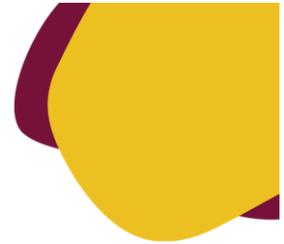


Rights Resource Network SA

connecting change creators + law makers

rightsnetworksa.com
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The Hon Vickie Chapman
Deputy Premier and Attorney General
10 Franklin Street, Adelaide
South Australia
Via email: AttorneyGeneral@sa.gov.au

10 February 2021

Dear Attorney General

RAISING THE AGE OF CRIMINALITY IN SOUTH AUSTRALIA

On behalf of the [Rights Resource Network SA](#),¹ and following discussions with SOS BlakAustralia – SA Action Group, we strongly urge you to take immediate action to amend section 5 of the *Young Offenders Act 1993* (SA) and raise the age of criminality from 10 years to at least 14 years in South Australia. The Black Lives Matter movement has highlighted the global imperative to address overrepresentation of black people in custody and given prominence to the unacceptably high incarceration rates of Aboriginal people in South Australia, including Aboriginal children. Members of the Network hold strong concerns about the impact the current minimum age of criminality has on the rights of South Australian children and their families, particularly Aboriginal children. We would like to schedule a meeting with you to better understand how your Government intends to deal with this issue.

We have warmly welcomed your past interest in this issue and your willingness to consult with the South Australian community, and most importantly, with the South Australian Aboriginal community whose families and children are disproportionately impacted by the current legislation.

We note that you and your Government have indicated that you will await a national consensus before advancing amending legislation in South Australia. With COAG disbanded there is no longer a clear national process for consensus. We further note that states and territories (including the ACT, for example) have indicated that they are prepared to legislate alone. For these reasons, we urge the Government to show leadership and introduce amending legislation to raise the age of criminality during the next sittings of Parliament. Such legislation could be based on the [Young Offenders \(Age of Criminal Responsibility\) Amendment Bill 2020](#) already drafted and introduced by the Hon Mark Parnell MLC or the [Crimes Legislation Amendment \(Age of Criminal Responsibility\) Bill 2019](#) introduced into the federal parliament by Rebekah Sharkie MP. An alternative would be to refer the issue to a South Australian parliamentary committee for inquiry and report, which would enable a further opportunity for community consultation.

In the interests of progressing this urgent reform, we seek your response to the following questions:

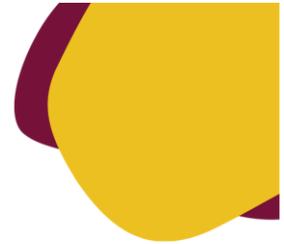
1. Is the Marshall Government committed to raising the age of criminality from 10 years old to at least 14 in line with medical evidence?

¹ The Rights Resource Network is a volunteer-run network designed to share information and research among academics, community organisations and individuals who are committed to protecting the human rights of South Australians.

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2. What steps is the Marshall Government taking to advance discussions at a national level on this issue?
3. How long is the Marshall Government prepared to wait for nationally consistent reforms to be identified? Would the Government consider introducing amending legislation for South Australia if national discussions have not resumed by the end of the year?
4. Will the Marshall Government provide a report summarising the outcomes of any community consultation with the South Australian community?

The Network is keen to re-iterate the range of human rights concerns arising from the current South Australian approach to the age of criminality, and emphasise the urgency of addressing this issue through amending local legislation.² These human rights concerns were highlighted at the international level last month when Australia's international human rights record was scrutinised by the UN Human Rights Council in Geneva as part of the [Universal Periodic Review](#). As part of this process, 31 countries recommended that Australia raise the age of criminal responsibility, which is currently out of step with international standards and has been condemned internationally for many years.³

Medical experts have confirmed that prior to the age of 18 children's brains are still developing, especially the parts that regulate judgement, decision-making and impulse control.⁴ Young children do not have the neurological maturity to foresee the consequences of their behaviours, assess risk and comprehend the potentially criminal nature of their behaviour.⁵ By failing to safeguard and care for the most vulnerable members of the community and ignoring the impact of physical and mental immaturity on their decision-making and behaviour⁶, we risk violating children's basic human rights

² Some of these concerns are outlined in Kershlin Krishna and Sarah Moulds, 'Old Enough to Know Better? Reform Options for South Australia's Age of Criminality Laws' (2020) 41 *Adelaide Law Review* 313.

³ Indeed, international human rights bodies have consistently expressed concerns about Australia's current laws governing the criminal capacity of children and have advocated for change. See e.g. Committee on the Rights of the Child, *Consideration of reports submitted by State Parties under article 44 of the Convention: Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (20 October 2005) para 74; Committee on the Rights of the Child, *Consideration of reports submitted by State Parties under article 44 of the Convention: Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) para 84; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 44 ('HRC Concluding Observations on Australia').

⁴ Office of the Children's Commissioner, *Nobody Made the Connection: The Prevalence of Neuro-Disability in Young People Who Offend* (Report, October 2012); Jean Piaget, *The Moral Judgement of the Child* (Scientific Study, 1977) 58, 63; P Smith, H Cowie and M Blades, *Understanding children's development* (Scientific Study, 1998) 216; Cordelia Fine and Jeanette Kennett, 'Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment' (2004) 9 *International Journal of Law and Psychiatry* 27, 425–443.

⁵ Australian Institute of Health and Welfare 2019. *Youth justice in South Australia 2017–18*. Cat. no. JUV 129. Canberra: AIHW; Sophie Trevitt and Bill Browne, 'Raising the age of criminal responsibility' (2020), The Australia Institute, Canberra.

⁶ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) preamble. Margaret White, 'Youth Justice and the Age of Criminal Responsibility: Some Reflections' (2019) 40 *Adelaide Law Review* 257.

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and doing these children further harm in the long term. Local⁷ and international research⁸ confirms that the incarceration of children has a direct impact on their fundamental rights of education, health care and access to culture. South Australian youth detention centres do not have the resources or capability to provide the appropriate conditions for children's fundamental needs, particularly children who have experienced trauma or violence.⁹ Detaining children as young as ten in closed facilities compounds past trauma and leads to stigmatisation that can detrimentally impact individual's lives well beyond the end of any criminal sentence. The Australian Medical Association have confirmed that imprisoning children under the age of 14 years old can have lifelong impacts on a child's physical, mental and cognitive development, including increasing the risk of future offending and leading to premature death.¹⁰

Aboriginal children are disproportionately represented within the youth justice system here in South Australia and around the country (with Aboriginal young people being 21 times as likely to be under supervision as non-Indigenous young people).¹¹ It is crucial that the Government listen to the numerous reports, inquiries and Royal Commissions which recommend governments invest in Aboriginal designed and led community solutions when responding to youth justice issues. For some years now, social movements such as the Raise the Age campaign, SOSBlakAustralia and Aboriginal Legal Rights Movement (ALRM) have been mobilising, educating people, and advocating for change. Aboriginal leaders have been drawing attention not just to the direct impacts of over-incarceration of Aboriginal children on those children's development, but also to the longer-term implications of institutionalisation and separation that continue to reverberate through Aboriginal communities and families across generations.¹² The Rights Resource Network endorses their work and adds to their voice calling for raising the minimum age of criminal responsibility.

In providing these preliminary comments we strongly urge the South Australian Government to listen to the medical and legal evidence and introduce legislation to raise the minimum age of criminal responsibility as soon as practicable. Our Network is made up of a wide range of Aboriginal leaders,

⁷ Australian Institute of Health and Welfare 2019. Youth justice in South Australia 2017–18. Cat. no. JUV 129. Canberra: AIHW; Sophie Trevitt and Bill Browne, 'Raising the age of criminal responsibility' (2020), The Australia Institute, Canberra; Australian Human Rights Commission, National Children's Commissioner, Children's Rights Report 2016, 187.

⁸ Goldson, Barry. "'Unsafe, unjust and harmful to wider society': Grounds for raising the minimum age of criminal responsibility in England and Wales." *Youth justice* 13.2 (2013): 111-130; Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, 44th sess, UN Doc CRC/C/ GC/10 (25 April 2007), paras 32–33.

⁹ See eg Office of the Guardian for Children and Young People, [Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide Youth Training Centre \(now known as the Kurlana Tapa Youth Justice Centre\)](#)

¹⁰ Law Council of Australia, AMA and LCA Policy Statement on Minimum Age of Criminal Responsibility (2020) available at <https://www.lawcouncil.asn.au/publicassets/20fb2a76-c61f-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>

¹¹ Australian Institute of Health and Welfare 2019. Youth justice in South Australia 2017–18. Cat. no. JUV 129. Canberra: AIHW.

¹² See eg. Laura Murphy-Oates 'Do we have that much to fear from a 12-year-old Aboriginal kid that we need to cage them?' | Australia The Guardian (23 January 2021).

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academics, legal experts and medical experts who are willing to offer their insights and expertise to the Government.

Dr Sarah Moulds (sarah.moulds@unisa.edu.au) will be in touch with your office to arrange a meeting with the relevant members of the Rights Resource Network SA with a view to seeking answers to the questions posed in this letter. Thank you for your attention to our request. We look forward to discussing it with you.

Yours sincerely

The Rights Resource Network SA

The following members of the Rights Resource Network SA specifically endorse this letter:

- SOSBlakAustralia – SA Action Group
- Sophie Trevitt, Executive Officer, Change the Record
- South Australian Council for Social Services
- Civil Liberties Australia
- South Australian Council for Civil Liberties
- Irene Watson, Pro Vice Chancellor Aboriginal Leadership and Strategy, and Professor of Law, Justice & Society University of South Australia
- Cornelia Koch, Senior Lecturer, Adelaide Law School, University of Adelaide
- Dr Sarah Moulds, Senior Lecturer in Law, Justice & Society, University of South Australia
- Amy Cleland, Program Director: Bachelor of Social Science (Human Services), Justice & Society, University of South Australia
- Dr Eileen Webb, Professor of Law and Ageing in the School of Law, Justice & Society, University of South Australia
- Sara Azadegan, Legal Practitioner
- Dr Beth Noseworthy, Senior Lecturer, Adelaide Law School, University of Adelaide
- Dr Peter Burdon, Associate Professor, Deputy Dean, Adelaide Law School, University of Adelaide
- Dr Anna Olijnyk, Senior Lecturer, Adelaide Law School, University of Adelaide
- Dr Laura Grenfell, Associate Professor, Adelaide Law School, University of Adelaide
- Dr Paul Babie, ALS Professor of Property Law, Adelaide Law School, University of Adelaide
- Sue Milne, Lecturer in Law, Justice and Society, University of South Australia
- Dr Michelle Fernando, Senior Lecturer in Law, Justice and Society, University of South Australia
- Dr Joe McIntyre, Research Degree Coordinator (Law), Senior Lecturer in Law, Justice and Society, University of South Australia
- Associate Professor Marinella Marmo, Flinders University
- Daniel Miller, University of South Australia
- Daniel Sobral, University of South Australia