1 July 2020

The Hon Vickie Chapman MP
Attorney-General
PO Box 464
ADELAIDE  SA  5001

Via email: AttorneyGeneral@sa.gov.au

Dear Ms Attorney

Minimum Age of Criminal Responsibility

1. The Society notes the Council of Attorneys-General Age of Criminal Responsibility Working Group ("the Working Group") and its consultation and work regarding the age of criminal responsibility. The Society understands the issue of the minimum age of criminal responsibility is being considered at both federal and state levels currently.

2. In South Australia, section 5 of the Young Offenders Act 1993 (SA) provides that a person under the age of 10 years cannot commit an offence. The Law Society on behalf of the South Australian legal profession, and the Law Council of Australia on behalf of the national profession, are calling for the age of criminal responsibility to be raised to at least 14 years of age, without exception.

3. The Society commends the work of the Law Council of Australia on the age of criminal responsibility in Australia. The Law Council’s submission to the Working Group of 2 March 2020, is enclosed for your information. The Society strongly supports the position taken by the Law Council, in particular the need to fund therapeutic responses.

4. An increase in the age of criminal responsibility would bring South Australia into line with international human rights standards and obligations, it would also bring us into step with the medical consensus regarding child brain development.

5. The United Nations Committee on the Rights of the Child has called for all nations to set a minimum age no lower than 14 years and that laws should ensure children under 16 years may not be legally deprived of their liberty. In November 2019, the Committee adopted concluding observations in relation to Australia’s compliance with the Convention. The Committee recommended Australia ‘raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which doli incapax applies’.¹ The Committee also expressed serious concerns about the ‘enduring overrepresentation of Aboriginal and Torres Strait Islander children and their parents and carers in the justice system’.²

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¹ UN Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Australia, 82nd session, CRC/C/AUS/CO/5-6 (1 November 2019) 14.
² UN Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Australia, 82nd session, CRC/C/AUS/CO/5-6 (1 November 2019) 14.
6. In addition to human rights experts, the medical profession is also in favour of an increase in the minimum age of criminal responsibility. The Australian Medical Association (AMA) is strongly in favour of an increase in the minimum age of criminal responsibility to 14 years of age. The AMA have based their position on the medical evidence that demonstrates that children under the age of 14 are undergoing significant growth and development, which means they may not have the required capacity to be criminally responsible.³

7. The Society assumes that you are well aware of the relevant medical evidence, as well the international human rights and standards relating to children and young people. However, it wishes to bring to your attention the local factors and context which justify change in South Australia. The Society has summarised briefly below, some of the key issues for your consideration which including complicating factors in youth incarceration and the disproportionate representation of Indigenous children; a disturbing but clear nexus between the child protection system; and finally, suggestions as to a way forward for children and young people in South Australia.

**Youth incarceration in South Australia**

8. The Society notes the Adelaide Youth Training Centre (AYTC) Report, authored by the Office of the Guardian for Children and Young People, found that in the 2018-2019 year there was an increase in the number of 10-12 year old people being admitted to the AYTC.⁴

9. Our Members have reported that the higher number of admissions observed for young people aged 10-14, are likely due to age-inappropriate bail conditions and a delay in the resolution of matters where doli incapax is an issue. Conditions of bail generally imposed in the Youth Court on young people with the presumption of doli incapax are curfew conditions and non-association clauses. These are commonly used in the adult jurisdiction, however, are often unworkable and problematic when applied to young people. Furthermore, the Society is informed by its Members who practice in this jurisdiction, that matters involving young people between the ages of 10 and 14 with the presumption of doli incapax in South Australia, tend to have ongoing adjournments and confusion as to who ought to be rebutting the presumption and what evidence can be used in rebuttal.

10. Such matters could be significantly addressed if the age of criminal responsibility was raised from 10 years of age to 14 years of age. The Society is calling upon the government to increase capacity for needs-based, non-criminal law responses to behaviour that current constitutes ‘offending’ for children aged 10 to 14 years. Recent Australian research has shown that children who first encounter the justice system by the age of 14 are more likely to experience all types of supervisions in their later teens, particularly the most serious type – a sentence of detention (33% compared to 8% for those first supervised at older ages).⁵

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11. This data is particularly troubling given the high incarceration rates of South Australian Indigenous children and young people. According to Australian Institute of Health and Welfare data, just over half (53%) of all young people in detention (nationally) on an average night in the June quarter 2019 were Aboriginal or Torres Strait Islander. Young Indigenous Australians aged 10-17 were 21 times as likely as young non-Indigenous Australians to be in detention on an average night.6

12. In South Australia, on an average day in 2017-2018, 62.3% of young people residing in the AYTC were of Aboriginal or Torres Strait Islander decent.7 This is seriously concerning given that Indigenous children comprise only about 4.5% of the State’s child population.8 Overall, the level of Indigenous overrepresentation is higher for young people than in the adult population in South Australia.

13. We cannot consider these figures in isolation: Aboriginal children and families are also vastly overrepresented in all parts of the South Australian child protection system.9 Aboriginal children are 7.3 per cent more likely than non-Aboriginal children to be in State care.10 The nexus between the child protection and juvenile justice system is an important one, as there is a strong association between child protection issues and offending, particularly youth offending.11 The nexus between the child protection system and the youth justice system, is explored further below.

The need for systemic change

14. The Society notes a recent Australian Institute of Health and Welfare study, which took place between 1 July 2013 – 30 June 2017. The study assessed the correlation between Australian children involved with both youth justice supervision and child protection.12 Of the 48,379 young people who received child protection services during the 4-year period, 1 in 13 (7.7%) also had some type of youth justice supervision in that time. However, of the 7,776 young people under youth justice supervision, nearly half (47.7%) had received child protection services.

15. The study found that of the 3,711 young people involved with both youth justice supervision and child protection, 81.7% (3,031) had received a child protection service before entering youth justice supervision.

16. Referring specifically to youth in South Australia, the study showed that those who had received a child protection service were the most likely to have been supervised by youth justice at some

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point during the assessed four-year period. This is almost 13 times the rate for those who were not in care during the same four-year period. The Society further notes, that in the 2017-2018 period, 24.3% of young people residing in the AYTC were under guardianship orders at the time they were admitted.¹³

17. These children while already disadvantaged, on many occasions are charged with offences that would ordinarily (if they were in a family environment) be dealt with through discussion between the parent and child, or some other punishment. For youth in care, these scenarios are dealt with by the police being called and the child being charged. Unfortunately, these children are often refused police Bail on account of concerns for the safety of carers or the ‘risk of reoffending’. In circumstances where a child is in the care of the Minister with no other accommodation, these arrests can result in a child being detained as an alternate accommodation option.

18. The Society notes that the paramount consideration of the Children and Young Person (Safety) Act 2017 (SA) is to ensure that children and young people are protected from harm.¹⁴ The statistics noted above appear to reflect serious failings in both our child protection and youth justice system.

19. The Society has called for an increased focus and investment in early intervention and prevention services for children in both the child protection and youth justice systems on an ongoing basis. Noting the nexus between both systems, specialist, joined-up, wrap-around services for children and their families, especially vulnerable cohorts, such as Indigenous families, is what is required to ensure better outcomes for children and young people in South Australia moving forward.

Reinvestment in our children and young people – alternatives to incarceration

20. An increase in the minimum age of criminal responsibility will not only lead to a number of positive benefits for children and young people, but will also result in cost savings in the criminal justice system. These savings can be used to scale up evidence-based alternatives to incarceration and non-custodial sentences for all children.

21. For example, by just addressing the disproportionately high rates of Indigenous youth incarceration, that is, if the rate of detention and community supervision of Aboriginal young people was the same as for the general young population, there would be fewer Aboriginal young people in the SA juvenile justice system, and a saving to the state budget of over $12 million per annum.¹⁵ Furthermore, a recent report by PwC found that closing the gap between Indigenous and non-Indigenous rates of incarceration in Australia would generate savings to the economy of $18.9 billion per year in 2040.¹⁶ These are significant cost savings that could be much better reinvested in improving outcomes for our children and young people.

22. The recent Australian Law Reform Commission (ALRC) Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples made 35 recommendations to end Australia’s disproportionate incarceration rate of Aboriginal and Torres Strait Islander Peoples.¹⁷ In addition to

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¹⁴ See section 7, Children and Young Person (Safety) Act 2017 (SA).


¹⁷ Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017).
the development of national criminal justice targets, the ALRC recommended that Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body and should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities.

23. Justice reinvestment aims to divert a portion of funds spent on incarceration to local community initiatives where it is invested in early intervention and prevention services, and to address the underlying issues that lead to involvement in the criminal justice system.

24. The lives of Aboriginal and Torres Strait Islander people who become involved in the justice system may be complicated by a range of factors including intergenerational trauma, alcohol and drug use, mental illness, homelessness, disengagement from education, family violence, and child abuse and neglect. The significant value of Justice Reinvestment resides in its recognition of underlying contributory factors relating to social disadvantage and primary and preventative approach to preventing offending pathways.18

25. This approach has had substantial success in Australia, in particular, the Maranguka Justice Reinvestment Project in Bourke, NSW. This project involved a collaboration between the Aboriginal community in Bourke and Just Reinvest NSW to achieve positive change for vulnerable children and families. The Maranguka Justice Reinvestment Project identified four specific priority areas for reducing crime in their community: early childhood and parenting; the role of men; children and young people 8-18 years of age; and service delivery reform. The local community identified a number of cross-sector initiatives (“circuit breakers”) to reduce offending and make the community safer. Circuit breakers included justice initiatives such as bail protocols, a driver licensing/crime prevention program and domestic violence surveillance and support program. These programs resulted in a 30% reduction in driving offences and a 37% reduction in domestic violence reoffending.

26. The project also included voluntary wrap around support for children and young people at risk of disengaging from school or offending. A July School holiday program was established to address the need for activities during the school holiday period, which was when the highest rates of youth offending took place in the community. The program resulted in no offences being committed by participants during the July school holiday period.

27. The Society has called for continued funding for Justice Reinvestment SA since 2018; unfortunately, funding was not continued by this Government. Preliminary work by Justice Reinvestment SA has included the development of its five-year action plan, the establishment of baseline data for Port Adelaide, and the establishment of the “Community Justice Hub” which is intended to consolidate community connections and provide support for Aboriginal young people and their families.

28. Noting the success of the Maranguka Justice Reinvestment Project, the Society re-urges the Government to consider refunding Justice Reinvestment SA and rethink its current criminal justice approach. A fundamental first step in this process will be increasing the minimum age of criminal responsibility.

29. Second, our policy making must take an evidence-based approach and align South Australian law with the scientific and social research on community safety, criminogenic effect, offending and child development. Locking up children as young as 10 years old in the criminal justice system

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perpetuates, rather than resolves, a problem. It is in neither the best interests of the child nor the best interests of the public in terms of crime prevention and community safety.

The Society looks forward to receiving your response and would be very happy to meet with you to discuss the matter further.

Yours sincerely

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