

# Alternative diversion model for children under the raised minimum age of criminal responsibility

Submission to the Attorney-General's Department,  
Government of South Australia

25 March 2024



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal people of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

## Introduction

1. The ALA welcomes the opportunity to have input to the Government of South Australia's Attorney-General's Department ('SA Attorney-General's Department') on the proposed alternative diversion model for children under the raised minimum age of criminal responsibility.
2. The ALA's submission responds to the two documents released by the SA Attorney-General's Department as part of this consultation: *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* ('Discussion Paper') and *Raising the age of criminal responsibility: Community Guide* ('Community Guide').<sup>2</sup>
3. The ALA notes that the SA Attorney-General's Department has framed this consultation about the proposed alternative diversion model on the premise that the Government of South Australia is considering raising the minimum age of criminal responsibility to 12 years.<sup>3</sup>
  - a. The ALA is concerned by this premise and our submission will discuss raising the minimum age of criminal responsibility to 14 years, in addition to providing analysis on the proposed alternative diversion model.

## Raising the minimum age of criminal responsibility

4. Children should be supported and nurtured, not incarcerated. The ALA submits that it is not appropriate for children aged between 10 and 14 – formative years of a child's development – to be under the supervision of the youth criminal justice system.

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<sup>2</sup> Attorney-General's Department, Government of South Australia, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (January 2024); Attorney-General's Department, Government of South Australia, *Raising the age of criminal responsibility: Community Guide* (January 2024).

<sup>3</sup> Attorney-General's Department, Government of South Australia, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (Discussion Paper, January 2024) 5.

5. We note with great concern that Aboriginal and Torres Strait Islander children are disproportionately affected by the status quo across Australia.<sup>4</sup> As the Standing Council of Attorneys-General's Age of Criminal Responsibility Working Group detailed in their September 2023 report:<sup>5</sup>

The rate of Aboriginal and Torres Strait Islander 10-, 11- and 12-year-olds being in detention is 52.8 times higher than that of non-Indigenous 10-, 11- and 12-year-olds. The rate of Aboriginal and Torres Strait Islander 13-year-olds in detention is 30.6 times that of non-Indigenous 13-year-olds.

6. The ALA considers that raising the age of criminal responsibility to at least 14 years is a key measure in reducing the rate of incarceration of young people, especially children.

### **The evidence and international precedents regarding raising the minimum age of criminal responsibility to 14 years**

7. Significant contemporary research indicates that many children aged between 10 and 14 years of age are not at a cognitive stage of development where they are able to appropriately appreciate the nature and significance of criminal conduct and the lifelong consequences of undertaking such conduct.<sup>6</sup>
8. As determined by the Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory:<sup>7</sup>

Due to their stage of physical and psychological development, children under the age of 14 years engage in increased risk-taking, have poor impulse control, poor emotional regulation and poor planning skills.

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<sup>4</sup> See: Australian Institute of Health and Welfare, Australian Government, *Youth detention population in Australia 2023* (Web Report, 13 December 2023); Australian Institute of Health and Welfare, Australian Government, *Children under youth justice supervision* (Web Report, 25 February 2022).

<sup>5</sup> Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 20.

<sup>6</sup> See, e.g., Kelly Richards, 'What makes juvenile offenders different from adult offenders?', *Trends & issues in crime and criminal justice* (Paper No. 409, 18 February 2011) 4; Laurence Steinberg, 'Risk taking in adolescence: new perspectives from brain and behavioural science' (2007) 16(2) *Current Directions in Psychological Science* 55, 56.

<sup>7</sup> *Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory* (Final Report, 17 November 2017) vol 1, 133.

9. The United Nations Committee on the Rights of the Child ('UN CRC') has concluded:<sup>8</sup>

Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence.

10. As accepted by the SA Attorney-General's Department in both the Community Guide and the Discussion Paper,<sup>9</sup> early experiences with the criminal justice system (including detention) have serious long-term consequences for those children:<sup>10</sup>

Early contact with the criminal justice system is correlated with ongoing justice system contact as an adult, with evidence demonstrating that the younger the child at the time of their first sentence, the more likely they are to reoffend (with any offence) and to reoffend violently. It is generally accepted by academics that the criminal justice system can itself be criminogenic, meaning involvement with the system can heighten the chance of a person continuing to engage with the criminal justice system in future.

11. This underscores the need for the minimum age of criminal responsibility to be raised to at least 14 years. The ALA notes that the consensus view of Aboriginal and Torres Strait Islander leaders, communities and organisations is that the minimum age of criminal responsibility should be raised to at least 14 years.<sup>11</sup>

12. Looking abroad, the ALA refers the SA Attorney-General's Department to the internationally-accepted minimum age of criminal responsibility, which is 14 years.<sup>12</sup> The UN CRC has confirmed that raising the minimum age of criminal responsibility

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<sup>8</sup> United Nations Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6 at [22].

<sup>9</sup> Attorney-General's Department, Government of South Australia, *Raising the age of criminal responsibility: Community Guide* (January 2024) 2; Attorney-General's Department, Government of South Australia, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (January 2024) 4.

<sup>10</sup> Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 23.

<sup>11</sup> *Ibid* 27.

<sup>12</sup> United Nations Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6 at [21]; National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2019 – In Their Own Right: Children's Rights in Australia* (Report, October 2019) 238.

ensures compliance with the Convention on the Rights of the Child and that most countries who have raised the minimum age of criminal responsibility in their own jurisdictions have raised the age to 14 years.<sup>13</sup>

13. The ALA submits that the evidence and international precedents cast significant doubt on the capacity for children below 14 years to appropriately reflect before embarking on a course of action involving criminal behaviour. Those children, therefore, should not be held criminally responsible for their actions but should be supported through therapeutic and other alternative processes.

### **Aligning with other jurisdictions**

14. The ALA notes developments regarding raising the minimum age of criminal responsibility in four other Australian jurisdictions, where those State and Territory Governments have accepted the need to raise the minimum age of criminal responsibility to 14 years:

- a. In Tasmania, the minimum age of criminal responsibility is being raised from 10 to 14 years, along with increasing the minimum age of detention to 16 years.<sup>14</sup>
- b. The ACT's Legislative Assembly passed legislation in November 2023 to initially raise the minimum age of criminal responsibility from 10 to 12 years and to then raise the age to 14 years in 2025.<sup>15</sup>

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<sup>13</sup> United Nations Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6 at [21].

<sup>14</sup> Tasmanian Government, 'Clear pathway to reform Tasmania's youth justice system' (Media Release, 6 December 2023) <[www.premier.tas.gov.au/site\\_resources\\_2015/additional\\_releases/clear-pathway-to-reform-tasmanias-youth-justice-system](http://www.premier.tas.gov.au/site_resources_2015/additional_releases/clear-pathway-to-reform-tasmanias-youth-justice-system)>.

<sup>15</sup> Justice and Community Safety Directorate, ACT Government, *Raising the Age* (Web Page) <[www.justice.act.gov.au/safer-communities/raising-the-age](http://www.justice.act.gov.au/safer-communities/raising-the-age)>.

- c. The Victorian Government will raise the minimum age of criminal responsibility from 10 to 12 years by the end of 2024, and then to 14 years by 2027.<sup>16</sup>
- d. In the Northern Territory, the Government has raised the minimum age of criminal responsibility from 10 to 12 years,<sup>17</sup> but has committed to reviewing that legislation in two years' time with a view to raising it to 14 years.<sup>18</sup>

15. While the ALA does not support raising the minimum age of criminal responsibility in stages (for example, from 10 to 12 years and then from 12 to 14 years), we contend that **the decisions made to raise the minimum age of criminal responsibility in the above jurisdictions demonstrate that Governments across Australia are accepting the medical evidence and international precedents that the minimum age of criminal responsibility must be 14 years.**

**Recommendation:** The ALA recommends that the South Australian Government raises the minimum age of criminal responsibility from 10 years to 14 years, immediately and without exceptions.

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<sup>16</sup> Premier of Victoria, State Government of Victoria, 'Keeping Young People Out Of The Criminal Justice System' (Media Release, 26 April 2023) <[www.premier.vic.gov.au/keeping-young-people-out-criminal-justice-system](http://www.premier.vic.gov.au/keeping-young-people-out-criminal-justice-system)>; Rachel Eddie, 'State stands by plan to raise age of criminal responsibility', *The Age* (online, 11 March 2024) <[www.theage.com.au/politics/victoria/state-stands-by-plan-to-raise-age-of-criminal-responsibility-20240311-p5fbi6.html](http://www.theage.com.au/politics/victoria/state-stands-by-plan-to-raise-age-of-criminal-responsibility-20240311-p5fbi6.html)>.

<sup>17</sup> *Criminal Code Amendment (Age of Criminal Responsibility) Act 2022* (NT).

<sup>18</sup> Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 13.

## The proposed alternative diversion model

16. The ALA supports the underlying principles of the proposed alternative diversion model, including that this model “should be restorative, culturally led, trauma-informed, and include professionally developed and led diversionary programs”.<sup>19</sup>
17. The ALA’s feedback on and analysis of the proposed alternative diversion model is detailed in this section of our submission.

## Processes and resources for Aboriginal and Torres Strait Islander children

18. With consideration to the impact this proposed alternative diversion model could have on Aboriginal and Torres Strait Islander children who are currently disproportionately represented in the criminal justice system,<sup>20</sup> the ALA is concerned that there is minimal reference to and no detail on specific processes and resources for supporting Aboriginal and Torres Strait Islander children in the Discussion Paper and in the Community Guide.
19. The ALA contends that proposed alternative diversion model does not adequately address the principles and recommendations detailed by the Standing Council of Attorneys-General’s Age of Criminal Responsibility Working Group,<sup>21</sup> including: incorporating “self-determination into responses to Aboriginal and Torres Strait Islander children displaying negative behaviours”; providing or expanding systems that are “Aboriginal and Torres Strait Islander children-specific”; and recognising “the importance of culture for Aboriginal and Torres Strait Islander children”.<sup>22</sup>

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<sup>19</sup> Attorney-General's Department, Government of South Australia, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (January 2024) 7.

<sup>20</sup> See: Australian Institute of Health and Welfare, Australian Government, *Youth detention population in Australia 2023* (Web Report, 13 December 2023); Australian Institute of Health and Welfare, Australian Government, *Children under youth justice supervision* (Web Report, 25 February 2022).

<sup>21</sup> See: Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) Chapter 3.

<sup>22</sup> Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 8.

20. As it stands, it is unclear to the ALA how the South Australian Government and South Australia's Attorney-General's Department intend for the proposed alternative diversion model to be implemented in culturally safe ways for Aboriginal and Torres Strait Islander children.

21. The ALA is also not aware of any commitment to provide specific resources to assist Aboriginal and Torres Strait Islander Elders and communities for safely guiding Aboriginal and Torres Strait Islander children through any eventual alternative diversion program.

22. Further, the ALA contends that incorporating feedback from Aboriginal and Torres Strait peoples and their communities across South Australia on raising the minimum age of criminal responsibility and any proposed alternative diversion model is crucial before any reform is finalised.

**Recommendation:** The South Australian Government and South Australia's Attorney-General's Department must commit to consulting with Aboriginal and Torres Strait peoples and their communities across South Australia, including through South Australia's First Nations Voice to Parliament, on these reforms and proposals.

**Recommendation:** The South Australian Government and South Australia's Attorney-General's Department must incorporate into South Australia's alternative diversion model the principles and recommendations detailed by the Standing Council of Attorneys-General's Age of Criminal Responsibility Working Group in its September 2023 report.<sup>23</sup> That must also include a commitment to providing the resources needed to safely apply any alternative diversion plan to Aboriginal and Torres Strait Islander children.

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<sup>23</sup> See: Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) Chapter 3.

## Police facilities as a place of safety

23. As part of the first response, it is proposed that “police facilities will be places of safety of last resort when no alternative options are available”.<sup>24</sup>

24. The ALA does not support children being held in police facilities, which includes police cells.

**Recommendation:** The South Australian Government and South Australia’s Attorney-General’s Department must ensure that alternative options for places of safety are always available under this alternative diversion model, so that children are not held in police facilities.

## Police powers

25. The ALA notes that police powers will be included in the proposed alternative diversion model which allow police to interview children younger than the minimum age of criminal responsibility “in an investigative capacity”.<sup>25</sup> The Discussion Paper lists four safeguards for the child, including “their right to have a parent or guardian present” and “the right to legal representation”.<sup>26</sup>

26. The ALA contends that children younger than the minimum age of criminal responsibility must not be interviewed by police without legal representation and a parent/guardian present during that interview.

27. The ALA is also concerned that children will not be informed of their rights by South Australia Police.

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<sup>24</sup> Attorney-General’s Department, Government of South Australia, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (January 2024) 8.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

**Recommendation:** The South Australian Government and South Australia’s Attorney-General’s Department must ensure that children younger than the minimum age of criminal responsibility have legal representation and a parent/guardian present during any interview by police. Further, the ALA recommends that it is detailed at every point in the alternative diversion plan that a child has the right to legal representation and that the child must be provided with that legal representation, including at ‘Level 3: Mandatory action plan’ and at the point of any criminal prosecution.

**Recommendation:** The alternative diversion model must detail how and when South Australia Police must communicate to the child the rights that child, including the right to legal representation. Those procedures must include ensuring that the child’s rights are communicated to the child in a way or ways that the child can definitely understand and as soon as South Australia Police has determined to interview the child, so that appropriate arrangements can be made (such as, contacting a legal representative).

### **Serious offences exceptions**

28. The ALA notes that the SA Attorney-General’s Department has proposed four serious offences for which children younger than the minimum age of criminal responsibility could still be prosecuted.<sup>27</sup>

29. The ALA does not support there being exceptions to a raised the minimum age of criminal responsibility for serious offences. That undermines the core reasons for raising the minimum age of criminal responsibility, which include providing alternative ways to “support the child” and “to help minimise the risk of future reoffending while helping the child change their behaviour and address its root causes”.<sup>28</sup>

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<sup>27</sup> Ibid 5.

<sup>28</sup> Attorney-General’s Department, Government of South Australia, *Raising the age of criminal responsibility: Community Guide* (January 2024) 5.

30. If a child has committed or has been involved in a serious offence being committed, that child needs support and a therapeutic response – not a punitive response and being detained.

**Recommendation:** The South Australian Government and South Australia’s Attorney-General’s Department must raise the minimum age of criminal responsibility to at least 14 years without any exceptions or conditions.

### **The proposed definition of “serious criminal offence” in the “option of last resort”**

31. The ALA notes the proposed definition of “serious criminal offence” is detailed in the Discussion Paper as part of the “option of last resort”.<sup>29</sup> The SA Attorney-General’s Department notes in the Discussion Paper that this option is designed to address children younger than the minimum age of criminal responsibility “who repeatedly engage in extreme or repeated harmful or violent behaviour and where a mandatory action plan has not been effective”.<sup>30</sup>

32. The ALA reiterates our position that children younger than the minimum age of criminal responsibility should not be criminally prosecuted.

33. The ALA is concerned by the broad nature of some of the offences included in the list of serious criminal offences. For example, ALA members reflect that incidents involving damage to a building or motor vehicle by fire generally involve minor damage. We question whether an incident like that should be framed as a “serious criminal offence” for the purposes of this “option of last resort”.

**Recommendation:** The South Australian Government and South Australia’s Attorney-General’s Department must not provide an option whereby children younger than the

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<sup>29</sup> Attorney-General’s Department, Government of South Australia, *Minimum Age of Criminal Responsibility – alternative diversion model: Discussion Paper* (January 2024) 14.

<sup>30</sup> Ibid 13.

minimum age of criminal responsibility can be criminally prosecuted. If the South Australian Government and South Australia’s Attorney-General’s Department proceed with this “option of last resort”, then an objective threshold for every offence must be detailed to ensure that children younger than the minimum age of criminal responsibility are not criminally prosecuted for a minor offence which has been misclassified by this proposed “option of last resort”.

**Recommendation:** If the South Australian Government and South Australia’s Attorney-General’s Department proceed with this “option of last resort”, then an objective threshold for every offence must be detailed to ensure that children younger than the minimum age of criminal responsibility are not criminally prosecuted for a minor offence which has been misclassified by this proposed “option of last resort”.<sup>31</sup>

## Conclusion

34. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Government of South Australia’s Attorney-General’s Department on the alternative diversion model for children under the raised minimum age of criminal responsibility.

35. The ALA is available to provide further assistance to the Government of South Australia and the Attorney-General’s Department on the issues raised in this submission.



**Greg Barns SC**  
**Criminal justice spokesperson,**  
**Australian Lawyers Alliance**



**Tim Downie**  
**President, South Australia Branch Committee**  
**Australian Lawyers Alliance**

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<sup>31</sup> See New Zealand model: Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 72.