility Working Group Report (2023): 15

wrong in the criminal sense (i.e. the prosecutor can rebut the presumption of doli incapax).[22]

The use of exceptions is inconsistent with medical evidence that children under the age of 14 are developmentally and neurologically unable to form criminal intent.[23] Children who commit serious offences are in need of care, guidance and rehabilitation, not criminal punishment. Following the wealth of research on child brain development as well as legal and health guidance from the many expert submissions on this subject, it is ANTAR's position that there should be no exceptions to the minimum age of criminal responsibility. It is particularly concerning that behaviours which 'cause serious harm' are included in the proposed list of serious offences, as this is an incredibly broad category which will allow a worrying number of children under the MACR to be criminally prosecuted.

The Discussion Paper also proposes to introduce an option of last resort in which criminal prosecution will be introduced to deal with children younger than the MACR who repeatedly engage in extreme or repeated harmful or violent behaviour and where a mandatory action plan has not been effective.[24] From ANTAR's perspective, this 'option of last resort' is an unacceptable and dangerous proposal which both fundamentally undermines the logic of raising the MACR and remains committed to carceral and punitive logics which have been proven to be ineffective in increasing community safety and addressing the root causes of criminal behaviour.

Most problematically, this option shifts the blame of the failure of mandatory action plans away from the design and delivery of the action plan and onto the child. Children with complex needs who are engaging in harmful behaviour need intensive support, not isolation and punishment, and should not be held responsible for the failure of action plans designed to provide this support. We must remember that the child's harmful behaviour is the result of society failing that child, not the other way around.

[22] Minimum Age of Criminal Responsibility Discussion Paper (2024): 5.
[23] Raising the Minimum Age of Criminal Responsibility in the ACT Listening Report, ACT Government (2021): 3.
[24] Minimum Age of Criminal Responsibility Discussion Paper (2024): 13.

First response

ANTAR supports the focus of the model's first response as being to guide children through flexible pathways to needs-based therapeutic early intervention and community-based programs that are restorative and rehabilitative. Providing early support to children, young people and families experiencing vulnerability can safeguard their wellbeing and development and prevent their entry to the CJS.[25]

While ANTAR supports the model's inclusion of community-based early intervention programs in its first response, early intervention strategies to address root causes and increase protective factors should be utilised well before a child is exhibiting harmful behaviour, including in the 6–9 year age range.[26]

In addition to a focus on the child or young person's behaviour, early intervention strategies must also include social supports and programs that address root causes of social disadvantage as informed by First Nations youth, families and communities themselves.

Family-inclusive approaches

International and national research has shown that early intervention through parenting and familial support has proven to be especially effective in reducing antisocial behaviour and preventing youth incarceration.[27]

First Nations community-led organisations are already utilising a family support approach exemplified by NPY's Women's Council's Child and Family Wellbeing Service.[28] More long-term funding and resources are necessary to expand on this framework in supporting families to prevent harmful behaviour and child contact with the criminal justice system in culturally appropriate ways.

[25] Queensland Family and Child Commission Annual Report 2022-23 (2023): 21.
[26] Putting children first: A rights respecting approach to youth justice in Australia, Save The Children and 54 Reasons (April 2023): 52.
[27] Alex R. Piquero, Wesley G. Jennings et al, 'A metaanalysis update on the effects of early family/parent training programs on antisocial behavior and delinquency', *Journal of Experimental Criminology* 12 (2016): 229–248
[28] Child and Family Wellbeing Service, NPY Women's Council, nd.

ANTAR recommends that family-inclusive approaches are centred in the alternative diversion model's first response.

Partnering with community organisations

Research shows a key element of successful prevention and early intervention programs is to build positive long-term relationships with family and community as well as with service providers. First Nations community ownership, design and control can ensure that first responses address the unique needs of individuals and communities and foster community buy-in.[29]

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) explicitly states that First Nations families and communities possess the right "...to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child".[30] Decisions about the first response to First Nations children under the alternative diversion model should be made by their communities, consistent with their rights under UNDRIP.

Adelaide's Panyappi Indigenous Youth Mentoring Program, an early intervention mentoring service for First Nations young people at risk of offending, is an example of best practice.[31] Several aspects of Panyappi's model of practice have led to success, including long-term mentoring beyond the 'trouble zone', working with children as young as ten from a developmental perspective, engaging with families as part of culturally appropriate practice and collaborating with other individuals and organisations in a child's community to address the problems collectively.[32] Programs such as Panyappi often suffer from insufficient and unsecured funding, leading to staff shortages and disruption in services. ANTAR calls on the South Australian Government to immediately increase funding of First Nations community-led programs working with at-risk youth.

[29] Rachel Stringfellow, Juan Tauri & Kelly Richards, Prevention and early intervention programs for Indigenous young people in Australia and Aotearoa New Zealand, Indigenous Justice Clearinghouse (2022): 4.
[30] ibid
[31] Kathleen Stacey, Panyappi Indigenous Youth Mentoring Project: External Evaluation Report 2004, Indigenous Justice Clearinghouse. See also: Professor Chris Cunneen, 'Self-Determination and the Aboriginal Youth Justice Strategy' Jumbunna Institute for Indigenous Education and Research (2019): 75.
[32] Panyappi Indigenous Youth Mentoring Program External Evaluation Report (2004): 4.

The research on mentoring programs – and early intervention for at-risk First Nations youth more broadly – supports Panyappi's model, consistently finding that long-term relationships of at least 12–18 months duration produce better outcomes than short-term programs.[33] ANTAR recommends this research is better incorporated into the first and secondary responses of the alternate diversion model, which currently reflect a shorter-term approach that is not consistent with best practice.

Police powers

The vast over-representation of First Nations children at all stages of the CJS is widely recognised as beginning with disproportionate police intervention.[34] Police function as 'gate-keepers' whose discretion wields the power to control who will enter the system and how they will enter, often to the disadvantage of First Nations children.[35]

Research shows that police intervene in situations involving First Nations individuals in unnecessary and provocative ways, particularly for minor or non-violent offences.[36] First Nations youth are 2.9 times less likely to be cautioned than they are to appear in court.[37] This reinforces that for First Nations young people, preventing initial contact with police is paramount.

This is supported by Principles 5 and 6 of the SCAG Age of Criminal Responsibility Working Group Report, which outline the importance of utilising community-based first responders instead of police, particularly when responding to Aboriginal and Torres Strait Islander children under the MACR. Principle 6 explicitly recommends that where a child has engaged in negative

[33] Vicki-Ann Ware, 'Mentoring programs for Indigenous youth at risk' Resource sheet no. 22, Closing the Gap Clearinghouse (September 2013): 2.
[34] 'Seen and heard: priority for children in the legal process' Australian Law Reform Commission Report 84 (1997)
[35] Chris Cunneen, Barry Goldson, Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' *Current Issues in Criminal Justice* 23 (2016): 173.
[36] For more on the role of policing in First Nations incarceration see Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police,* Allen & Unwin (2001)
[37] Troy Allard *et al.* 'Police diversion of young offenders and Indigenous over-representation'. *Trends & issues in crime and criminal justice* no. 390. (2010): 4.

behaviours, police contact should be minimal as early interaction with police can frame further engagement with the criminal justice system.[38]

By contrast, alternative policing and alternative first responder models reduce criminal justice system involvement and lessen the likelihood of arrest by 58%, halve the rate of crime and justice system involvement, significantly reduce levels of specific crime, improve health and wellbeing (especially for people with mental health conditions) and address the social drivers of incarceration while avoiding contact with police.[39]

This is particularly important for First Nations children with disabilities who are 14 times more likely to be imprisoned than the general population and who experience multiple discrimination in the CJS due to the intersection of racism and ableism.[40] [41] A report by the Disability Royal Commission found that police are "frequently damaging" people with a disability, undermining their right to justice, and enabling violence and exploitation against them.[42]

The report argued that First Nations Peoples, particularly young people with disability, require a trauma-informed, culturally safe, community-based and holistic social service response, not police interaction. Non-police first responders are better able to limit the criminalisation of social issues that people with disabilities experience, and connect children with diversionary programs and supports they need.

As such, ANTAR strongly recommends that South Australia Police (SAPOL) powers are limited under each stage of the proposed alternative diversion model, and particularly during first responses to a child's behaviour. The model should not grant police specific powers to interview children younger than the MACR in an investigative capacity nor to take forensic samples. Instead, the role

[38] Age of Criminal Responsibility Working Group Report (2023): 42.
[39] JRI Alternatives to Incarceration in SA (2023): 10.
[40] Criminal justice system Issues paper, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (January 2020): 1.
[41] The overrepresentation of First Nations People with cognitive disability in the criminal justice system warrants own Disability Royal Commission Hearing [media release], First Peoples Disability Network, 16 February 2021
[42] Responses to people with disability in the justice system are often 'inadequate' and can significantly impact their rights to justice, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Australian Government (19 October 2021)

of non-police first responders – including Aboriginal community-controlled organisations (ACCOs) and other culturally appropriate services – should be prioritised and well-resourced to support the child through each stage of an alternative diversion model response.

The role of SAPOL, if involved at all, should be to direct children at risk to the appropriate social support services they require. This is consistent with Principle 7 of the SCAG Age of Criminal Responsibility Working Group Report which states that jurisdictions should consider the need for adequate and appropriate limitations and safeguards on police powers in relation to children under a raised MACR.[43]

Secondary response

ANTAR appreciates the nature of the first and secondary responses as being needs-based and flexible, as well as being based on voluntary engagement which is more likely to lead to better outcomes for children and young people. ANTAR also commends the model's framing of the Level 1 secondary response – community action plan – as a restorative and therapeutic undertaking which is trauma-informed and age specific.

This framing must be backed up by design that is truly trauma-informed and therapeutic in nature, which many aspects of the proposed model are not. Where the 3-level plans of the secondary response concern First Nations children and young people, ANTAR stresses that these action plans must be developed and led by individuals and/or Elders in the community who are trusted and known by the child in question.

Level 2: Mediated action plan

We note that the Discussion Paper envisions the Level 2 mediated action plan as analogous to the family conferencing process within the youth justice system.

[43] Age of Criminal Responsibility Working Group Report (2023): 11.

Research on best practice by the Secretariat of National Aboriginal and Islander Child Care (SNAICC) promotes the role of ACCOs in supporting families to participate in decision making, including in culturally safe family group conferencing.[44] Borrowing from Aotearoa/New Zealand's approach to family group conferencing, it is critical to remember that family conferencing processes were inspired by aspects of Māori methods of dispute resolution in which it was intended that the state would stand aside, and family, kin and community groups would be given responsibility and power to make decisions, supported by professional advice.[45]

The rationale for this process is a worldview in which children and young people are never separate from their family, kin and community. In this sense, alleged offending by a child or young person is seen as a collective problem and thus requires a collective response.[46] As such, it is critical that First Nations children and their families and kin are kept at the centre of decisions and planning for mediated action plans in order to ensure they are relevant and culturally safe, both of which are prerequisites for their success.

As Professor Chris Cunneen points out in his research, restorative justice processes such as family group conferencing cannot be imposed models, nor can there be a 'one size fits all' approach to what is culturally appropriate.[47] Aboriginal community-controlled organisations and communities must make these decisions based on the best interests of the child in question. Successful First Nations-led restorative justice and early intervention programs should be properly resourced, scaled and expanded in order to carry out this role. Priority should be given to making sure services are available across South Australia, including in regional and remote areas, so that all children under the MACR have access to restorative justice programs.

[44] Understanding and Applying The Aboriginal and Torres Strait Islander Child Placement Principle, SNAICC – National Voice for our Children (June 2017)
[45] Family Group Conferences: Still New Zealand's gift to the world? Reflections by Judge Andrew Becroft, Children's Commissioner (December 2017): 2.
[46] ibid
[47] Professor Chris Cunneen, Self-Determination and the Aboriginal Youth Justice Strategy, Jumbunna Institute for Indigenous Education and Research (2019): 49.

Furthermore, it is recommended that where First Nations children and youth are engaged in mediated action plans, the supervising body is not the South Australian Civil and Administrative Tribunal (SACAT) but a relevant ACCO or local First Nations community via an Aboriginal Community Supervision Agreement or similar. There is a precedent for this in Western Australia where legislation provides for the use of contractual arrangements between WA Corrective Services and First Nations communities for the local provision of community supervision under Division 5 of the Young Offenders Act 1994.[48]

Level 3: Mandatory action plan

ANTAR is particularly concerned with the Discussion Paper's proposal regarding compliance and secure therapeutic facilities in Level 3 (mandatory action plan).

Regarding compliance, the Paper states that in situations where a child refuses to comply with or engage in voluntary therapeutic programs and services set out in their mediated action plan and is at risk of causing harm to themselves or others, it may be necessary to compel the child to undertake specific treatments or engage with specific programs.[49] ANTAR is gravely concerned about the potential for this to direct even more children under the MACR into the CJS. The focus of any mandatory secondary response should continue to be on connecting the child to appropriate services and support, rather than directing them into the CJS when all other avenues via the alternative diversion process have been unsuccessful. As stated earlier, failure to complete the alternative diversion process should not be considered the fault of the child; rather, it should be interpreted as the system failing to meet the child's complex needs.

The Paper further states that in extreme cases, it may be necessary to compel a child to reside in a secure therapeutic facility to receive treatment if it is not safe for them to reside at home or within the community.[50]

[48] For more, see Self-Determination and the Aboriginal Youth Justice Strategy (2019): 75 and Young Offenders Act 1994, Part 3, Division 5, s. 17A.
[49] Minimum Age of Criminal Responsibility Discussion Paper (2024): 12.
[50] Minimum Age of Criminal Responsibility Discussion Paper (2024): 12.

It goes on to acknowledge that this type of facility is not currently available and would need to be developed, for example, by extending the space at Kurlana Tapa Youth Detention Centre. Of the 300 individuals admitted to this centre each year, more than 50% are First Nations children, reflecting a legacy of dispossession and intergenerational disadvantage.[51] Expanding these already failing juvenile justice spaces will worsen the crisis of First Nations children being over-represented in detention and should be avoided at all costs.

ANTAR is gravely concerned that the proposal to detain a child in a therapeutic care facility following a failed Mandatory Action Plan would be a contravention of the child's right to natural justice as well as a breach of Article 14 of the International Covenant on Civil and Political Rights.

Compelling a child to reside in a 'therapeutic facility' – be it a school, child protection facility or otherwise – away from their family, trusted individuals and community under the guise of safety and protection is reminiscent of an all too familiar violent pattern that the settler colonial project has inflicted on Aboriginal and Torres Strait Islander Peoples since the earliest days of colonial invasion. As the SA Commissioner for Aboriginal Children and Young People points out, locking up First Nations children is another form of separating them from their sense of family, community, culture and identity.[52]

Article 7.2 of the UN Declaration on the Rights of Indigenous Peoples explicitly states that First Nations Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.[53] This inherent right to be with family and community is also protected by Article 30 of the Convention on the Rights of the Child. Similarly, Principle 20 of the SCAG Age of Criminal Responsibility Working Group Report states that secondary responses should not isolate a

[51] Great responsibility: Report on the 2019 pilot inspection of the Adelaide Youth Training Centre (Kurlana Tapa Youth Justice Centre), Office of the Guardian for Children and Young People South Australia (2019): 8.
[52] 'Family and Culture is Everything', South Australia's Commissioner for Aboriginal Children and Young People Report (2020): 22.
[53] United Nations Declaration on the Rights of Indigenous Peoples, (2007): 9.

child, particularly an Aboriginal and Torres Strait Islander child, from their family or community connections, including peers.[54]

All children – and particularly Aboriginal and Torres Strait Islander children who have in ways, both historical and ongoing, been forcibly removed from their homes and families – deserve to remain in the places and communities in which they feel safe and supported. To forcibly relocate them from these places is a breach of their human rights under international law, and contrary to the principles of restorative, trauma-informed and needs-based care. Forcing a child to reside in a secure therapeutic facility to receive treatment is, quite simply, a thinly veiled attempt to expand existing youth detention centres and blatantly disregards the best interests of the child.

ANTAR opposes the incarceration and criminalisation of all children and young people. Should a jurisdiction such as South Australia insist – contrary to evidence – that detention of a child under the MACR is necessary for therapeutic purposes or for reasons of their 'harmful behaviour', it is crucial that such detention is treated as a criminal justice response. Which is to say, the child should be afforded the full rights, protections and safeguards ordinarily available to them through the CJS. For example, as per the newly established Custody Notification Service – a program that was first recommended more than thirty years ago by the Royal Commission into Aboriginal Deaths in Custody[55] – police must notify the South Australian Aboriginal Legal Rights Movement (ALRM) when they detain any Aboriginal or Torres Strait Islander person in custody. This critical protection provides a holistic wellbeing check as well as 24-hour legal advice and support via a telephone hotline for Aboriginal and Torres Strait Islander people held in police custody, with or without charge, and by doing so reduces preventable deaths in custody and related harm.[56]

It is essential that Aboriginal and Torres Strait Islander communities participate in decisions concerning the care and placement of their children and young

[54] Age of Criminal Responsibility Working Group Report (2023): 55
[55] Isabella Higgins, 'States urged to back 'life-saving' policy to prevent Indigenous deaths in custody', ABC News, 11 October 2017.
[56] Custody Notification Service, Aboriginal Legal Rights Movement, nd.

people.[57] Where decisions about the placement and care of First Nations children are concerned, the five core elements of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) must be understood and applied.[58]

Where absolutely necessary, First Nations children and young people under the proposed MACR who are at risk of involvement with the CJS and need to access treatment in a therapeutic facility can be guided into culturally appropriate First Nations community-led and operated diversionary accommodation programs. One example is the Tirkandi Inaburra Cultural and Development Centre in NSW. For more on First Nations-operated residential alternatives to mainstream detention centres, we recommend Chris Cunneen's rigorous research on Self-Determination and the Aboriginal Youth Justice Strategy Research Report for the Jumbunna Institute for Indigenous Education and Research.[59]

In rare cases that a child commits a serious offence, the focus should be on rehabilitation, community safety and supporting the victims of the offending, including through restorative justice processes.[60] No child should be considered beyond rehabilitation.[61] In line with the recommendations from the United Nations Committee on the Rights of the Child, as well as Australia's legal obligations under the Convention on the Rights of the Child, the focus for children committing serious offences should be on addressing the underlying root causes of the behaviour, on restoring and rehabilitating their connections to self and community, and on building extensive support networks and scaffolds to ensure that children at risk of further offending are supported in making better choices.

[57] Doing Time - Time for Doing Indigenous youth in the criminal justice system, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (June 2011): 80.
[58] The Aboriginal and Torres Strait Islander Child Placement Principle Implementation Guide, SNAICC – National Voice for our Children (June 2019)
[59] Professor Chris Cunneen, Self-Determination and the Aboriginal Youth Justice Strategy, Jumbunna Institute for Indigenous Education and Research, University of Technology (2019): 78.
[60] VALS Raising the Age of Criminal Responsibility Policy Brief (August 2022): 5.
[61] ibid

First Nations children in particular need to receive tailored support in community, not in facilities designed to punish and isolate. Recent updates from the Training Centre Visitor report that children in Kurlana Tapa are being locked in their cells for up to 23 consecutive hours and engaging in self-harm in order to be transferred to hospital for a break.[62] It should also be noted that of all the children and young people locked up in Kurlana Tapa, more than 90 percent are detained on remand, meaning they have not yet been found guilty of the crimes for which they were alleged to have committed.[63] This is plainly unacceptable.

Too often, including in the Discussion Paper itself, community safety is positioned as in conflict with or at risk due to the behaviour of young people. In fact, the safety and protection of the community is contributed to by the successful rehabilitation of children and youth exhibiting problematic or harmful behaviour.[64] In this sense, rehabilitative processes and programs should be designed to maximise therapeutic and diversionary benefit to the child or young person in question. This is supported by Principle 11 of the Age of Criminal Responsibility Working Group Report, which states that the focus of secondary responses to children under a raised MACR should shift from punitive interventions towards a needs-based response to the child.[65]

In developing the alternative diversion model as part of raising the MACR, ANTAR urges the SA Government to ensure that any actions taken via an alternative diversion pathway do not have any bearing on subsequent proceedings through the CJS. In particular, prosecution must not be able to rely on evidence of a child's participation in a diversionary response for the purpose of rebutting doli incapax in subsequent criminal proceedings. Further, a child's participation in a diversionary response, whether voluntary or otherwise, must not appear on the child's criminal record.

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[62] Sarah Collard, 'Children self-harming to escape prolonged confinement in cells, South Australian watchdog says', The Guardian, 30 June 2023. See also, Stephanie Richards, 'South Australian youth in detention causing 'significant risk and injury' to themselves, report reveals', ABC News, 2 November 2023.
[63] Stephanie Richards, 'South Australian youth in detention causing 'significant risk and injury' to themselves, report reveals', ABC News, 2 November 2023.
[64] King, CJ in Yardley v Betts (1979) 22 SASR 108, cited in The nexus between sentencing and rehabilitation in the Children's Court of NSW, Judicial Commission of New South Wales (2005): 1.
[65] Standing Council of Attorneys-General Age of Criminal Responsibility Working Group Report (September 2023): 11.

Early intervention through Youth Justice Reinvestment

As noted by the South Australian Commissioner for Aboriginal Children and Young People in their 2020 Report, early intervention through an expanded Youth Justice Reinvestment strategy is key to reducing the high numbers of First Nations children and young people in detention and in the youth justice system.[66]

The Discussion Paper itself acknowledges that a justice reinvestment approach is likely to deliver significant long-term savings.[67] The total operating expenditure on children and young people's incarceration in South Australia in 2021/2022 was $36.98 million. The real direct cost per child in prison is $3,145 per day, equivalent to $1,147,794 per year.[68]

Justice reinvestment approaches are place-based, contextual, self-determining and based on the recognition that local communities have the answers. First Nations place-based approaches have resulted in significant reductions in crime, criminal justice system contact, youth justice contact and significant cost savings, as well as improvements in a range of cultural, social, health and wellbeing measures.[69]

Case study: Tiraapendi Wodli

Currently there is one First Nations-led youth justice reinvestment program in South Australia. The community-led Tiraapendi Wodli Port Adelaide Justice Reinvestment project aims to prevent involvement in the youth justice system and support the community to intervene early in family violence and child protection.[70] By implementing a strengths based First Nations-led approach, Tiraapendi Wodli addresses underlying causes of crime and provides support

[66] 'Family and Culture is Everything', South Australia's Commissioner for Aboriginal Children and Young People Report (2020): 23.
[67] Minimum Age of Criminal Responsibility Discussion Paper (January 2024): 4.
[68] JRI Alternatives to Incarceration in South Australia (2023): 18.
[69] JRI Alternatives to Incarceration in South Australia (2023): 9.
[70] 'Family and Culture is Everything', South Australia's Commissioner for Aboriginal Children and Young People Report (2020): 26.

across a range of key areas from education to justice and health, with a focus on family and community support for lasting solutions.

Their main gathering space, referred to as 'The Hub', is used by more than 350 people per month, 120 of whom are regular service users.[71] A breakdown of popular services accessed at The Hub in 2021 indicated that 71% of visitors were accessing support related to family and individual stability and mental health and wellbeing, while 49% of individuals were engaging in cultural connection and leadership, all of which are protective factors for youth at risk of engagement with the CJS.[72] The success and vast potential of such programs is evident in the yearly increase of individuals who are provided services each year.

University SA is currently assisting Tiraapendi Wodli to undertake the first stage of a longer-term monitoring and evaluation project in order to understand the strengths, opportunities and outcomes of the justice reinvestment approach in Port Adelaide.[73]

Aboriginal and Torres Strait Islander people know what is best for protecting their peoples and their children. To effect positive, lasting outcomes in youth justice reform, including successful diversionary programs and models for those under the MACR, the South Australian government must ultimately consistently and genuinely be led by, and invest in, Aboriginal and Torres Strait Islander solutions.[74] Respect for the principle of community control and self-determination is fundamental to any successful approach.[75]

Following the Federal Government's commitment to provide $79 million to support up to 30 community-led justice reinvestment initiatives in First Nations communities across the country, ANTAR urges the South Australian Government to provide greater long-term investment into First-Nations led

[71] Urgent investment needed for important justice reinvestment, The Bulletin - Law Society of South Australia, (July 2022).
[72] Tiraapendi Wodli Port Adelaide Justice Reinvestment Hub Information Sheet (2021).
[73] Justice Reinvestment in Port Adelaide, Tiraapendi Wodli, nd.
[74] 'Leadership and Legacy Through Crises: Keeping our Mob safe' Close the Gap (2021): 6.
[75] 'Family and Culture is Everything', South Australia's Commissioner for Aboriginal Children and Young People Report (2020): 27.

justice reinvestment programs such as Tiraapendi Wodli and to commit to the expansion of these programs across the State.

Strengths-based, culturally safe diversion grounded in self-determination

Research on best practice in First Nations youth diversion practices suggests at least three main principles must be followed in order for Aboriginal and Torres Strait Islander young people – and by extension their families, communities and the wider community – to receive meaningful benefits and success from diversion.

Firstly, youth diversionary models must operate within a context and framework which respects First Nations sovereignty and in which self-determination is built into the design and delivery of diversionary practices. This includes collaborating with and deferring to ACCOs and other relevant community members in order for First Nations people to have real decision-making power, to set the direction and priorities and to determine the goals about the issues that affect their communities.[76] The new South Australian Voice to Parliament is a key institution with a direct interest in systemic youth justice reform and provides an opportunity for genuine consultation and First Nations voices to be heard from a state and local community level.

The SA Government must engage in genuine power-sharing with and provide sustainable funding to ACCOs so that they are able to consistently provide service delivery and solutions that are reflective of the unique needs and priorities of their communities. As SNAICC have stated in their Family Matters report, there is an urgent need to invest in ACCOs to deliver holistic and culturally safe services to Aboriginal and Torres Strait Islander families.[77] This commitment to structural change is an integral part of the National Agreement on Closing the Gap, including the transfer of meaningful decision making to

[76] Larissa Behrendt, Amanda Porter and Alison Vivian, 'Indigenous self-determination within the justice context: Literature review', Jumbunna Institute UTS (2018): 22.
[77] Family Matters Report, SNAICC (2023): 42.

First Nations communities as per Priority Reform 1 and increased funding and capacity building for ACCOs as per Priority Reform 2.

Secondly, the youth diversion model must utilise a strengths-based approach in which the child is an active participant in their diversion from the CJS. In this sense, children who are at risk of offending or are engaging in 'problematic' or dangerous behaviour must be treated not as recipients of a top-down approach, but as individuals with the agency and responsibility to participate in the design and implementation of processes intended to support them in making better choices.

Lastly, diversionary practices are more effective when delivered in a culturally appropriate way.[78] This includes not only how the programs are delivered but also the location in which they are delivered. Many of the examples of best practice take place 'on Country' in the presence of Elders and in a cultural setting, reflecting highly localised, holistic and whole-of-community approaches.[79] As such, ANTAR recommends that South Australia's alternative diversion model ensures the design, delivery and guaranteed accessibility of 'On Country' diversion models for Aboriginal and Torres Strait Islander children.

Intersections with out of home care and child protection system

It is widely known and documented that there is a well-established 'care to criminalisation' pathway between out of home care/the child protection system and the criminal justice system. These vulnerable children in out-of-home or residential care – 'crossover kids' – become disproportionately involved in the CJS, with Aboriginal and Torres Strait Islander children making up the majority. The number of children in out-of-home-care (OOHC) has reached crisis proportions in South Australia (as well as nationally), with one in three children

[78] Professor Chris Cunneen, Dr Amanda Porter, Professor Larissa Behrendt, 'Discussion Paper: Aboriginal Youth Cautioning', Jumbunna Institute for Indigenous Education and Research University of Technology, Sydney (2018): 7.
[79] Cunneen et al, 'Discussion Paper: Aboriginal Youth Cautioning', (2018): 95.

born reported to the Department of Child Protection by the time they are ten years old.[80]

A recent Australian Institute of Health and Welfare study found that, of 4,035 Australian children aged 10-17 who received child protection services and youth justice supervision from 1 July 2014 to 30 June 2018, 81% were known to child protection authorities before entering youth justice supervision.[81] In a 2020 study on the intersection between the child protection and youth justice systems in South Australia, researchers found that young people from every level of the child protection system were over-represented in the youth justice system, with 84% of young people under youth justice supervision having had contact with child protection.[82] Furthermore, almost all of the young people known to the youth justice system were involved in the child protection system first.[83]

Similarly, the South Australian Dual Involved Project highlights the ways in which the residential care system has played a part in the criminalisation of children. The Project's report reflects on the experiences of 71 'dual involved' children and young people who were in state care and experienced youth detention in 2021, finding that harmful practices at multiple service levels - including inadequate therapeutic support and over-policing of children in state care – exposed children and young people living in state care to a disproportionate and unacceptable risk of becoming involved in the youth justice system.[84] These practices were identified as key issues that led to the children's incarceration in the Kurlana Tapa Youth Justice Centre.

ANTAR echoes the point made by SACOSS in their submission on Youth Justice and Child Wellbeing Reform across Australia that if children and young people

[80] Roadmap for reforming the Child and Family Support System - Safe and well Supporting families, protecting children 2021-23, Government of South Australia (nd): 6.
[81] Australian Institute of Health and Welfare, Young People in Child Protection and under Youth Justice Supervision: 1 July 2014 to 30 June 2018 (2019): 6, 8.
[82] Malvaso C, Santiago P, Pilkington, R, Montgomerie, A, Delfabbro, P, Day, A & Lynch, J, The intersection between the Child Protection and Youth Justice systems in South Australia. Adelaide: BetterStart Child Health and Development Research Group, The University of Adelaide (2020): 6.
[83] ibid
[84] SACOSS Submission to the Australian Human Rights Commission – Youth Justice and Child Wellbeing Reform across Australia, South Australian Council of Social Service (June 2023): 8.

are to be kept out of the youth justice system, every preventative effort must also be made to keep children at home with their family and out of the child protection system.[85]

Conclusion

Children belong in schools and playgrounds, connected to their families, communities and culture, not placed in handcuffs, held in watchhouses or incarcerated.[86] Young people causing serious harm to others have themselves almost invariably been the victims of violence, neglect, harm, racism, poverty, structural disadvantage and/or neurodisabilities for which they have not received adequate and effective support.[87] Criminalising these children – society's most vulnerable members and our future – is not only a fundamental failure of social support and of our collective responsibilities, it is a crisis of moral imagination. It must be the central focus of any alternative diversion model to avoid this criminalisation at all costs, and to renew our collective obligation to the youngest members of our societies in ways that are based on care and respect for their needs.

Diversion away from the CJS is particularly crucial for Aboriginal and Torres Strait Islander children who too often bear the brunt of intergenerational trauma resulting from ongoing structures of colonisation. First Nations children also find themselves the victim of society's failure to design and deliver better child-centric and rehabilitative systems, with government's historically focusing on crime-prevention responses that revolve around policing, punishment and incarceration. These children, no matter how complex their needs, are not the problem; rather, the spotlight needs to be turned on the punitive, short-sighted and often discriminatory policies that consistently fail to address the factors which contribute to their disproportionate criminalisation and incarceration.

[85] SACOSS Submission, 11.
[86] Raise the Age Public Statement to the Council of Attorneys-General on Raising the Age (December 2019)
[87] Ben Mathews, Nina Papalia et al. 'Child maltreatment and criminal justice system involvement in Australia: Findings from a national survey', Trends & issues in crime and criminal justice No. 681, Australian Government (2023)

ANTAR thanks the Attorney-General's Department for the opportunity to comment on its Discussion Paper, and sincerely hopes that the voices of First Nations communities and young people in South Australia are reflected in the alternative diversion model. Aboriginal and Torres Strait Islander Peoples already have the solutions… we cannot afford to ignore them any longer.

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