Submission

National Children's Commissioner - *Youth Justice & Child Wellbeing Reform across Australia*
June 2023

Introduction

The Youth Affairs Council of South Australia (YACSA) is the peak body in South Australia (SA) representing young people aged 12-25 years and organisations and networks throughout the non-government youth sector. YACSA is an independent member-based organisation, our policy positions are not aligned with any political party or movement, and we support the fundamental right of all young people to participate in and contribute to aspects of community life, particularly in decision-making processes that impact them.

As YACSA is a state-based peak body, this submission will primarily feature information from SA and focus on youth justice and related systems within the State. In the past, SA Governments have led reforms for youth justice. However, the reforms prioritised a populist 'law-and-order' focused response over obligation to adhere to the UN Convention on the Rights of the Child (UNCRC) and the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules').

South Australia's History

The *Children's Protection and Young Offenders Act 1979 (SA)* shifted SA towards a populist justice-based approach to youth justice. As SA was the first jurisdiction to reform youth justice at the time, the Act facilitated reforms nationally that adopted similar approaches[i]. A 1992 South Australian Select Committee on Juvenile Justice and second reform to youth justice and child protection legislation produced the *Young Offenders Act 1993 (SA)* completing the State's transition to a justice-based approach[ii]. Again, the review and Act led the way for reforms nationally[iii]. Prior to reforms, diversion saw each case of a child or young person offending assessed by screening panels before a decision to prosecute[iv]. The State Government cited this as the reason to review youth justice via the Committee[v]. This Committee review was impacted by populist context including contentious media rhetoric on non-existent 'youth crime waves', apparent implications for community safety, and a desire by members of parliament for a more punitive response to young offenders[vi].

The *Young Offenders Act 1993 (SA)* abolished screening panels and replaced it with current diversionary pathways. The removal of screening panels was consistent with evidence that showed panels were inaccessible to First Nations children and young people[vii]. Panels were replaced with a system of diversion largely centred on police discretion which saw issues of inaccessibility with previous diversion unaddressed[viii]. The Act also allowed police to question, gain admissions of guilt from and issue cautions to children and young people without a guardian, legal representative or independent witness[ix]. The 1992 Committee believed aspects of a welfare approach to youth justice kept under the 1979 Act were too lenient[x]. Additionally, the Committee's report stated rights contained within the UNCRC and 'Beijing Rules' *"are legally enforceable only in so far as Parliament has specifically amended legislations to incorporate them."*[xi]

Later reform to related legislation also impacted youth justice, connected systems like child protection and the wellbeing of children and young people. The *Children and Young People (Safety) Act 2017* (SA) prioritised the 'protection of children and young people from harm' as the paramount principle despite an obligation under the UNCRC to hold the 'best interests of the child' as the paramount consideration. This decision highlights gaps in prevention and early intervention that could support children, young people and their families as well as a system focus on tertiary crisis-based intervention like removal of children, a high rate of residential care and prolonged incarceration of children and young people.

Human rights of young people that the State Government is obligated to consider have been insincerely and inadequately reflected in successive reforms and this has led to detrimental consequences for children and young people involved with youth justice as well as other related systems.

What factors contribute to children's and young people's involvement in youth justice systems in Australia?

Over-representation of First Nations children and young people in youth justice across Australia has increased over the last generation[xii]. Despite representing less than 5 per cent of SA's 10- to 17-year-old population in 2021-22, over 47 per cent of individuals admitted to Adelaide Youth Training Centre (AYTC) were First Nations (an increase of almost 4 per cent from 2020-21)[xiii]. On an average night, First Nations children and young people represented over 46 per cent of the unsentenced and over 55 per cent of the sentenced population in AYTC[xiv]. For 10–13-year-olds, First Nations children and young people represent the majority of the unsentenced and all of the sentenced population[xv]. The over-representation demonstrated here, especially for 10–13-year-olds, reflects a racist adultification bias inflicted on non-white children[xvi].

Data on children and young people in out-of-home care and engaged in youth justice in SA is limited to those in care who are or have been incarcerated. In 2021-22 individuals admitted to AYTC while under guardianship orders represented almost 30 per cent of admissions[xvii]. The criminalising of those within residential care is also concerning. Despite representing 13 per cent of care placements, 90 per cent of those admitted to AYTC lived in residential care facilities[xviii]. The residential care system contributes to the criminalisation of 'dual involved' children and young people and facilitates agencies making system-focussed decisions rather than prioritising the rights and well-being of children and young people. An example of such decision-making being the practice of remand incarceration due to no suitable community-based placement being available.

A pilot project called the Youth Justice Assessment and Intervention Service (YJAIS) in 2018 found 9 out of 10 children or young people incarcerated at AYTC had disability needs[xix]. Despite the high result, behavioural frameworks and operational systems in AYTC functions under the assumption disability is far less common. Within the Training Centre Visitor's 2019 Pilot Inspection of AYTC (2020) a number of recommendations were made to recognise disability and better support children and young people living with disability but only marginal progress on these recommendations has been made by the State Government[xx].

Increasing over-representation of First Nations children and young people, people living with disability, and those with experiences of family violence, abuse or neglect within the youth justice and related systems across Australia demonstrates how police and criminal justice responses are relied upon to address the needs of vulnerable children and young people due to a lack of investment in prevention and early intervention supports[xxi].

What needs to be changed so that youth justice and related systems protect the rights and well-being of children and young people? What are the barriers to change, and how can these be overcome?

Youth justice and related systems in Australia are ineffective, expensive and harmful. Interaction with youth justice systems risks rights violations for children and young people as each Australian jurisdiction has a system that labels, adultifies and criminalises children and young people who likely experience intersectional disadvantage and have not been provided adequate prevention or early intervention supports. Ongoing nation-wide systemic issues demonstrates systems-based interests appear to be prioritised over the best interests of children and young people, which amounts to state-facilitated systems abuse[xxii]. There are recurring practices that risk harm including inadequate training for staff, a largely casualised workforce with limited qualifications or experience, little to no therapeutic supports as well as poor cross-agency communication and poor decision-making processes and accountability[xxiii]. Additionally, despite Australia ratifying the Optional Protocol to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (OPCAT) the deadline for implementation was January 2023 and while some state and territory jurisdictions have designated independent National Preventive Mechanisms (NPM), there has been no legislation or funding provided[xxiv].

A presumption of *doli incapax* should apply to those under the age of 14 years. It purports to presume a 10–13-year-old is incapable of criminal intent but in reality, it fails to protect 10–13-year-olds. It also causes confusion in practice, slows justice proceedings and increases time children and young people are held in custody[xxv]. Relying on *doli incapax* means those under 14 years are engaging with the youth justice system which is harmful and increases the risk of recidivism. The minimum age of criminal responsibility (MACR) has been discussed across Australia as the UN Human Rights Council rightly remains critical of jurisdiction's low age of 10 years[xxvi]. In 2018, the Council of Attorneys-General sought to develop a work plan on a national approach to raising the age, however, five years on it has not progressed and advocates are pushing each jurisdiction to raise the minimum age. In SA, there have been two Bills introduced since 2020 but neither has progressed past the first reading.

The diversionary approach established by the *Young Offenders Act 1993 (SA)* is a two-tiered system that allows police discretion to issue an informal or formal caution as pre-court diversion. This diversion can only be utilised for first-time offenders who admit guilt to a low-level offence. The second tier of diversion is family conference however this is only available for those who make an admission of guilt to a minor offence. The average rate of diversion utilisation in SA over the past decade is less than 50 per cent[xxvii]. Concerningly, the rate of diversion utilisation for First Nations children and young people averages just 27 per cent. Diversion utilisation for First Nations children and young people does not appear to be improving as 2021-22 was the lowest rate at 19.6 per cent (a decrease of more than 10 per cent over the last decade)[xxviii]. This suggests reforms in 1993 did not address the inaccessibility of diversionary pathways cited as the basis for the 1992 review and 1993 reform.

Given issues present across related systems like child protection, it is clear incarceration is not being used as only a last resort. Despite evidence of the harm caused by deprivation of liberty, it continues unnecessarily and for prolonged periods. YACSA is concerned about treatment children and young people experience while incarcerated and maintains AYTC is not a therapeutic environment. The Training Centre Visitor has reported 80 per cent of day shifts have been understaffed, averaging nine out of the 21 required operational staff members meaning most days at AYTC operate with modified routines[xxix]. These modified routines mean medical assessments are delayed or cancelled, school attendance is compromised, and those incarcerated are often 'locked down'. Reports also suggest those incarcerated can spend up to 23 hours per day in isolation due to operational issues[xxx]. Access

to programs is limited as well. In July-December 2021, 121 programs were scheduled with 58 per cent delivered while in the next period of January-March 2022, there was 34 programs scheduled (a 72 per cent reduction) with less than 7 per cent delivered[xxxi]. Long-term 'modified routine' has increased distress and incidents of self-harm. In the three recent financial years the average number of incidents increased by over 230 per cent[xxxii]. While nurses, doctors and psychiatrists visit AYTC, there is often no medical personnel on site and the Enhanced Support Team can respond to some need but there is limited capacity to meet the increasing level of demand[xxxiii]. A lack of basic medical care is also demonstrated via reporting on medical requirements under S.33(2)(b) of the *Youth Justice Administration Act 2016 (SA)*. There were 70 incidents in term one of 2022 but only 46 per cent of incidents had required medical referrals completed and only 19 per cent had required medical examinations completed[xxxiv].

The Department of Human Services (SA) has been provided with a series of recommendations from the Training Centre Visitor, Commissioner for Children and Young people and the SA Ombudsman, including the need to review the effectiveness of operational models in AYTC, however these issues persist.

Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?

Australia remains out of step with other democracies without legislated protections for human rights. Australia is signatory to international treaties and conventions, however, these rights are only protected when established in legislation. While legislation like the *Racial Discrimination Act 1975* provides limited protection for specific rights there is no legislation in place that specifically provides protections for rights contained under the UNCRC ratified by Australia in 1990[xxxv]. The result of limited to no protection for these rights is clearly observable in youth justice systems. Youth justice and its administration continues to draw the attention of the UN Rights of the Child Committee who consistently raises over-representation of First Nations children and young people in child protection and youth justice, low minimum age of criminal responsibility, high numbers of remand and sentenced, consistent over-representation of those living with a disability, isolation, and lack of awareness for their rights[xxxvi].

In SA, legislative reform has impacted youth justice, related systems and the overall well-being and rights of the child. The *Children and Young People (Safety) Act 2017 (SA)* did not place 'best interests of the child' as the paramount principle, placing 'protection of children and young people from harm' as the paramount consideration in administration, operation and enforcement of child safety[xxxvii]. The importance of 'best interests' as the paramount principle of the Act was clearly outlined in the Nyland Royal Commission Report in 2016[xxxviii] and was again raised in a recent review. However, the State Government review discussion paper in 2022 only asked *"whether the legislation should include a requirement to consider a child's best interests, while retaining safety as the paramount consideration"* and the State Government has been clear in its intention to retain 'protecting children and young people from harm' as the paramount consideration[xxxix].

YACSA advocates for participation of children and young people in the child protection, youth justice and other related systems to be meaningful. This requires a shift in paramount principle to the 'best interests' of children and young people, allowing safety to be considered in conjunction with rights contained in the UNCRC including rights of identity, nationality, and family relationships[xl]. Placing 'best interest of the child' as the paramount consideration allows importance of prevention and early intervention to be better recognised. While focus remains on 'protection' as outlined in the legislation[xli], systems like child protection and youth justice must focus on responding to those who

have already experienced harm or are at immediate risk of harm to the detriment of efforts to strengthening preventative and early intervention supports. YACSA maintains that a greater emphasis on prevention and early intervention is needed to address issues of disadvantage that lead families, children and young people to become involved in child protection, youth justice and other related systems.

From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

Issues are occurring nationally within youth justice, related systems like child protection, and for child well-being so a national approach to funding prevention and early intervention supports may be beneficial. However, youth justice and related systems are within state and territory jurisdictions and a national approach will not address the multiple interconnecting issues. As seen with efforts to raise the minimum age of criminal responsibility, coordinating a national approach to reforms based at a state and territory level risks obfuscating and prolonging advocacy efforts, delaying desperately needed reform.

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