The Hon Vickie Chapman

Attorney General

10 Franklin Street, Adelaide

South Australia

Via email

\*\* November 2021

Dear Attorney

**RAISING THE AGE OF CRIMINALITY IN SOUTH AUSTRALIA**

On behalf of the [Rights Resource Network SA](https://www.rightsnetworksa.com/) 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 Rights Resource Network is a volunteer-run network designed to share information and research among academics, community organisations and individuals who share an interest in protecting the human rights of South Australians. Members of the Network hold strong concerns about the impact the current age of criminality has on the rights of South Australian children and their families.

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 were concerned to learn that on Friday 12 November 2021 the Meeting of Australian Attorneys General resolved to ‘support developing a proposal to increase the minimum age of criminal responsibility from *10 to 12 including with regard to any carve outs*, timing and discussion of implementation supports’ (emphasis added).[[1]](#footnote-1)

We are concerned that this statement fails to address the core human rights issues associated with the incarceration of children and young people. As the Raise the Age Campaign has explained, it does nothing to change the lives of children who are dragged into the criminal legal system, and ignores the medical evidence that governments should raise the age of criminal responsibility to 14 years old as a bare minimum.[[2]](#footnote-2)  Based on data collected by the Australian Institute of Health and Welfare, if governments only raise the age to 12 years old, then 456 out of the 499 children under 14 in prison last year will remain locked away behind bars.[[3]](#footnote-3)  If the South Australian Government only raises the age to 12 years old than over 90% of the children under 14 behind bars last year would remain locked away in prison cells.

For this reason, we strongly recommend that you work to immediately introduce amending legislation to raise the age of criminality to at least 14 years old during the next sittings of Parliament. This could take the form of a minor legislative amendment to section 5 of the Young Offenders [Act](https://www.legislation.sa.gov.au/LZ/B/CURRENT/YOUNG%20OFFENDERS%20(AGE%20OF%20CRIMINAL%20RESPONSIBILITY)%20AMENDMENT%20BILL%202020_HON%20MARK%20PARNELL%20MLC/B_AS%20INTRODUCED%20IN%20LC/YOUNG%20RESPONSIBILITY%20AMENDMENT%20BILL%202020.UN.PDF). An alternative would be to refer the issue to a South Australian parliamentary committee for inquiry and report.[[4]](#footnote-4)

Recent developments in the Australian Capital Territory have made it clear that raising the age to 14 years is not only *necessary* to protect the human rights and health and wellbeing of children but is also *achievable* within a policy context that also seeks to protect the community from harm caused by criminal or anti-social conduct. The ACT Government has released a clear roadmap to raising the age to 14 years old and ensuring the social and community programs are in place to support children and their families to thrive.[[5]](#footnote-5) This roadmap could serve as an important starting point for community consultation in South Australia, following the implementation of legislative reforms to raise the age to at least 14 years. This type of pro-active approach to rights-protection legislation has been adopted recently in South Australia with respect to legislation designed to address coercive control.[[6]](#footnote-6)  A similar model of reform, which looks to imbed legislative principles first and then develop community reference groups for implementation advice, could be adopted in this context.

The Network is also 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. These human rights concerns were highlighted at the international level earlier this year when Australia’s international human rights record was scrutinised by the UN Human Rights Council in Geneva as part of the [University Periodic Review](https://www.upr-info.org/en/review/Australia). 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.[[7]](#footnote-7)

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. [[8]](#footnote-8) This means that young children cannot foresee the consequences of any action and cannot fully understand the criminal nature of their behaviour.[[9]](#footnote-9) 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 behaviour[[10]](#footnote-10), we risk violating children’s basic human rights. Local[[11]](#footnote-11) and international research[[12]](#footnote-12) confirms that the incarceration of children has a direct impact on their fundamental rights of education, health care and access to culture. 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. [[13]](#footnote-13)

We also acknowledge that, because the youth justice system disproportionately affects Aboriginal children (with Aboriginal young people being 21 times as likely to be under supervision as non-Indigenous young people) [[14]](#footnote-14), Aboriginal voices must be heard, and their leadership enforced, when designing new youth justice policies and legislation. In this regard, 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 rights impacts of over-incarceration of Aboriginal children, but also to the longer-term implications of institutionalisation and separation that continue to reverberate through Aboriginal communities and families across generations.[[15]](#footnote-15) The Rights Resource Network endorses their work and adds to their voice calling for raising the age of criminal responsibility to at least 14 years of age.

In providing these preliminary comments we wish to offer to help facilitate further community consultation on this important reform. Please be in touch with Dr Sarah Moulds on sarah.moulds@unisa.edu.au to arrange a meeting with the relevant members of the Network.

Yours sincerely

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Dr Sarah Moulds

Director, Rights Resource Network SA

The following members of the Network endorse this letter:

1. Attorney Generals Department, Meeting of Attorney General’s *Communique,* Australian Government, 12 November 2021, available at <<https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>>. [↑](#footnote-ref-1)
2. Raise the Age Campaign, Media Release, **‘**Empty Commitment’ Does Nothing To Help Children: Says Raise The Age Coalition’ 12 November 2021. [↑](#footnote-ref-2)
3. Data from the Australian Institute of Health and Welfare’s ‘Youth justice in Australia 2019-20 report’ - <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/data> [↑](#footnote-ref-3)
4. For further discussions about the options for addressing this component of the age of criminality see 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 [↑](#footnote-ref-4)
5. Australian Capital Territory Government, [Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory (act.gov.au)](https://justice.act.gov.au/sites/default/files/2021-10/Raising%20the%20Age%20-%20Final%20Report.PDF), Final Report, August 2021. [↑](#footnote-ref-5)
6. See South Australian Government, YourSAY website, Criminalising Coercive and Controlling Behaviours, available at < [Criminalising coercive and controlling behaviours | YourSAy](https://yoursay.sa.gov.au/control)>. [↑](#footnote-ref-6)
7. See eg. 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*’). [↑](#footnote-ref-7)
8. 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.. [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. 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. [↑](#footnote-ref-10)
11. 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. [↑](#footnote-ref-11)
12. 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. [↑](#footnote-ref-12)
13. 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)](http://www.gcyp.sa.gov.au/wp-content/uploads/2020/07/TCVU-inspection-report-2020-web.pdf) [↑](#footnote-ref-13)
14. Australian Institute of Health and Welfare 2019. Youth justice in South Australia 2017–18. Cat. no. JUV 129. Canberra: AIHW. [↑](#footnote-ref-14)
15. See eg South Australia’s Commissioner for Aboriginal Children and Young People Report 2020, ‘*Family and Culture is Everything*’ April Lawrie, Commissioner for Aboriginal Children and Young People, 2020 available at [CACYP04-2020-Report-opt.pdf](https://cacyp.com.au/wp-content/uploads/2021/09/CACYP04-2020-Report-opt.pdf). [Laura Murphy-Oates](https://www.theguardian.com/profile/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). [↑](#footnote-ref-15)